

**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 AUTHORITY

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 authority. In its consideration of the defendants’ motion to dismiss the complaint, the Court may wish to take into consideration the recent decision of the United States District Court for the District of Columbia in *State National Bank of Big Spring v. Lew*, --- F. Supp. 2d ---, 2013 WL 3945027 (D.D.C. Aug. 1, 2013).

In that case, the State of Oklahoma, along with several other states and several private plaintiffs, challenged the constitutionality of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), Pub. L. No. 111-203 (2010). (The private plaintiffs also challenged additional provisions of Dodd-Frank.) Title II grants the Secretary of the Treasury “orderly liquidation authority,” under which he has the authority to appoint the FDIC as the receiver of a failing financial company. *See* 12 U.S.C. § 5384(a). In some circumstances,

this orderly liquidation authority replaces the liquidation and reorganization procedures of Chapters 7 and 11 of the Bankruptcy Code. The State of Oklahoma, along with the other state plaintiffs, alleged that they had standing to challenge Title II, because the states enjoyed statutory rights under the Bankruptcy Code which would be abrogated under Dodd-Frank. The district court rejected this argument, noting that a plaintiff must allege a concrete injury that would result from an alleged violation of a statutory right in order to have Article III standing:

Nor is the Court persuaded by the States' argument that the loss of a right in the abstract is sufficient to confer standing. The States cite *Lujan [v. Defenders of Wildlife]*, 504 U.S. 555, 560, 578 (1992) for the proposition that an "injury" is "an invasion of a legally protected interest[.]" and the injury "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." But the States misinterpret *Lujan*. In the passage that the States cite, the Supreme Court clarified its holding in an earlier case by reiterating that the "[statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Lujan*, 504 U.S. at 578-79. As to the latter requirement, the Supreme Court affirmed that "the concrete injury requirement *must* remain" in suits against the government. *Id.* (emphasis added). There is no real question then that an injury could arise out of the invasion of a statutory right, *as long as there is a concrete injury based on that invasion*. Nor is there a real debate that an injury can be of a non-financial nature, as in FOIA cases, *see, e.g., Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989), or in cases such as *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 617-18 (D.C. Cir. 2006). But there must be a *concrete, present injury*, which the States have not shown here.

State Nat'l Bank of Big Spring v. Lew, --- F. Supp. 2d ---, 2013 WL 3945027, at *12 (D.D.C. Aug. 1, 2013) (court's emphasis).

The states' allegations of standing in *State National Bank* are analogous to Oklahoma's allegation of standing in this case. Oklahoma has contended in this case that it has a statutory right to determine whether the residents of its state will receive premium tax credits. In support of its claim of standing here, Oklahoma has cited to the same passage in *Lujan* on which it had relied in *State National Bank*. (See ECF 53 at 8.) The defendants dispute Oklahoma's reading of

the relevant statutes, but in any event, Oklahoma has not explained how the violation of its alleged statutory right will result in a concrete injury that the State would personally suffer. As the defendants have previously discussed, a plaintiff must show how the violation of a right purportedly accorded by a statute results in a concrete injury in order to have Article III standing. A plaintiff's mere belief that the federal government is misinterpreting federal law is not such a concrete injury. (ECF 57 at 4.)

A copy of the decision in *State National Bank* is attached for the Court's convenience.

DATED this 2nd day of August, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 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:

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