IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. Scott Pruitt, in his official capacity as Attorney General of Oklahoma,	)	
Plaintiff,	)	
v.	)	**No. 6:11-cv-00030-RAW**
KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; and JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury,	)	
Defendants.	)	

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

The defendants, Kathleen Sebelius, in her official capacity as Secretary of the United States Department of Health and Human Services, and Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury, by the undersigned counsel, respectfully move this Court for summary judgment with respect to all claims of all parties pursuant to Rule 56 of the Federal Rules of Civil Procedure. In support of this motion, the defendants refer the Court to their Memorandum in Support of Their Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, and the exhibits accompanying thereto.

WHEREFORE, the defendants, by counsel and pursuant to Rule 56 of the Federal Rules of Civil Procedure, respectfully request that the Court award summary judgment to them with respect to all claims of all parties.

DATED this 19th day of March, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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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.

Oklahoma seeks to deny these tax credits to millions of Americans who need the credits to purchase health insurance in states, like Oklahoma, where the federal government operates the Exchange. It asserts its 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, Oklahoma has not raised a justiciable claim. It does not have standing under Article III, as it has not shown that its own tax circumstances are affected in any way by the availability of these tax credits for Oklahoma residents. Moreover, if Oklahoma had suffered any injury, that injury could not be redressed here, because this Court could not extinguish absent parties' rights to these tax credits. Oklahoma's 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, Oklahoma's reading of the Act is incorrect. Its argument is based on an

improper method of statutory construction, in which it 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. Its 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 Oklahoma's 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.

Oklahoma also claims that the ACA violates the Tenth Amendment by directing the federal government to operate the Exchange for states that have chosen not to do so. This does not state a Tenth Amendment claim. The Act's Exchange provisions do not command Oklahoma to do, or refrain from doing, anything. The Tenth Amendment is not implicated here.

Statement of Material Facts

I. The Affordable Care Act

1. 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

2. 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.

3. 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).

4. 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).

5. Because of the high cost of policies sold in the non-group insurance market and restrictions on coverage, participation in that 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

6. 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.

7. *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).

8. 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).

9. 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) (Exh. 4). More recent CBO projections indicate that the average tax subsidy will be $4,700 per person in 2014, rising to $7,900 in 2023, and that, by 2018, 80% of people who buy non-group policies through the Exchanges (20 million of 25 million) will receive premium tax credits. CBO, *The Budget and Economic Outlook: 2014 to 2024* 108 (Feb. 2014) (Exh. 5).

10. *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.

11. *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).

12. *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).

13. 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.

14. *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. The large employer tax assessment will begin to be applied in 2015. *See* 26 C.F.R. § 54.4980H-4(h); 54.4980H-5(g).

* * *

15. 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.

16. 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.* 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).

17. 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.

18. 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.

II. This Litigation

19. The State of Oklahoma has brought suit to challenge the validity of a Treasury regulation that interprets the ACA to provide for premium tax credits for participants in all of the Exchanges, whether state- or federally-run. 26 C.F.R. § 1.36B-1(k). It asserts that these tax credits are available only on state-run Exchanges. Because the federal government operates the Exchange in this state, Oklahoma argues, Oklahoma residents are not eligible for the substantial federal tax relief available to other states' residents under 26 U.S.C. § 36B. Oklahoma asserts that it has standing to challenge the Treasury regulation because it is a large employer under 26 U.S.C. § 4980H, and the receipt of tax credits by any of its employees would trigger its liability for a tax under that provision for a failure to provide adequate coverage to those employees.

20. Oklahoma, however, offers health coverage for its full-time employees (and their dependents) that meets the ACA's standards for minimum value and affordability. Okla. Employee Benefits Dep't, *2014 Benefits Enrollment Guide* at 3-5, 33 (Exh. 9). Oklahoma asserts that it may still face liability under Section 4980H because it fails to offer coverage to employees that it classifies as part-time, but whom it contends would be treated as "full-time employees" for

the purposes of Section 4980H. As will be explained below, Oklahoma will not incur Section 4980H liability for any of the part-time employees that it has described in its briefing.

