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

DAVID KING, *et al.*, *Plaintiffs*, *v.* KATHLEEN SEBELIUS, *et al.*, *Defendants.*	))))))))))	No. 3:13-CV-630 (JRS) **MOTION FOR PRELIMINARY INJUNCTION**

MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs respectfully move this Court for entry of an Order enjoining Defendants, pending resolution of the litigation, from applying the IRS regulations extending eligibility for premium assistance subsidies under the Patient Protection and Affordable Care Act to individuals who purchase health coverage through Exchanges established by the federal government pursuant to § 1321(c) of that Act.

As explained in the supporting papers, Plaintiffs are very likely to succeed on the merits of their claim that those regulations are contrary to law; they will suffer irreparable injury if preliminary relief is not granted; and the balance of equities and public interest favor injunctive relief. Consequently, Plaintiffs respectfully request that this Court grant the preliminary relief.

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DAVID KING, *et al.*,	)	
	)	No. 3:13-CV-630 (JRS)
Plaintiffs,	)	
	)	
v.	)	**BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**
	)	
KATHLEEN SEBELIUS, *et al.*,	)	
	)	
Defendants.	)	

INTRODUCTION

The Patient Protection and Affordable Care Act ("ACA" or "the Act") provides federal subsidies for health coverage purchased through a marketplace established by a "State." The federal government is not a "State." Subsidies are therefore not available for coverage purchased through federally established marketplaces. Yet the IRS has promulgated regulations ("the IRS Rule") declaring precisely the opposite. Those regulations, which purport to dispense billions of dollars in federal spending that Congress never authorized, are plainly contrary to law.

Yet if they are not enjoined in advance of the year-end, Plaintiffs will be irreparably deprived of their right to obtain certified exemptions from the ACA's individual mandate for 2014. They would thus be forced either to buy comprehensive health coverage that they do not want or risk incurring a penalty; and they would also be foreclosed from buying catastrophic coverage for 2014. Moreover, thousands of employers are poised to eliminate or restructure their group insurance programs on the false premise that their employees are entitled to subsidies, and the Government is poised to spend billions of unauthorized dollars that it may never be able to recover. In short, it is imperative that all affected parties know whether the IRS Rule is legally valid *before* it triggers billions in spending and massive behavioral changes.

Plaintiffs have already filed a motion for summary judgment (Dkt. No. 5 ("SJ")), and if the Government responds to that motion within the time permitted by the Local Rules, then there would be sufficient time for the Court to resolve the matter well in advance of the year-end. But in other cases challenging the IRS Rule, the Government has sought extensions, postponements, and deferrals, thereby successfully delaying adjudication of the merits. Accordingly, Plaintiffs are also moving for a preliminary injunction, but this Court need not act on it if the Government responds with appropriate expedition to the pending motion for summary judgment.

STATUTORY, REGULATORY, AND FACTUAL BACKGROUND

A. Congress Authorized Subsidies To Encourage States To Establish Insurance Exchanges, But Most States Nevertheless Declined.

The Patient Protection and Affordable Care Act ("ACA" or "the Act") regulates the individual health insurance market primarily through insurance "Exchanges" organized along state lines. Congress determined that it would be preferable for the states themselves to establish and operate these Exchanges. Accordingly, the Act provides that "[e]ach State shall … establish an American Health Benefit Exchange … for the State …." ACA, § 1311(b)(1).

The federal government cannot, however, constitutionally *compel* sovereign states to create Exchanges. The Act therefore recognizes that some states may decline or fail to do so. *See* ACA, § 1321(b)-(c). Section 1321 of the Act therefore authorizes the federal government to establish fallback Exchanges in states that do not establish their own. *See* ACA, § 1321(c). The ACA thus provides for two basic types of Exchanges: those established by states under § 1311, and those established by the federal government under the § 1321 fallback.

To encourage states to establish Exchanges, the Act authorizes premium assistance subsides for state residents who purchase health coverage through state-established Exchanges. These subsidies are available only to those who enroll in coverage "through an Exchange

established by the State under section 1311," 26 U.S.C. § 36B(c)(2)(A)(i)—not those who enroll in coverage through an Exchange established by the *federal government* under *§ 1321* of the Act.

