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 (PLF) **REPLY IN SUPPORT OF PLAINTIFFS' REQUEST FOR EXPEDITION OF PRELIMINARY INJUNCTION MOTION**

Plaintiffs filed this case more than four months ago, and from the beginning made very clear that, if the Government did not cooperate in moving the case toward a timely resolution, they would be forced to file an expedited motion for a preliminary injunction. (*See* Dkt. No. 19.) After all, the new insurance Exchanges under the Patient Protection and Affordable Care Act ("ACA" or "Act") are scheduled to open on October 1, 2013, and the ACA's individual mandate to purchase comprehensive health coverage takes effect on January 1, 2014. By the latter date, therefore, the individual plaintiffs must buy comprehensive coverage (that they would prefer not to buy), if—but only if—the IRS Rule is valid. On the other hand, if Plaintiffs are correct that the IRS Rule is *ultra vires*, they have until January 1, 2014, to apply for and obtain "certificates of exemption" from the individual mandate penalty, or else risk incurring that penalty if their challenge is subsequently rejected. Plaintiffs therefore obviously need—and deserve—to know sufficiently far advance of January 1, 2014, whether the IRS Rule is valid, so that they can conform their conduct to the law. (And this is to say nothing about the millions of Americans and thousands of employers that, absent a prompt ruling on the IRS Rule, are poised to make important financial decisions for themselves and their employees based on the false premise that federal subsidies will be available in the 34 states with federally established Exchanges.)

Nevertheless, the Government refused to respond to Plaintiffs' motion for summary judgment (Dkt. No. 17), which has been pending for more than three months and with respect to which the Government never obtained an extension of time from this Court. Accordingly, with only weeks remaining until the opening of the new Exchanges, Plaintiffs were forced to file a motion for preliminary injunction, and to invoke the expedited procedures that this Court's Local Rules provide. *See* LCvR 65.1(c). Predictably, the Government has now opposed the request for expedition (Dkt. No. 33 ("Opp.")), continuing its evident, cynical strategy: delay judicial review of the IRS Rule until billions of dollars in unauthorized subsidies are spent, and then dare the courts to require millions of Americans to repay the funds. Of course, that risk is precisely why review should be expedited. None of the Government's contrary arguments has any merit.

1. The IRS Rule Threatens Klemencic with Cognizable Injury. The Government first rehashes a meritless argument from its motion to dismiss—that the IRS Rule will not harm Plaintiffs. (Opp. at 3.) But the Government no longer appears to dispute that, absent the IRS Rule, Klemencic would be legally entitled under the ACA and its implementing regulations to a "certificate of exemption" from the individual mandate penalty, because the cost to him of comprehensive coverage would exceed 8% of his projected household income for 2014. *See* 45 C.F.R. § 155.605(g)(2). Nor does the Government dispute that, under the IRS Rule, Klemencic would be entitled to a subsidy that would reduce the projected cost of coverage to no more than 5.1% of his income (*see* Aff. of Daniel Kessler, Dkt. No. 24-2, ¶ 22), thereby disqualifying him from that exemption, requiring him to comply with the individual mandate, and preventing him from buying catastrophic coverage that is otherwise limited to those under age 30. In short, there appears to be no dispute that the IRS Rule operates to deprive Klemencic of an exemption, to which he would otherwise be entitled, from a law that he does not want to comply with.

Rather, the Government's argument is that Klemencic will be "better off" under the IRS Rule, because subsidized coverage would be economically preferable to him over an exemption. The Government's premise is that Klemencic would "pay *nothing* for coverage," because the Kaiser Subsidy Calculator—an online tool that projects insurance premiums and the value of subsidies under the ACA—estimates that Klemencic would be entitled to a subsidy sufficient to pay all of his premiums. (Opp at 3; Dkt. 29, Exh A.) As Plaintiffs have pointed out, however, Klemencic's *actual* subsidy will depend on his *actual* household income for 2014, *see* 26 U.S.C. § 36B(f)(2), and therefore may end up being less than Kaiser's rough estimate—with Klemencic responsible for paying the difference between the subsidy and the premiums. Meanwhile, the IRS Rule deprives him of a *guaranteed exemption* from the individual mandate penalty. *See* 45 C.F.R. § 155.605(g)(2). Klemencic is obviously injured by a Rule that forces him *now* to buy an expensive, unwanted product that only *may* be subsidized *later*. Put another way, Klemencic could—and would—make the eminently rational decision to forgo coverage entirely, or to buy only "catastrophic" coverage at a certain, fixed cost, rather than buy a more expensive product on the speculation that a subsidy of unknown size may end up making that the "better deal" *ex post*. He is plainly injured by a Rule that legally precludes him from making that choice. (In any event, Klemencic also is injured by the imposition of a legal constraint enforced by a penalty, regardless of the economic consequences of this deprivation of freedom.)