21. In its amended complaint, Oklahoma asserted five counts, raising constitutional challenges to particular provisions of the ACA, and challenges to the validity of 26 C.F.R. §1.36B-1(k). This Court has dismissed two of those counts (Counts I and IV). Order, ECF 71. With respect to Oklahoma's challenges to the validity of the Treasury regulation (Counts II and III), this Court held that Oklahoma had adequately alleged at the motion to dismiss stage that it had standing to challenge the regulation because of its potential liability for the Section 4980H tax, but it noted that Oklahoma would need to prove its standing on that ground at the summary judgment stage. *Id.* at 18-20. This Court rejected Oklahoma's claim that it had standing as a sovereign state to challenge the regulation. *Id.* at 16. This Court also permitted Oklahoma to proceed with its claim (Count V) that the ACA's provision for federal Exchanges, 42 U.S.C. § 18041(c), unconstitutionally commandeers state resources. *Id.* at 21.

Response to Statement of Material Facts

1. This paragraph states only conclusions of law, and not assertions of fact.

2. The first two sentences misstate the cited material. In 2009, the House passed a bill that would have created a single, national Exchange that would operate in every state, unless a state received a waiver to operate its own Exchange. H.R. 3962, 111th Cong., §§ 301, 308 (2009) (Exh. 10). The Senate passed a bill that "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) (Exh. 11). The third sentence accurately quotes the cited news article, but fails to note the article's observation that Senator Nelson's vote "doesn't mean much," nor does the cited article

contain any reference to any "prevailing Senate view" that the plaintiff purports to describe.

3. This paragraph states only conclusions of law, and not assertions of fact.

4. The text of this paragraph states only conclusions of law, and not assertions of fact. Footnote 2 accurately quotes the cited material, but that material does not contain any support for the plaintiff's assertion of Professor Jost's "influence on the ACA," or that Professor Jost advocated in Congress for any one of the options that his paper described.

5. The first sentence contains no support for the assertion that Congress "had to entice" states to establish Exchanges. Instead, the Act "fundamentally gives States the choice" whether to do so. 155 Cong. Rec. S13,832 (Dec. 23, 2009) (Sen. Baucus). The remainder of this paragraph states only conclusions of law, and not assertions of fact.

6. The first sentence is undisputed. The second and third sentences, to the extent that they state assertions of fact, are disputed. HHS is operating an Exchange in the State of Oklahoma, and by definition under the ACA, that Exchange is the Section 1311 Exchange that is established on the state's behalf. *See Halbig*, 2014 WL 192023, at *14.

7. The first two sentences are undisputed. As to the third sentence, it is undisputed that HHS is operating federally-facilitated Exchanges in each of the states that elected not to operate their own Exchanges, but it is disputed that this is a "near-national marketplace"; separate federally-facilitated Exchanges operate in each state that has so elected.

8-14. These paragraphs state only conclusions of law, and not assertions of fact.

15. Undisputed.

16. It is undisputed that, during its rulemaking process, the Department of the Treasury received both comments that supported its interpretation of Section 36B to provide that federal tax credits are available on the federally-facilitated Exchanges, and comments that

opposed that interpretation. Those comments are part of the administrative record, which is on file with the Court in this case and which speaks for itself.

17. Undisputed.

18. This paragraph accurately quotes the cited material, but the paragraph contains no support for the assertion as to the "sum total of the justification in the administrative record" for the Treasury regulation at issue here. The administrative record is on file with the Court in this case and speaks for itself.

19-24. These paragraphs, including footnote 3 of paragraph 19, contain only conclusions of law, and not assertions of fact.

25. As to the first sentence, it is undisputed that the State of Oklahoma is an applicable large employer under 26 U.S.C. § 4980H. The second and third sentences contain only conclusions of law, and not assertions of fact.

26. As to the first sentence, it is undisputed that Oklahoma offers its employees (and their dependents) health coverage that meets the ACA's standards for minimum value and affordability, but it is disputed that there are any "full-time employees" of the state to whom Oklahoma fails to offer such coverage; the record evidence submitted by Oklahoma does not so demonstrate. The second sentence is disputed for the same reason.

27. This paragraph, including footnote 4, contains only conclusions of law, and not assertions of fact.

28. The first sentence is undisputed. The second sentence is disputed; Oklahoma would not incur liability for the large employer tax under 26 U.S.C. § 4980H for any of the state employees identified as examples in Mr. Doerflinger's affidavit.

29. Undisputed.

30. This paragraph is disputed. Oklahoma has not shown that it faces any liability under 26 U.S.C. § 4980H, and it certainly does not face liability "of not less than $71,994,000 annually." Oklahoma's assertion to this effect is premised on a misreading of 26 U.S.C. § 4980H and its implementing regulations.

31. This paragraph is disputed for the same reason that paragraph 30 is disputed.

32-35. These paragraphs, including footnote 5 of paragraph 32, contain only conclusions of law and not assertions of fact.