Nevertheless, 34 states have decided not to establish Exchanges, including Virginia. *See State Decisions For Creating Health Insurance Exchanges*, Kaiser State Health Facts, http://kff.org/health-reform/stateindicator/health-insurance-exchanges/; 77 Fed. Reg. 18,310, 18,325 (Mar. 27, 2012) (categorizing "partnership" Exchanges as federally established). The federally established Exchanges are scheduled to open on October 1, 2013.

By that same date (October 1), the vast majority of American employers are required to notify their employees as to whether they intend to offer group coverage meeting ACA standards, so that the employees can determine whether coverage and subsidies will be available to them on the Exchanges. *See* ACA, § 1512; Dep't of Labor, *Guidance on the Notice to Employees of Coverage Options under Fair Labor Standards Act § 18B and Updated Model Election Notice under the Consolidated Omnibus Budget Reconciliation Act of 1985*, Tech. Release No. 2013-02 (May 8, 2013).

B. The IRS Promulgated a Regulation Expanding the Availability of Federal Subsidies, Triggering Other Mandates and Penalties Under the ACA.

Although the ACA provides that premium assistance subsidies will not be available in the states with federal Exchanges, the IRS has promulgated a regulation ("the IRS Rule") granting subsidies in those states. Specifically, the IRS Rule states that subsidies shall be available to anyone "enrolled in one or more qualified health plans through an Exchange," and then defines "Exchange" to mean "State Exchange, regional Exchange, subsidiary Exchange, *and Federally-facilitated Exchange.*" *See* Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378, 30,387 (May 23, 2012) (emphasis added). In effect, the Rule eliminates the statutory language restricting subsidies to Exchanges "established by the State under section 1311 of the [ACA]."

Availability of subsidies, in turn, triggers other mandates and penalties under the Act, including the individual mandate penalty for people who would otherwise be exempt therefrom.

Failure to comply with the ACA's individual mandate to buy comprehensive health coverage triggers a penalty, but individuals "who cannot afford coverage" are exempt from it. 26 U.S.C. § 5000A(b), (e)(1). To claim this exemption, the annual cost of health coverage—net of any subsidy under the Act—must exceed eight percent of annual household income. *Id.* § 5000A(e)(1)(A), (e)(1)(B)(ii). Someone whose *projected* income satisfies that condition is entitled, under HHS regulations, to obtain a "certificate of exemption," prior to the start of the calendar year, that would allow him to forgo coverage, or to buy inexpensive, high-deductible, catastrophic insurance (which is otherwise restricted to those under age 30, ACA, § 1302(e)). *See* 45 C.F.R. § 155.605(g)(2). Yet, by purporting to make subsidies "allowable" in states without their own Exchanges, the IRS Rule disqualifies numerous people in those states from obtaining those certificates, by reducing their "net" cost of coverage to below 8% of projected income, and thus forces them to comply with the individual mandate.

C. The IRS Rule Threatens Plaintiffs with Irreparable Injury.

As explained in more detail in Plaintiffs' summary judgment brief, Plaintiffs reside in Virginia, which has not established its own Exchange. None wants to buy comprehensive, ACA-compliant coverage for 2014. And, absent the IRS Rule, none would be penalized for failing to, because—based on their personal characteristics and projected household incomes—they would be entitled to "certificates of exemption" from the individual mandate penalty for 2014. Those certificates, which for 2014 must be sought and issued by the end of 2013, guarantee that the exempt individuals will not incur any penalties for failure to purchase ACA-compliant insurance, and would further allow those individuals to purchase cheaper, "catastrophic" coverage, which otherwise would not be available to them. (*See* SJ at 9-13.)

