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' MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO PLAINTIFFS' SUMMARY JUDGMENT MOTIONS

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Introduction

The Patient Protection and Affordable Care Act ("ACA" or "Act") includes several key measures that will expand the availability of affordable health coverage. Most relevant here, the ACA authorizes federal tax credits and cost sharing subsidies for insurance purchased through new health insurance Exchanges, which are operated by states or, where the state has chosen not to do so or has failed to do so consistent with federal standards, by the federal government. 26 U.S.C. § 36B. These tax credits are vital to the operation of the Exchanges, and are helping millions of Americans to purchase affordable health insurance, consistent with Congressional intent; indeed, Congress understood that the tax credits would be "key" to its goal of ensuring the availability of affordable health coverage.

The plaintiffs here, the State of Indiana and several Indiana school districts, seek to deny these tax credits to millions of Americans who need the credits to purchase health insurance in states, like Indiana, where the federal government operates the Exchange. They assert their claim by reading one phrase of the Act incorrectly and out of context, contrary to all recognized canons of statutory construction, and contrary to Congress's intent in providing for tax relief that would be available nationwide. As an initial matter, however, the plaintiffs have not raised a justiciable claim. They do not have standing under Article III, as they have not met their burden to show either an injury-in-fact, or that any such injury could be redressed in this suit. The plaintiffs' suit further violates the prudential principle that bars litigation over third parties' tax liabilities, and the Administrative Procedure Act's (APA) provisions that channel review to the adequate forum that Congress has provided – here, a tax refund action.

In any event, the plaintiffs' reading of the Act is incorrect. Their argument is based on

an improper method of statutory construction, which reads one provision in isolation while turning a blind eye to surrounding provisions and the structure of the Act, as well as legislative history and Congressional purpose. Their argument ignores Congress's specification in 42 U.S.C. § 18041(c)(1) that a federally-facilitated Exchange is the same entity as the Exchange that the Act contemplated that the state would create, as well as its specification in Section 36B itself that the federally-facilitated Exchange must assist in administering the federal premium tax credits. Moreover, under the plaintiffs' theory, no person could qualify to buy coverage at all (subsidized or not) under a plan offered on the federally-run Exchange. Congress plainly did not intend this result. Instead, Congress's obvious purpose was for all of the Exchanges to function as marketplaces with buyers and sellers, and for premium tax credits to be available nationwide.

Thus, "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"). At a minimum, the Treasury Department has permissibly read Section 36B to provide eligibility for tax credits for participants in any Exchange, and this Court should defer to the agency's interpretation.

The plaintiffs also challenge two other provisions of the Act, a tax on large employers that fail to offer adequate health coverage to their employees, and a reporting provision that

directs large employers to provide information to their employees and to Treasury concerning the coverage that they offer. 26 U.S.C. § 4980H, 6056. They contend that the Tenth Amendment prohibits the application of these provisions to state governments or the states' political subdivisions. Indiana pursued the same claim in prior litigation, and lost that claim on the merits. Principles of claim and issue preclusion prevent Indiana from relitigating the same claim here. In any event, the claims lack merit; the Tenth Amendment is not offended when a state employer is subjected to a generally applicable regulation, or a generally applicable tax, on equal terms with private entities.

Last, the plaintiffs seek a declaration of "judicial estoppel" that would bind the defendants to their announcement, in formally published Treasury regulations, that the Section 4980H large employer tax and the Section 6056 reporting provision will not be applied in 2014. This claim does not state any case or controversy, as there is no dispute between the parties on this point. In any event, the plaintiffs do not make out any case for judicial estoppel.

Statement of Material Facts

I. The Affordable Care Act

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), "to increase the number of Americans covered by health insurance and decrease the cost of health care." *Nat'l Fed'n of Indep. Business v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2580 (2012). This case concerns interrelated provisions of Title I of the Act that, working in tandem, will substantially increase participation in private health insurance markets.

A. The Group and Non-group Health Insurance Markets

Most Americans with private health insurance coverage receive that coverage through an

employer-sponsored group health plan. *See* Congressional Budget Office ("CBO"), *Key Issues in Analyzing Major Health Insurance Proposals* xi (2008) ("*Key Issues*") (Exh. 1). "One fundamental reason such plans are popular is that they are subsidized through the tax code." *Id*. Congress has provided these tax subsidies for many decades and, in 2007 alone, the federal tax subsidy for employment-based health coverage was $246 billion. *Id*. at 31.

Congress has long regulated certain terms of employer-sponsored group health coverage. Federal law generally bars group health plans from excluding individuals based on health status-related factors or charging different premiums for similarly situated employees based on such factors. *See id*. at 79; *see also* 42 U.S.C. § 300gg-1 (2006); 29 U.S.C. § 1182 (2006 & Supp. III 2009).

Before the Affordable Care Act, these federal efforts to make affordable health coverage widely available left a significant gap. Health insurance purchased in the "non-group market" (also known as the "individual market") generally did not receive favorable federal tax treatment, so the purchasers had to bear the full costs of premium payments. *Key Issues* 9. Moreover, federal law generally did not prevent insurers in the non-group market from increasing premiums, or denying coverage altogether, based on an individual's medical condition or history. Without such rules, insurers denied coverage to or charged higher premiums for individuals with conditions as common as high blood pressure, asthma, ear infections, and pregnancy. *See 47 Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the S. Comm. on Finance*, 110th Cong., 2d Sess. 52 (2008) (Prof. Mark Hall) (Exh. 2); Sara R. Collins et al., *Help on the Horizon, Findings from the Commonwealth Fund Biennial Health Insurance Survey of 2010* xi & Exh. ES-2 (Exh. 3).

Because of the high cost of policies sold in the non-group insurance market, restrictions on coverage, and the absence of any tax subsidies, participation in the individual market was low even among those who lacked other health coverage options. *Key Issues* 46. Of the 45 million individuals who lacked access to an employer-sponsored group plan or government health benefits program in 2009, only about 20% were covered by a policy purchased in the non-group insurance market; the remaining 80% were uninsured. *Id*.

B. The Affordable Care Act's Reforms of the Non-group Market

In Title I of the Affordable Care Act, Congress enacted a set of provisions that work in tandem to reform the dysfunctional non-group health insurance market.

Premium tax credits. To provide "Affordable Coverage Choices for All Americans," ACA, Title I, Subtitle E, Congress provided favorable federal tax treatment for certain health insurance obtained in the non-group market. The Act establishes federal tax credits that assist eligible individuals with household income between 100% and 400% of the federal poverty line to pay premiums for non-group insurance policies on the health insurance Exchanges created pursuant to the Act. 26 U.S.C. § 36B. These premium tax credits help to make health insurance affordable by reducing a taxpayer's net cost of insurance. For eligible individuals with income between 100% and 250% of the federal poverty line, the Act also authorizes federal payments to insurers to help cover those individuals' cost-sharing expenses (such as co-payments or deductibles) for certain insurance obtained through an Exchange. 42 U.S.C. § 18071(c)(2).

The statute imposes certain conditions on eligibility for the tax credits. In particular, a taxpayer may not receive a premium tax credit if he or she is eligible for any other form of coverage that qualifies as "minimum essential coverage" under the ACA, such as Medicare or

Medicaid. 26 U.S.C. § 36B(c)(2)(B). Employer-sponsored coverage is minimum essential coverage under the ACA. Section 36B nonetheless permits an employee who is eligible for, but does not enroll in, such coverage to receive premium tax credits and cost-sharing reductions, if the employer-sponsored plan is unaffordable, meaning that the employee would pay more than 9.5% of his household income for that coverage, or if that plan does not offer minimum value, meaning that it fails to cover at least 60% of the total allowed costs of benefits under the plan. 26 U.S.C. § 36B(c)(2)(C).

CBO projected in 2009 that 78% of people who would buy non-group insurance policies through Exchanges (18 million of 23 million) would receive premium tax credits, and that those credits, on average, would cover nearly two-thirds of the premium. CBO, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act* 24 (Nov. 30, 2009) ("*Analysis of Health Insurance Premiums*") (Exh. 4). More recent CBO projections indicate that the average tax subsidy will be $4,410 per person in 2014, rising to $7,170 in 2024, and that, by 2017, 76% of people who buy non-group policies through the Exchanges (19 million of 25 million) will receive premium tax credits. CBO, *Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act* ("*CBO Updated Estimates*") 3-4 & tbl. 2 (April 2014) (Exh. 5).