2. Klemencic's Injuries Will Be Irreparable. Next, the Government contends that Klemencic's injuries would not be "irreparable," because merely "economic loss" does not count and because the $150 individual mandate penalty is not "serious." (*See* Opp. at 3-4.) But, as Plaintiffs explained in their preliminary injunction brief, forcing Klemencic to either purchase a product that he does not want or incur a penalty if his challenge subsequently fails is a classic

form of irreparable harm, not mere "economic" harm. *See Ex parte Young*, 209 U.S. 123, 148 (1908) ("[T]o impose upon a party … the burden of obtaining a judicial decision … only upon the condition that if unsuccessful he must … pay fines …, is, in effect, to close up all approaches to the courts … and therefore invalid."); *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967) (citing "dilemma" of either "comply[ing] … and incur[ring] the costs" of doing so or violating the law"and risk[ing] prosecution" if legal challenge later fails). Moreover, if the IRS Rule is not enjoined before January 1, 2014, then Klemencic will literally be unable to buy catastrophic coverage even using his own funds, and there will be no way to retroactively remedy that harm. That is not mere "economic loss" either.

Anyway, the rule that economic loss is not irreparable applies only if the monetary loss can be "recouped," *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997) (Friedman, J.), and the costs of compliance with the individual mandate here could not be, given the sovereign immunity of the Government. *See Smoking Everywhere, Inc. v. FDA*, 680 F. Supp. 2d 62, 77 n.19 (D.D.C. 2010) (finding injury irreparable "because plaintiffs cannot recover money damages against FDA" due to sovereign immunity), *aff'd sub nom. Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010) ("The district court's finding that this loss would be irreparable absent an injunction appears entirely reasonable."); *see also Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008). Finally, a $150 penalty is not minor to a low-income individual like Klemencic, and the Government's alternative argument—that Klemencic ought to take the circuitous, lengthy, and costly course of violating the mandate, incurring the penalty, paying the penalty, and then raising his objections to the IRS Rule in a suit for a tax refund over this supposedly negligible sum—is completely without legal basis or authority.

3. Expedition Is Necessary. Finally, the Government argues that expedition is not necessary because, if Plaintiffs succeed, Klemencic would be able to apply for a certificate of exemption until March 31, 2014. (Opp. at 4-5.) But it is the Government that is misreading the regulation. An application for exemption must be made "prior to the last date on which [the applicant] could enroll in a [qualified health plan] … for the *month or months of a calendar year for which the exemption is requested*." 45 C.F.R. § 155.605(g)(2)(v) (emphasis added). Therefore, if Klemencic wants an exemption for *all* of 2014, he must apply prior to the last date on which he could enroll in a plan for *all* of 2014—*i.e.*, by December 15, 2013. *See* 45 C.F.R. § 155.410(c)(1) (providing that coverage would be effective on January 1, 2014, if enrollment occurs by December 15, 2013; otherwise, coverage would begin the following month). If he is not able to apply for a certificate of exemption until March, the Exchange would provide the exemption "for all remaining months" in the year (from April or May until December 2014), but not retroactively for the earlier months. *See id.* § 155.605(g)(2)(vi). Moreover, Klemencic also needs to know before January 1 whether the IRS Rule is valid, in case Plaintiffs subsequently *lose* this case. If the IRS Rule is upheld after December 15, 2013, and Klemencic waits until that point to enroll in coverage, then he will have incurred a penalty for January 2014 and any subsequent month until his enrollment takes effect.

In sum, Klemencic needs to know by December 15, 2013, whether he is required to enroll in comprehensive health coverage. And, if not, he must file an application for a certificate of exemption sufficiently far in advance of that date to allow the Exchange to process and approve it by December 15, 2013, in order to preserve his right to buy catastrophic coverage for 2014. In light of these realities, his need for an expedited adjudication is obvious.

The Government also ignores all of the bigger-picture reasons why expedition is needed. Absent a prompt ruling, millions of Americans will make important financial decisions based on the potentially false premise that subsidies will be available to help pay for their health coverage, even in the 34 states without their own Exchanges. Thousands of employers will likewise make important choices about coverage for their employees based on that same false premise. (*See generally* Decl. of W. Thomas Haynes, Dkt. 30-3.) And the Government will spend billions of taxpayer dollars in unlawful subsidies that it may never be able to recoup. Plaintiffs understand that the Government would prefer for the courts to review the validity of the IRS Rule *after* these "facts on the ground" have changed, but such delay is clearly not in the public interest.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court hold a prompt hearing on Plaintiffs' motion for a preliminary injunction.

September 18, 2013

Respectfully submitted,

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