UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA, *et al.*	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 1:13-cv-01612-WTL-TAB
	)	
INTERNAL REVENUE SERVICE, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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Introduction

The plaintiffs assert that "the Federal Government … attempts to explain why the Court should ignore the plain language of the statute." In their telling, the defendants are asking the Court to completely disregard the text of the Affordable Care Act ("ACA") in order to uphold the Treasury regulation that is challenged here. State of Indiana's Mem. in Opp. to Defs.' Cross-Mot. for S.J. and Reply Mem. in Supp. of Its Own Mot. for S.J. ("Indiana Reply") at 6, ECF 65. The plaintiffs devote large portions of their briefs to a rebuttal of this straw argument, rather than engaging with the arguments that the defendants have actually put forth.

In truth, both the plain text of the Affordable Care Act – when the Act is read in full, as it must be – and Congress's obvious purpose in enacting the Act point to the same conclusion: Congress intended that participants in all of the Act's Exchanges may be eligible for premium tax credits, whether the Exchange is state- or federally-run. The Act defines the term "Exchange" to be "a governmental agency or nonprofit entity that is established by a State," 42 U.S.C. § 18031(d)(1), but it does not force the state to operate that entity. Instead, if the state chooses not to establish or operate the "required Exchange," the Act directs the Secretary of Health and Human Services ("HHS") to establish and operate "such Exchange." 42 U.S.C. § 18041(c)(1). When these provisions are read together, as they must be, it is clear that Congress intended for the federally-run Exchange to be the same entity as the Exchange that is, by operation of the statute, the entity "that is established by a State" under Section 18031. Thus, when Section 36B specifies that tax credits are available to pay for premiums for a plan "enrolled in through an Exchange established by the State under [42 U.S.C. § 18031]," 26 U.S.C. § 36B(b)(2)(A), it refers both to state-run Exchanges and to federally-run Exchanges, which are each treated, by operation of law, as the same entities.

The plain text of the statute thus supports Treasury's interpretation of Section 36B. That interpretation is further confirmed by other provisions in Section 36B itself, which reflect Congress's understanding that federal tax credits would be distributed through the federally-run Exchanges; by the remainder of the ACA, which contains numerous provisions that would become nonsensical under the plaintiffs' theory; and by the ACA's purpose and legislative history, which reflect the importance of the premium tax credits to the Act's overall structure and mission. At the very least, Treasury has reasonably interpreted Section 36B in light of these considerations, and its reasonable reading should be accorded *Chevron* deference.

In short, "the plain text of the statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges." *Halbig v. Sebelius*, --- F. Supp. 2d ---, 2014 WL 129023, at *18 (D.D.C. Jan. 15, 2014), *appeal docketed*, No. 14-5018 (D.C. Cir. Jan. 16, 2014); *see also King v. Sebelius*, --- F. Supp. 2d ---, 2014 WL 637365, at *11 (E.D. Va. Feb. 18, 2014), *appeal docketed*, No. 14-1158 (4th Cir. Feb. 21, 2014) ("when statutory context is taken into account, Plaintiffs' position is revealed as implausible"). If this Court were to reach the merits of the plaintiffs' challenge to the Treasury regulation, then, Treasury's reasonable construction of Section 36B should be upheld.

The plaintiffs also persist in their Tenth Amendment challenge to the ACA's large-employer tax and reporting provisions, 26 U.S.C. §§ 4980H, 6056, as well as their claim that Treasury is "estopped" from applying these provisions for the current tax year. Both of these claims are insubstantial. Sections 4980H and 6056 apply equally to state employers as they do to private employers, and they therefore do not violate the Tenth Amendment. And there is no sense in which Treasury should be "estopped" simply because it has exercised its authority to

provide transition relief from the large-employer tax and reporting provisions for the current year.

Argument

I. The Text and Structure of the Affordable Care Act Show that Federal Premium Tax Credits Are Available on Federally-Run Exchanges (Count I)

A. Under Settled Principles of Statutory Construction, a Court Must Construe the Entire Statute, not Isolated Provisions

The plaintiffs continue to insist that the Court read a phrase in 26 U.S.C. § 36B(b)(2)(A) in isolation, divorced of its larger context, and even divorced from a consideration of the provision that is explicitly cross-referenced in that phrase. All established canons of statutory interpretation demand precisely the opposite approach. "In making the threshold determination under *Chevron*, a reviewing court should not confine itself to examining a particular statutory phrase in isolation. Rather, the meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (internal quotations and alterations omitted). The Court's "ultimate objective must be to give effect to the congressional intent embodied in the entire statute," and thus the Court must "turn to an examination of the overall text and structure of the statute to ascertain [Congress's] intent." *Mach Mining, LLC v. Secretary of Labor*, 728 F.3d 643, 648 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1873 (2014). When Section 36B is read in context – as it must be – it is clear that Congress meant for federal premium tax credits to be available for participants in the federally-run Exchanges. Because Treasury offers the best reading of the Act, and at the very

least a reasonable reading of the Act, its interpretation must be sustained under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

B. Section 36B, When Read in Full and Together with 42 U.S.C. §§ 18031 and 18041, Provides that Federal Premium Tax Credits Are Available on Federally-Run Exchanges

Section 36B(b)(2)(A) cannot be read in isolation, as the plaintiffs demand, because it expressly refers to 42 U.S.C. § 18031, which declares that "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an 'Exchange') for the State" that meets certain statutory requirements. 42 U.S.C. § 18031(b)(1). *See also* 42 U.S.C. § 18031(d)(1) ("An Exchange shall be a governmental agency or nonprofit entity that is established by a State."). Section 18031 thus presumes that the state establishes the Exchange, but also accounts for the possibility that a state may not do so, by directing that, if a state will "not have any required Exchange operational by January 1, 2014, … the Secretary shall (directly or through agreement with a not-for-profit entity) establish and operate *such Exchange* within the State[.]" 42 U.S.C. § 18041(c)(1) (emphasis added). The "required Exchange" in this phrase is the Exchange that Section 18031 directs the state to establish. Thus, the federally-facilitated Exchange is the Exchange that the state is directed to establish under Section 18031: the federal government stands in the shoes of the state in establishing "such Exchange."[1]