Guaranteed-issue and community-rating requirements. To eliminate restrictive insurance industry practices that prevented people from obtaining affordable coverage in the non-group market, Congress prohibited insurers, starting in 2014, from denying new coverage to any person because of medical condition or history (the guaranteed-issue requirement, codified at 42 U.S.C. §§ 300gg-1, 300gg-3, 300gg-4(a)) and from charging higher premiums for such

coverage because of a person's medical condition or history (the community-rating requirement, codified at 42 U.S.C. §§ 300gg(a)(1), 300gg-4(b)). Congress thereby extended to the non-group market norms of non-discrimination parallel to those already applicable to group health plans.

Minimum coverage provision. To ensure that individuals who can afford coverage do not delay the purchase of insurance until they are sick or injured, Congress provided that non-exempted individuals must maintain a minimum level of health coverage for themselves and their dependents or pay a tax penalty. 26 U.S.C. § 5000A. Congress exempted from this tax penalty individuals who cannot afford coverage, including individuals who cannot afford coverage even with the benefit of the premium tax credits provided under Section 36B. 26 U.S.C. § 5000A(e)(1).

Exchanges. Congress provided for the creation of health insurance Exchanges to serve "as an organized and transparent marketplace for the purchase of health insurance where individuals … can shop and compare health insurance options." H.R. REP. NO. 111-443, pt. II, at 976 (2010) (Exh. 6) (quotation marks and citation omitted). Among other functions, the Exchanges (whether state- or federally-run) certify the qualified health plans ("QHPs") offered on the Exchanges; determine the eligibility of individuals to enroll in these QHPs; and determine the eligibility of individuals for advance payments of the Act's premium tax credits and cost-sharing reductions. 42 U.S.C. § 18031(d)(4); 45 C.F.R. § 155.200 *et seq.* Each Exchange also reports information to the IRS for the purpose of determining whether participants are eligible for premium tax credits. 26 U.S.C. § 36B(f)(3).

The Act provides 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." 42 U.S.C. § 18031(b)(1). The Act does not impose any sanction, however, if a state elects not to establish an Exchange that complies with federal standards. Instead, the Act directs that, if the state does not create a "required Exchange," the Secretary of HHS shall "establish and operate such Exchange within the State." 42 U.S.C. § 18041(c)(1); *see* 45 C.F.R. § 155.105(f). A state thus has the option to operate its own Exchange, or to permit the federal government to operate the Exchange for that state in its stead. A state that chooses not to operate its own Exchange, however, loses access to federal grants that would otherwise be available to fund the establishment of the Exchange. *See* 42 U.S.C. § 18031(a). The Act also vests the Exchanges with certain regulatory power with respect to insurers seeking to offer plans on the Exchanges. *See* 42 U.S.C. § 18031(e) (power to certify QHPs and to review proposed QHP premium increases); 42 U.S.C. § 18021(a)(1)(C)(iv) (power to impose additional requirements for QHPs). A state that declines to operate its own Exchange, therefore, forgoes that regulatory power.

The large employer tax. The Affordable Care Act prescribes a tax assessment under specified circumstances for certain large businesses that do not offer affordable, minimum value coverage to their full-time employees and their dependents. 26 U.S.C. § 4980H. Under this provision, an applicable large employer that offers health coverage to its full-time employees and their dependents will be subject to a tax if one or more of its full-time employees "has been certified to the employer under [42 U.S.C. § 18081] as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee." 26 U.S.C. § 4980H(b)(1)(B); *see also* 26 U.S.C. § 4980H(a)(2) (same condition for assessment against applicable large employer

that offers no coverage to its full-time employees and their dependents). As noted, an employee who is eligible for employer-sponsored health coverage is eligible to receive these subsidies only if the coverage offered by the employer fails to meet certain standards for affordable, minimum value coverage. 26 U.S.C. § 36B(c)(2)(C). Accordingly, an applicable large employer that offers coverage to its full-time employees and their dependents that meets these standards will not be subject to the Section 4980H tax.

Congress also directed applicable large employers to report certain information to Treasury concerning the health coverage that they offer to their employees. 26 U.S.C. § 6056. The large employer tax assessment and the Section 6056 reporting provision will begin to be applied in 2015. *See* 26 C.F.R. §§ 54.4980H-4(h); 54.4980H-5(g); 301.6056-1(m); 301.6056-2(b).

* * *

When Congress enacted the ACA Title I provisions discussed above, Congress understood that the extension of nondiscrimination norms – *i.e.*, the guaranteed-issue and community-rating requirements – to the non-group market would undermine that market unless these new regulations of the insurance industry were coupled with the premium tax credits and the minimum coverage provision. CBO advised Congress that, by themselves, the guaranteed-issue and community-rating requirements would result in "adverse selection" that would "increase premiums in the exchanges relative to nongroup premiums under current law." *Analysis of Health Insurance Premiums* 19.

CBO also concluded, however, that "several other provisions of the proposal would tend to mitigate that adverse selection." *Id.* Most notably, CBO determined that there would be

"an influx of enrollees with below-average spending for health care, who would purchase coverage because of the new subsidies to be provided and the individual mandate to be imposed." *Id.* at 6. CBO advised Congress that "[t]he substantial premium subsidies available in the exchanges would encourage the enrollment of a broad range of people." *Id.* at 19-20 (explaining that, for people whose income is below 200% of the federal poverty line, those subsidies would average about 80% of the premium payments). Furthermore, CBO concluded that the structure of the federal tax credits for premium payments would mitigate the impact of adverse selection. CBO informed Congress that the premium tax credits "would dampen the chances that a cycle of rising premiums and declining enrollment would ensue." *Id.* at 20. Taking the premium tax credits, minimum coverage provision, and other mitigating influences into account, CBO concluded that the extent of adverse selection in the non-group market "is likely to be limited[.]" *Id.* The Act's financial assistance encourages individuals with lower expected health care costs to participate in the Exchanges, resulting in an expansion of the risk pool, and a decrease in the expected costs of plans offered on the Exchanges. *See also* Linda J. Blumberg & John Holahan, *Health Status of Exchange Enrollees: Putting Rate Shock in Perspective* at 2, 8 (Urban Institute July 2013) (Exh. 7) (describing success of premium subsidies in limiting costs for both the subsidized and unsubsidized populations in the non-group market).

State insurance regulators likewise advised Congress that the premium tax credits and minimum coverage provision were necessary to protect insurance markets operating under guaranteed-issue and community-rating rules. The National Association of Insurance Commissioners ("NAIC") offered "the experience and expertise of the states to Congress as it attempt[ed] to improve the health insurance marketplace." *Roundtable Discussion on*

Expanding Health Care Coverage: Hearing Before the Senate Comm. on Finance, 111th Cong., 1st Sess. 502-503 (2009) (Exh. 8) (statement of Sandy Praeger, Kansas Commissioner of Insurance, on behalf of the NAIC). "Based on that experience and expertise," the NAIC emphasized the need to avoid adverse selection. *Id*. at 503, 504. The NAIC explained that proposals for "guaranteed issue and elimination of preexisting condition exclusions for individuals" could "result in severe adverse selection," and the NAIC advised Congress that "State regulators can support these reforms to the extent they are coupled with an effective and enforceable individual purchase mandate and appropriate income-sensitive subsidies to make coverage affordable." *Id*. at 504.

Accordingly, Congress coupled the Act's guaranteed-issue and community-rating requirements with the minimum coverage provision and federal tax credits that will pay the lion's share of the premium for most individuals who buy coverage on an Exchange. Congress thus found that the premium tax credits "are *key* to ensuring people affordable health coverage." H.R. REP. NO. 111-443, pt. I, at 250 (emphasis added).

Congress's prediction on this score has been borne out; premiums for plans on the Exchanges are substantially lower than what had initially been projected. The cost of a silver plan is, on average, 16% lower than what was contemplated under the CBO's original projections, even before tax credits are considered. Office of the Ass't Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Servs., *ASPE Issue Brief: Health Insurance Marketplace Premiums for 2014* at 2-3 (Sept. 25, 2013) (Exh. 9); *see also CBO Updated Estimates* at 6. After taking tax credits into account, 56% of uninsured Americans may qualify for health coverage for less than $100 per person per month. *ASPE Issue Brief* at 3-4.