However, under the IRS Rule, each of the Plaintiffs would be entitled to a subsidy that would reduce the net cost of ACA-compliant coverage to below 8% of their projected household income, and thus disqualify them from the exemption for those for whom insurance would be "unaffordable." (*See* SJ at 10-13.) Accordingly, as a result of the IRS Rule, each of the Plaintiffs is now subject to the individual mandate penalty, and must either buy insurance that he or she does not want (and which would be only *partly* subsidized) or pay a penalty. (*Id.*)

Critically, the individual mandate takes effect on January 1, 2014. *See* ACA, § 1501(d). That means that, absent injunctive relief in advance of that date, Plaintiffs would be unable to procure a "certificate of exemption" for the 2014 calendar year and so would be forced to suffer the irreparable injury of either buying a product that they do not want or exposing themselves to penalties; and, further, they would be unable to use their own funds to buy catastrophic coverage for 2014. Once 2014 begins, Plaintiffs would no longer be able to obtain certificates of exemption, 45 C.F.R. § 155.605(g)(2)(v), and that injury could never be remedied after-the-fact. In short, the IRS Rule is blocking Plaintiffs from obtaining certificates of exemption, and the window for them to obtain those certificate will close, for good, on December 31, 2013.

D. The IRS Rule Is Also Poised To Affect the Coverage Decisions of Thousands of Employers, and Thus the Coverage Options of Millions of Americans.

The adverse impact of the IRS Rule is obviously not limited to Plaintiffs. Nor is it limited to the many low- and middle-income Americans who are similarly situated to them (*i.e.*, deprived of their statutory eligibility for a certified exemption from the individual mandate by virtue of the availability of the subsidies under the IRS Rule). As further explained in the attached declaration of health insurance expert W. Thomas Haynes, thousands of employers are now poised to eliminate or narrow their group coverage programs for their employees, on the premise that those employees and their families may actually be *better* off by obtaining subsidies

on the Exchanges (which would not be available if the employer were to continue to sponsor group coverage). (Exh. A, Decl. of W. Thomas Haynes ("Haynes Decl."), ¶¶ 6-12.) If the IRS Rule is subsequently invalidated, those employees in states without their own Exchanges will be left without either employer coverage *or* subsidized individual coverage, and may become uninsured—directly contrary to the fundamental purpose of the ACA.

ARGUMENT

In determining whether to grant preliminary relief, the Court weighs four factors: (i) the plaintiff's likelihood of success on the merits of his claim; (ii) the irreparable harm that the plaintiff would suffer absent preliminary relief; (iii) the balance of the equities; and (iv) the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 345-47 (4th Cir. 2009). Here, these factors decisively favor the issuance of a preliminary injunction against the application of the unlawful IRS Rule.

On the merits, that Rule is plainly unlawful and contrary to the text of the ACA. In the ACA, Congress expressly provided that subsidies would be available only for coverage that is purchased "through an Exchange *established by the State under section 1311 of the Patient Protection and Affordable Care Act*." 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added). Since the federal government is obviously not a "State" and its Exchanges are established under § 1321 of the ACA, not § 1311, the subsidies are not available through federal Exchanges.

The irreparable injury that Plaintiffs face from the IRS Rule is indisputable: Unless the IRS Rule is enjoined in advance of January 1, 2014, when the individual mandate takes effect and the regulatory window for obtaining certificates of exemption closes, they will be forced either to comply with the ACA's individual mandate or risk incurring a penalty, and they will further be entirely and forever precluded from purchasing catastrophic coverage for 2014.

And the balance of the equities and public interest both cut strongly in favor of resolving the legal validity of the IRS Rule *now*, before billions of taxpayer dollars are illegally expended and before employers make unalterable benefit decisions premised on the Rule. If a ruling invalidating the IRS Rule is delayed until *after* these events, the result would be utter chaos.

I. PLAINTIFFS ARE VERY LIKELY TO SUCCEED ON THE MERITS, BECAUSE THE IRS RULE IS SQUARELY FORECLOSED BY THE STATUTORY TEXT.

Plaintiffs explain, in their motion for summary judgment, why the IRS Rule cannot survive review. (*See* SJ at 14-25.) Rather than repeat that submission, Plaintiffs hereby incorporate by reference their comprehensive summary judgment brief.

