IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*, *Plaintiffs*, *v.* KATHLEEN SEBELIUS, *et al.*, *Defendants.*	)))))))))))	Civ. No. 13-623 (RWR) **MOTION FOR PRELIMINARY INJUNCTION AND EXPEDITED HEARING**

MOTION FOR A PRELIMINARY INJUNCTION
[EXPEDITED HEARING REQUESTED]

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.

For reasons explained in the supporting memorandum and affidavits, Plaintiffs are very likely to succeed on the merits of their claim that those regulations are contrary to law; they, especially David Klemencic, would suffer irreparable injury if preliminary relief were not granted; and the balance of equities and public interest strongly favor granting an injunction. Consequently, Plaintiffs respectfully request that this Court grant the preliminary relief.

Further, pursuant to this Court's Local Rule 65.1(c), and for reasons explained in the supporting statement of facts, Plaintiffs submit that expedition is necessary and therefore respectfully request that a hearing on this motion be held within 21 days.

/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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*,	)	
	)	Civ. No. 13-623 (RWR)
Plaintiffs,	)	
	)	
v.	)	**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF 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, Plaintiff David Klemencic will be irreparably deprived of his right to obtain a certified exemption from the ACA's individual mandate for 2014. He would thus be forced either to buy comprehensive health coverage that he does not want or risk incurring a penalty; and he would 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.

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, thirty-four states have decided not to establish Exchanges, including West 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 Plaintiff David Klemencic with Irreparable Injury.

Plaintiff David Klemencic will be 54 years old on January 1, 2014, and is an unmarried citizen of West Virginia, which has not established its own Exchange. (Exh. A, Decl. of David Klemencic ("Klemencic Decl."), ¶¶ 1-3.) He does not wish to buy comprehensive coverage for 2014. (*Id.* ¶ 8.) Absent the IRS Rule, Klemencic could refrain from doing so without incurring any penalty. He projects that his household income will be $20,000 in 2014. (*Id.* ¶ 4.) Absent any subsidy, the cost of his coverage (through the cheapest "bronze" plan available to him on the federal Exchange in West Virginia) will exceed 8% of that projected income. (*Id.* ¶ 6; Exh. B, Aff. of Prof. Daniel Kessler ("Kessler Aff."), ¶ 21.) He would therefore qualify for the unaffordability exemption to the individual mandate penalty and be entitled to a "certificate of exemption." 45 C.F.R. § 155.605(g)(2). The subsidy offered by the IRS Rule, however, guarantees that he need pay no more than 5.1% of his total income toward premiums. *See* 26 U.S.C. § 36B(b)(2)(B), (3)(A)(i). Since 5.1% is less than 8%, the Rule thus disqualifies Klemencic from the exemption (Kessler Aff. ¶ 22), and precludes him from buying catastrophic insurance for 2014, forcing him instead to either pay the individual mandate penalty or buy comprehensive coverage. (Klemencic Decl. ¶ 7.)

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, Klemencic 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 he does not want or exposing himself to penalties; and he would be unable to use his own funds to buy catastrophic coverage for 2014. Once 2014 begins, Klemencic would no longer be able to obtain a certificate 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 Klemencic from obtaining a certificate of exemption, and the window for him to obtain that certificate will close, for good, on December 31, 2013.

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

Although the movant here is Klemencic, the adverse impact of the IRS Rule is obviously not limited to him. Nor is it limited to the many low- and middle-income Americans who are similarly situated to him (*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. C, 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 balances 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); *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011); *Davis v. Pension Ben. Guaranty Corp.*, 571 F.3d 1288, 1291 (D.C. 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 so plainly unlawful and contrary to the text of the ACA that the Government has repeatedly resisted even filing a summary judgment brief defending it. 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 Klemencic faces 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, he will be forced either to comply with the ACA's individual mandate or risk incurring a penalty, and he 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. KLEMENCIC IS VERY LIKELY TO SUCCEED ON THE MERITS, BECAUSE THE IRS RULE IS SQUARELY FORECLOSED BY THE STATUTORY TEXT.