II. This Litigation

The State of Indiana and several Indiana school districts have filed this suit, which seeks to deprive Indiana residents of the benefit of the federal tax credits extended to them under the ACA. Am. Compl., ECF 22. The amended complaint asserts five counts. In Count I, the plaintiffs seek to challenge the validity of 26 C.F.R. § 1.36B-1(k), the Treasury Department regulation that clarifies that participants in both state-operated and federally-facilitated Exchanges may be eligible for federal premium tax credits. Am. Compl., ¶¶ 197-204 (Count I). In Counts II and III, the plaintiffs contend that the Section 4980H large employer tax and the Section 6056 tax reporting requirement for large employers violate the Tenth Amendment and the principle of intergovernmental tax immunity, to the extent that these provisions are applied to state governmental employers. *Id.*, ¶¶ 205-217 (Counts II and III). In Count IV, the plaintiffs argue that, if they prevail on their as-applied challenge to Section 6056, additional provisions of the ACA could not be severed from Section 6056 and would therefore also be invalid as applied to the plaintiffs. Am. Compl., ¶¶ 218-220 (Count IV, reciting challenges to 29 U.S.C. §§ 218a, 218b, and 26 U.S.C. § 125(f)). In Count V, the plaintiffs seek a declaration of "judicial estoppel" that would bind the government to its announcement that Section 4980H will not be applied with respect to the 2014 tax year. Am. Compl., ¶¶ 221-226 (Count V).

The defendants have moved to dismiss the complaint, and that motion is fully briefed. With respect to Count I, the defendants showed that the plaintiffs lack Article III standing, as they offered only speculation that they would suffer an injury from the availability of tax credits for Indiana residents. Moreover, any such injury could not be redressed in this action, as this Court could not extinguish the claims of absent parties to those tax credits. Defs.' Mem. in

Supp of Their Mot. to Dismiss the Am. Compl. ("MTD Br.") at 16-21, ECF 37; Defs.' Reply Mem. in Supp of Their Mot. to Dismiss the Am. Compl. ("MTD Reply") at 3-9, ECF 55. The defendants also showed that the plaintiffs' challenge to the Treasury regulation violated the prudential principle that bars litigation over third parties' tax liabilities, and the Administrative Procedure Act's (APA) provisions that channel review to the adequate forum that Congress has provided – here, a tax refund action. MTD Br. 21-28; MTD Reply 9-15.

With respect to Counts II through IV, the defendants showed that the plaintiffs' constitutional challenges to Sections 4980H and 6056 failed on the merits, because the Tenth Amendment is not offended when Congress regulates state employers on equal terms with private employers. MTD Br. 31-32; MTD Reply 16-17. The plaintiffs failed to defend the merits of these claims in the briefing on the motion to dismiss, and consequently these claims are waived. MTD Reply 16-17. The defendants also showed that these claims fail under principles of claim and issue preclusion, because Indiana litigated the same claims in a prior action, however, and lost on the merits. MTD Br. 28-31; MTD Reply 17-21. And because the plaintiffs sought relief under Count IV only if they first prevailed on Count III, the defendants showed that that claim necessarily fails as well. MTD Br. 32 n.7.

With respect to Count V, the defendants showed that this claim did not state any case or controversy under Article III, as the parties are fully in agreement that Section 4980H and Section 6056 will not begin to be applied until 2015. MTD Br. 32-33; MTD Reply 21-23.

The plaintiffs have filed separate motions for summary judgment. *See* State of Indiana's Mem. in Supp. of Its Mot. for S.J. ("Indiana S.J. Br."), ECF 45; Am. Br. in Supp. of Pl. Sch. Corps.' Mot. for S.J. ("School Corporations S.J. Br."), ECF 54. As shown below, even if the

plaintiffs' claims could survive the threshold defects that the defendants have described in their motion to dismiss, those claims lack merit. The plaintiffs' summary judgment motions should be denied, and the defendants' cross-motion for summary judgment should be granted.

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 argue that 26 U.S.C. § 36B conditions a taxpayer's eligibility for federal premium tax credits on whether his or her state's government has created a state-operated Exchange. In their view, Indiana residents are ineligible for these federal tax credits, because the federal government operates the Exchange in this state. They premise their theory on an isolated reading of a phrase in 26 U.S.C. § 36B(b)(2)(A), which limits the amount of the credit to no more than the amount of premiums for a qualified health plan in which the taxpayer (or a spouse or dependent) is "enrolled in through an Exchange established by the State under [42 U.S.C. § 18031, *i.e.*, Section] 1311 of the Patient Protection and Affordable Care Act." 26 U.S.C. § 36B(b)(2)(A); *see also* 26 U.S.C. § 36B(c)(2)(A). The plaintiffs reason that the amount of the tax credit for Indiana residents under this formula must always be zero.

But "[c]ourts have a duty to construe statutes, not isolated provisions." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (internal quotation omitted). Thus, "[i]n 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)

(internal quotation omitted); *see also Wells Fargo Bank v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 694 (7th Cir. 2011). "Statutory ambiguity is a creature not just of definitional possibilities but also of statutory context. [The] meaning – *or ambiguity* – of certain words or phrases may only become evident when placed in context." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 98-99 (2007) (emphasis in original; internal quotations omitted). Courts also must employ all of the traditional tools of statutory construction, which include the examination of the statute's "text and structure," as well as the statute's "purpose and history." *Rodas v. Seidlin*, 656 F.3d 610, 618 (7th Cir. 2011).

The phrase in Section 36B(b)(2)(A) upon which the plaintiffs rely, then, cannot be read in a vacuum. Instead, the text of Section 36B, when read in full and in conjunction with the Act's other provisions, makes clear that federal premium tax credits are available both in state-operated Exchanges and in federally-facilitated Exchanges. At the very least, a contrary reading is not compelled by the plain language of the Act, and, as will also be explained below, this Court should defer to the Treasury Department's reasonable interpretation of Section 36B 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

1. Congress Defined the Federally-Run Exchange to Be the Same Exchange as the One Established by a State under Section 18031

Section 36B provides that a tax credit shall be allowed to any "applicable taxpayer," defined as "a taxpayer whose household income for the taxable year equals or exceeds 100 percent but does not exceed 400 percent of an amount equal to the poverty line for a family of the size involved." 26 U.S.C. § 36B(a), (c)(1)(A). Congress thus defined the taxpayers who

are eligible for federal premium tax credits as those with a certain household income, regardless of whether the Exchange on which the insurance is purchased is established by the Secretary on behalf of a state, or by the state itself.

The plaintiffs attempt to limit the availability of these tax credits by relying on a phrase in subsection (b) of Section 36B, which sets the formula for calculating the amount of the credit. That subsection provides that the premium tax credit is calculated by adding up the "premium assistance amounts" for all "coverage months" in a given year; that the "premium assistance amount" is based in part on the cost of the monthly premium for the health plan that the taxpayer purchased "through an Exchange established by the State under [42 U.S.C. § 18031]"; and that a "coverage month" is defined as a month during which the taxpayer (or dependent) is enrolled in a qualified health plan "that was enrolled in through an Exchange established by the State under [42 U.S.C. § 18031]." 26 U.S.C. § 36B(b)(1), (2), (c)(2)(A)(i). The plaintiffs contend that the phrase "established by the State under [42 U.S.C. § 18031]" in this formula shows that Congress meant for federal tax credits to be unavailable on federally-facilitated Exchanges.

The relevant statutory provisions preclude this reading. Section 36B(b)(2)(A) 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."). Despite this use of the term "shall," however, "states are not actually required to 'establish' their own Exchanges." *Halbig*, 2014 WL 129023, at *13. Instead, the Act directs 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). "In other words, even where a state does not actually establish an Exchange, the federal government can create 'an Exchange established by the State under [42 U.S.C. § 18031]' *on behalf of* that state." *Halbig*, 2014 WL 129023, at *14 (emphasis and alteration in original).[1]

Congress's use of the phrase "such Exchange" in Section 18041(c)(1) shows that it meant for the federally-facilitated Exchange to be the *same entity* as the earlier-referenced Exchange, that is, the Exchange contemplated under 42 U.S.C. § 18031. *See* Black's Law Dictionary 1570 (9th ed. 2009) ("such" means "[t]hat or those; having just been mentioned"). "Read in context," then, the federally-facilitated Exchange "*must be the same* ['Exchange'] mentioned at the beginning of [the provision] …. Indeed, because there are no other ['Exchanges'] mentioned in the section, there is no other antecedent to which the word 'such' could refer." *Miller v. Clinton*, 687 F.3d 1332, 1344 (D.C. Cir. 2012) (emphasis added). Congress frequently uses the term "such" to show that a person or thing is the same entity as the person or thing that it had described before. *See, e.g.*, *Alliance 3PL Corp. v. New Prime, Inc.*, 614 F.3d 703, 707 (7th Cir. 2010) ("such" is "legalese for the proposition that 'this use of the word "traffic" refers to the same "traffic" that this clause already mentioned'").

