[ORAL ARGUMENT SCHEDULED FOR MARCH 25, 2014]

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))

MOTION TO STRIKE NOTICE OF SUPPLEMENTAL AUTHORITY

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1. On March 12, 2014, the Government filed a notice of supplemental authority ("Notice"), purportedly under Federal Rule of Appellate Procedure 28(j) (though without citing that Rule), discussing the Supreme Court's 1999 decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). The Government quotes *Ortiz* for the proposition that members of a class cannot, as a matter of Due Process, have their rights of action extinguished absent notice and a chance to opt out. *Id.* at 848.

2. The Government's filing is improper under Rule 28(j) and should be stricken. The Rule allows parties to cite significant authorities that "come to a party's attention after the party's brief has been filed." Fed. R. App. P. 28(j). The Supreme Court's *Ortiz* decision is fifteen years old. It clearly did not "come to [the Government's] attention" just this week. Rather, as the Government itself concedes, its citation of *Ortiz* is intended to respond to a point made in Appellants' reply brief—*i.e.*, to file an unauthorized surreply. That is plainly improper.

Moreover, as the Government well knows, the dispute over whether vacatur of the IRS Rule would affect the employees of the employer plaintiffs did not arise "for the first time" in reply. (Notice at 1.) To the contrary, as the Government itself stated in its brief, "plaintiffs argued below that an order setting aside the Treasury regulation would prevent the restaurant group's employees and millions of other people across the country from obtaining premium tax credits on federally-run Exchanges." (Govt.Br.54.) The Government sought to refute that

point (*id.*), and Appellants' reply defended it (Reply Br. 26). Thus, even if Rule 28(j) could be used to respond to "new" arguments raised in a reply brief (which it cannot), the Government's "first time" representation is a knowing falsehood.

3. In the event that their motion to strike is denied, Appellants make the following points on why the Government's argument is not only meritless, but why it directly affects the appropriate relief in this case.

This Court plainly can and should invalidate regulations that affect non-parties, without implicating Due Process concerns. The APA directs this Court to "set aside" unlawful agency action. 5 U.S.C. § 706(2)(A). *See also Comcast Corp. v. FCC*, 579 F.3d 1, 10 (D.C. Cir. 2009) (Randolph, J., concurring). And this Court has made clear that when it invalidates a regulation under the APA, such a ruling has "nationwide" effect, for "plaintiffs and non-parties alike." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408-10 (D.C. Cir. 1998); *see also Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed."). As *National Mining* explained, Justice Blackmun's dissent in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), "express[ing] the view of all nine Justices on this question," established that when an APA plaintiff prevails in challenging a "rule of broad applicability … the result

is that the rule is invalidated," and thus that "a single plaintiff … may obtain 'programmatic' relief that affects the rights of parties not before the court." *Nat'l Mining*, 145 F.3d at 1409. There is therefore no room for any "non-acquiescence doctrine" with respect to APA litigation in this Circuit. *Id.* at 1410. That is why the IRS cannot, *e.g.*, continue to enforce the rules governing tax-return preparers that this Court invalidated in *Loving v. IRS*, No. 13-5061, 2014 WL 519224 (D.C. Cir. Feb. 11, 2014)—even against individuals who were not parties to that case.

Contrary to the Government's last-minute contention, this standard APA practice obviously does not violate the Due Process Clause. If this Court vacates the IRS Rule as contrary to the ACA's text, that eliminates the only legal basis for the IRS to distribute U.S. Treasury funds to subsidize those who purchase coverage on federally established Exchanges. Thus, vacating the IRS Rule precludes the *Government* from committing the *ultra vires* act of distributing Treasury funds that have not been authorized by Congress. So precluding lawless subsidies to those purchasing coverage on federal Exchanges obviously means those people cannot receive those subsidies, but it does not in any way *bind* them or deny them Due Process rights. Were it otherwise, the APA's requirement to set aside regulations would be unconstitutional every time the rule affects non-parties (which is almost always true). And this Court would obviously not have substantially expedited this case if it affected nobody beyond Klemencic.

4. Since it is inconceivable that the Government submitted this stale, irrelevant "supplemental" authority to shore up its argument about the justiciability of the employer plaintiffs' claims (particularly given plaintiff Klemencic's clear standing), the Government appears to be laying the groundwork to openly flout any decision by this Court invalidating the IRS Rule. Its view, apparently, is that even if this Court vacates the IRS Rule as contrary to the ACA, the Government may nonetheless freely continue to subsidize coverage for the "millions of people across the country" not parties to this litigation. (Notice at 1.) Indeed, because the Government contends that the Due Process Clause would be violated if non-parties were deprived of subsidies, it may believe that it is constitutionally *required* to continue to offer subsidies in the face of this Court's invalidation of the IRS Rule.

Consequently, it is incumbent on the Government to now inform the Court and Appellants whether it will abide by this Court's decision or, for the first time in history, continue to pursue an agency policy after this Court has ruled that the policy is unlawful and set it aside as *ultra vires*. Indeed, unless the Government affirmatively disavows its apparent intention to lawlessly flout this Court's binding order invalidating the IRS Rule, the ordinary remedy of vacatur will not suffice, and injunctive relief will be required to enjoin the IRS from making available the subsidies ruled unlawful.

First, if the Government inexplicably believes that it has the *authority* (or, more absurdly, a constitutional duty) to continue to disburse subsidies for federal Exchanges in the face of this Court's order vacating the IRS Rule, this means that invalidating the IRS Rule will not disable the Government from making subsidies available to *anybody*, including even *Klemencic*. Thus, mere vacatur of the IRS Rule would not remedy Klemencic's injury, because so long as a subsidy is "allowable" to Klemencic, he is not exempt from the individual mandate penalty. 26 U.S.C. § 5000A(e)(1)(B)(ii). (*See* App. Br. 9-11.) An injunction clearly forbidding the Government from subsidizing coverage on HHS-established Exchanges would therefore be necessary to remedy Klemencic's injury.

More broadly, injunctions are required where there is doubt about whether vacating the challenged agency action will cause the agency to cease engaging in that unlawful action. While vacatur is typically adequate, because one assumes that the Government will comply with declaratory orders, *Comm. on the Judiciary of the U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam), injunctive relief is proper if the agency "failed to argue that a declaratory judgment would be adequate," *Nat'l Mining*, 145 F.3d at 1409; *see also, e.g.*, *Harmon*, 878 F.2d at 493 (affirming injunction against enforcement of drug-testing regulations); *Planned Parenthood Fed'n of Am., Inc. v. Heckler*, 712 F.2d 650, 665 (D.C. Cir. 1983) (affirming injunction against enforcement of

challenged regulations); *Sanjour v. EPA*, 7 F. Supp. 2d 14, 17 (D.D.C. 1998) ("[C]ourts frequently enjoin the enforcement of regulations ultimately held to be invalid."). Here, the Government's apparent intention to continue to provide subsidies even if the IRS Rule is set aside affirmatively illustrates why declaratory relief would *not* be adequate. Thus, unless the Government affirmatively disavows its lawless intent to provide subsidies after this Court has invalidated the exclusive legal basis for the Executive Branch to make such withdrawals from the Treasury, this Court should not only vacate the IRS Rule but also enjoin the IRS from providing subsidies for coverage purchased on HHS-established Exchanges.

CONCLUSION

The Court should strike the notice of supplemental authority filed by the Government on March 12, 2014.

March 14, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of March 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 Circuit Rules, I will also file four copies of the foregoing document, by hand delivery, with the clerk of this Court.

March 14, 2014

/s/ Michael A. Carvin
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