[ORAL ARGUMENT NOT YET SCHEDULED]

No. 14-5018

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACQUELINE HALBIG, ET AL.,

Appellants,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (NO. 13-623 (PLF))

REPLY IN SUPPORT OF APPELLANTS' MOTION TO EXPEDITE THE APPEAL

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The Government's terse, conclusory opposition reflects its apparent strategy of downplaying the public significance of this challenge and ignoring the relevant statutory language. It evidently hopes that nobody will notice the manifestly *ultra vires* nature of the IRS Rule, which conflicts on its face with the Affordable Care Act's text, until the massive disputed federal subsidies are out the door, having induced the increased health coverage enrollment that the Government is desperate for. But with billions of taxpayer dollars at stake, and threatened irreparable injury to hundreds of thousands of individuals across the country (including Appellant Klemencic), this presents a quintessential case for expedition, as even the district court recognized. The Government offers nothing to counterbalance these weighty interests. This Court should accordingly grant Appellants' motion.

1. Even looking only to Appellant Klemencic—and ignoring the broader *public* interest in prompt resolution of the validity of the most consequential rule implementing the most consequential social legislation in a generation—expedition is plainly warranted. Unless the validity of the IRS Rule is resolved prior to the close of 2014 open enrollment, Klemencic and the many other Americans facing similar circumstances will be forced either to buy a product they do not want or risk incurring a penalty. That "Hobson's Choice" presents the type of irreparable harm courts have long held justifies preemptive judicial relief. *Ex parte Young*, 209 U.S. 123, 148 (1908); *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967).

The Government does not dispute that, if people like Klemencic bow to this pressure and buy the unwanted coverage, the costs to them of doing so could not be recovered later. *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010). But it argues that these individuals could simply pay the penalty and try to recover it from the IRS later, in a tax-refund action. (Opp. 13.) To do so, of course, is to risk *not* recovering the money, which is precisely what creates the irreparable injury. And while $150 in penalties may not be substantial to the Government, it assuredly is significant to Klemencic and the other low-income Americans affected.

2. By focusing primarily on Klemencic, the Government is trying to distract from the momentous public interest at stake, which was Appellants' principal ground for expedition. Billions of taxpayer dollars are being spent *every month* on the authority of the IRS Rule. If Appellants are correct that the Rule is invalid, those massive sums are at best being wasted and at worst will be unfairly clawed back from unsuspecting Americans—as the Government does not dispute. It is hard to imagine a more compelling reason to resolve this case quickly.

The Government's bizarre response is that this Court is an "intermediate" appellate court and therefore cannot "definitively" resolve this issue. (Opp. 13.) But if this Court agrees that the ACA's plain language must be respected, it will vacate the IRS Rule, which *will* resolve the issue "definitively," absent further discretionary review by the Supreme Court. There is, of course, *always* a prospect

of Supreme Court review. That is hardly a reason for *this* Court to fail to expedite *its own* adjudication; to the contrary, the Supreme Court cannot act until this Court does, which is all the more reason for this Court to move quickly (just as the district court expedited its own consideration while recognizing that this Court would inevitably decide the matter afresh). Indeed, if potential for Supreme Court review were enough to defeat expedition, this Court would never grant it.

The Government also objects, by conclusory assertion, that Appellants' claims "have no merit." (Opp. 13.) Tellingly, it completely ignores the arguments in Appellants' motion, instead preferring to rely exclusively on the district court's flawed analysis. But the IRS Rule's contradiction of the ACA's text is blatant, and the Government's defense of it cannot be taken seriously. The ACA directs states to establish Exchanges (42 U.S.C. § 18031) and tells HHS to establish Exchanges in states that fail to do so (42 U.S.C. §18041). The Act then provides subsidies for coverage obtained on "an Exchange established by the State under [42 U.S.C. §18031]." 26 U.S.C. §36B(b), (c). The Government contends that this reference to state-established Exchanges must include HHS-established Exchanges, because the ACA allows the latter to be created if the former are not. (Opp. 9.) That does not follow. That the ACA allows two different entities to establish Exchanges is precisely why the subsidy provision's reference to *one* of those entities (states) excludes the *other* entity (HHS). The IRS Rule is plainly, facially, *ultra vires*.

CONCLUSION

The Court should expedite this appeal to require briefing on the timetable set forth in Appellants' motion, with oral argument before March 31, 2014.

January 22, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of January 2014, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Pursuant to this Court's order, I also filed four copies of the foregoing document by hand delivery with the clerk of this Court.

January 22, 2014

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