It follows from the foregoing that the Section 36B tax credit is available in every Exchange, whether the state itself establishes the Exchange, or whether the federal government

[1] The plaintiffs refer to 42 U.S.C. § 18043, which sets up a mechanism to establish Exchanges in the territories. Reply in Supp. of Pl. Sch. Corps.' Mot. for S.J. and Response to Defs.' Cross Mot. for S.J. ("School Corporations Reply") at 7 n.3, ECF 63. The reason why the Act treats territories separately is clear. Territorial residents do not ordinarily pay federal income tax, 26 U.S.C. §§ 931-33, so Congress needed some mechanism other than the distribution of federal premium tax credits to put the Act into effect for the territories. Residents of all fifty states, of course, do pay federal income tax, whether or not their state has established its own Exchange.

stands in the state's shoes to do so. This reading is necessary to make sense, for example, of Section 18031(d)(1), which defines the "Exchange" as an entity "that is established by a State." That phrase, coupled with Section 18041(c)'s reference to "such Exchange," reflects that the federally-facilitated "Exchange" is the Exchange that the state is directed to establish. That is, the Act takes the state-established Exchange as its foundational assumption, and directs the federal government to act to bring the Exchange into operation if the state chooses not to do so, or fails to do so sufficiently.[2]

The ACA's definitional provisions confirm this reading. The Act treats "Exchange" as a defined term; to confirm this point, it is capitalized each time it appears in the Act. The term is defined to mean "an American Health Benefit Exchange established under [42 U.S.C. § 18031]." 42 U.S.C. §§ 300gg-91(d)(21), 18111. So, when the Act instructs the Secretary to establish "such Exchange," it instructs that "the Secretary shall … establish and operate such [American Health Benefit Exchange established under 42 U.S.C. § 18031]." 42 U.S.C. § 18041(c)(1). The federally-facilitated Exchange, then, *is* the Section 18031 Exchange. The plaintiffs dispute the relevance of these definitional provisions, arguing that the definitional provisions do not speak to which entity has created the Exchange. *See* Indiana Reply 8; *see also* School Corporations Reply 6-7. Their argument misses the point. Section 18031 itself defines the term "Exchange" as an entity that is established by a state. 42 U.S.C. § 18031(d)(1). When the Act directs that the Secretary shall establish the Exchange under 42 U.S.C. § 18031, then, it makes clear that that

[2] The plaintiffs continue to reply on the canon against surplusage. Indiana Reply 10. But, as the defendants have noted, "the canon against surplusage assists only where a competing interpretation gives effect to every clause and word of a statute." *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) (internal quotation omitted). The plaintiffs' theory renders superfluous numerous other provisions of the ACA, and therefore "the canon against surplusage is of no use here." *Halbig*, 2014 WL 129023, at *14 n.11.

Exchange is deemed, by the operation of the statute, to be the Exchange that the state is directed to establish under Section 18031.

This reading is further confirmed by 26 U.S.C. § 36B(f)(3). This provision directs every Exchange, expressly referencing the federally-run Exchanges, to provide information to Treasury and to taxpayers regarding the payments of premium tax credits. This provision – which was enacted as part of Section 36B itself – assumes that tax credits are available on the federally-run Exchanges, and would make no sense if there were no tax credits for those Exchanges to process.

The plaintiffs note that the Section 36B(f)(3) reporting requirements apply to all plans purchased on the Exchanges, including plans that are initially purchased without subsidies. They argue that it makes as much sense, under their theory, for Congress to require federally-run Exchanges to report on tax credits that could never be recognized, as it does for Congress to require all of the Exchanges to report on every plan that is sold. School Corporations Reply 12-13. Congress, however, had good reason to require all of the Exchanges, both state- and federally-run, to report on every plan that is purchased through them. It is impossible to know with certainty, at the time that a plan is purchased through an Exchange, whether a tax credit will be claimed for that plan. A taxpayer may choose to purchase a plan without first claiming advance payment of the credit. That taxpayer may choose to claim the tax credit on the income tax return that he or she files the following year, either because the taxpayer's income or family circumstances have changed, or simply because the taxpayer wishes to defer his or her receipt of the valuable tax benefit. When that taxpayer later seeks the tax credit, Treasury will need information about the amount of advance payments that the taxpayer has received (even if that amount is zero) in order to calculate the tax credit. Accordingly, it makes perfect sense for Congress to require all of the Exchanges to report information to Treasury concerning all of the

plans purchased on them; Treasury needs information concerning every plan purchased on the Exchanges, both state- and federally-run, in order to perform its duty under Section 36B(f)(3) to administer the tax credits for all of the Exchanges.

The plaintiffs also argue that the express reference in Section 36B(f)(3) to the federally-facilitated Exchanges shows that Congress intended the two types of Exchanges to be different entities. School Corporations Reply 11-12. They misread the statute. Section 36B(f)(3) applies the reporting requirements to "[e]ach Exchange (or any person carrying out 1 or more responsibilities of an Exchange under section 1311(f)(3) or 1321(c) of the Patient Protection and Affordable Care Act)," that is, 42 U.S.C. §§ 18031(f)(3) or 18041(c). The term outside the parenthetical – "Exchange" – refers to both the state-run Exchanges and the federally-run Exchanges, by virtue of the Act's definitional provisions and Section 18041's specification that the Secretary stands in the shoes of the state to establish the federally-run Exchange. The phrase inside the parenthetical clarifies that the reporting requirements also apply to any private parties with which either the state or the Secretary has contracted to perform certain Exchange functions. 42 U.S.C. §§ 18031(f)(3), 18041(c). The full phrase, then, does confirm that Congress understood the state-run Exchanges and the federally-run Exchanges to be equivalent. The far more natural conclusion to draw from Section 36B(f)(3) is the one drawn by Treasury: Congress expected that premium tax credits would be provided in every Exchange. *See Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 878 (D.C. Cir. 2006) (interpretations that would render particular provisions pointless should be avoided).

