IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DAVID KING, *et al.*,	)	
	)	
Plaintiffs,	)	No. 3:13-CV-630 (JRS)
	)	
v.	)	
	)	**OPPOSITION TO DEFENDANTS' MOTION FOR BRIEFING SCHEDULE**
KATHLEEN SEBELIUS, *et al.*,	)	
	)	
Defendants.	)	

For reasons explained below, Plaintiffs oppose Defendants' motion to indefinitely delay their obligation to respond to Plaintiffs' motion for summary judgment as well as for a nearly two-week extension to file an opposition to Plaintiffs' motion for a preliminary injunction.

1. Plaintiffs filed their Complaint on September 16, 2013, seeking to invalidate a regulation promulgated by the IRS as part of the implementation of the Patient Protection and Affordable Care Act ("ACA"). (ECF 1.) On September 19, 2013, Plaintiffs moved for summary judgment, contending that the IRS regulation conflicts with the plain language of the ACA and is therefore invalid as a matter of law. (ECF 5.) They also moved for a preliminary injunction, explaining that such interim relief may be needed if the Government seeks—as it has in other challenges to the same rule—to delay adjudication of the merits. (*See* ECF 6.)

2. Plaintiffs were apparently correct to predict such tactics. The Government has now moved to defer summary judgment briefing *indefinitely*—until after it moves to dismiss the Complaint (which motion is not due until November 15, 2013) and the Court disposes of that motion. (*See* ECF 11.) Under such a schedule, summary judgment would not even be *briefed* until sometime in 2014. There is no reason for such delay, and good reason to avoid it.

a. The Government argues that it plans to move to dismiss, and that such motion "should be addressed before the case proceeds to summary judgment." (ECF 11, ¶ 7.) To be sure, this Court should not *grant* summary judgment until it resolves any threshold defenses. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). But that hardly means that parties cannot or should not *brief* the merits. Courts routinely resolve jurisdictional and merits issues at the same time, which obviously could not happen unless they were briefed in parallel. Plaintiffs are simply asking the Government to brief *both* sets of issues, so as not to unduly postpone resolution of the merits once any jurisdictional issues are disposed of.

b. The Government would obviously suffer no prejudice from being required to respond to Plaintiffs' summary judgment motion within the time prescribed by the applicable Local Rules. The Government must address the merits of the IRS regulation's validity *anyway* in its response to Plaintiffs' motion for preliminary injunction. And, indeed, the Government has *already* briefed the merits in another challenge to the same regulation pending in the District Court for the District of Columbia, as the Government itself admits. (ECF 11, ¶ 4.) Plaintiffs would happily submit to jurisdictional discovery at any time, if the Government needs any.

c. On the other hand, if summary judgment briefing is delayed as requested by the Government, it will not be ripe for adjudication until sometime in 2014. As explained in Plaintiffs' preliminary injunction brief, however, the relevant ACA provisions take effect on January 1, 2014, forcing Plaintiffs to act before then if—but only if—the IRS regulation is valid. (ECF 6, at 8-11.) To be sure, the Court could enter preliminary relief to prevent that irreparable injury. But it would obviously be preferable for all parties and for this Court (and the Court of Appeals, from which review will almost certainly be sought) to simply enter final judgment this year, if feasible—which it would be, if the Government's postponement request is rejected.

3. The Government also seeks a 13-day extension of its time to respond to Plaintiffs' motion for preliminary injunction, which was filed on September 19 and to which a response would be due (under this Court's Rules) on October 3. The Government says that it requires the extra time because counsel has been occupied preparing a preliminary injunction opposition in another case challenging the same IRS regulation. (ECF 11, ¶ 5.) That opposition brief was filed on September 27 (ECF 11, ¶ 4), and Plaintiffs would therefore have no objection to giving the Government the 11-day response period contemplated by this Court's Rules as measured from that date—in other words, an extension until October 9, to make up for the time spent by counsel on the other case. (And Plaintiffs' counsel said so to counsel for the Government.) But an additional extension until October 16 would be unwarranted and would not leave the Court with much time to review all of the pleadings and materials before the scheduled hearing on October 31. Plaintiffs believe that an extension until October 9 would be sufficient and even generous, especially given that the Government has already prepared and filed an opposition to a materially identical preliminary injunction motion in the District of Columbia action.

4. Assuming that the Court denies the Government's motion to indefinitely defer its response to Plaintiffs' summary judgment motion, Plaintiffs would also have no objection to an extension, until October 9, for the Government to file that response as well. That would allow the Court to consider both motions (including any threshold jurisdictional objections that the Government may include in its opposition to summary judgment) at the hearing on October 31, and thus potentially obviate the need to act on the preliminary injunction motion at all.

WHEREFORE, Plaintiffs respectfully request that this Court direct Defendants to respond to Plaintiffs' motion for summary judgment and motion for a preliminary injunction by no later than October 9, 2013.

September 30, 2013

Respectfully submitted,

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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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