IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*,	)	
	)	
Plaintiffs,	)	Civ. No. 13-623 (RWR)
	)	
v.	)	
	)	**OPPOSITION**
KATHLEEN SEBELIUS, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DEFER SUMMARY JUDGMENT BRIEFING AND FOR EXTENSION OF TIME

Plaintiffs filed their Complaint in this Administrative Procedure Act case on May 2, 2013 (Dkt. 1), and moved for summary judgment on June 6, 2013 (Dkt. 17). On June 13, 2013, the Government moved to defer filing its response to the summary judgment motion until *after* the Court *resolves* its motion for dismiss—which it has not yet filed, and for which it seeks an extension of time to file until July 29, 2013. ("Mot.," Dkt. 18.) As explained below, Plaintiffs oppose the motion to defer summary judgment briefing, because there is no reason to delay *briefing* (as opposed to decision) and because doing so would threaten irreparable injury, forcing Plaintiffs to seek a preliminary injunction. If the Government's motion to defer is denied, however, Plaintiffs do not oppose the Government's requested extension of time.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' challenge in this case is to the facial validity of an IRS regulation that purports to make individuals who buy health insurance coverage from federally established insurance "Exchanges" eligible for premium assistance subsidies under the Patient Protection and Affordable Care Act ("ACA"). As explained in the Complaint, that regulation, which is flatly contrary to the text of the ACA, has the effect of exposing Plaintiffs to substantial penalties if they do not purchase coverage—for themselves or their employees—by January 1, 2014.

In particular, the individual plaintiffs would, absent the IRS regulation, be exempt from the "individual mandate" penalty, because insurance would be "unaffordable" given their modest incomes. 26 U.S.C. § 5000A(e)(1). They would therefore be able to obtain "certificates of exemption" that would entitle them to purchase cheaper, catastrophic coverage for 2014, or to forgo health coverage entirely without penalty. *See* 78 Fed. Reg. 7348, 7354 (Feb. 1, 2013). But, because the IRS regulation purports to make them eligible for subsidies, they can no longer claim the protection of that exemption or obtain those "certificates of exemption"; consequently, they are unable to buy catastrophic coverage, and must instead (under threat of penalties) purchase comprehensive coverage that they do not want. (*See* Compl., Dkt. 1, ¶¶ 12-15.)

The business plaintiffs would, absent the IRS regulation, be effectively exempt from the ACA's "employer mandate," because their employees would be ineligible for the subsidies that trigger the employer-mandate penalty against their employers. 26 U.S.C. § 4980H. But if their employees *are* eligible for subsidies, as they would be under the IRS regulation, then the business plaintiffs must sponsor health coverage that they do not want to sponsor, or be subject to large assessable payments. (*See* Compl., Dkt. 1, ¶¶ 16-18.)

Critically, both the individual and employer mandates—the two provisions that the challenged IRS regulation threatens to subject Plaintiffs to—take effect on January 1, 2014. *See* ACA, §§ 1501(d), 1513(d). That means that Plaintiffs only have until the end of this year to comply with these mandates—which they must do if, but only if, the IRS regulation is valid. In other words, sometime between October 1 (when the federally established Exchanges will open) and December 31 (when the year ends), Plaintiffs must finally commit to financial courses of action that will have profound consequences for their families and businesses. Specifically, they must decide whether or not to comply with the ACA's mandates by purchasing or sponsoring

health coverage that they otherwise would not want to purchase or sponsor. (*See* Compl. ¶ 25.) Moreover, those individual plaintiffs who want to purchase catastrophic coverage for 2014 only have until January 1 to obtain the "certificates of exemption" that allow them to buy it. Without those certificates, they are precluded from purchasing the coverage, and after January 1, they will be unable to procure those certificates, even if they succeed in this suit.

As should be clear from the above, Plaintiffs will suffer irreparable harm if they cannot obtain a judicial declaration as to the validity of the IRS regulation by the end of 2013. Absent such a ruling, Plaintiffs will be forced either (i) to violate the individual and employer mandates, and thereby risk liability if the IRS regulation is upheld; or (ii) bear the irrecoverable expense of complying with those mandates. And the individual plaintiffs will be fully precluded from purchasing, for 2014, the catastrophic health coverage that some of them want.