36. This paragraph is disputed, as the cited material does not acknowledge the Treasury Department's regulations, which "minimize the cost" to large employers of their reporting obligation under 26 U.S.C. § 6056. 79 Fed. Reg. 13,231, 13,247 (Mar. 10, 2014).

Argument

I. Oklahoma's Challenge to the Treasury Regulation Is Not Justiciable

A. Oklahoma Does Not Suffer an Injury in Fact from the Treasury Regulation

To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010). A plaintiff may not show standing simply by asserting that it is subject to regulation: "to hold that *any* member of a regulated class automatically has standing to challenge a regulation regardless of injury, would, in some cases, eviscerate the constitutional standing requirement of injury in fact." *Qwest Comm'ns v. FCC*, 240 F.3d 886, 892 (10th Cir. 2001). Nor may a plaintiff show standing by speculating that it may be subject to some injury in the future. "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is

certainly impending. Thus, [the Supreme Court has] repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (Supreme Court's emphasis; internal quotations omitted). "[A]t the summary judgment stage, the elements of standing must be set forth, through specific facts, by affidavit or other evidence." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005).

Oklahoma asserts that it has standing to litigate its employees' eligibility for federal premium tax credits under 26 U.S.C. § 36B, because those employees' receipt of the tax credits may trigger its liability for the large employer tax under 26 U.S.C. § 4980H. But Oklahoma already offers adequate coverage to its state employees (and their dependents) who are "scheduled to work at least 1,000 hours per year," apart from temporary or seasonal employees. *2014 Benefits Enrollment Guide* at 33. Oklahoma thus faces no Section 4980H liability for those employees. *See* 26 U.S.C. §§ 36B(c)(2)(C), 4980H(a), (b). Oklahoma acknowledges this point, Pl.'s Mot. for S.J. and Br. in Supp. ("Pl.'s Br.") 12, ECF 87, but contends that it still faces a tax for its failure to offer coverage to some employees whom it treats as part-time, but who, it contends, would be treated as full-time under Section 4980H. *See* 26 U.S.C. § 4980H(c)(4) (employee is full-time if he or she is employed on average at least 30 hours per week).

Oklahoma's argument rests on a misreading of Section 4980H and its implementing regulations.[1] It describes two categories of employees with respect to whom, it contends, it faces

[1] Oklahoma's claim that it faces "an assessment of not less than $71,940,000" if it fails to offer coverage to "as few as one" of its full-time employees, Doerflinger Aff., ¶¶ 20, 21, is wildly misplaced. It assumes that it faces a tax under 26 U.S.C. § 4980H(a), under which an employer that fails to offer any coverage to its full-time employees can incur a tax of $2,000 a year multiplied by all of its full-time employees (less the first 30). Oklahoma could be subject to that tax only if it failed to offer minimum essential coverage to five percent or more of its full-time employees. 26 C.F.R. § 54.4980H-4(a). Oklahoma *does* offer coverage to its full-time

potential liability for the Section 4980H large employer tax. It is incorrect in both instances. First, it alleges that it may be taxed for a failure to offer coverage to variable-hour Tourism, Parks and Recreation Department (TPR) employees who work fewer than 1600 hours over a twelve-month period. Affidavit of Preston L. Doerflinger, ¶ 15, ECF 87-12; *see also id.* ¶ 49. Section 4980H, however, permits an employer to use a "look back" method of up to twelve months after the date of hire for newly-hired, variable-hour employees, to determine whether those employees have averaged more than 30 hours a week over that period; only after that period (as well as an additional, optional 90-day administrative period) expires could those employees be treated as full-time for the purposes of Section 4980H. 26 C.F.R. § 54.4980H-3(d)(1), (d)(3). Oklahoma has not described any cases in which any TPR employees would be treated as full-time under Section 4980H before they would gain eligibility for coverage under Oklahoma's existing policies. *See* Doerflinger Aff. ¶ 49 (listing four examples, none of which would trigger Section 4980H liability for Oklahoma).[2]

Second, Oklahoma alleges that it may face a tax for a failure to offer coverage to "999 employees," that is, employees for whom it does not know, at the time that they are hired, whether they will work for more than 1,000 hours over the first year of their service. Doerflinger Aff. ¶ 17. But, again, Oklahoma may use a "look back" method, applying a measurement period of as long as twelve months, before any newly-hired employees will be treated as full-time, if it

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employees, so it will not incur the Section 4980H(a) tax. The only tax that is even arguably at issue here is the tax under Section 4980H(b), which amounts to $3,000 per year for each *particular* full-time employee who obtains a Section 36B tax credit. As noted in the text, however, Oklahoma has failed to show that it faces any liability even under this provision.