Section 36B therefore, when read in its entirety, and in conjunction with the provisions of the ACA describing the Exchange, 42 U.S.C. §§ 18031 and 18041, makes plain that Congress envisioned the federally-facilitated Exchange to be the same entity as the Exchange that the state

is directed to establish, and that Section 36B would operate in every state "to establish a nationwide scheme of taxation uniform in its application." *United States v. Irvine*, 511 U.S. 224, 238 (1994) (federal taxing statute not to be read to be "subject to state control or limitation" absent plain language so requiring). Because, once the Court "appl[ies] the ordinary tools of statutory construction," the intent of Congress is clear – or at the very least, because Treasury has reasonably resolved any statutory ambiguity – its interpretation should be upheld under *Chevron*. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

C. The Act's Larger Structure Confirms that Its References to State-Established Exchanges Include the Exchange Established by the Secretary on a State's Behalf

It is axiomatic that, "in ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004); *see also, e.g., Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563 (2013); *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013). "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute." *Senne v. Village of Palatine*, 695 F.3d 597, 601 (7th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2850 (2013). The reading of Section 36B that the plaintiffs offer is not compatible with the rest of the ACA; accordingly, that reading should be rejected.

1. Under the Plaintiffs' Theory, Nobody Would Be Eligible to Buy Insurance on a Federally-Run Exchange, a Result that Congress Could Not Have Intended

Notably, the logic of the plaintiffs' theory would produce the absurd result that nobody would be eligible to buy insurance offered on the federally-facilitated Exchange – with or without a subsidy. This is so because a "qualified individual" who is eligible to buy insurance on

the Exchange is defined as an individual "who resides in the *State that established the Exchange*." 42 U.S.C. § 18032(f)(1)(A)(ii) (emphasis added). There is no separate provision defining "qualified individual" for purposes of the federally-facilitated Exchange. Run to its logical conclusion, then, the plaintiffs' theory would mean that nobody would be a "qualified individual" in a state with a federally-facilitated Exchange. Congress obviously did not intend this result; without any eligible buyers, there would be no reason for the federally-facilitated Exchange to exist. *See Halbig*, 2014 WL 129023, at *15 (under the plaintiff's theory, "[t]he federal Exchanges would have no customers, and no purpose. Such a construction must be avoided, if at all possible.").

The plaintiffs respond that HHS has issued regulations that clarify that Section 18032's residence standards apply to the same extent on both the state-run and federally-run Exchanges. School Corporations Reply 15-16 (citing 45 C.F.R. § 155.305(a)(3)). It is not surprising that HHS has done so; that agency, like Treasury, understands that, when the ACA directs the Secretary of HHS to establish a federally-facilitated Exchange, it directs that the Secretary shall stand in the shoes of the state to do so, and that the state-run Exchange and the federally-run Exchange are to be treated as the same entity. The plaintiffs cannot explain, however, how HHS's regulation could survive under their theory, given that the condition that an applicant "reside[] in the State that established the Exchange," 42 U.S.C. § 18032(f)(1)(A)(ii), could never be met in a state with a federally-run Exchange under their reading of the Act.

The plaintiffs also suggest that the absurdity that their theory creates should be resolved for Section 18032 alone. School Corporation Reply 14-15. They apparently reason that the relevant phrase in 42 U.S.C. § 18032 – "resides in the State that established the Exchange" – may be read to include states with federally-run Exchanges, but that the materially identical

phrase in Section 36B – an "Exchange established by the State under [42 U.S.C. § 18031]" – must be read *not* to do so. But Section 18032 is the very next section of the Affordable Care Act after Section 18031, in the same title, subtitle, and part of the Act as the provision that directs states to establish Exchanges. The plaintiffs' selective reading ignores the principle that adjacent statutory provisions "should be read in harmony." *Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2563; *see also Kloeckner v. Solis*, 133 S. Ct. 596, 606 (2012) (statute should not be read to create an absurdity in "[a]nother section of the statute"); *Robers v. United States*, 134 S. Ct. 1854, 1857 (2014) ("identical words used in different parts of the same statute are presumed to have the same meaning") (internal quotation and alteration omitted).

It makes far more sense to do as Treasury has done, and to read the Act not to create an absurd result in the first place. As explained above, the Act is best read to create a presumption that a state will create an Exchange, and to provide, where a state fails to do so adequately, that the federal government will stand in the shoes of the state to perform the actions needed to ensure that the Exchange that the state is directed to establish under 42 U.S.C. § 18031 is brought into operation. The Act's definition of a "qualified individual" makes perfect sense under this approach. Every person "resides in [a] State that established the Exchange," then, and there is no need to resort to the contortions that the plaintiffs offer to avoid the absurdities created by their theory.

2. The Plaintiffs' Theory Would Create Numerous Additional Anomalies that Are Inconsistent with the Basic Statutory Scheme of the ACA

As the defendants have noted, there are numerous additional provisions in the ACA that demonstrate that Congress intended the Act's references to state-operated Exchanges to include the Exchanges that HHS operates on a state's behalf.

The Medicaid maintenance-of-effort requirement. The plaintiffs' theory would create an unanticipated obligation for states in the operation of their Medicaid programs. As the plaintiffs themselves acknowledge, Indiana Reply 17, it follows from their theory that a state with a federally-run Exchange would never be relieved of the Act's temporary maintenance-of-effort requirement for that state's Medicaid program. 42 U.S.C. § 1396a(gg)(1); *see* Defs.' Mem. in Supp. of Their Cross-Mot. for S.J. and in Opp. to Pls.' S.J. Mots. ("Defs.' Mem.") at 25-26, ECF 62. It is not plausible that Congress intended this result. If it had, it would have said so directly, thereby giving notice to the states and the public of the consequences of the state's decision. *See King*, 2014 WL 637365, at *13.

The plaintiffs contend that Congress intended this result, *see* Indiana Reply 17, but their argument cannot be squared with 42 U.S.C. §§ 1396a(gg)(3), which permits a state to obtain a waiver of the maintenance-of-effort requirement upon a certification that the state faces a budget deficit "[d]uring the period that begins on January 1, 2011, and ends on December 31, 2013." Congress obviously chose these dates because, after 2013, the Exchange in each state – whether state- or federally-run – would be in operation. Under the plaintiffs' theory, however, not only would a state with a federally-facilitated Exchange never be relieved of the maintenance-of-effort requirement, that requirement would remain in place even in the face of a state budgetary shortfall. The states simply had no reason to believe that this consequence would follow from the decision to rely on a federally-facilitated Exchange.