ARGUMENT

Plaintiffs moved for summary judgment promptly because they sought to give the Government and the Court adequate time to address and resolve the merits in advance of January 1, 2014, at which point Plaintiffs will suffer irreparable injury from the challenged regulation. If the Government succeeds in staying summary judgment briefing, Plaintiffs will unfortunately be forced to seek a preliminary injunction, which is surely not preferable for the Government, the Court, or the public. Anyway, the Government has no good reason to put off briefing summary judgment: The only merits issue in this case is a purely legal one, requiring no facts or discovery. And the Government will have to brief the merits regardless, because it has *no* argument—and certainly has not articulated any—for dismissal of at least the *individual* plaintiffs. Assuming that summary judgment briefing is not deferred, however, Plaintiffs do not object to a limited extension of time, until July 29, 2013, for the Government to file its motion to dismiss and response to the summary judgment motion.

I. EXPEDITIOUS BRIEFING ON THE MERITS POSES NO BURDENS AND IS NECESSARY TO AVOID A MOTION FOR PRELIMINARY INJUNCTION.

The impending, January 1 deadline for compliance with the individual and employer mandates is precisely why Plaintiffs filed a motion for summary judgment relatively early: to enable the parties to brief the merits, and the Court to make a reasoned decision, sufficiently far in advance of 2014 to allow Plaintiffs to conform their behavior to the law. Plaintiffs would prefer not to subject opposing counsel or this Court to the burdens of litigating a motion for preliminary injunction at the eleventh hour, which will—given the threat of irreparable injury—unfortunately become necessary if the case does not proceed expeditiously.

Yet the Government now seeks to *defer* even *responding* to the summary judgment motion until *after* its jurisdictional objections—which have not yet even been filed—are *resolved*. There is no basis for that request, which would intolerably delay resolution of the case.

A. Plaintiffs Are Only Asking for *Briefing* To Proceed Normally, Not for the Court To *Address* the Merits Prematurely.

To be sure, this Court should obviously not *resolve* the merits of the IRS regulation's validity until after it has resolved any threshold jurisdictional objections that the Government may raise in its motion to dismiss. The cases that the Government cites stand only for that limited proposition. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). But that hardly means that the parties cannot or should not *brief* the merits in the interim. To the contrary, courts (at the trial, appellate, and Supreme Court levels alike) routinely resolve jurisdictional issues and merits issues at the same time, in the same opinion, which obviously could not happen unless the issues were briefed in parallel. Contrary to the Government's suggestion, Plaintiffs are not asking the *Court* to do anything before resolving the jurisdictional issues; they are simply asking *Defendants* to brief both sets of issues, so as not to unnecessarily postpone the resolution of the merits once any jurisdictional issues are disposed of.

B. Deferring Summary Judgment Briefing Threatens Irreparable Injury.

Here, the reasons to have the parties brief the issues in parallel are plain. Deferring summary judgment briefing would seriously, potentially irreparably, harm Plaintiffs by making it difficult for the Court to reach the merits by the end of 2013. If a motion to dismiss is not filed until July 29 (pursuant to the Government's extension request), then the Court would not be in a position to rule on those issues until September. Even if the Court ruled promptly, within the month, that would only *start* the time for the Government to respond to the pending summary judgment motion. That motion would therefore not be ripe for adjudication until, most likely, sometime in November, leaving insufficient time for the Court to rule and for Plaintiffs to conform their behavior by the end of the year. And that is not even taking into account the virtual certainty that the losing party would seek appellate review and emergency relief from the Court of Appeals. In short, deferring summary judgment briefing would cause a likely insurmountable "time crunch," and Plaintiffs would therefore be forced to burden opposing counsel and the Court with a motion for preliminary relief.

The Government contends that the timing difficulties are Plaintiffs' own fault, because they did not bring suit immediately upon the regulation's promulgation in May 2012. (Mot. 6.) But, of course, no plaintiff could have established standing in *May 2012* to challenge a regulation that does not take effect until *January 2014*. Among other things, states were not even required to decide whether to establish their own insurance Exchange until January 2013, and so nobody could have known before then whether their state would be served by a state or federal Exchange. Had plaintiffs sued in May 2012, the Government would quite reasonably have moved to dismiss as unripe. Plaintiffs thus filed suit once they had sufficient information to be certain that the IRS regulation would cause them injury—and that still left eight months to resolve the merits, more than sufficient time were the Government not desperately seeking to stall.