[2] Oklahoma's assertion to the contrary appears to rest on simple mathematical errors. For example, employee TMW worked 1893 hours over the course of his or her first twelve months of employment (March 2011 to February 2012). Doerflinger Aff. ¶ 49(A). Because TMW exceeded 1600 hours of service, his or her entitlement to health coverage under Oklahoma's policies arose *sooner* than Section 4980H would have treated him or her as a full-time employee.

is not known at the time of that employee's hire how many hours he or she will serve. 26 C.F.R. § 54.4980H-3(d)(1), (d)(3). Oklahoma would not face liability for any of its "999 employees."[3]

Because Oklahoma cannot allege that it is likely, as opposed to speculative, that it will be subject to the Section 4980H penalty, it lacks standing to seek to litigate the potential application of the penalty to it as an employer. *See, e.g.*, *Morgan v. McCotter*, 365 F.3d 882, 888 (10th Cir. 2004) ("mere possibility" of "future injury" is inadequate to establish injury-in-fact).[4]

B. Even If Oklahoma Suffered an Injury in Fact, That Injury Would Not Be Redressible Here

Oklahoma must show that it is "likely as opposed to merely speculative that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It has not met this burden. No judgment in this action could bind the parties who are not present here, namely, the Oklahoma state employees who Oklahoma contends may receive federal tax credits (if any such employees exist). Those employees could bring their own claims for tax credits in a separate proceeding, even if this Court were to accept Oklahoma's reading of the Internal Revenue Code in this case. Because Oklahoma could not extinguish the claims of those absent parties in this suit, it could not gain redress from the injury that it claims would result from those employees' receipt of federal tax credits. *See Nova Health Sys.*, 416 F.3d at

[3] Oklahoma argues that it is also injured in that, as an "applicable large employer," it must comply with tax reporting obligations under 26 U.S.C. § 6056. Pl.'s Br. 23. These reporting obligations apply to every applicable large employer, whether or not the employees of that employer receive premium tax credits, and whether or not that employer owes a Section 4980H tax. 26 U.S.C. § 6056(a); 26 C.F.R. §§ 54.4980H-1(a)(4), 301.6056-1(b)(2). Thus, Oklahoma's claimed injury would not be redressed in this suit; it would remain obliged to comply with Section 6056 regardless of any relief it receives here.

[4] Oklahoma also seeks to revive its earlier arguments that it has standing because it is a sovereign state, or because Congress purportedly granted it statutory standing to litigate the eligibility of third parties for premium tax credits. Pl.'s Br. 24-26. This Court has rejected these arguments, Order at 1-16, ECF 71, and properly so, for the reasons that the Court has already explained.

1158-59; *see also University Med. Ctr. of S. Nevada v. Shalala*, 173 F.3d 438, 441-42 (D.C. Cir. 1999); *Comite de Apoyo a los Trabajadores Agricolas v. U.S. Dep't of Labor*, 995 F.2d 510, 514 (4th Cir. 1993). As a result, Oklahoma lacks standing to challenge the Treasury regulation.

C. Oklahoma Lacks Prudential Standing to Seek to Adjudicate the Tax Liabilities of Absent Third Parties

In addition to the requirement of Article III standing, a plaintiff must also demonstrate that he or she has prudential standing to invoke the jurisdiction of a federal court. Oklahoma's suit violates one principle of prudential standing, namely, "the principle that a party may not challenge the tax liability of another." *United States v. Williams*, 514 U.S. 527, 539 (1995).

"It is well-recognized that the standing inquiry in tax cases is more restrictive than in other cases." *Nat'l Taxpayers Union v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). The standing inquiry becomes particularly "restrictive" where a plaintiff seeks to litigate the tax liabilities of third parties who are not before the court, as Oklahoma does here by seeking an adjudication of its employees' eligibility for federal tax credits. In that context, the courts have recognized "that a party may not challenge the tax liability of another," apart from circumstances where the party stands in the shoes of the absent taxpayer. *Williams*, 514 U.S. at 539. Accordingly, the Supreme Court has expressed doubt (without directly deciding) "whether a third party ever may challenge IRS treatment of another." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). At most, the door is "barely ajar" for third party challenges in tax litigation. *Wright v. Regan*, 656 F.2d 820, 828 (D.C. Cir. 1981), *rev'd sub nom. Allen v. Wright*, 468 U.S. 737, 748-49 (1984) (closing the door).[5]

