IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DAVID KING, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 3:13-cv-00630-JRS
	)	
KATHLEEN SEBELIUS, in her official capacity as U.S. Secretary of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

The defendants respectfully submit this notice of supplemental authority. On January 15, 2014, the United States District Court for the District of Columbia granted the defendants' motion for summary judgment, and denied the plaintiffs' motion for summary judgment, in *Jacqueline Halbig, et al. v. Sebelius*, No. 1:13-cv-00623-PLF (D.D.C. Jan. 15, 2014).

The plaintiffs in *Halbig*, like the plaintiffs in this case, have challenged the validity of a Treasury regulation, 26 C.F.R. § 1.36B-1(k), which interprets a provision in the Affordable Care Act ("Act"), 26 U.S.C. § 36B, to extend eligibility for premium tax credits to participants in any of the Act's health insurance Exchanges, whether those Exchanges are state or federally operated. The district court applied the "familiar analytical framework" set forth in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), to address the plaintiffs' challenge. Op. 22. (The plaintiffs had argued that the *Chevron* test should not apply because the Treasury Department and the Department of Health and Human Services share administrative responsibilities under the Act. The district court rejected this argument, noting that the

regulation "falls squarely within the agencies' areas of expertise," and was "issued as a result of a statutorily coordinated effort among the agencies." Op. 24 (internal quotation omitted).)

The district court accordingly proceeded to examine whether the statute is ambiguous under *Chevron* Step One. It noted that, in "making this threshold determination under *Chevron*," it could not "'confine itself to examining a particular statutory provision in isolation,'" but must instead analyze the Act's larger context. Op. 27 (quoting *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007)). After considering both 26 U.S.C. § 36B and related provisions in the Act, the court determined that "the ACA takes a state-established Exchange as a given and directs the Secretary of HHS to establish such Exchange and bring it into operation if the state does not do so. *See* 42 U.S.C. §§ 18031(b)-(d), 18041(c). In other words, even where a state does not actually establish an Exchange, the federal government can create 'an Exchange established by the State under [42 U.S.C. § 18031] *on behalf of* that state." Op. 28-29 (emphasis in original). It followed from that analysis that the defendants had provided "the more credible" construction of the Act to provide for tax credits for participants in federally-facilitated Exchanges. Op. 29.

The district court further noted that the plaintiffs' theory "would create numerous anomalies that Congress could not have intended." Op. 30. In particular, the court noted that, under 26 U.S.C. § 36B(f)(3), a federally-facilitated Exchange must provide certain information to the Treasury Department, to facilitate the reconciliation of advance payments of the tax credit with the credit that is allowed for the taxpayer at the end of the year. It determined that this provision "would serve no purpose with respect to the federally-facilitated Exchanges, and the

language referencing 42 U.S.C. § 18041 would be superfluous, if federal Exchanges were not authorized to deliver tax credits." Op. 31.

The district court also noted that the Act defines a "qualified individual," that is, a person who is permitted to purchase insurance on the Exchange, as a person who "resides in the State that established the Exchange." 42 U.S.C. § 18032(f)(1)(A)(ii). The court noted that, under the plaintiffs' theory, "no 'qualified individuals' would exist in the thirty-four states with federally-facilitated Exchanges, as none of these states is a 'State that established [an] Exchange.' The federal Exchanges would have no customers, and no purpose." Op. 31. The court noted that "[s]uch a construction must be avoided, if at all possible." *Id.* The court reasoned that numerous provisions in the Act, including this qualified individuals provision, "make far more sense when construed consistently with defendants' interpretation of the Act – *i.e.*, viewing 42 U.S.C.§ 18041 as authorizing the federal government to create 'an Exchange established by the State under [42 U.S.C. § 18031]' on behalf of a state that declines to establish its own Exchange." Op. 32-33 (citing 42 U.S.C. §§ 1396a(gg), 1397ee(d)(3)(B), 18031(d)(1), 18032(f)(1)(A)(ii)).

The district court further reasoned that the plaintiffs' theory "runs counter to [the] central purpose of the ACA: to provide affordable health care to virtually all Americans," and thus "violate[s] the basic rule of statutory construction that a court must interpret a statute in light of its history and purpose." Op. 33. The court rejected the plaintiffs' argument that Congress had a different purpose in enacting the ACA, to compel states to run their own Exchanges: "there is simply no evidence in the statute itself or in the legislative history of any intent by Congress to ensure that states established their own Exchanges." Op. 34. "It make little sense

to assume that Congress sacrificed nationwide availability of the tax credit . . . in an attempt to promote state-run Exchanges." Op. 34-35. The court further noted that the legislative history supported the conclusion that Congress had intended for premium tax credits to be available on a nationwide basis, rather than conditioning their availability on a state's operation of an Exchange. Op. 35-37.

The Court thus held, under *Chevron* Step One, that Congress had provided that participants in all of the Exchanges could be eligible for premium tax credits:

> In sum, the Court finds that the plain text of the statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges. What little relevant legislative history exists further supports this conclusion and certainly – despite plaintiffs' best efforts to suggest otherwise – it does not undermine it. The Court therefore concludes that "Congress has directly spoken to the precise question" of whether an "Exchange" under 26 U.S.C. § 36B includes federally-facilitated Exchanges. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. at 842. And that must be "the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-83. The IRS has done exactly that by promulgating regulations authorizing the provision of tax credits to individuals who purchase health insurance on federally-facilitated Exchanges as well as to those who purchase insurance on state-run Exchanges.

Op. 37-38. The court held, in the alternative, that the Treasury Department had permissibly construed the Act to so require under *Chevron* Step Two. Op. 38 n.14.

A copy of the opinion in *Halbig* is attached for the Court's convenience.

Dated: January 15, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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