C. Requiring a Response to the Summary Judgment Motion in the Ordinary Course Would Impose No Burdens on the Government.

On the other hand, requiring the Government to respond to the summary judgment motion in the normal course would pose virtually no burden at all. This case turns on the purely legal issue of the facial validity of a regulation under the Administrative Procedure Act. There are no relevant facts and no need for merits discovery. Plaintiffs' summary judgment brief was under 25 pages. And the Government has (allegedly) *already* considered, before the challenged Rule was promulgated, whether it is consistent with the governing statute. So there are no novel issues here that the Government would need time to consider or ought to be shielded from addressing. And, if the Government responds to the summary judgment motion in the normal course (or even after an extension of time), both the jurisdictional and merits issues would be briefed and ripe for judicial resolution by September, leaving ample time for adjudication and even appeal. Thus, when weighed against the potential harm that delay would cause Plaintiffs, it is clear that deferring summary judgment briefing would be inappropriate in this case.

In an effort to evade that clear balance of hardships, the Government puts forward a set of makeweight "burdens" that responding to the summary judgment motion now would allegedly impose. *First*, the Government says that its motion to dismiss on jurisdictional grounds may "narrow, or provide greater focus for, the issues remaining in this litigation." (Mot. 5.) But a motion to dismiss *for lack of jurisdiction* is obviously not going to narrow or focus the *merits* issues; the two are completely distinct. Anyway, there is only one, crisp legal issue at stake in this case—whether the regulation extending subsidies to federal Exchanges violates the ACA—so there is nothing that could conceivably be "narrowed." *Second*, the Government says that it might want jurisdictional discovery (Mot. 5), but such discovery would relate only to the *jurisdictional* issues, posing no obstacle to briefing the *merits*. And if the Government wants

jurisdictional discovery, Plaintiffs are happy to provide it at any time. *Third*, the Government rather absurdly complains that it should not be "forced to brief summary judgment … without the benefit of the administrative record." (Mot. 6.) But this suit alleges only a conflict between the regulation and the plain text of the ACA, so no "administrative record" is needed beyond the agency's publication in the Federal Register. *See* 77 Fed. Reg. 30,377 (May 23, 2012). Anyway, the Government already *has* the administrative record, so that is hardly cause for delay.

It is notable that, when expedition is needed, courts often allow *discovery* to proceed while a dispositive motion is pending—even though discovery imposes substantial, often costly burdens on the parties themselves (not just their counsel). *See Beecham v. Socialist People's Libyan Arab Jamahiriya*, 245 F.R.D. 1, 2 (D.D.C. 2007) (Roberts, J.) (denying stay of discovery during pendency of motion to enforce settlement agreement, because "proponent of a stay bears the burden of establishing its need" and had not proved that discovery would be "unnecessarily costly or time-consuming"); *Glazer's Wholesale Drug Co. v. Klein Foods*, No. 3-08-cv-0774, 2008 BL 155038, at *1 (N.D. Tex. July 23, 2008) ("For defendant to now suggest that there will be no delay or prejudice if all discovery is stayed for several months while the court considers its Rule 12(b)(6) motion is, at the very least, disingenuous."); *Fairley v. Andrews*, 423 F. Supp. 2d 800, 806 (N.D. Ill. 2006) ("Where the court finds that a motion to stay discovery is unlikely to significantly expedite the litigation, and may actually slow it down, the court will … decline to stay discovery."). Here, where all that is at issue is a purely legal response by counsel to a straightforward and concise summary judgment motion, it is obvious that the anticipated pendency of a motion to dismiss should not be used as an excuse for delay.

D. In Any Event, the Government's Motion-To-Dismiss Arguments Would Not Dispose of the *Entire* Case.

The Government's arguments are premised on the claim that its motion to dismiss will "dispose of this case in its entirety." (Mot. 5.) But the Government fails even to *articulate* a comprehensible argument that would have that result, as *none* of its stated, anticipated arguments relate to the standing or jurisdictional propriety of the *individual* plaintiffs. As such, it is clear that the Government will have to brief the merits regardless—the only question is when.

All the Government says is that its motion will address (i) "whether the Anti-Injunction Act … deprives the Court of jurisdiction"; and (ii) "whether the plaintiffs have standing to litigate the federal tax liabilities of parties who are not before the Court." (Mot. 3.)

But the Anti-Injunction Act, which prohibits claims to restrain or enjoin federal *taxes*, has no conceivable bearing on the *individual* plaintiffs, who are suing only to invalidate *subsidies* that the Government is offering to pay them. Even if one looks beyond the individual plaintiffs' requested relief to their ultimate goal—*i.e.*, avoiding the individual mandate penalty that would apply to them if the IRS regulation is valid—the Supreme Court has already unanimously held, with the Government's agreement, that the Anti-Injunction Act does not bar challenges to the individual mandate penalty. *See Nat'l Fed. of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2582-84 (2012).