Indeed, Indiana has itself relied on the expiration of this provision, reducing benefits for pregnant women in a manner that it could not have done if 42 U.S.C. § 1396a(gg)(1) had not expired. *See* Defs.' Mem. 26. Indiana asserts that its State Medicaid plan "has not changed," and guesses that the defendants are "apparently referring to … [its] request for a one year

renewal of the Healthy Indiana Plan" (a program under which Indiana provides health coverage to persons in addition to those treated as mandatory Medicaid populations under pre-ACA law). Indiana Reply 17. This is incorrect. Indiana sought, and received, an amendment to its State Medicaid plan – that is, the plan that covers its mandatory population, apart from its Healthy Indiana Plan – to reduce benefits for certain persons covered under that plan. *See* Declaration of Anne Marie Costello, ¶¶ 3, 4, ECF 61-10. Indiana could not have sought, or received approval for, that amendment if Section 1396a(gg)(1) had remained in effect. *See* 42 C.F.R. § 430.10 (when it submits State Medicaid plan for approval, the state "giv[es] assurance that [the plan] will be administered in conformity with the specific requirements of title XIX").

In any event, Indiana has *also* sought approval for changes to its Healthy Indiana Plan in a manner that is inconsistent with its theory here. *See* Defs.' Mem. 26 n.6. Indeed, only this month, Indiana has once again contradicted its theory in this lawsuit, seeking approval of an amendment to the Healthy Indiana Plan that assumes that "individuals above 100% FPL who were previously eligible for HIP would have new coverage options and access to premium tax credits and cost-sharing reductions via the federal Marketplace." Ind. Family & Soc. Servs. Admin., *Healthy Indiana Plan HIP 2.0 1115 Waiver Application* at 8 (May 13, 2014) (attached to this brief as Defs.' Exh. 27). Indiana unabashedly defends its right to pursue inconsistent positions, Indiana Reply 18, but this Court should not allow that effort to proceed. *See In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) (estoppel applies where "intentional self-contradiction is being used as a means of obtaining unfair advantage").

Coordination of CHIP benefits with the Exchanges. The plaintiffs' reading is also inconsistent with the ACA's provisions concerning Children's Health Insurance Program ("CHIP") benefits. The Act instructs states to ensure that children (who are not Medicaid-

eligible) have access to plans in an "Exchange established by the State under [Section 18031]," if there is a funding shortfall in the state's CHIP program. 42 U.S.C. § 1397ee(d)(3)(B). The Act also directs HHS, "[w]ith respect to each State," to certify whether plans offered through an "Exchange established by the State under [42 U.S.C. § 18031]" provide benefits for children that are comparable to those offered in the state's CHIP plan. 42 U.S.C. § 1397ee(d)(3)(C). Under the plaintiffs' reading, a state with a federally-facilitated Exchange would necessarily be in violation of these CHIP provisions in the event of a funding shortfall, and HHS could not fulfill its certification obligation for "each State."

The plaintiffs deny this point, suggesting that a state would have no reason to enroll children in an Exchange that it had not established, and that HHS should instead "review the benefits available on the federal Exchanges to ensure that the children are not left behind." School Corporations Reply 16-17. This cavalier suggestion is not responsive to the defendants' argument. The point is that, under the plaintiffs' theory, the state could never fulfill its obligation under the CHIP program to provide an Exchange plan as a backup to ensure coverage for needy children. The plaintiffs' further observation that, under their theory, there would be no plans available to provide coverage for CHIP-eligible children, Indiana Reply 20, only confirms the irrationality of their theory. Congress obviously intended the Act's provisions for the coordination of CHIP benefits with the Exchanges to be meaningful, and to offer vulnerable children a seamless guarantee of coverage.[3]

[3] In the *Florida* litigation, Indiana pursued the same theory with respect to the Act's CHIP provisions (as well as the Act's Medicaid maintenance-of-effort provisions), asserting that these provisions unconstitutionally coerced the state into establishing its own Exchange. The federal government explained there, as it has here, that by virtue of 42 U.S.C. § 18041(c), these provisions would operate in the same manner for federally-run Exchanges as they would for state-run Exchanges, and that the Act gives the states a meaningful choice whether to operate their own Exchanges. The district court accepted the defendants' argument and rejected the

The better reading is the one offered by Treasury, under which the federal government stands in the shoes of the state to operate the Exchange where the state does not do so. Under this reading, Section 1397ee does not impose an obligation on HHS that is impossible to fulfill, and subsidized coverage is available for the children who are protected by the CHIP program. *See Halbig*, 2014 WL 129023, at *14; *King*, 2014 WL 637365, at *13 n.8.

State Innovation Waivers. The plaintiffs' theory would also undermine the ACA's process for state innovation waivers. As the defendants have noted, beginning in 2017, a state that has enacted legislation to provide its own deficit-neutral system of comprehensive, affordable health coverage may seek to opt out of some of the Act's provisions. 42 U.S.C. § 18052. In particular, if a waiver were approved, the state could opt out of the application of premium tax credits under Section 36B; federal funds in the amount of the forgone tax credits would be distributed directly to the state to administer its alternative plan. 42 U.S.C. § 18052(a)(3), (b)(1). Congress thus specified the terms of the deal that it offered to the states – the state could gain approval for Section 36B (and related provisions) not to apply within its borders, but only after the state enacted its own comprehensive health reform legislation meeting specified criteria.

