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February 28, 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:

On February 27, 2014, the Centers for Medicare and Medicaid Services, a division within Defendant-Appellee U.S. Department of Health and Human Services ("HHS"), issued a bulletin relevant to the issues presented on this appeal. (*See* Exh. A.)

This case involves IRS regulations purporting to extend federal subsidies under the ACA to health coverage purchased through insurance Exchanges established by HHS under § 1321 of the Act, even though the ACA's plain text limits such subsidies to coverage purchased "through an Exchange established by the State under section 1311" of the Act. (App.Br.17-26.)

In its new bulletin, HHS has now eliminated even the requirement that, to be eligible for a subsidy, the coverage must be purchased "through an Exchange." The bulletin provides that if someone enrolled in "coverage offered outside of the Marketplace [Exchange]," the Exchange may nonetheless later "deem the individual to have been enrolled … through the Marketplace." (Exh. A, at 2.) In such cases, the individual "will be treated for all purposes as having been enrolled through the Marketplace since the initial enrollment date," and so will be eligible on a "retroactive" basis for federal subsidies under 26 U.S.C. § 36B. (*Id.*)

This bulletin is notable for two reasons. *First*, it further illustrates the Government's lack of fidelity to the conditions that Congress included in § 36B. Not only does the Government believe that it may simply "deem" HHS-established Exchanges to be established "by the State" notwithstanding the lack of any statutory authority for such transmogrification, but that it may also "deem" individuals who buy coverage *outside* an Exchange to have purchased it *on* an Exchange. If such administrative revision—simply "deeming" A to be B—were permitted, there is literally nothing in the ACA (or any other statute) that could not be reversed by agency fiat. *Second*, the bulletin was issued by HHS, not the IRS. This further demonstrates the intertwined nature of Titles 26 and 42 of the U.S. Code with respect to eligibility for the ACA's subsidies, and thus the impropriety of according deference to either agency. (App.Br.46-49.)

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 February 28, 2014, via ECF at their respective email addresses.

Attachment