Plaintiffs have already explained, in their motion for summary judgment, why the IRS Rule cannot survive review. (*See* Dkt. No. 17.) Rather than repeat that submission, Plaintiffs hereby incorporate by reference their comprehensive summary judgment brief.

Simply put, an agency's "failure to respect the unambiguous textual limitations" of a statutory provision is "fatal" to its regulatory efforts under the APA. *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 490 (D.C. Cir. 2007). Here, the relevant text of the ACA is indeed "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 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. Fundamental canons of statutory construction thus squarely foreclose the IRS Rule. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("no clause, sentence, or word [of a statute] shall be superfluous, void, or insignificant"); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("differing language" in "two subsections" of a statute should not be treated by the courts as having "the same meaning in each"); *Custis v. United States*, 511 U.S. 485, 492 (1994) (court should not interpret statute to mean something that, if Congress intended, it "knew how to" say).

The IRS Rule's departure from the ACA's text is especially forbidden because of its profound effect on the federal treasury. Under the Appropriations Clause of the Constitution, "the payment of money from the Treasury must be authorized by a statute." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990). Executive agencies are not empowered to disburse federal funds absent such statutory authority; indeed, to do otherwise is a *crime*. *See id.* at 430. Yet the IRS Rule effectively appropriates *billions* of dollars without authorization.

There is no way to reconcile the IRS Rule with the ACA's text. All that the Government has said, thus far, on the merits is that a federal Exchange "stands in the shoes" of a state-created Exchange, citing 42 U.S.C. § 18041(c)(1). (*See* Dkt. No. 23-1, at 1.) That provision simply says that if a state does not establish an Exchange, the federal government must "establish and operate such Exchange." ACA, § 1321(c)(1). All that means is that federal Exchanges should look and function like ordinary state-established Exchanges. It says nothing about *which governmental entity*—state or federal—has *established* the Exchanges. And it is the identity of the establishing entity that distinguishes an Exchange "established by the *State* under section 1311" from an Exchange established by the *federal government* under § 1321. The routine language cited by the Government obviously cannot and does not alter the ACA's clear specification of "State" Exchanges in the subsidy provisions to somehow mean "federal." If anything, the cited language reinforces the blazingly obvious distinction between the federal and state governments: If an entity is "stepping into the shoes" of another entity, they are necessarily separate.

There is no legislative history supporting the IRS Rule, not that legislative history could justify departure from clear statutory text anyway. Courts, after all, "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Nor can vague appeals to statutory purpose save the Rule. To allow courts "to 'correct' what they believe to be congressional oversights by construing unambiguous statutes to the contrary of their plain meaning" would "open the way to judicial hijacking of the power to legislate." *Consol. Rail Corp. v. United States*, 896 F.2d 574, 579 (D.C. Cir. 1990). Moreover, by limiting subsidies to state-established Exchanges (and thus providing that citizens of states that did not establish Exchanges would miss out on this benefit), Congress could have intended to incentivize states to create Exchanges, as a contemporaneous commentator suggested. Timothy S. Jost, *Health Insurance Exchanges: Legal Issues*, O'Neill Institute Papers, Georgetown Univ. Legal Ctr., no. 23, at 7, April 27, 2009 (suggesting that Congress induce state participation in Exchanges "by offering tax subsidies for insurance only in states that complied with federal requirements"). There is therefore good reason to believe that Congress meant exactly what it said, which is anyway what courts and agencies must presume.

The Government has also moved to dismiss the Complaint on procedural grounds. Yet this is a purely legal APA challenge by regulated parties to a final regulation—the type of suit that this Court resolves every day. Plaintiffs incorporate their opposition by reference (Dkt. 24), adding only that the newest attack on Klemencic's standing, in the Government's reply, is fundamentally off-base. The Government claims that some projections show that Klemencic's subsidy under the Rule would fully cover the cost of the bronze coverage that the Rule obligates him to buy. (*See* Dkt. 29, at 4-5.) But that is mere speculation; the actual value of the subsidy may turn out to be lower, depending on Klemencic's actual 2014 income. 26 U.S.C. § 36B(f)(2). Meanwhile, the Rule deprives him of a *guaranteed* exemption from the mandate. Klemencic obviously has standing to challenge a Rule that forces him *now* to buy an expensive product that only *may* be subsidized later. (In any event, he also has standing to challenge a legal constraint enforced by a penalty, regardless of the *economic* consequences of this deprivation of freedom.)

