

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

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

**DEFENDANTS’ MOTION TO ESTABLISH A BRIEFING SCHEDULE**

The defendants, Kathleen Sebelius, in her official capacity as Secretary of Health and Human Services; Jacob J. Lew, in his official capacity as Secretary of the Treasury; Daniel I. Werfel, in his official capacity as Acting Commissioner of Internal Revenue; the United States Department of Health and Human Services; the United States Department of the Treasury; and the Internal Revenue Service, respectfully move this Court to establish a briefing schedule with respect to the plaintiffs’ preliminary injunction motion, in which the defendants’ response to that motion would be due to be filed on or before October 16, 2013. The defendants also respectfully move this Court to defer their obligation to respond to the defendants’ summary judgment motion until after the Court’s disposition of the defendants’ forthcoming motion to dismiss the complaint. In support of this motion, counsel for the defendants state as follows:

1. The plaintiffs filed a complaint in this action on September 16, 2013. (ECF 1.) The United States Attorney’s Office was served with a copy of the summons and the complaint in this action on the same day, and the defendants are required to respond to the complaint on or before November 15, 2013. (ECF 7.)

2. The plaintiffs filed a motion for summary judgment on September 19, 2013. (ECF 5.) They also filed a motion for a preliminary injunction on the same day. (ECF 6.)

3. Counsel for the defendants understand that this Court's scheduling clerk has tentatively scheduled a hearing to be held with respect to the plaintiffs' preliminary injunction motion for 9:30 a.m. on October 31, 2013.

4. It would be appropriate to establish a schedule in which the defendants' response to the preliminary injunction motion would be due on October 16, 2013. Plaintiffs' counsel have brought another action in the United States District Court for the District of Columbia, challenging the Treasury regulation that is at issue in this case. *Halbig, et al. v. Sebelius, et al.*, No. 1:13-cv-00623-PLF. Plaintiffs' counsel filed a motion for a preliminary injunction in that action on September 10, 2013, and the defendants filed their opposition on September 27, 2013.

5. Counsel for the defendants, Mr. McElvain, represents the defendants in that action, and he will have primary responsibility for the representation of the defendants in this action. Because plaintiffs' counsel filed a preliminary injunction motion here while the defendants' response date to the other preliminary injunction motion was pending, counsel for the defendants have been unable to date to devote time and resources to the preparation of their defense in this action. A response date of October 16 will afford counsel for the defendants adequate time to prepare a response in this action while also attending to counsel's other duties. In addition, the defendants' brief will require review and approval from officials within the Department of Justice and the three defendant agencies. A response date of October 16 would allow sufficient time for this process of review.

6. The plaintiffs would suffer no prejudice from this schedule. As noted above, a hearing with respect to the preliminary injunction motion is tentatively scheduled for October 31. If the plaintiffs wish to file a reply in support of their preliminary injunction motion, they could do so within one week after the defendants file their opposition brief, *i.e.*, October 23, well in advance of the hearing date.

7. The defendants also ask that the Court defer their obligation to respond to the summary judgment motion until after the Court disposes of the defendants' forthcoming motion to dismiss the complaint. The plaintiffs filed a summary judgment motion immediately upon the filing of their complaint. The Federal Rules of Civil Procedure recognize, however, that "in many cases [such a] motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had." Fed. R. Civ. P. 56(b) advisory committee's note (2010). In this case, the defendants contemplate moving to dismiss the complaint on jurisdictional and other threshold grounds. Those grounds should be addressed before the case proceeds to summary judgment. Moreover, jurisdictional discovery may be appropriate with respect to the plaintiffs, in the event that the defendants' forthcoming motion to dismiss is denied in whole or in part.

8. Counsel for the defendants have contacted counsel for the plaintiffs. Counsel for the plaintiffs state that they oppose the relief requested in this motion.

A proposed Order is attached.

WHEREFORE, the defendants respectfully request that the Court direct that their response to the preliminary injunction motion shall be due on or before October 16, 2013, and

that their obligation to respond to the summary judgment motion shall be deferred until after the disposition of the defendants' forthcoming motion to dismiss the complaint.

Dated: September 30, 2013

Respectfully submitted,

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By: /s/  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of September, 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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_____	)	

**[PROPOSED] ORDER**

This matter is before the Court upon the defendants’ motion to establish a briefing schedule. Finding it proper to do so, it is hereby

ORDERED that the defendants shall file their response to the preliminary injunction motion on or before October 16, 2013, and it is further

ORDERED that the defendants’ obligation to respond to the plaintiffs’ summary judgment motion is deferred until after the Court disposes of the defendants’ forthcoming motion to dismiss the complaint.

IT IS SO ORDERED.

Entered: \_\_\_\_\_

\_\_\_\_\_  
James R. Spencer  
United States District Judge