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[1] The plaintiffs suggest that, by permitting the federal government to "stand in the shoes" of the state to operate the Exchange that the Act contemplated that the state would establish, the Act unconstitutionally commandeers the state government. Indiana S.J. Br. 13-15. To the contrary, as the last district court to which Indiana made this argument explained, the Act's Exchange provisions follow the model of "cooperative federalism," in which Congress may give states the choice in the first instance to take regulatory action, subject to a federal backstop if the state elects not to do so, or fails to do so consistent with federal standards. *See Florida v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1154-56 (N.D. Fla. 2010), *rev'd in part on other grounds by NFIB* (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981)).

Any doubt on this score is removed by the ACA's definitional provisions. For each use of the term "Exchange" in Title I of the ACA (which includes 42 U.S.C. § 18041), that term "means an American Health Benefit Exchange established under [42 U.S.C. § 18031]." 42 U.S.C. § 300gg-91(d)(21) (defining term for purpose of Public Health Services Act); *see* 42 U.S.C. § 18111 (incorporating this definition for purpose of Title I of ACA). Thus, in light of the fact that "Exchange" is a defined term of art in the ACA, Section 18041(c)(1) reads, "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). Thus, an Exchange established by the Secretary *is*, "by definition under the statute," the required state Exchange established under Section 18031. *Halbig*, 2014 WL 129023, at *13; *see also King*, 2014 WL 637365, at *11.

The plaintiffs' contrary reading fails to give effect to the ACA's definitional provisions. Moreover, their reading fails to give effect to Section 18031's instruction that each state is to establish an Exchange, or to Section 18041's use of the term "such Exchange" to refer to the Exchange to be established by a state in Section 18031. That reading, accordingly, should be rejected. *See United States v. Joseph*, 716 F.3d 1273, 1278 (9th Cir. 2013) (rejecting interpretation that would render the term "such" superfluous).[2]

Moreover, "the statutory formula for calculating the tax credit seems an odd place to

[2] The plaintiffs rely almost entirely on the canon against surplusage. *See* School Corporations S.J. Br. 26. But "instances of surplusage are not unknown" in federal statutes. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006). In any event, as the plaintiffs themselves acknowledge, School Corporations S.J. Br. 41 n.10, "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 "would render superfluous other portions of the ACA, such as the advance payment reporting requirements under Section 36B(f). Thus the canon against surplusage is of no use here." *Halbig*, 2014 WL 129023, at *14 n.11.

insert a condition that the states establish their own Exchanges if they wish to secure tax credits for their citizens." *Halbig*, 2014 WL 129023, *17 n.12 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("[Congress] does not, one might say, hide elephants in mouseholes.")). "One would expect that if Congress had intended to condition availability of the tax credits on state participation in the Exchange regime, this condition would be laid out clearly in subsection (a), the provision authorizing the credit, or some other provision outside of the calculation formula." *Id.* "This is particularly so because courts presume that 'Congress when it enacts a statute is not making the application of the federal act dependent on state law.'" *Id.* (quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989)). This principle has particular force in the area of taxation, where the Supreme Court has emphasized that "'the revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application.'" *Halbig*, 2014 WL 129023, *17 n.12 (quoting *United States v. Irvine*, 511 U.S. 224, 238 (1994)). "State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law." *Burnet v. Harmel*, 287 U.S. 103, 110 (1932).

2. The Reporting Requirements in Section 36B Confirm that Federal Premium Tax Credits Are Available on Federally-Run Exchanges

Further confirmation is provided within 26 U.S.C. § 36B itself. Section 36B(f), which is titled "Reconciliation of credit and advance credit," requires the IRS to reduce the amount of a taxpayer's end-of-year premium tax credit by the amount of any advance payment of that credit. *See* 26 U.S.C. § 36B(f)(1). To enable the IRS to perform this function, Section 36B(f) directs "[e]ach Exchange (or any person carrying out 1 or more responsibilities of an Exchange under [42 U.S.C. § 18031(f)(3) *or 42 U.S.C. § 18041(c)*])" to provide certain information to the

Treasury and to taxpayers, including "[t]he aggregate amount of any advance payment" of tax credits or cost-sharing reductions that the taxpayer receives under the ACA, "[a]ny information provided to the Exchange, including any change of circumstances, necessary to determine eligibility for, and the amount of, such credit," and "[i]nformation necessary to determine whether a taxpayer has received excess advance payments" of the credit. 26 U.S.C. § 36B(f)(3) (emphasis added).[3] "By invoking both Section 18031 and Section 18041, this advance payment provision is expressly directed at *every* Exchange, regardless of whether the Exchange is state- or federally-run. … Section 36B(f) thus indicates that Congress assumed that premium tax credits would be available on any Exchange, regardless of whether it is operated by a state under 42 U.S.C. § 18031 or by HHS under 42 U.S.C. § 18041." *Halbig*, 2014 WL 129023, at *15 (emphasis in original); *see also King*, 2014 WL 637365, at *12.

Under the plaintiffs' reading, by contrast, "Section 36B(f)(3) would serve no purpose with respect to the federally-facilitated Exchanges, and the language referencing 42 U.S.C. § 18041 would be superfluous, if federal Exchanges were not authorized to deliver tax credits." *Halbig*, 2014 WL 129023, at *15. The "amount of such credit," and "the aggregate amount of any advance payment" of such credit to be reported would necessarily always be zero. It is not plausible that Congress meant for the federally-facilitated Exchange to report information that it thought would not exist. "That plaintiffs interpret [Section 36B(f)(3)] to be an empty gesture is yet another indication that their submission is erroneous." *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 878 (D.C. Cir. 2006). *See also Henderson v. United States*, 133 S.

[3] 42 U.S.C. § 18031(f)(3), referenced in the text quoted above, permits a state-based Exchange to contract with an outside entity to perform one or more of the Exchange's responsibilities. Similarly, 42 U.S.C. § 18041(c) permits the Secretary of HHS to enter into an agreement with a non-profit entity to operate a federally-facilitated Exchange.

Ct. 1121, 1131 (2013) (Scalia, J., dissenting) ("A rudimentary principle of textual interpretation … is that if one interpretation of an ambiguous provision causes it to serve a purpose consistent with the entire text, and the other interpretation renders it pointless, the former prevails.").

The plaintiffs speculate that Congress might have intended the federally-facilitated Exchange to make meaningless reports, simply to avoid potential redundancy in drafting the statute. School Corporations S.J. Br. 33. But there would be no reason for the federally-facilitated Exchange to report any of the information listed in Section 36B(f)(3) to Treasury under the plaintiffs' theory. All of the information specified in that provision – which, again, is titled "Reconciliation of credit and advance credit" – is directed to Treasury to assist it with its administration of the premium tax credit. This is why Congress directed "*[e]ach Exchange*," as well as any persons with whom the states or HHS has contracted to perform Exchanges functions, *see* 42 U.S.C. §§ 18031(f)(3), 18041(c), to provide all of the specified information, including reporting on tax credits. 26 U.S.C. § 36B(f)(3) (emphasis added). The far more natural conclusion to draw from this language is the one drawn by Treasury – Congress expected that federal premium tax credits would be provided in every Exchange. *See Fund for Animals*, 472 F.3d at 878.

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

As noted, statutory interpretation requires a review of the full statutory context, because "an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning." *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013). In other words, "statutory construction is a holistic endeavor," and "a

provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563 (2013) (internal quotation and alteration omitted). A review of the "text of the whole statute" shows that, when Congress referred to a state-established Exchange in the ACA, it included the Exchange established by the Secretary on a state's behalf.

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

Under the plaintiffs' theory, nobody could meet the standard for eligibility to buy insurance offered on the federally-facilitated Exchange. The ACA provides that "[a] qualified individual may enroll in any qualified health plan available to such individual and for which such individual is eligible." 42 U.S.C. § 18032(a)(1). The statute defines a "qualified individual" as an individual "who resides in the State that established the Exchange." 42 U.S.C. § 18032(f)(1)(A)(ii).[4] This definition appears in the section of the ACA that immediately follows the provision regarding states' establishment of Exchanges, *see* 42 U.S.C. §§ 18031, 18032, and Congress certainly had the same concept in mind in enacting the two provisions together. *See Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2563 (adjacent statutory provisions "should be read in harmony"). So, under the plaintiffs' theory, nobody would be a "qualified individual" in a state with a federally-run Exchange. Obviously, Congress did not intend this result. It designed the Exchange, after all, to serve "as an organized and transparent marketplace for the purchase of health insurance." H.R. REP. NO. 111-443, pt. II, at 976. Congress certainly would not have gone to the trouble of creating a federally-run Exchange that

[4] *See also* 42 U.S.C. § 18032(f)(1)(B), (f)(3) (incarcerated persons, and aliens not lawfully present in the United States, excluded from definition of "qualified individual").

could serve only as a Potemkin marketplace.[5] "Courts presume that Congress has used its scarce legislative time to enact statutes that have some legal consequence." *Halbig*, 2014 WL 129023, at *15 (internal quotation omitted); *see also Kloeckner v. Solis*, 133 S. Ct. 596, 606-07 (2012) (courts should avoid interpretations that create absurdities in related provisions).