This offer would be pointless under the plaintiffs' reading. The plaintiffs suggest that Congress intended Section 18052 as an incentive to states, reasoning that there would be no

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plaintiffs' coercion claim. Reply in Supp. of Defs.' Mot. to Dismiss at 6-7, ECF No. 74, *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91 (N.D. Fla. filed Aug. 27, 2010); *Florida v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1156 n.15 (N.D. Fla. 2010) (adopting the defendants' interpretation), *rev'd in part on other grounds by Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566 (2012). Before the Supreme Court, Indiana and the other states switched gears, and argued that "States were given a meaningful choice whether to operate the health benefit exchanges created by the Act," in alleged contrast to the Act's Medicaid provisions that the states challenged. Brief of State Petitioners on Medicaid at 22, No. 11-400, *Florida v U.S. Dep't of Health & Human Servs*. (U.S. filed Jan. 10, 2012). Indiana is now estopped from presenting a different theory as to the operation of these provisions of the Act.

funds available to a state for a waiver if the state had not first established its own Exchange, and they further suggest that Congress meant to allow states to waive out of the Act's system of comprehensive, affordable health coverage simply by doing nothing. Indiana Reply 21; School Corporations Reply 18. To the contrary, Section 18052 underscores Congress's plain intention to ensure that comprehensive, affordable health coverage would be available in every state, either under the system specified by the ACA or under an alternative, equally comprehensive system enacted by the state.

Electronic Calculators and Transmittals of Information to Treasury. Under 42 U.S.C. § 18031(d)(4)(G), every Exchange (whether state-run or federally-run) is required to "make available by electronic means a calculator" that applicants may use to determine the "actual cost of coverage" after Section 36B tax credits and any cost-sharing reductions are applied. Under 42 U.S.C. § 18031(d)(4)(I), every Exchange (again, whether state-run or federally-run) is required to report information to Treasury concerning persons whom those Exchanges have found to be eligible for the Section 36B tax credit. The plaintiffs note that, "if Federal tax credit subsidies are available only to those who purchase coverage on a State-run Exchange, there [would be] no reason" for these rules to apply to the federally-run Exchanges. Indiana Reply 23. We agree. The fact that these requirements *do* apply to the federally-run Exchanges is powerful evidence that Congress intended for the Section 36B tax credit to be available on all of the Exchanges.

Reporting of Social Security Information. The plaintiffs note that the ACA provides that HHS and the "'Exchanges established under section 1311'" are authorized to collect social security numbers as needed to administer the Act's provisions, and they suggest that this provision shows that Congress meant to draw a distinction between state-run and federally-run Exchanges. Indiana Reply 11 (quoting 42 U.S.C. § 405(c)(2)(C)(x)). In fact, it proves the

opposite point. Under the ACA, an applicant for enrollment in a plan on the Exchange is directed to provide his or her social security number to the Exchange (whether state-run or federally-run), so that the applicant's citizenship and immigration status may be verified. 42 U.S.C. § 18081(b)(2). Each Exchange then transmits that information to HHS, which forwards the information to the Social Security Administration, in order to perform the verification. 42 U.S.C. § 18081(c)(1). Under the plaintiffs' reading – where the "Exchanges established under section 1311" exclude the federally-run Exchanges – applicants would be required to provide information to the federally-run Exchanges under 42 U.S.C. § 18081(b) that those Exchanges would lack statutory authorization to accept under 42 U.S.C. § 405(c). Under the defendants' reading of the ACA, in which the state-run Exchanges and the federally-run Exchanges are understood to be the same entities, there is no conflict.

In sum, multiple provisions in the Affordable Care Act "reflect an assumption that a state-established Exchange exists in each state." *Halbig*, 2014 WL 129023, at *16. It defies credulity for the plaintiffs to offer a reading in which "these provisions would be nullified when applied to states without state-run Exchanges, leading to strange or absurd results." *Id.* Instead, it makes far more sense to construe these provisions "consistently with [the government's] interpretation of the Act – *i.e.*, viewing 42 U.S.C. § 18041 as authorizing the federal government to create 'an Exchange established by the State under [42 U.S.C. § 18031]'" on behalf of the state that elects not to establish the required Exchange. *Id.*

D. Treasury's Interpretation Comports with Congress's Clear Purpose in Enacting the Affordable Care Act and with the Act's Legislative History

As the defendants have shown, the plaintiffs' reading of Section 36B would undermine Congress's basic goals in passing that legislation. The plaintiffs profess to be unconcerned about this point, asserting that the language of the ACA should be interpreted without any reference to

the goals that Congress sought to achieve in passing that statute. School Corporations Reply 20. But the principle is well established that a statute must be interpreted in light of its "object and policy." *Maracich v. Spears*, 133 S. Ct. at 2203. This principle applies with special force in cases like this one, where a plaintiff asserts that states have been given a veto over federal policy; in such cases, courts are obliged to "look to the purpose of the statute," so as to guard against "the danger that the federal program would be impaired if state law were to control." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44 (1989). This Court, then, must interpret Section 36B in light of Congress's recognition that the tax credits under that provision "are *key* to ensuring people affordable health coverage." H.R. REP. NO. 111-443, pt. I, at 250 (2010), ECF 61-6 (emphasis added).

The defendants have explained – and the plaintiffs have not disputed – that, without Section 36B tax credits, millions of Americans living in states with federally-facilitated Exchanges would find it impossible to buy affordable insurance; the cost of premiums would rise significantly for millions more Americans; and the ACA's insurance reforms, including the ban on discrimination by insurers on the basis of pre-existing conditions, would be undermined. Defs.' Mem. 9-11. Congress clearly did not intend such a result, and, as explained above, the proper interpretation of the text of the Act precludes that result. Section 36B, then, should be interpreted in keeping with Congress's intent to treat the state-operated Exchange and the federally-facilitated Exchange as the same entity, and to ensure that premium tax credits would be available for participants on all of the Exchanges.

The plaintiffs persist in a post hoc argument divorced from legislative reality, claiming that Congress meant to withhold tax credits from residents of states with federally-run Exchanges, so as to give states an incentive to create their own Exchanges. Indiana Reply 24.

They cite no evidence that Congress had this intent, and no such evidence exists. Their claim simply makes no sense. "A state-run Exchange is not an end in and of itself, but rather a mechanism intended to facilitate the purchase of affordable health insurance. And there is evidence throughout the statute of Congress's desire to ensure broad access to affordable health coverage. It makes little sense to assume that Congress sacrificed nationwide availability of the tax credit … in an attempt to promote state-run Exchanges." *Halbig*, 2014 WL 129023, at *17.