[5] Congress has consistently legislated with this understanding. For example, a person who is subject to an IRS levy for a third party's tax debt may challenge that levy, but may not dispute the underlying tax assessment. 26 U.S.C. § 7426(c); *Aspinall v. United States*, 984 F.2d 355, 357 (10th Cir. 1993). Similarly, a person who owns property subject to a tax lien for a third party's

This principle applies with special force where, as here, a plaintiff seeks to increase the tax liabilities of third parties who are not before the court. Even if the door is "barely ajar" for plaintiffs to seek to decrease a third party's tax liability, the door should remain firmly shut for those plaintiffs who ask a federal court to impose additional federal tax obligations on absent parties. A court could not award such relief to a plaintiff in an APA action without inserting itself inappropriately into the process of tax administration:

> Congress has erected a complex structure to govern the administration and enforcement of the tax laws, and has established precise standards and procedures for judicial review of tax matters. Even if the plaintiffs succeeded in gaining the relief they seek [to prohibit favorable tax treatment for third parties] … the affected taxpayers, who are not parties, would remain free to challenge any deficiencies asserted. … It is obvious that the relief the plaintiffs seek, if granted, would seriously disrupt the entire revenue collection process.

Apache Bend Apartments, Ltd. v. United States, 987 F.2d 1174, 1177 (5th Cir. 1993). *See also Louisiana v. McAdoo*, 234 U.S. 627, 632 (1914) (declining to adjudicate third-party challenge to favorable tax treatment for another taxpayer, because the maintenance of such actions "would operate to disturb the whole revenue system of the government"). This Court accordingly should decline Oklahoma's invitation to interfere with the administration of third parties' taxes.

D. Oklahoma Must Proceed in the Forum that Congress Specified, an Action for a Tax Refund

The APA generally provides for judicial review of agency action, but it does not create a cause of action in cases where Congress has specified other judicial review procedures. In such cases, "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute," unless the statutorily specified review proceeding is "inadequa[te]." 5 U.S.C. § 703; *see also* 5 U.S.C. § 704. In other words,

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tax debt may litigate the validity of the lien in a quiet title action, but may not challenge the assessment. 28 U.S.C. § 2410; *Arford v. United States*, 934 F.2d 229, 232 (9th Cir. 1991).

the APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (internal quotation omitted). "When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies." *Id.*; *see also Raines v. Block*, 798 F.2d 377, 379-80 (10th Cir. 1986).

Oklahoma seeks to adjudicate its potential liability for a tax assessment under Section 4980H of the Internal Revenue Code. Congress has specified that a tax refund suit is the form of proceeding that a plaintiff must follow for such a claim. 28 U.S.C. § 1346. Before bringing such a suit, the taxpayer "must comply with the tax refund scheme established in the Code," *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4 (2008), including the requirements that the tax has been assessed, that the taxpayer has made payment in full, and that he or she has filed an administrative claim for a refund before bringing suit. *See United States v. Dalm*, 494 U.S. 596, 609-10 (1990). Congress thus has specified the form of proceeding that the taxpayer must follow "in an unusually emphatic form." *Clintwood Elkhorn*, 553 U.S. at 7 (internal quotation omitted). And, in enacting Section 4980H, Congress has reiterated that the employer's remedy for a challenge to that tax would arise in a refund action. *See* 26 U.S.C. § 4980H(d)(3) (describing procedure for repayment of tax to the employer if an employee's tax credit is later disallowed). It is well-settled that a refund action provides an adequate remedy, even though the tax must first be imposed before the suit is brought. *See, e.g., Bob Jones Univ. v. Simon*, 416 U.S. 725, 742 (1974); *Alexander v. Americans United, Inc.*, 416 U.S. 752, 762 (1974). The APA does not duplicate this remedy, and Oklahoma must present its claims in a refund suit.[6]

[6] The defendants contend that the Anti-Injunction Act, 26 U.S.C. § 7421(a), presents an

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

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

Oklahoma argues 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 its view, Oklahoma residents are ineligible for these federal tax credits, because the federal government operates the Exchange in this state. It premises its 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). Oklahoma reasons that the amount of the tax credit for Oklahomans 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 United States v. Williams*, 376 F.3d 1048, 1052 (10th Cir. 2004). "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

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independent jurisdictional barrier to Oklahoma's claims, but recognize that this Court has ruled to the contrary. Order at 22, ECF 71.

(2007) (emphasis in original; internal quotations omitted); *see also Lee v. Mukasey*, 527 F.3d 1103, 1106 (10th Cir. 2008). Courts also must employ all of the "traditional tools of statutory construction," including "examination of the statute's text, purpose, history and relationship to other statutes." *Harbert v. Healthcare Serv. Group, Inc.*, 391 F.3d 1140, 1147 (10th Cir. 2004).