II. WITHOUT PRELIMINARY RELIEF, KLEMENCIC WOULD IRREPARABLY LOSE HIS OPPORTUNITY TO OBTAIN A CERTIFICATE OF EXEMPTION FROM THE 2014 INDIVIDUAL MANDATE PENALTY AND TO BUY 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 Klemencic from obtaining a "certificate of exemption" from the individual mandate penalty for 2014—a benefit to which he would otherwise be entitled by law and which has value only if granted by year's end.

Klemencic lives in West Virginia, which has not established an Exchange. (Klemencic Decl. ¶ 3.) He does not want to purchase comprehensive health coverage for 2014. (*Id.* ¶ 8.) Under the ACA's individual mandate, though, he must do so, or pay a penalty if he fails to. 26 U.S.C. § 5000A. However, Klemencic is entitled to an exemption if the cost to him of "bronze" insurance would exceed 8% of his 2014 "projected annual household income." 45 C.F.R. § 155.605(g)(2). If not for the subsidy to which he is entitled under the IRS Rule, Klemencic would be entitled to that exemption. (*See* Dkt. No. 24, at 7-14; *see also* Klemencic Decl. ¶ 4; Kessler Aff. ¶¶ 5-17, 21.) Yet because of the IRS Rule and the subsidy to which it entitles Klemencic, he is no longer able to claim that exemption. (Dkt. No. 24, at 7-14; *see also* Kessler Aff. ¶¶ 18-20, 22.) Accordingly, he is barred from purchasing catastrophic coverage with his own funds, *see* ACA, § 1302(e) (providing that only individuals who are under 30 or have "certification in effect … that the individual is exempt" are "eligible for enrollment" in catastrophic coverage), and forced to comply with the individual mandate by either purchasing comprehensive coverage that he does not want or exposing himself to a penalty. 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, thus requiring Klemencic to act beforehand, *see* ACA, § 1501(d).

This injury is irreparable. Klemencic will literally be *permanently* precluded from purchasing catastrophic coverage for 2014 unless he obtains a certificate of exemption by the end of the 2013 calendar year. Whatever this Court ultimately rules on the merits, there will be no way for Klemencic to retroactively obtain catastrophic coverage once the window for purchasing it has closed. That window closes on January 1, 2014. This injury inflicted by the IRS Rule is thus *per se* irreparable. *See Ctr. for Int'l Envt'l Law v. Office of the U.S. Trade Rep.*, 240 F. Supp. 2d 21, 22-23 (D.D.C. 2003) (finding harm to be irreparable where party risked losing the chance to obtain relief); *Hatfill v. Mukasey*, 539 F. Supp. 2d 96 (D.D.C. 2008) (presuming irreparable harm where party risked losing ability to assert privilege). It is also "both certain and great." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). "This Court has recognized … that a clear statutory entitlement is not 'merely economic' harm, and its loss may be sufficiently irreparable to justify emergency injunctive relief because '[o]nce the statutory entitlement has been lost, it cannot be recaptured.'" *Hi-Tech Pharmacal Co. v. FDA*, 587 F. Supp. 2d 1, 11 (D.D.C. 2008) (quoting *Apotex, Inc. v. FDA*, No. 06-0627, 2006 WL 1030151, at *17 (D.D.C. Apr. 19, 2006)); *see also Mova Pharm. Corp. v. Shalala*, 955 F. Supp. 128, 131 (D.D.C. 1997) (concluding that "depriv[ation]" of a "statutory grant" constituted irreparable injury), *aff'd* 140 F.3d 1060, 1067 & n.6 (D.C. Cir. 1998).