The legislative history further confirms that Congress intended for premium tax credits to be available in every state, regardless of which entity operated the Exchange. The defendants have referred to multiple sources in the Act's legislative history that confirm that Congress so intended. Defs.' Mem. 32-37. For example, the Congressional Budget Office (CBO) and the Joint Committee on Taxation (JCT) prepared estimates of the budgetary effects of the ACA, predicated on the belief that tax credits would be available nationwide.[4] The plaintiffs offer that perhaps CBO and JCT "simply misread the statute." School Corporations Reply 21. But, given the central importance that CBO's budget scoring played in Congress's deliberations, if anybody believed that CBO or JCT had erred, the issue would have arisen during the Congressional debates. It did not. To the contrary, members of Congress repeatedly endorsed CBO's estimates, and recited the conclusion that Section 36B tax credits would be available in every state. *See* Defs.' Mem. 33-34 (collecting legislative history). And, as CBO's director describes, "the possibility that those subsidies would only be available in states that created their own exchanges did not arise during the discussions CBO staff had with a wide range of Congressional

[4] The JCT also prepared a detailed summary of the Act's tax-related provisions, which recited that the Section 36B premium tax credit "subsidizes the purchase of certain health insurance plans through an exchange," without specifying that the entity that operates the Exchange would be relevant in any way. JCT, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Care Act"* 12 (Mar. 21, 2010), ECF 61-24.

staff when the legislation was being considered." Letter from Douglas Elmendorf, Director, CBO, to Rep. Darrell Issa, Chair, House Committee on Oversight and Gov't Reform at 1 (Dec. 6, 2012), ECF 61-16.[5]

In addition, in passing H.R. 3962, its version of health reform legislation, the House expressly provided for tax credits to be available in every Exchange, whether state- or federally-run. If any House member believed that the Senate's bill had departed from this approach, he or she would have noted this distinction. No such objection was raised. The plaintiffs speculate that the House raised no objections because a "revised healthcare bill from the House would have died a filibustered death in the Senate." School Corporations Reply 23. But the House *did* successfully propose amendments to Section 36B in passing HCERA, the reconciliation bill that accompanied the ACA. Pub. L. No. 111-152, § 1001(a), 124 Stat. 1029, 1030-31 (2010). It is not plausible that the House would have adjusted the amounts of the Section 36B tax credits in enacting the reconciliation bill, HCERA, while ignoring the supposed fact that tax credits would be denied entirely in some states. To the contrary, the House recognized that, under the ACA as enacted, "[f]or states that choose not to operate their own Exchange, there will be a multi-state Exchange run by the Department of Health and Human Services," and all of the Exchanges would "provide[] premium tax credits to limit the amount individuals and families up to 400% poverty spend on health insurance premiums." House Committees on Ways and Means, Energy and Commerce, and Education and Labor, *Health Insurance Reform at a Glance: The Health Insurance Exchanges* 1-2 (Mar. 20, 2010), ECF 61-25.

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[5] The plaintiffs note that Senator Nelson opposed a "national Exchange." School Corporations Reply 22. There is no single "national Exchange" under the ACA. Every state has the first option whether to operate the Exchange within its borders. If a state chooses not to do so, the federal government will operate that particular Exchange in that particular state, rather than a single national Exchange. 42 U.S.C. § 18041(c)(1). The plaintiffs' cited news article does not remotely suggest that federal tax credits would not be available on the federally-run Exchanges.

Moreover, the language that became 26 U.S.C. § 36B was developed in the Senate Finance Committee, and that Committee did not at any time express any intent to condition the availability of federal premium tax credits on the existence of a state-operated Exchange. That Committee instead expressed its understanding that the federally-facilitated Exchange would be treated as the same entity as the state-operated Exchange. *See* S. REP. NO. 111-89, at 19 (2009) (directing "the Secretary" to establish "state exchanges" if the state does not do so); *see also* *Halbig*, 2014 WL 129023, at *17.

The plaintiffs suggest that the Senate Finance Committee proposed to give states a veto over a *different* tax credit provided in its bill. School Corporations Reply 22. Even if this were the case, it would not speak to the Committee's intent with respect to the Section 36B tax credit, but in any event the plaintiffs have misread the bill. The Committee proposed a "small employer health insurance credit," which would apply after "the first month the State establishing the exchange has in effect the insurance rating reforms described in subtitle A of title XXII of the Social Security Act." S. 1796, 111th Cong. § 1221 (2009) (proposing to add 26 U.S.C. § 45R(a), (c)(2)). The cross-referenced subtitle would have enacted insurance industry reforms that would be put into effect by the federal government by July 1, 2013, in the absence of action by the state, but that states could have chosen to put into effect more quickly. *Id.* § 1001 (proposing to add Social Security Act, titl. XXII, subtit. A , including in particular § 2225(a)(2), (a)(3)). So, under the Committee's bill, the tax credit would have applied on a nationwide basis, with or without state action; states were not given a veto over the application of that federal tax credit.[6]

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[6] The plaintiffs similarly misread a provision in the Senate Health, Education, Labor and Pensions ("HELP") Committee bill (which, in any event, did not form the basis for the language of Section 36B in the Act as enacted). The HELP Committee bill did not provide that "eligibility for tax credits depended on whether states adopted [insurance-industry] reforms." School Corporations Reply 22. Instead, that bill proposed that the residents of every state would be

The plaintiffs also assert that relevant legislative history can be found in an earlier, expired statute that was never referenced in any of the Congressional debates over the ACA. They surmise that, in the Trade Adjustment Assistance Act ("TAAA"), 26 U.S.C. § 35(e), Congress "conditioned health insurance-based tax credits for taxpayers on their states taking certain actions or adopting certain healthcare reforms," and that therefore Congress modeled the ACA after the TAAA. School Corporations Reply 10; *see also* Indiana Reply 14-15. The conclusion does not follow from the premise, but, in any event, the plaintiffs misread the earlier statute. Congress did not "condition[] eligibility" for the tax credit under the TAAA on state action. Instead, Congress provided tax relief for certain workers displaced by foreign competition, which could be used to offset the costs of several different kinds of qualifying health insurance. Some forms of qualifying insurance were available nationwide, although the TAAA permitted states to designate additional kinds of insurance that would meet certain minimum standards. 26 U.S.C. § 35(e). The TAAA, then, provides no support for the plaintiffs' claim that Congress intended, in that statute or in the ACA, to give states a veto over the nationwide availability of the tax relief that it enacted.