The plaintiffs offer two arguments in an attempt to avoid the absurdity that their interpretation would create. Neither argument is tenable. First, they argue that the definition of a "qualified individual" applies only where states operate their own Exchange. School Corporations S.J. Br. 43. They read the term "Exchange" in Section 18032(f) – which defines eligibility "with respect to an Exchange" – to refer only to state-operated Exchanges. Under this theory, no residence requirement would apply at all for the federally-run Exchanges. But, as discussed above, the term "Exchange" necessarily includes both state-run and federally-run Exchanges, given the Act's definitional provisions and Section 18041(c)'s reference to the federally-run Exchange as "such Exchange." *See supra*, pp. 16-18. The plaintiffs' attempt to offer a different definition of "Exchange" for Section 18032 ignores the principle that "identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). There is no reason to think that Congress intended to depart from that principle of statutory construction, or that it intended to eliminate all residence requirements for the purchase of health insurance.

The plaintiffs' argument would create further absurdities, moreover. If, as the plaintiffs

[5] It would follow, moreover, that the language in Section 36B upon which the plaintiffs rely would be surplusage, even under their theory. If residents of a state with a federally-facilitated Exchange could not enroll in coverage through that Exchange, they could not obtain tax credits for that coverage, and there would be no need to specify also that they must enroll in a plan on an Exchange "established by the State under [42 U.S.C. § 18031]." An interpretation that compounds, rather than resolves, any surplusages in the Act should be rejected.

would have it (contrary to the Act's definitional provisions and Section 18041), the term "Exchange" refers only to state-operated Exchanges, then no plan would be eligible to be sold on the federally-run Exchange. Only an "Exchange" has the power to certify "qualified health plans" eligible to sell plans on that Exchange. 42 U.S.C. §§ 18021(a)(1)(A), 18031(e)(1). The plaintiffs thus would trade one absurdity that their reading creates for another, eliminating residence requirements and permitting individuals to buy insurance on an Exchange that could have no plans available for them to buy. In sum, the "plaintiffs' insistence that the Court should read the residence requirement out of the ACA or not apply section [18032] to federally-facilitated Exchanges is a telltale sign that their reading of section 36B is wrong." *King*, 2014 WL 637365, at *12.

In apparent recognition of this point, the plaintiffs offer a second argument. They recognize the principle that, under the Act's definitional provisions, "the federal Exchange 'stands in the shoes' of the state Exchange," but they argue that this principle may be applied for purposes of the Act's residence requirement, and at the same time denied for the purpose of eligibility for the Section 36B tax credit. School Corporations S.J. Br. 44. They reason that Section 36B(b)(2)(A) refers to an "Exchange established by the State under 1311," *i.e.*, 42 U.S.C. § 18031, while the residence provision contains no explicit cross-reference to Section 18031. This is a distinction without a difference. Once again, under the ACA, an "Exchange" *is* "an American Health Benefit Exchange established under [42 U.S.C. § 18031]." 42 U.S.C. §§ 300gg-91(d)(21), 18111. No provision in the ACA, other than Section 18031, authorizes or instructs states to establish Exchanges. The Exchange referenced in Section 36B, Section 18031, and Section 18032, then, all refer to the same entity.

In sum, Congress plainly intended that all of the Exchanges would operate as marketplaces for the sale and purchase of health insurance, no matter which entity operates the Exchange. But under the plaintiffs' theory, no persons could buy insurance on a federally-facilitated Exchange (and, thus, no insurer would bother to try to sell insurance on that Exchange). Because Congress could not have intended to create federally-facilitated Exchanges that would be completely inoperative, the plaintiffs' theory should be rejected.

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

Additional provisions provide further proof 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' reading would create an unanticipated obligation for states in the operation of their Medicaid plans. The ACA expands the scope of eligibility for the Medicaid program, beginning January 1, 2014. *E.g.*, 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). As a bridge until that date, the ACA provided, as a condition of continued federal funding, that participating states were required to maintain their then-existing eligibility standards, until the effective date of the ACA's Medicaid eligibility expansion provision. In particular, this "maintenance of effort" provision directed states, as a condition for the receipt of federal Medicaid funds, not to impose any "eligibility standards, methodologies, or procedures" under their Medicaid state plan, or any applicable waiver, that were "more restrictive" than the standards that the state had in place as of the date the ACA was enacted. 42 U.S.C. § 1396a(gg)(1). This condition applied until "the date on which the Secretary determines that an Exchange established by the State under [42 U.S.C. § 18031] is fully operational." *Id.*; *see also* 42 U.S.C. § 1396a(gg)(3) (permitting waivers of the

maintenance-of-effort provision for states with budget deficits until December 31, 2013).

The language in 42 U.S.C. § 1396a(gg)(1) is identical to the language upon which the plaintiffs rely in 26 U.S.C. § 36B(b)(2)(A). Thus, under the plaintiffs' reading of the ACA, "a state with a federally-facilitated Exchange would *never* be relieved of this maintenance of effort requirement." *King*, 2014 WL 637365, at *13 (court's emphasis). It is not plausible that Congress intended this result. Indeed, if Congress had intended to impose such a condition, it would have said so directly, thereby giving individuals and States themselves clear notice of the consequences of a State's decision. *See id*.

Indeed, Indiana itself has relied on the expiration of this provision. Before 2014, certain parents and caretaker relatives of dependent children with incomes up to 100 percent of the federal poverty line received benefits under Indiana's Medicaid state plan. Declaration of Anne Marie Costello (Exh. 10), ¶ 2. Effective January 1, 2014, however, Indiana, with HHS's approval, amended its state plan to reduce the income threshold for benefits for these persons. *Id.*, ¶¶ 3, 4. Indiana could not have reduced this threshold under the theory that it offers here; it could not impose a more restrictive "eligibility standard" without creating its own Exchange, under its theory. Indiana thus is estopped from, first, inducing HHS to approve its state plan amendment under one legal theory, and then asserting an inconsistent theory in this case.[6] *See, e.g., Matamoros v. Grams*, 706 F.3d 783, 793 (7th Cir. 2013).

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[6] *See also* Ind. Family & Soc. Servs. Admin., *Healthy Indiana Plan 1115 Waiver Extension Application* at 29 (Apr. 12, 2013) (Exh. 11) (Indiana's successful application to HHS for extension of Medicaid funds for its expansion program, which reduced the income cap for eligibility to participate in that program, and recited that "[t]his will assure there is limited overlap with the tax credits available through the Exchanges"); *id*. at 44 ("Individuals with MAGI income between above [sic] 100% FPL will become eligible for Exchange subsidies beginning January 1, 2014"; former plan participants "over 138% FPL will be enrolled in a Qualified Health Plan with tax subsidies").

Coordination of CHIP benefits with the Exchanges. The plaintiffs' reading is also inconsistent with the ACA's provisions concerning 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." In contrast, under a proper reading of the Act, where the federal government stands in the shoes of the state to operate the Exchange where the state does not do so, Section 1397ee does not impose an obligation on HHS that is impossible to fulfill, and subsidized coverage would be available for the impoverished 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 ACA enacts a procedure for a state to seek a waiver from some of the Act's provisions. 42 U.S.C. § 18052. Beginning in 2017, if a state has enacted legislation that provides coverage that is "at least as comprehensive," "at least as affordable," and that reaches "at least a comparable number of its residents" as does the coverage provided for under the ACA, and if that legislation would not increase the federal deficit, that state may seek a waiver of certain provisions of the Act. 42 U.S.C. § 18052(a), (b)(1). In particular, the state could seek to opt out of provisions relating to Exchanges, the distribution of premium tax

credits and cost-sharing subsidies, and the large employer tax provision (26 U.S.C. § 4980H) and the minimum coverage provision (26 U.S.C. § 5000A). *Id.* The amount of forgone tax credits would then be distributed directly to the state to administer its plan. 42 U.S.C. § 18052(a)(3).