Additionally, forcing Klemencic to either buy a product he does not want 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). This imposes a fundamental burden on Klemencic's personal liberty, not a mere financial harm. Moreover, if Klemencic, under threat of liability, chooses to comply with the individual mandate, the costs of doing so would not be recoverable from the Government, and are therefore also irreparable. *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008) ("[W]here, as here, the plaintiff in question cannot recover damages from the defendant due to the defendant's sovereign immunity, any loss of income suffered by a plaintiff is irreparable *per se*." (citations omitted)); *Smoking Everywhere, Inc. v. FDA*, 680 F. Supp. 2d 62, 77 n.19 (D.D.C. 2010) (stating that "even if the claimed economic injury did not threaten plaintiffs' viability, it is still irreparable because plaintiffs cannot recover money damages against FDA" due to sovereign 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."); *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997) (harm irreparable if costs "can never be recouped").

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 preliminary 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); *Patriot, Inc. v. U.S. Dep't of Housing & Urban Dev.*, 963 F. Supp. 1, 6 (D.D.C. 1997) ("[T[he public interest is best served by having federal agencies comply with the requirements of federal law."). 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 proceeded to promulgate a rule that purports to authorize billions of dollars in federal subsidies. *Mylan*, 81 F. Supp. 2d at 45.

While there is always "a substantial public interest in ensuring that [a government agency] acts within the limits of its authority," *Clarke v. Office of Fed. Housing Enter. Oversight*, 355 F. Supp. 2d 56, 66 (D.D.C. 2004), here, the consequences of the IRS's *ultra vires* action are particularly grave. For the Government to pay out billions of dollars in subsidies and for thousands of employers and millions of citizens to make health coverage decisions in reliance on those 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 millions of individuals might be forced to repay the subsidy funds after having purchased insurance 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 and should never have been spent.

Furthermore, potentially millions of American employees stand to be injured if the validity of the IRS Rule is not adjudicated promptly. Indeed, 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. This is especially true because "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) (concluding that avoiding potentially unnecessary "expenditures from the public treasury" "serves the public interest"). *Cf. Nat'l Head Start Ass'n v. Dep't of Health & Human Servs.*, 297 F. Supp. 2d 242, 251 (D.D.C. 2004) ("The public has a strong interest in the effective and transparent administration of federal grant programs.").

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. 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 10, 2013

Respectfully submitted,

/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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

STATEMENT OF FACTS MAKING EXPEDITION ESSENTIAL

Pursuant to this Court's Local Rule 65.1(c), Plaintiffs hereby submit this short statement of facts which make expedition essential.

1. The individual mandate under the ACA is scheduled to take effect on January 1, 2014. *See* ACA, § 1501(d). Plaintiff David Klemencic must therefore purchase comprehensive health coverage or risk incurring a penalty if he has not obtained a certificate of exemption by that date.

2. The federally established Exchange in West Virginia is scheduled to open on October 1, 2013. At that time, the Exchange will begin to accept applications for "certificates of exemption" from the individual mandate penalty. *See* 45 C.F.R. § 155.605(g)(2).

3. To be excused in advance from complying with the ACA's individual mandate, Klemencic must therefore apply for and obtain a certificate of exemption from West Virginia's federal Exchange between October 1, 2013, and January 1, 2014.

4. Moreover, Klemencic must obtain a certificate of exemption before he may purchase catastrophic coverage for 2014. *See* ACA, § 1302(e); 45 C.F.R. § 155.605(g).

5. The IRS Rule disqualifies Klemencic from obtaining a certificate of exemption, because it entitles him to a subsidy that brings the cost of his coverage below the cutoff that triggers the exemption from the individual mandate penalty. (*See* Kessler Aff. ¶¶ 21, 22.)

6. Therefore, in order to obtain a certificate of exemption and thus be able to buy catastrophic coverage and be free from the obligation to buy comprehensive coverage, the IRS Rule must be enjoined with sufficient time remaining in 2013 to allow Klemencic to apply for and obtain the certificate of exemption.

7. For these reasons, expedition is essential, and Plaintiffs respectfully request a hearing within 21 days, as provided by Local Rule 65.1(c).

September 10, 2013

Respectfully submitted,

/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