Simply put, the relevant text of the ACA is unambiguous that subsidies are available only to individuals who buy coverage "through an Exchange *established by the State under section 1311 of the Patient Protection and Affordable Care Act*." 26 U.S.C. § 36B(c)(2)(A)(i); *see also id.* § 36B(b)(2)(A) ("enrolled in through *an Exchange established by the State under [§] 1311*") (emphases added). The Act does not, when describing the availability of subsidies, use generic language that appears elsewhere in the ACA, like "an Exchange" (*e.g.*, ACA, § 1421(a)), or an Exchange "established under this Act" (*e.g.*, ACA, § 1312(d)(3)(D)(i)(II)). Thus, if an individual's state is—like Virginia—served by a *federal* Exchange under *§ 1321*, no premium assistance subsidies are available to that individual. Yet the IRS Rule says just the opposite, *see* 26 C.F.R. § 1.36B-2(a)(1); *id.* § 1.36B-1(k); 45 C.F.R. § 155.20, even as the same set of regulations admits that a federally facilitated Exchange is "established and operated … by *the Secretary* under *section 1321(c)(1)* of the [ACA]," 45 C.F.R. § 155.20 (emphases added). Fundamental canons of statutory construction thus squarely foreclose the IRS Rule. Nor is there any legislative history or other indication of congressional intent that contradicts this understanding (not that any such history or indication could overcome plain statutory text).

II. PLAINTIFFS ARE AT RISK OF IRREPARABLY LOSING THEIR CHANCE TO OBTAIN A CERTIFICATE OF EXEMPTION FROM THE 2014 INDIVIDUAL MANDATE PENALTY, AND SO WILL BE FORCED TO EITHER BUY ACA-COMPLIANT INSURANCE OR EXPOSE THEMSELVES TO PENALTIES, AND BE PRECLUDED FROM BUYING CATASTROPHIC COVERAGE FOR 2014.

Plaintiffs' claim in this litigation is that the IRS Rule is unlawful. But, unless that Rule is enjoined in advance of January 1, 2014, it will irremediably prevent Plaintiffs from obtaining "certificates of exemption" from the individual mandate penalty for 2014—a benefit to which they would otherwise be entitled by law and which has value only if granted by year's end.

As explained in Plaintiffs' summary judgment brief and supporting exhibits, they reside in Virginia, which has not established its own Exchange. They do not want to purchase comprehensive, ACA-compliant health coverage for 2014. Nor, absent the IRS Rule, would they have to—because the statute and implementing regulations recognize an exemption for individuals for whom coverage would cost more than 8% of their projected household income. *See* 45 C.F.R. § 155.605(g)(2); 26 U.S.C. § 5000A(e)(1), (5). Plaintiffs would all be entitled to that exemption, if not for the subsidies that they are granted under the IRS Rule. (*See* SJ at 9-13.) Yet because of the IRS Rule and the subsidies to which it entitles Plaintiffs, they are no longer able to claim that exemption. (*See id.*) Accordingly, they are forced to comply with the individual mandate by either purchasing comprehensive coverage that they do not want or exposing themselves to a penalty; and they are barred from purchasing catastrophic coverage with their own funds, *see* ACA, § 1302(e). Relief after January 1, 2014, would not remedy this injury for 2014, because certificates of exemption cannot be obtained after that date, *see* 45 C.F.R. § 155.605(g)(2)(v), and because the individual mandate takes effect then, *see* ACA, § 1501(d), thus requiring Plaintiffs to make irrecoverable outlays beforehand if they do not want to risk incurring penalties under the individual mandate.

This injury is irreparable. Indeed, forcing Plaintiffs to either change their behavior or be subject to a penalty is a *classic* form of irreparable 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). If Plaintiffs, under threat of liability, reasonably choose to comply with the individual mandate, the costs of doing so could not be recovered from the Government if Plaintiffs later prevail, and are therefore irreparable. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 362 (4th Cir. 1991) (finding irreparable injury where plaintiff cannot "collect monetary damages from the State" due to immunity); *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 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.").

Moreover, the IRS Rule will also permanently preclude Plaintiffs from obtaining certificates of exemption for 2014, and thus from purchasing catastrophic coverage for that year using their own funds. However this Court ultimately rules on the merits, there will be no way for Plaintiffs to retroactively obtain catastrophic coverage after the window for purchasing it closes on January 1, 2014. This injury is also, therefore, *per se* irreparable. *Reid v. Johnson*, 333 F. Supp. 2d 543, 551 (E.D. Va. 2004) (accepting that "any harm suffered … will be irreparable in the sense that it cannot be undone after the fact"). As this Court (and other courts) have recognized, deprivation of statutory rights therefore constitutes irreparable injury. *See Odetics,*

Inc. v. Storage Tech. Corp., 14 F. Supp. 2d 785, 795 (E.D. Va. 1998) (finding "loss of [plaintiff's] statutory right" to be "significant irreparable harm" warranting relief); *Mova Pharm. Corp. v. Shalala*, 955 F. Supp. 128, 131 (D.D.C. 1997) (concluding that "depriv[ation]" of a "statutory grant" was irreparable injury), *aff'd*, 140 F.3d 1060, 1067 & n.6 (D.C. Cir. 1998).

