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May 29, 2014

Mr. Mark Langer
Clerk, United States Court of Appeals
for the D.C. Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001

Re: *Halbig v. Sebelius*, No. 14-5018 (D.C. Cir.)
(oral argument heard March 25, 2014)

Dear Mr. Langer:

Plaintiffs' May 27 letter quotes the Supreme Court's decision in *Bay Mills* for the proposition that the Court "'does not revise legislation … just because the text as written creates an apparent anomaly as to some subject it does not address.'" Op. 10. In *Bay Mills*, the plaintiff "fail[ed] to identify any specific textual or structural features of the statute to support its proposed result." *Ibid*.

Here, by contrast, the district court correctly held that the text, structure and purpose of the Affordable Care Act all show that federal tax credits to defray the cost of health insurance are available on federally run Exchanges. "Exchange" is a defined term: Section 1311(d)(1) provides that "an Exchange shall be a governmental entity or nonprofit entity that is established by a State." Thus, by definition, when Section 1321(c)(1) directs the Secretary to set up "such Exchange" if a State elects not to do so, the Act equates that Exchange with the Exchange that otherwise would have been established by the State. The statutory text ensures that an Exchange's purpose—to offer *affordable* health coverage—is accomplished. Thus, the nationwide availability of federal tax credits to subsidize

the purchase of health insurance most certainly is a "subject" that Congress did "address." *Bay Mills* Op. 10.

Whereas the *Bay Mills* Court found that its interpretation was supported by the statute's "history and design," Op. 11, plaintiffs' position here disregards the statutory text, structure and purpose. On plaintiffs' theory, the sections that expressly provide "State Flexibility Relating to Exchanges" (Title I, Subtitle D, Part 3) are meaningless: the promised state flexibility is illusory because any federally run Exchange would be dysfunctional. Plaintiffs' insistence that Congress rendered these "state flexibility" provisions meaningless as part of a secret floor deal with Senator Nelson is baseless and ignores the relevant chronology, which shows that the text on which they rely was already in the bill before it was brought to the floor. *See* S. 1796, 111th Cong., § 1205(a) (Oct. 19, 2009). Under *Bay Mills*, the Act's express statutory assurance of "state flexibility" cannot properly be ignored.

Sincerely,

s/ Alisa B. Klein

Alisa B. Klein
Counsel for the Appellees

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2014, I electronically filed the foregoing letter with the Clerk of the Court by using the appellate CM/ECF system. Counsel of record are registered CM/ECF users.

s/ Alisa B. Klein
ALISA B. KLEIN