Likewise, while the Government opaquely says that it will contend that Plaintiffs lack standing to litigate the "tax liabilities of parties who are not before the Court," that argument similarly relates (at best) only to the *business* plaintiffs, who are injured by their *employees*' potential receipt of subsidies. The *individual* plaintiffs, by contrast, seek only to dispute their *own* eligibility for the subsidies, which preclude them from buying catastrophic health coverage and force them to purchase comprehensive coverage that they do not want.

If the Government cannot even coherently state a basis for dismissal of the individual plaintiffs, it surely cannot defer briefing on the assumption that such motion will succeed.

E. The Government's Cited Cases Do Not Support a Stay of Briefing Here.

The cases cited by the Government (Mot. 5) as evidencing an allegedly common practice of staying summary judgment briefing do not support it. In *Freedom Watch, Inc. v. Department of State*, the defendant "filed its opposition to the motion for partial summary judgment," and only *after* asked to "stay the motion for partial summary judgment." 2013 WL 692770, at *3 (D.D.C. Feb. 27, 2013). That is, it briefed the motion but asked the Court not to *decide* it. Plaintiffs here are asking for nothing more. In *Daniels v. United States*, it was the *defendant* who moved to dismiss "or, in the alternative, for summary judgment," and the court stayed *that* motion after the plaintiff amended his complaint, mooting the original motion to dismiss. 2013 WL 2352106, at *3 (D.D.C. May 30, 2013). In *Angulo v. Gray*, the court stayed summary judgment after all briefing on the motion to dismiss was *completed*, when it was clear that such motion would be granted, which it was. 2012 WL 5995734, at *2, *5 (D.D.C. Dec. 3, 2012). In *Rundquist v. Vapiano SE*, the *entire case* was stayed because the defendant claimed that the court lacked personal jurisdiction, making it unfair to subject it to any further proceedings. *See* 2012 WL 5954706, at *1 n.1 (D.D.C. Nov. 9, 2012). There is no such argument or potential unfairness here. *Magritz v. Ozaukee County* was a frivolous suit against "judges, a district attorney, a register of deeds, and a parks commissioner"; the court stayed briefing on the motion for summary judgment after the plaintiff failed to respond to the defendants' motions to dismiss. 894 F. Supp. 2d 34, 37 (D.D.C. 2012). The Government is therefore left with exactly one precedent: a 25-year old decision that simply states that a summary judgment motion was "held in abeyance" and ultimately mooted. *Ticor Title Ins. Co. v. FTC*, 625 F. Supp. 747 (D.D.C. 1986). In all, hardly a persuasive basis for deferring briefing here, on these facts.

II. SO LONG AS SUMMARY JUDGMENT BRIEFING IS NOT DEFERRED, PLAINTIFFS DO NOT OPPOSE A REASONABLE EXTENSION OF TIME.

In addition to its request for a stay of the summary judgment briefing pending resolution of its anticipated motion to dismiss, the Government also seeks a 21-day extension of time to file that motion, on top of the 60 days already afforded by the Federal Rules.

Were the Government not also seeking to delay summary judgment briefing until *after* resolution of its motion to dismiss, Plaintiffs would have consented to its extension request. And if this Court denies the stay, Plaintiffs would consent to the extension. Indeed, Plaintiffs would also be willing to consent to the Government's request (Mot. 9) for the same extension to respond to the summary judgment motion, such that its motion to dismiss and its opposition to summary judgment could be filed together on July 29, 2013. As noted above, that would still allow for all of the issues—jurisdictional and merits—to be briefed and ripe for resolution by the end of the summer, such that a decision could be made with enough time for Plaintiffs to conform their behavior to the law by the end of December.

But, if the Court grants the Government's request to defer summary judgment briefing until after the motion to dismiss is resolved, then it is all the more important that such motion be filed as soon as possible. Otherwise, as explained above, it will be difficult if not impossible for Plaintiffs to obtain a ruling on their summary judgment motion by the end of 2013, and that in turn would necessitate a motion for preliminary relief, which would not be to anyone's benefit.

CONCLUSION

Plaintiffs therefore respectfully request that this Court deny the Government's motion to stay summary judgment briefing, for which no good cause exists, and then grant its motion for an extension of time to respond to the Complaint and the summary judgment motion. But, if the Court grants the stay motion, Plaintiffs respectfully urge the Court to deny the extension of time.

Dated: June 14, 2013

/s/ Michael A. Carvin
Michael A. Carvin (D.C. Bar No. 366784)
Jacob M. Roth (D.C. Bar No. 995090)
Jonathan Berry (*application for admission pending*)
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
Phone: (202) 879-3939
Fax: (202) 626-1700

Attorneys for Plaintiffs