This waiver procedure would be an empty formality if, as the plaintiffs would have it, a state already had the power to prevent the application of central features of the ACA within its borders, simply by declining to establish its own Exchange. Congress intended a state to be eligible for a waiver only after first enacting an alternative system to provide equally comprehensive and affordable health coverage. Congress certainly did not intend, then, that simply by declining to operate an Exchange, a state could effectively obtain a waiver from providing a functioning and affordable system of health coverage in that state.

These and other provisions in the ACA "reflect an assumption that a state-established Exchange exists in each state." *Halbig*, 2014 WL 129023, at *16.[7] Under the plaintiffs' reading, "these provisions would be nullified when applied to states without state-run Exchanges, leading to strange or absurd results." *Id.* "These provisions make far more sense when construed 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

[7] This list of anomalies in the plaintiffs' theory is far from exhaustive. Other examples abound. *See, e.g.*, 26 U.S.C. § 125(f)(3) (exclusion from employee's gross income for benefits offered in a cafeteria plan would apply for plans offered on a federally-run Exchange, but not on a state-operated Exchange); 42 U.S.C. § 1320b-23(a)(2) (pharmacy benefits managers would provide certain pricing information to HHS if the plan is offered on a state-operated Exchange, but not on a federally-run Exchange); 42 U.S.C. § 1396w-3(b)(1)(D) (federally-run Exchange would not be subject to provisions concerning coordination of Medicaid and CHIP benefits); 42 U.S.C. § 18031(d)(4)(G) (all Exchanges are required to provide an electronic calculator to cost of coverage after application of premium tax credits); 42 U.S.C. § 18031(d)(4)(I) (all Exchanges are required to send information to IRS concerning individuals found to be eligible for premium tax credits).

under [42 U.S.C. § 18031]'" on behalf of the state that elects not to establish the required Exchange. *Id.*

D. The Plaintiffs' Position Would Undermine Congress's Objective to Make Affordable Insurance Available in the Non-Group Health Insurance Market

The plaintiffs fundamentally err by suggesting a reading of the ACA that would undermine Congress's basic goals in passing that legislation. Their theory is in tension with the principle that a law must be interpreted in light of its "object and policy": "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Maracich v. Spears*, 133 S. Ct. at 2203 (internal quotation omitted). In other words, in evaluating the plaintiffs' theory, the Court must guard against "the danger that the federal program would be impaired if state law were to control," and thus must "look to the purpose of the statute to ascertain what is intended." *Mississippi Band of Choctaw Indians*, 490 U.S. at 44 (internal quotation omitted).

As noted above, the purpose of the Affordable Care Act is "to increase the number of Americans covered by health insurance and decrease the cost of health care." *NFIB*, 132 S. Ct. at 2580. In combination, the Act's provisions are designed to achieve "near-universal coverage" for all Americans. 42 U.S.C. § 18091(2)(D). Congress accordingly enacted a set of interrelated provisions in Title I of the ACA that, working together, have reformed what was the dysfunctional non-group health insurance market. In particular, Congress: (1) extended federal subsidies to the non-group market (*i.e.*, premium tax credits under 26 U.S.C. § 36B and cost-sharing subsidies under 42 U.S.C. § 18071(c)(2)); (2) barred insurers from denying coverage because of an individual's medical condition or history, 42 U.S.C. §§ 300gg-1, 300gg-3, 300gg-4(a), or charging higher premiums for coverage because of medical condition or

history, 42 U.S.C. § 300gg(a)(1), 300gg-4(b) (the guaranteed-issue and community-rating requirements); and (3) required that non-exempted individuals maintain minimum essential health coverage or else pay a tax penalty, 26 U.S.C. § 5000A (the minimum coverage provision).

Congress understood that the guaranteed-issue and community-rating requirements, if enacted alone, would create a substantial adverse selection effect that would undermine its goal of expanding the availability of affordable health coverage. Accordingly, Congress coupled these requirements with the minimum coverage provision and premium tax credits designed to provide "Affordable Coverage Choices for All Americans." ACA Title I, Subtitle E. Congress found that the premium tax credits "are *key* to ensuring people affordable health coverage." H.R. REP. NO. 111-443, vol. 1, at 250 (2010) (emphasis added).

Given this background, it is not tenable to suggest that Congress meant to withhold tax credits from individuals in states with federally-facilitated Exchanges. Congress sought to *reform* the non-group market, not to *destroy* it. The plaintiffs' "proposed construction in this case – that tax credits are available only for those purchasing insurance from state-run Exchanges – runs counter to this central purpose of the ACA: to provide affordable health care to virtually all Americans." *Halbig*, 2014 WL 129023, *16; *see also King*, 2014 WL 637365, at *14. Insurers in states with federally-run Exchanges would still be required to comply with guaranteed-issue and community-rating rules, but, without tax subsidies to encourage broad participation in the market, insurers would be deprived of the broad risk pool needed to make those reforms viable. Adverse selection would cause premiums to rise, further discouraging market participation, and the result would be a "death spiral" in the individual insurance markets in states with federally-run Exchanges. *See* Jonathan Gruber, *Health Care Reform Is a*

"Three-Legged Stool": The Costs of Partially Repealing the Affordable Care Act (Aug. 2010) (Exh. 12).[8]

The plaintiffs contend that Congress intended precisely this result, because, in their account, Congress meant to "encourage States to establish Exchanges," School Corporations S.J. Br. 36, and Congress elevated this goal above its purpose to provide for affordable, universally available health coverage. This assertion is implausible. "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." *Halbig*, 2014 WL 129023, at *17. It should not be surprising, then, that "there is simply no evidence in the statute itself or in the legislative history of any intent by Congress to ensure that states established their own Exchanges." *Id.* at *16.

Congress did, of course, intend to give states the *option* whether to operate an Exchange. That is why it enacted the statute that it did, presuming in the first instance that "[a]n Exchange shall be a governmental agency or nonprofit entity that is established by a State," 42 U.S.C. § 18031(d)(1), but directing the federal government to stand in the shoes of the state to create the Exchange if the state chooses not to take the necessary action to do so, 42 U.S.C. § 18041(c)(1). Thus, as Senator Baucus put it, the ACA "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) (Exh. 14); *see also* 156 Cong. Rec. H2423-24 (Mar. 25, 2010) (Rep. Waxman) (Exh. 15). It does not follow, however, that a

[8] *See also Health Reform in the 21st Century: Insurance Market Reforms: Hearing Before the H. Comm. on Ways and Means*, 111th Cong., 1st Sess. 13 (Apr. 22, 2009) (statement of Uwe Reinhardt, Prof. of Econ., Princeton Univ.) (Exh. 13) (noting importance of "adequate public subsidies" to achievement of Congress's purposes in health reform legislation); *id*. at 50 (statement of Linda Blumberg, Principal Research Assoc., Urban Inst.) (same).

Congress that sought to show that it was *solicitous* of states' interests in choosing whether to operate their own Exchanges would try to prove the point by *threatening* to deprive those states' residents of tax credits, amounting to billions of dollars annually, if the states did not comply.[9]

In sum, when Congress enacted the ACA, it did not enact a statute that would be at war with itself. It did not enact comprehensive reform legislation for the purpose of expanding the availability of affordable health insurance, and at the same time hide a provision in the text that would undermine the possibility that that goal could be achieved. The plaintiffs' reading of the ACA to allow for affordable health insurance in some states but not others is implausible.

E. The Legislative History of the Act Confirms that Federal Premium Tax Credits Are Available on Federally-Run Exchanges

If Congress had intended to penalize states for a failure to establish an Exchange by depriving those states' citizens of federal premium tax credits, Congress would have explained those terms clearly and directly at the time that the Act was passed. *See Mississippi Band of Choctaw Indians*, 490 U.S. at 43 (plain language required before it will be presumed that

[9] The plaintiffs cite an expired statute, the Trade Adjustment Assistance Act (TAAA), as an example of Congress's use of the "tactic of incentivizing States through offering tax incentives that voters can receive only if the State adopts policies that advance federal policies." Indiana S.J. Br. 9. This misdescribes the TAAA. That statute provided a tax credit 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, and 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 make its tax credits available in some states but not others. 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, understood that the statute would no longer be required once the Exchange-related provisions of the ACA came into effect in 2014. It is doubtful that Congress would have terminated this program for health insurance tax credits – which, again, 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.