III. THE EQUITIES AND PUBLIC INTEREST WEIGH IN FAVOR OF A RULING NOW, BEFORE BILLIONS OF TAXPAYER DOLLARS ARE EXPENDED AND THOUSANDS OF EMPLOYERS MAKE UNALTERABLE BENEFIT CHOICES.

The final two factors of the preliminary injunction test also weigh heavily in favor of relief. "It is in the public interest for courts to carry out the will of Congress and for an agency to implement properly the statute it administers." *Mylan Pharms. Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000). As detailed above, far from properly implementing the ACA, the IRS chose to ignore "the will of Congress as evinced in the statute's text" and promulgated a rule that unlawfully purports to authorize billions of dollars in subsidies. *Id.*

Here, the consequences of the IRS's *ultra vires* action are particularly grave. For the Government to pay out billions of dollars in subsidies before the facial validity of the IRS Rule is resolved by a federal court is a recipe for chaos. Consider the consequences if the IRS Rule is invalidated only *after* millions of Americans receive subsidies. Those individuals might be forced to repay the funds after having purchased coverage only on the promise of receiving them, triggering serious Due Process Clause and retroactivity concerns (not to mention mass confusion and outrage). Or, if the funds cannot be recouped (whether practically or constitutionally), then the Government—and the taxpayers—will have irretrievably lost billions of dollars that were never congressionally authorized. Yet "the protection of the public fisc is a matter that is of interest to every citizen." *Brock v. Pierce Cnty.*, 476 U.S. 253, 262 (1986); *see also James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544-45 (8th Cir. 1982) (per curiam) (avoiding potentially unnecessary "expenditures from the public treasury" "serves the public interest").

Furthermore, potentially millions of American employees stand to be injured if the validity of the IRS Rule is not adjudicated promptly. The ACA requires employers to announce by October 1 whether they intend to offer group coverage to their employees or, instead, allow those employees to purchase individual coverage on the Exchanges. (*See* Haynes Decl. ¶ 5.) Many employers are expected to drop group coverage and push employees into the Exchanges, in reliance on the IRS Rule's promise that those employees will be eligible for federal subsidies on the Exchanges. (*Id.* ¶ 12.) If those subsidies are enjoined only *after* employer-sponsored coverage is dropped or narrowed for millions of employees, one of the ACA's principal goals—namely, reducing the number of uninsured Americans—will be substantially undermined.

It is inconceivable that following this course could possibly be in the "public interest," or that forcing millions of Americans to buy insurance (or thousands of employers to drop or modify the plans that they would otherwise offer) based on a false promise of subsidies could be anything other than massively prejudicial. It serves *everyone's* interests—those of Plaintiffs, the Government, and the public alike—to obtain a prompt ruling on the legal validity of the IRS Rule, so that there will be no need subsequently to confront the logistical nightmare of trying to unscramble and undo the unlawful expenditure of billions of federal dollars.

The Government may contend that it is not in the public interest to withhold subsidies from millions of Americans. But, as explained, the ACA subsidy scheme's implications make it, at best, a mixed blessing for many people. And, since the alternative is to mislead millions of Americans into believing that they will obtain subsidies, only to retract that promise after they (and their employers) have made substantial and unalterable financial decisions based upon it, it is clear that knowing the truth up front *is* far better for the public.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue a preliminary injunction enjoining Defendants from applying the IRS Rule pending the resolution of this litigation.

September 19, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2013, I caused true and correct copies of the foregoing Motion for Preliminary Injunction and Brief in Support, as well as its supporting Exhibit, to be served on each of the following via Certified U.S. Mail:

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