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June 24, 2014

Office of the Clerk
U.S. Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

Re: *Jacqueline Halbig et al. v. Kathleen Sebelius et al.* (No. 14-5018)

Dear Clerk of the Court:

Yesterday, the U.S. Supreme Court decided *Utility Air Regulatory Group v. EPA*, No. 12-1146, which bears on the issues here in three respects.

First, the Court reiterated that an agency "has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." (Op.21.) Rather, it may "exercise discretion only in the interstices created by statutory silence or ambiguity." (*Id.*) That limit applies regardless of policy consequences; agencies cannot "revise clear statutory terms that turn out not to work in practice." (Op.23.) Here, it is "hard to imagine" (Op.21) a phrase less susceptible to ambiguity than "Exchange *established by the State*," nor can the IRS defend its "revis[ion]" of these "clear statutory terms" by claiming (as the Government has) that limiting subsidies to state-established Exchanges would somehow "not [] work in practice." (Govt.Br.34-40.)

Second, the Court explained that agencies cannot make "decisions of vast 'economic and political significance'" absent a clear statement from Congress (Op.19), thus affirming this Court's holding to that effect in *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014). Yet here the Government argues that the IRS, despite a clear congressional statement *to the contrary*, was empowered to trigger $150 billion per year in spending and deprive states of the ability to shield their residents from federal regulation. (Govt.Br.44-48.)

Third, the Court rejected the EPA's argument that the statutory term bears a certain meaning because it must be given that meaning *elsewhere* in the law. The presumption of "identical … meaning" throughout a statute "readily yields" where "context" demands otherwise. (Op.15 (quoting *Envt'l Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007)).) Here, the Government has tried to leverage supposed anomalies in other provisions of the ACA to defend its wholesale revision of the unambiguous statutory text "established by the State." (Govt.Br.29-34.) But *Utility Air* confirms that, even if absurdities required "limiting constructions" elsewhere in the ACA (Op.15), that would provide no basis for importing those constructions to defeat the plain, perfectly reasonable text of § 36B.

Sincerely,

/s/ Michael A. Carvin
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cc: All counsel of record, whom the above-signing attorney certifies were served with this letter on June 24, 2014, via ECF.

Attachment