Oklahoma acknowledges these points, *see* Pl.'s Br. 27 (quoting *Harbert*), but it fails to apply them. The phrase in Section 36B(b)(2)(A) upon which it relies 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.

Oklahoma attempts 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). Oklahoma contends 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 192023, at *14 (emphasis and alteration in original).

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.*, *In re Meredith Hoffman Partners*, 12 F.3d 1549, 1555 (10th Cir. 1993) ("[s]uch creditor" refers to the only previous mention of creditor in section 547(b)").

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.

Oklahoma's contrary reading fails to give effect to the ACA's definitional provisions. Moreover, its 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).[7]

Moreover, "the statutory formula for calculating the tax credit seems an odd place to 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)). *See also Salt Lake Tribune Pub. Co. v. Mgt. Planning, Inc.*, 390 F.3d 684, 688 (10th Cir. 2004). 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

[7] Oklahoma relies almost entirely on the canon against surplusage. *See* Pl.'s Br. 32. 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, "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). Oklahoma's theory "would render superfluous other portions of the ACA, such as the advance reporting requirements of Section 36B(f). Thus, the canon against surplusage is of no use here." *Halbig*, 2014 WL 129023, at *14 n.11.

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).[8] "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.

[8] 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.

Under Oklahoma's 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. 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.").

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). "The reason for doing so is clear: a provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1200 (10th Cir. 2007) (internal quotation omitted). A review of Congress' use of the "same terminology" elsewhere in the ACA, and of

the "substantive effect" of those provisions, shows that, when Congress referred to a state-established Exchange, it included the Exchange established by the Secretary on a state's behalf.

1. Under Oklahoma's Reading of the Act, Nobody Would Be Eligible to Buy Insurance on a Federally-Run Exchange, a Result that Congress Could Not Have Intended

Under Oklahoma's 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).[9] 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. 2552, 2563 (2013) (adjacent statutory provisions "should be read in harmony"). So, under Oklahoma's reading, 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 could serve only as a Potemkin marketplace.[10] "'Courts presume that Congress has used its

[9] *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").

[10] It would follow, moreover, that the language in Section 36B upon which Oklahoma relies would be surplusage, even under its 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

scarce legislative time to enact statutes that have some legal consequence.'" *Halbig*, 2014 WL 129023, at *15 (quoting *Fund for Animals*, 472 F.3d at 877); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995) (interpretation that would leave a statutory provision "utterly without effect" is "a result to be avoided if possible"); *King*, 2014 WL 637365, at *11-12.

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 Oklahoma's 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, Oklahoma's reading should be rejected.

2. Oklahoma's 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. Oklahoma's 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

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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.

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.*

The language in 42 U.S.C. § 1396a(gg)(1) is identical to the language upon which Oklahoma relies in 26 U.S.C. § 36B(b)(2)(A). As Oklahoma acknowledges, Pl.'s Br. 4-5, under its 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, Oklahoma itself has relied on the expiration of this provision. Before 2014, under Oklahoma's Medicaid state plan, pregnant women were eligible for Medicaid coverage if their income was at or below 185% of the federal poverty line. Declaration of Anne Marie Costello (Exh. 12), ¶ 2 & Exh. A. Effective January 1, 2014, however, Oklahoma, with HHS's approval, amended its state plan to reduce the income threshold for Medicaid eligibility for pregnant women to 133% of the federal poverty line. *Id.*, ¶ 3 & Exh. B. Oklahoma could not have reduced this threshold under the theory that it offers here. It could not impose an "eligibility standard" that is "more restrictive" than its previous standard without creating its own Exchange, under its theory. Oklahoma 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. *See Penny v. Giuffrida*, 897 F.2d 1543, 1545 (10th Cir. 1990).[11]

[11] *See also* Gov. Mary Fallin, *Press Release: Governor Fallin Announces Extension of Insure*

Coordination of CHIP benefits with the Exchanges. Oklahoma's 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 Oklahoma's 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

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Oklahoma (Sept. 6, 2013) (Exh. 13) (announcing reduction in income cap for the state's Insure Oklahoma plan from 200% to 100% of federal poverty level, and noting that "[t]hose individuals above 100 percent of the Federal Poverty Level qualify for the federal Health Insurance Marketplace and related advance premium tax credits, which will be offered to individuals and families earning up to 400 percent of the Federal Poverty Level").