The most relevant feature of the TAAA, instead, is its sunset date – January 1, 2014. Pub. L. No. 112-40, § 241(a), 125 Stat. 401, 418 (Oct. 21, 2011). Congress, obviously,

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eligible for subsidies upon the effective date for the bill's health insurance reforms. S. 1679, 111th Cong. § 142 (2009) (proposing to add Public Health Service Act, § 3104(d)). Those subsidies would have been made available earlier, in both states with their own Exchanges and states with federally-run Exchanges, if the states chose to accelerate the effective date of those reforms. *Id.* (proposing to add Public Health Service Act, § 3104(b), (c)). The bill did expressly propose to condition subsidy eligibility, however, upon the state's agreement to apply the bill's insurance reforms to state and local employers. *Id.* (proposing to add Public Health Service Act, § 3104(d)(1)(D)). The HELP Committee's structure is not reflected in the ACA; the Senate chose to follow the Finance Committee's framework instead. The HELP Committee's bill confirms, however, that Congress knows how to describe conditions on subsidy eligibility *explicitly* when it wishes to do so – in other words, that Congress knows how to give the states clear warning of the consequences of their decision whether to run their own Exchange or not.

understood that the statute would no longer be needed once Section 36B came into effect in 2014. It is doubtful that Congress would have terminated this program for health insurance tax credits, which were available on a nationwide basis for displaced workers, if it had thought that workers in states with federally-facilitated Exchanges would be left with no tax relief at all.

E. The Treasury Department Has Reasonably Interpreted Section 36B to Provide that Federal Premium Tax Credits Are Available on Federally-Run Exchanges

It follows from the foregoing discussion that 26 C.F.R. § 1.36B-1(k) is, at a minimum, "based on a permissible construction of the statute," and should be upheld under *Chevron* step two. *City of Arlington v. FCC*, 133 S. Ct. at 1868. Congress expressly instructed in the ACA that the federally-run Exchange should be treated as the same entity as the Exchange that the Act contemplates that the state would establish. Moreover, Congress directed in Section 36B itself that the federally-run Exchange must assist in administering premium tax credits, an exercise that would be pointless if such credits were not available for participants on that Exchange. The plaintiffs' contrary theory would create a long list of anomalies in the operation of the ACA's provisions, including, most notably, the anomaly that no individuals would be eligible to buy insurance on the federally-run Exchanges. The plaintiffs' theory, further, cannot be reconciled with either Congress's clear purpose to make affordable health coverage available on a nationwide basis, or the Act's legislative history, which shows that Congress understood that premium tax credits would be available for participants in all of the Exchanges. In light of all of these considerations, Treasury reasonably interpreted Section 36B in a manner that is consistent with Congress's intent. That interpretation should be upheld under *Chevron* step two. *See Halbig*, 2014 WL 129023, at *18 n.14; *see also King*, 2014 WL 637365, at *16.

The plaintiffs argue that *Chevron* deference should not apply because, under the doctrine

of constitutional avoidance, the Court should adopt an interpretation of the ACA that does not "usurp State sovereign authority." Indiana Reply 11-12. The Act in no sense "usurps" the authority of the states. Instead, the Act "fundamentally gives States the choice to participate in the exchanges themselves or, if they do not choose to do so, to allow the Federal Government to set up the exchanges." 155 Cong. Rec. S13,832 (Dec. 23, 2009) (Sen. Baucus). It is entirely commonplace for Congress to enact statutes that give states the first option to take regulatory action, and that provide that the federal government will step in in the state's stead, if the state declines to take that option. *See Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981); *Florida v. U.S. Dep't of Health & Human Servs*., 716 F. Supp. 2d at 1154-56. *Cf. Michigan v. EPA*, 268 F.3d 1075, 1085 (D.C. Cir. 2001) (under Clean Air Act, EPA acts in "shoes of the state" for a state that declines to adopt an implementation plan). There simply are no "grave doubts" as to the constitutionality of Treasury's interpretation of the Act that could justify the invocation of the avoidance canon. *Almendarez-Torres v. United States*, 523 U.S. 224, 237-39 (1998).

The plaintiffs also argue that *Chevron* deference does not apply in cases involving tax benefits. School Corporations Reply 23-24. As the defendants have shown, *see* Defs.' Mem. 38, there is no "clear statement" principle concerning tax benefits that would defeat *Chevron* deference for the Treasury regulation. Indeed, in *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704, 715 (2011), the Court accorded *Chevron* deference to a Treasury regulation that reasonably construed a tax exemption statute. In any event, the question at issue here is not whether tax credits are available under Section 36B or not; all parties agree that they are. The question instead is whether these tax credits are available on a nationwide basis. The relevant canon, therefore, is the principle that "revenue laws are to be

construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application." *United States v. Irvine*, 511 U.S. at 238.

The plaintiffs reason that the uniformity principle applies only to "revenue" laws, not to provisions like Section 36B that provide valuable tax benefits. Indiana Reply 14. To the contrary, the uniformity canon applies with the same force for statutes conferring tax benefits as it does for statutes imposing taxes; in either instance, "the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law." *Lyeth v. Hoey*, 305 U.S. 188, 194 (1938).

