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' RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY

The defendants respectfully submit this response to the plaintiffs' notice of supplemental authority. On October 22, the United States District Court for the District of Columbia denied the plaintiffs' motion for a preliminary injunction and denied the defendants' motion to dismiss in *Jacqueline Halbig, et al. v. Sebelius*, No. 1:13-cv-00623-PLF (D.D.C. Oct. 22, 2013). The plaintiffs' notice mischaracterizes the district court's ruling.

In *Halbig*, the plaintiffs, who are represented by the same counsel as the plaintiffs here, sought (as the plaintiffs do here) a preliminary injunction to prevent the Treasury Department from implementing 26 C.F.R. § 1.36B-1(k). The district court determined that the plaintiffs had not shown that they were likely to suffer irreparable harm from the implementation of that regulation. The plaintiffs had argued that they could be assessed with the tax penalty under the minimum coverage provision, 26 U.S.C. § 5000A, if they failed to maintain qualifying health coverage. The court determined that the plaintiffs could challenge any such assessment in a tax refund action, and thus they did not face any irreparable injury. Transcript of Oral Ruling ("Tr.") 46. The court further noted that it was doubtful whether the plaintiffs could "create

[their] own irreparable injury" by declining to pursue their claim in an action for a tax refund. Tr. 46-47.

The district court also rejected the plaintiffs' claim of irreparable harm for an additional, independent reason. The plaintiffs had alleged that they would suffer irreparable harm if they purchased health insurance, but the court held that "de minimis economic harm cannot constitute irreparable harm for preliminary injunction purposes." Tr. 47. The court explained that, "[t]o warrant emergency injunctive relief, the injury must be certain, great, actual, and imminent," and that "[h]arm that is merely economic in character is not sufficiently grave under this standard." Tr. 48. The plaintiffs' claimed injury from the cost of purchasing health insurance did not meet this standard, the district court held. Tr. 49.

The district court also reasoned that the plaintiffs had not shown irreparable harm, because it could reach a decision before the open enrollment period for the purchase of insurance on the Exchanges would end for the coming year. Tr. 45-46. (The enrollment period for coverage through an Exchange for 2014 is open until March 31, 2014. 45 C.F.R. § 155.410(b). A taxpayer who enrolls in coverage through an Exchange by the end of the open enrollment period for 2014, *i.e.*, March 31, 2014, will not face liability under the minimum coverage provision for the months preceding that enrollment in coverage. Centers for Medicare & Medicaid Services, Center for Consumer Information & Insurance Oversight, *Shared Responsibility Provision Question and Answer* at 2-3 (Oct. 28, 2013), available at www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/enrollment-period-faq-10-28-2013.pdf.)

The district court also addressed whether the plaintiffs were likely to succeed on the merits of their claims. (In the D.C. Circuit, it remains an open question whether the "sliding

scale" test for preliminary injunctions remains viable; in the Fourth Circuit, however, it is clear that a movant must independently make a clear showing of irreparable harm and of a likelihood of success on the merits. *E.g., United States v. South Carolina*, 720 F.3d 518, 533 (4th Cir. 2013).) The district court noted that "the plaintiffs have the burden of showing a particularly strong likelihood of success on the merits," and held that they had not met that burden. Tr. 50. The district court determined that it was unnecessary to address whether the plaintiffs had met their burden with respect to the balance of the equities or the public interest. Tr. 51.

The district court denied the defendant's motion to dismiss, but invited further briefing with respect to certain threshold issues on summary judgment. Tr. 16-17, 23.

Dated: October 29, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2013, 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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