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 Oklahoma 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.[12] Under Oklahoma's 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

[12] This list of anomalies in Oklahoma's theory is far from exhaustive. Other examples abound. *See, e.g.*, 26 U.S.C. § 125(f)(3) (effective 2014) (exclusion from employee's gross income for benefits offered in a cafeteria plan would apply for plans offered on a federally-facilitated 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-facilitated Exchange); 42 U.S.C. § 1396w-3(b)(1)(D) (federally-facilitated 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).

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

Oklahoma fundamentally errs by suggesting a reading of the ACA that would undermine Congress's basic goals in passing that legislation. Its 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 Oklahoma's 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 in tandem, have reformed what was the dysfunctional non-group health insurance market. To reform that market, 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. Oklahoma's "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. 14). As Oklahoma's counsel puts the matter, if his client's position were to be adopted, "the structure of the ACA will

crumble." Scott Pruitt, *ObamaCare's Next Legal Challenge*, The Wall Street Journal (Dec. 1, 2013) (Exh. 15). "While much time has been devoted in Washington to the issue of 'defunding' the Affordable Care Act, the success of these lawsuits would have much the same effect." *Id.*

In this Court, however, Oklahoma's counsel asserts that this result is precisely what Congress intended. Oklahoma claims that Congress meant to give the states "incentives to establish an Exchange," Pl.'s Br. 36, and that it 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); *see also* 156 Cong. Rec. H2423-24 (Mar. 25, 2010) (Rep. Waxman) (Exh. 16). It does not follow, however, that a 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.

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. Oklahoma's 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 Congress will be presumed to intend 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 anybody in 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 consistently points to the conclusion 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.[13] *See* 155 Cong. Rec. S12,764 (Dec. 9, 2009) (Sen. Baucus) (Exh. 18) (discussing CBO's finding that most participants in "the exchange" would receive tax credits, reducing their overall costs); 155 Cong. Rec. S13,559 (Dec. 20, 2009) (Sen. Durbin) (Exh. 19) (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. 20). 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. 21). 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. 22).

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

[13] *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. 17) ("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.").

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. 23).[14] 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 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*

[14] 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." *Miller v. United States*, 65 F.3d 687, 690 (8th Cir. 1995) (internal quotation omitted). *See also Security State Bank v. Commissioner*, 214 F.3d 1254, 1259-60 (10th Cir. 2000) (relying on JCT report).

Insurance Exchanges at 1-2 (Mar. 20, 2010) (Exh. 24).

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. 25); *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 Oklahoma's reading of the Act is incorrect.

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

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 Oklahoma's 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." *City of Arlington*, 133 S. Ct. at 1868. 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.

Oklahoma asserts that Treasury is not owed this deference, because the agency shares

responsibility for administering parts of the Act with HHS. Pl.'s Br. 34-35. This argument is doubly misplaced. First, Treasury and HHS fully agree that residents of every state are eligible for premium tax credits. There is no reason to deny *Chevron* deference to Treasury's expert judgment, simply because that judgment is also shared by HHS. Second, Congress expressly delegated rulemaking power to Treasury here, so there is no need to speculate whether Congress intended an implicit delegation or not.

As Treasury recited when it proposed the regulation at issue here, it has "work[ed] in close coordination [with HHS] to release guidance related to Exchanges, in several phases." 76 Fed. Reg. 50,931, 50,932 (Aug. 17, 2011). Through this process of close coordination, both Treasury and HHS issued notice-and-comment regulations that provide that state-operated and federally-facilitated Exchanges are to be treated alike for all purposes relevant here. Treasury, for its part, promulgated 26 C.F.R. § 1.36B-1(k), the regulation challenged here, providing that participants in any Exchange may be eligible for Section 36B tax credits. HHS, likewise, has determined that participants in any of the Exchanges may be eligible for advance payments of the premium tax credit, regardless of who runs the Exchange. *See* 45 C.F.R. § 155.20 (advance payments are provided for eligible individuals enrolled in a plan "through an Exchange"); 45 C.F.R. § 155.305(a), (f) (listing criteria for eligibility for advance payments). HHS has also determined that cost-sharing reductions under 42 U.S.C. § 18071 (which turn on tax credit eligibility) are available for participants in any Exchange. 45 C.F.R. §§ 155.20, 155.305(a), (g).

Given that the two agencies are in full agreement, *Chevron* deference plainly applies here. *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665-66 (2007) (deferring to regulation jointly issued by Departments of Commerce and Interior under the Endangered Species Act); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S.