Congress intended federal law to turn on state action). Indeed, such a dramatic condition on the availability of federal premium tax credits would have been a central feature of Congress's reform effort. But there is not a word in the legislative history that any member of Congress contemplated such a result. "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991).

Instead, the legislative history confirms that Congress meant premium tax credits to be available in every state, consistent with Treasury's rule. *First*, CBO's cost analyses show that Congress understood that the federal premium tax credits would apply nationwide. CBO played a central role in Congress's deliberations on the ACA. CBO, along with the Joint Committee on Taxation ("JCT"), prepared analyses that estimated the cost of premiums in the Exchanges and the numbers of individuals who would enroll in plans on the Exchanges; these analyses assumed that tax credits would be available in every state. *See, e.g.*, *Analysis of Health Insurance Premiums* 6-7. Congress relied heavily on these estimates in debating the merits of the ACA; indeed, the Act itself recites that Congress had adopted CBO's findings. Pub. L. No. 111-148, § 1563(a), 124 Stat. 119, 270-71 (2010). There is no indication anywhere in the legislative record that any member of Congress took issue with CBO's assumption that tax credits would be available nationwide.[10] *See* 155 Cong. Rec. S12,764 (Dec. 9, 2009) (Sen. Baucus) (Exh. 17) (discussing CBO's finding that most participants in "the exchange" would

[10] *See also* Letter from Douglas Elmendorf, Director, CBO, to Rep. Darrell Issa, Chair, House Committee on Oversight and Gov't Reform at 1 (Dec. 6, 2012) (Exh. 16) ("To the best of our recollection, 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 staff when the legislation was being considered. Nor was the issue raised during consideration of earlier versions of the legislation in 2009 and 2010, when CBO had anticipated, in its analyses, that the credits would be available in every state.").

receive tax credits, reducing their overall costs); 155 Cong. Rec. S13,559 (Dec. 20, 2009) (Sen. Durbin) (Exh. 18) (describing comprehensive availability of tax credits).

To the contrary, members of Congress affirmed that tax credits would be available in every state. Senator Landrieu quoted a poll question describing the ACA as legislation in which "[l]ower and middle income people would receive subsidies to help them afford" insurance on a "[n]ational [i]nsurance Exchange," and declared that description to be "very accurate." 155 Cong. Rec. S13,733 (Dec. 22, 2009) (Exh. 19). Senator Johnson noted that the ACA would "form health insurance exchanges in every State" and would "provide tax credits to significantly reduce the cost of purchasing" coverage on the Exchanges. 155 Cong. Rec. S13,375 (Dec. 17, 2009) (Exh. 20). Similarly, Senator Bingaman noted that the ACA would create "a new health insurance exchange in each State which will provide Americans … refundable tax credits to ensure that coverage is affordable." 155 Cong. Rec. S12,358 (Dec. 4, 2009) (Exh. 21). *See also* 155 Cong. Rec. S11,964 (Nov. 21, 2009) (Sen. Baucus) (Exh. 22) ("Under our bill, new exchanges will provide one-stop shops where plans are presented in a simple, consistent format. … And tax credits will help to ensure all Americans can afford quality health insurance."). Even the Act's opponents agreed that subsidies would be available on the federally-run Exchanges: "From our perspective, these state-based exchanges are very little in difference between the House version – which has a big federal exchange. … [W]hat we're basically saying to people making less than 400 FPL, or in real language, it's about $100,000, is don't worry about it. Taxpayers got you covered."). CQ Transcriptions, *Rep. John M. Spratt Jr., Holds a Markup on the Reconciliation Act of 2010*, at 64 (H. Comm. on Budget Mar. 15, 2010) (commercial transcript) (Exh. 23).

Second, the JCT prepared a report on the ACA's tax provisions. That report further confirms that Congress intended federal premium tax credits to be available for the purchase of insurance on the federally-facilitated Exchange. The JCT stated that the Section 36B premium tax credit "subsidizes the purchase of certain health insurance plans through an exchange," without any suggestion that the identity of the entity operating 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) (Exh. 24).[11] If Congress had intended federal premium tax credits to be available only in states with state-operated Exchanges, JCT would have made note of that fact.

Third, the House passed a bill that explicitly provided for federal tax credits on a federally-run Exchange. Its bill would have created a federal Exchange that would operate as the default Exchange, unless a state received a waiver to operate its own Exchange. H.R. 3962, 111th Cong., §§ 301, 308 (2009). The bill provided for tax credits for participants in any of the Exchanges. *Id.*, §§ 308(b)(1)(A)(iv), 341(a). If the Senate-passed bill had changed this scheme to provide for tax credits in some states but not others, one would expect House members to have noticed this change. There is no indication, however, that any member of Congress believed that the two bills differed on this issue. Instead, 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

[11] To be sure, a JCT report is prepared by committee staff. But, because that staff is closely involved in the formulation of taxing provisions such as Section 36B, the courts have recognized that the JCT's reports are "highly indicative of what Congress did, in fact, intend." *Kikalos v. Commissioner*, 190 F.3d 791, 798 (7th Cir. 1999) (internal quotation omitted).

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* at 1-2 (Mar. 20, 2010) (Exh. 25).

Moreover, the House paid careful attention to the amount of federal premium tax credits under the Act. As a condition to the enactment of the ACA, the Senate accepted the House's amendments to Section 36B in contemporaneously-enacted legislation, the Health Care and Education Reconciliation Act of 2010 (HCERA), Pub. L. No. 111-152, 124 Stat. 1029. HCERA adjusted Section 36B to provide a more generous formula for the calculation of premium tax credits. *Id.*, § 1001(a), 124 Stat. at 1030-31. It is doubtful that the House would have paid such close attention to the *amount* of these credits, while at the same time silently acceding to legislation that foreclosed tax credits *entirely* in some states.

Fourth, the language that became 26 U.S.C. § 36B was developed in the Senate Finance Committee, but 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. To the contrary, to the extent that the issue arose at all, the Finance Committee expressed its understanding that the federally-facilitated Exchange would be 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) (Exh. 26); *see also Halbig*, 2014 WL 129023, at *17. The committee would not have used such language in its report if it had believed the Secretary-established Exchange was a different entity from the "state exchange."

In sum, all of the legislative history points to the same conclusion: Congress intended that the federal premium tax credits would be available for the participants in every Exchange, as

part of "a nationwide scheme of taxation uniform in its application," *Irvine*, 511 U.S. at 238. If Congress had had the opposite intent, surely some legislative history would so indicate. That silence is a powerful indication that the plaintiffs' reading of the Act is incorrect.

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

A. The Treasury Regulation Is Entitled to *Chevron* Deference

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), establishes a two-step framework that governs the plaintiffs' challenge to the Treasury regulation. "First, applying the ordinary tools of statutory construction, the court must determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter[.]" *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). Under the second step, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* In other words, no matter whether the case involves a "big, important" issue or a "humdrum, run-of-the-mill" one, "the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *Id.* (emphasis in original). "If the agency's answer is based on a permissible construction of the statute, that is the end of the matter." *Id.* at 1874-75.

For the reasons discussed above, Congress has made its intent clear that federal premium tax credits are available for participants in federally-run Exchanges. Under the ordinary tools of statutory construction, the statute's text, structure, purpose, and history all compel this conclusion, and Treasury's reading of Section 36B should prevail under *Chevron* step one. But

even assuming that "the statute could be characterized as ambiguous – which it cannot – [the Treasury regulation] must be upheld at *Chevron* step two as a permissible construction of the statute." *Halbig*, 2014 WL 129023, at *18 n.14; *see also King*, 2014 WL 637365, at *16.[12]

The plaintiffs contend that *Chevron* deference does not apply in cases involving tax credits. School Corporations S.J. Br. 29. They cite no case so holding, and no such case exists. Although tax benefits are not to be presumed, that is not a "clear statement" rule that would trump *Chevron* deference. Instead, a tax benefit, even if "not supported by express statutory language," can "nonetheless be recognized if it is in harmony with the statute as an organic whole." *Centex Corp. v. United States*, 395 F.3d 1283, 1295 (Fed. Cir. 2005); *see also Int'l Trading Co. v. Commissioner*, 484 F.2d 707, 711-12 (7th Cir. 1973). Thus, Treasury is entitled to *Chevron* deference in its construction of the Internal Revenue Code, whether it is interpreting a statute that imposes a tax, or one that confers a tax benefit. *See Mayo Found. for Med. Educ. & Res. v. United States*, 131 S. Ct. 704, 711-12 (2011) (upholding Treasury's reasonable construction of tax exemption statute). The relevant canon here, instead, 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," *Irvine*, 511 U.S. at 238. *See also Lyeth v. Hoey*, 305 U.S. 188, 194 (1938) (uniformity canon applies with same force for taxing statutes and tax exemption statutes).