The plaintiffs also present a new argument concerning *Chevron* deference for the first time in their reply briefs. (This argument is, therefore, waived. *See Griffin v. Bell*, 694 F.3d 817, 822 (7th Cir. 2012).) They contend that the Treasury regulation should not be sustained at *Chevron* step two, because the agency purportedly failed to explain the "factual basis" for its decision. School Corporations Reply 28 (quoting *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 626 (1986)). But the plaintiffs, citing a recent House Committee report that was issued on a purely partisan basis, do not allege that Treasury committed any *factual* error. Instead, they allege that Treasury failed to adopt the *legal* arguments concerning the Act's text and structure that they have presented in this case. Where, as here, a plaintiff raises purely legal grounds to object to an agency's interpretation of a statute, "[t]he analysis of disputed agency action under *Chevron* Step Two and arbitrary and capricious review is often the same[.]" *Halbig*, 2014 WL 129023, at *11 (internal quotation omitted); *id.* at *18 n.14. *See also Mayo Found.*, 131 S. Ct. at 712, 714 (overruling prior case law in which deference to tax regulations depended on "the way in which the regulation evolved," and instead applying *Chevron* step two, which asks "whether the agency's answer is based on a permissible construction of the statute"). And Treasury's

regulation easily survives *Chevron* step two; "the agency's answer is based on a permissible construction of the statute," and "that is the end of the matter." *City of Arlington*, 133 S. Ct. at 1874-75.[7]

II. The Act's Large Employer Provisions Do Not Violate the Tenth Amendment as Applied to State Governments (Counts II, III, and IV)

The plaintiffs also repeat their claim that the Section 4980H large employer tax and the Section 6056 reporting provision, as applied to state governments, violate the Tenth Amendment. Even assuming that the plaintiffs have not waived these claims, and assuming that res judicata does not bar them from relitigating these claims, their theory fails on the merits. The Tenth Amendment is not offended when Congress regulates the states' own activities as employers, at least where, as here, the regulation is one of general applicability. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985); *see also Reno v. Condon*, 528 U.S. 141, 150 (2000); *Travis v. Reno*, 163 F.3d 1000, 1002 (7th Cir. 1998); *Florida v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d at 1152-54 & n.14.

The plaintiffs argue that *Garcia* and its progeny do not apply here because, in their view, Section 4980H and 6056 are exercises only of the taxing power, and not also of Congress's commerce power. Indiana Reply 26-28. Section 4980H does fall within Congress's commerce power (as well as its taxing power), as "it is simply another example of Congress's longstanding authority to regulate employee compensation offered and paid for by employers in interstate commerce." *Liberty Univ. v. Lew*, 733 F.3d 72, 93 (4th Cir.), *cert. denied*, 134 S. Ct. 683 (2013).

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[7] Needless to say, Treasury vigorously disputes the cited report's misleading characterization of its rulemaking process. In a case (unlike this one) where the agency's resolution of factual or procedural issues in its rulemaking process has been put into question, that dispute would be resolved by a review of the administrative record, not by a review of an outside party's characterization of the rulemaking process. Treasury has not filed an administrative record in this action, because, before the plaintiffs filed their reply briefs, they had not put any factual issue concerning the Treasury regulation into dispute (and they still have not).

(Likewise, there is no doubt that Congress may impose recordkeeping and reporting requirements, as it did in Section 6056, in support of its exercises of its commerce power. *See United States v. Darby*, 312 U.S. 100, 125 (1941).) The premise of the plaintiffs' argument fails, and *Garcia* therefore forecloses the Tenth Amendment claim.

Even if Sections 4980H and 6056 were to be viewed only as exercises of the taxing power, the Tenth Amendment claim would still fail. As the defendants have explained, the intergovernmental tax immunity doctrine is not implicated where Congress subjects state employers to a nondiscriminatory tax. *See South Carolina v. Baker*, 485 U.S. 505, 525 n.15 (1988); *see also Garcia*, 469 U.S. at 543-45; *Massachusetts v. United States*, 435 U.S. 444, 454 (1978); *Travis v. Reno*, 163 F.3d at 1002. Section 4980H applies a tax on nondiscriminatory terms to both public and private employers, and both public and private employers are subject to the same reporting obligations under Section 6056. The provisions therefore do not run afoul of the intergovernmental tax immunity doctrine. Indiana insists that these provisions are invalid because they represent an "unprecedented assertion of federal power" to impose taxes directly on states, Indiana Reply 32, but this simply is not the case. Section 4980H and 6056 operate in the same manner as well-established employment taxes that apply to state employers, such as income tax withholding provisions and the FICA taxes that fund Social Security and Medicare, as well as reporting obligations related to those taxes, such as the requirement to provide a Form W-2 to one's employees and to the IRS. *See* 26 U.S.C. §§ 3125(a), 3126, 3404, 6051.

If the Court were to reach Count IV of the plaintiffs' complaint (and there is no need to do so, as this claim depends on the plaintiffs first prevailing on their challenge to Section 6056), the plaintiffs could not meet their heavy burden to show that Congress would have wanted additional provisions of the ACA to fall if, hypothetically, Section 6056 were to be invalidated

with respect to state employers. *See Nat'l Fed'n of Indep. Business v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2607 (2012) (plurality opinion). The provisions that the plaintiffs challenge – 26 U.S.C. § 125(f) and 29 U.S.C. §§ 218a and 218b – do not depend on Section 6056 for their operation, and each of those provisions "will remain fully operative as a law, and will still function in a way consistent with Congress' basic objectives in enacting the statute." *NFIB*, 132 S. Ct. at 2608 (internal quotations omitted).

III. The Plaintiffs Do Not State a Claim for Estoppel against the Federal Government with Respect to Their 2014 Liability for the Large Employer Tax (Count V)

The plaintiffs continue to seek a declaration of "judicial estoppel," but, for understandable reasons, they no longer seriously pursue this claim in their reply briefs. There is little more that needs to be said regarding this claim. Treasury has exercised its transitional authority under 26 U.S.C. § 7805(a) to provide that Sections 4980H and 6056 will not be applied in 2014. It has memorialized its determination on this score in its regulations. *See* 26 C.F.R. §§ 54.4980H-4(h); 54.4980H-5(g); 301.6056-1(m); 301.6056-2(b). Because the parties are fully in agreement that these provisions will not be applied during the current year, there is no case or controversy with respect to this claim that could warrant judicial relief. *See, e.g., Lawson v. Hill*, 368 F.3d 955, 957 (7th Cir. 2004). In any event, the plaintiffs do not (and cannot) make out any case for estoppel to be applied against the federal government. *See* Defs.' Mem. 42-43.

Conclusion

For the reasons set forth above, the defendants' cross-motion for summary judgment should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2014, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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