[12] The plaintiffs misquote a Congressional Research Service report, which, they claim, concluded that the Treasury regulation would fail under *Chevron* Step One. School Corporations S.J. Br. 23. That report instead concluded that the regulation would likely be upheld. Cong. Res. Serv., *Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act* at 8-10 (July 23, 2012).

B. This Court Should Defer to the Treasury Department's Reasonable Interpretation of Section 36B

It follows from the foregoing that 26 C.F.R. § 1.36B-1(k) "is based on a permissible construction of the statute" under *Chevron* step two. *City of Arlington*, 133 S. Ct. at 1868. Given Congress's instruction in the ACA to treat the federally-run Exchange as the same entity as the Exchange that the Act contemplated that the state would establish; its instruction in Section 36B itself that the federally-facilitated Exchange shall assist in administering premium tax credits; the long list of anomalies that a contrary reading would create in the operation of the ACA's provisions; the absence of any legislative history that would support that contrary reading; and Congress's clear purpose to expand the availability of affordable health coverage, Treasury reasonably concluded that premium tax credits are available for participants in federally-facilitated Exchanges. Its interpretation should be upheld under *Chevron* step two.

III. 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 allege that the Section 4980H large employer tax and the Section 6056 reporting provision, as applied to state governments, violate the Tenth Amendment.[13] 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 regulate 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); *Florida v.*

[13] The plaintiffs apparently mean to argue that the school corporations would also be immune from taxation under their Tenth Amendment theory, but they do not explain why their theory would extend immunity to a state's political subdivisions. In any event, the school corporations' Tenth Amendment claim fails for the same reasons that Indiana's claim fails.

U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d at 1152-54 & n.14. "Neutrality between governmental and private spheres is a principal ground on which the Supreme Court has held that states may be subjected to regulation when they participate in the economic marketplace – for example, by hiring workers covered by the Fair Labor Standards Act." *Travis v. Reno*, 163 F.3d 1000, 1002 (7th Cir. 1998). Likewise, 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) ("[T]he best safeguard against excessive taxation (and the most judicially manageable) is the requirement that the government tax in a nondiscriminatory fashion."); *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.[14]

Section 4980H applies a tax on nondiscriminatory terms to both private and public employers, and both public and private employers are subject to the same reporting obligations under Section 6056. State employers may be subject to this taxing provision, then, in the same manner as they are subject to other well-established employment taxes, such as income tax withholding provisions or 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.

The plaintiffs acknowledge that, if *Garcia* remains valid, it would foreclose their claims, and they recite their Tenth Amendment claim "to preserve it on appeal." Indiana S.J. Br. at 23

[14] Section 4980H and Section 6056 are valid exercises both of Congress's commerce power and its taxing power. *See Liberty Univ. v. Lew*, 733 F.3d 72, 91-98 (4th Cir.), *cert. denied*, 134 S. Ct. 683 (2013). The plaintiffs accordingly would need to prevail on both their *Garcia* claim and their tax immunity claim in order to claim Tenth Amendment immunity from these provisions. They can succeed on neither claim, however.

n.6. They suggest, however, that *Garcia* has been implicitly overruled by subsequent Supreme Court decisions. *Id.* at 27. This argument is unavailing. As an initial matter, only the Supreme Court may overrule its prior decisions; lower courts remain bound by existing Supreme Court authority until that authority is overruled. *See United States v. O'Brien*, 560 U.S. 218, 224 (2010). More to the point, there is nothing in more recent Supreme Court authority that suggests that *Garcia* does not remain good law. To the contrary, in *Reno v. Condon*, the Court unanimously upheld the validity of a statute of "general applicability" that imposed regulations directly on a state government. 528 U.S. at 151.[15]

Because the plaintiffs cannot prevail on Counts II or III, their claim in Count IV for the invalidation of additional provisions of the Act (which claim, by the plaintiffs' own admission, only arises if they first succeed on Count III, Am. Compl., ¶¶ 219-220) must fail as well.[16] In any event, they do not adequately explain their contention that certain additional provisions in the Affordable Care Act would not be severable from Section 6056.

Questions of severability turn on Congressional intent; "The question here is whether Congress would have wanted the [challenged provisions] to stand, had it known that

[15] The plaintiffs also suggest that the Court could distinguish *Garcia* as upholding the validity only of those generally applicable regulations that may be found in Title 29 of the United States Code. Indiana S.J. Br. 27. There is no principled rationale to hold that the scope of Congress's power depend on which title of the United States Code it uses.

[16] The provisions that the plaintiffs claim cannot be severed from Section 6056 are, in addition to Section 4980H: (1) the requirement that some large employers that offer health coverage to their employees to provide automatic enrollment for their full-time employees in their plan, 29 U.S.C. § 218a; (2) the requirement that some employers to notify their employees of the existence of an Exchange and of the employees' potential eligibility for Section 36B premium tax credits for the purchase of insurance through the Exchange, 29 U.S.C. § 218b; and (3) the exclusion from an employee's gross income the cost of health coverage provided by an employer, as part of a cafeteria plan, through a QHP offered on an Exchange, 26 U.S.C. § 125(f).

[hypothetically, the Section 6056 reporting provision is invalid as applied to state employers]. Unless it is 'evident' that the answer is no, we must leave the rest of the Act intact." *NFIB*, 132 S. Ct. at 2607 (plurality opinion) (internal quotations omitted). The plaintiffs bear a heavy burden under this test, but they do not offer any argument at all in support of their nonseverability theory. Even if Section 6056 could be validly applied only to private employers and not also to state employers, each of the additional provisions that the plaintiffs have challenged "will remain fully operative as a law, and will still function in a way consistent with Congress' basic objectives in enacting the statute." *Id.* at 2608 (internal quotations omitted). Thus, there is no basis to strike down additional provisions of the Act, even if (contrary to controlling precedent) plaintiffs were somehow to prevail on their as-applied challenge to Section 6056.

IV. 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 Internal Revenue Code affords the Secretary of the Treasury the authority to "prescribe all needful rules and regulations for the enforcement of" the Code, "including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." 26 U.S.C. § 7805(a). Treasury exercised this transitional authority to determine that the Section 4980H tax assessment and the Section 6056 reporting requirement will not begin to be applied until 2015. *See* 26 C.F.R. §§ 54.4980H-4(h); 54.4980H-5(g); 301.6056-1(m); 301.6056-2(b). In Count V of the amended complaint, the plaintiffs seek what they call a declaration of "judicial estoppel" that would bind the defendants to this determination. As an initial matter, for the reasons explained in the defendants' motion to dismiss, this case does not present any case or controversy that this Court could adjudicate. The parties are fully in

agreement that these provisions will not be applied in 2014, and this Court does not sit to ratify the parties' agreement on matters that are not actually in dispute. *See* MTD Br. 32-33; MTD Reply 21-23.

In any event, the plaintiffs do not state any claim for judicial estoppel. Judicial estoppel applies when a "party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal quotation omitted). Treasury has not "misled" any court by applying Section 7805(a)'s transition relief provision to phase in Section 4980H and Section 6056.[17]

Conclusion

For the foregoing reasons, the defendants respectfully request that the Court grant their cross-motion for summary judgment and deny the plaintiffs' summary judgment motions.[18]

[17] The plaintiffs cite *Wheaton College v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012), as an example of a case that "granted injunctive relief" in circumstances that they claim to be analogous. Indiana S.J. Br. 35. No injunction was granted in *Wheaton College*; the court instead held an appeal in abeyance pending the issuance of final regulations. 703 F.3d at 553. When those regulations were issued, the court remanded the case with instructions to the district court to dismiss the case for the absence of a live case or controversy. *See Wheaton College v. Sebelius*, 2013 WL 5994617 (D.D.C. Aug 19, 2013). Here, Treasury has issued final regulations that confirm, yet again, that the plaintiffs will not be subject to Section 4980H or Section 6056 for 2014.

[18] At all events, even if the plaintiffs were to prevail on any of their claims, this Court should not order any relief broader than that needed to address their particular injuries. *See Los Angeles Haven Hospice v. Sebelius*, 638 F.3d 644, 664-65 (9th Cir. 2011). Indeed, any attempt to extinguish the rights of absent parties would raise serious due process concerns. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999).

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 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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