261, 277-78 (2009) (deferring to agencies' interpretation of shared-administration statute).[15] Indeed, both Treasury and HHS are co-defendants here. Both agencies agree that Treasury has primary authority to interpret Section 36B, and they both stand behind their consistent interpretations in their arguments before this Court. Consequently, *Chevron* deference applies.

Moreover, Congress *expressly* delegated authority to Treasury to resolve any ambiguities in Section 36B. *See* 26 U.S.C. § 36B(g) ("The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section."); *see also* 26 U.S.C. § 7805(a). Treasury's exercise of this express grant of authority is entitled to deference. *See Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 715 (2011). *Mayo* involved parallel (and identical) provisions in the Internal Revenue Code and the Social Security Act, the former exempting students from FICA taxes, and the latter withholding Social Security benefits from the same students. The Court accorded *Chevron* deference to Treasury, even though the case involved, in part, an interpretation of the Social Security Act (which is administered by the Social Security Administration, not by Treasury). Indeed, the Court noted that Treasury had reasonably considered "the purpose of the Social Security Act," and had "take[n] into account the SSA's concern[s]," in upholding the agency's interpretation. 131 S. Ct. at 715.

Oklahoma also contends that *Chevron* deference does not apply in cases involving tax credits. Pl.'s Br. 33. It cites no case so holding, and no such case exists. Although tax benefits

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[15] *See also Toomer v. City Cab*, 443 F.3d 1191, 1196 (10th Cir. 2006) (deferring to Transportation Department regulations under statute also implemented by other agencies); *Mainstream Marketing Servs. v. FTC*, 358 F.3d 1228, 1250 (10th Cir. 2004) (deferring to FTC's construction of statute it jointly administered with the FCC); *NISH v. Rumsfeld*, 348 F.3d 1263, 1271 (10th Cir. 2003) (deferring to Air Force's interpretation of a statute, where the Air Force had relied on the Department of Education's interpretation of that statute); *Quivira Min. Co. v. NRC*, 866 F.2d 1246, 1248, 1258 (10th Cir. 1989) (deferring to NRC regulations under the Uranium Mill Tailings Radiation Control Act, which "assigned regulatory responsibilities to the Department of Energy, the Environmental Protection Agency (EPA) and the NRC").

are not to be presumed, that is not a "clear statement" rule. 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 Colorado Gas Compression, Inc. v. Commissioner*, 366 F.3d 863, 868 (10th Cir. 2004). 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.*, 131 S. Ct. at 711-12 (upholding Treasury's reasonable construction of tax exemption statute).[16] 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.

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,

[16] Oklahoma also invokes a canon against changes in the "usual constitutional balance between the States and the Federal Government," which it argues that Treasury has violated by disrupting "States' policy determinations as to what health insurance its large employers must offer." Pl.'s Br. 33-34. But Congress has regulated the terms of large-group health coverage for decades. *See supra*, pp. 3-4. There is no doubt whatsoever regarding Congress' power to do so. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552-53 (1944).

Treasury reasonably concluded that premium tax credits are available for participants in federally-facilitated Exchanges. Its interpretation should be upheld under *Chevron* step two.

Oklahoma also asserts that Treasury acted arbitrarily and capriciously by failing to address the legal arguments that it has presented in this case. Pl.'s Br. 37-38. Particularly where (as here) the 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 Department's rule is a 'reasonable interpretation' of the enacted text"). In any event, none of the legal arguments that Oklahoma has described is relevant, for the reasons that the defendants have explained above.[17]

IV. The Act's Exchange Provisions Do Not Violate the Tenth Amendment

Last, Oklahoma contends that the ACA's provisions for federally-run Exchanges violate the Tenth Amendment, because the federal government "unconstitutionally commandeers state authority" by doing so. Pl.'s Br. 43. It asks the court to enjoin the operation of the federally-run Exchange in this state to remedy this alleged violation. Pl.'s Br. 45. This does not state a Tenth Amendment claim. A state could assert a Tenth Amendment commandeering claim if a federal measure commands the state to take action, *e.g.*, *New York v. United States*, 505 U.S. 144 (1992) (federal law required state to take title to nuclear waste or enact federally-approved regulations), or if a federal measure prohibits specified state action, *e.g.*, *Oregon v. Mitchell*, 400 U.S. 112

[17] Oklahoma also contends that Treasury violated the Congressional Review Act, 5 U.S.C. § 804, by purportedly failing to consider the economic impact of the regulation. Pl.'s Br. 38-39. That claim is not reviewable here. 5 U.S.C. § 805; *Via Christi Regional Med. Ctr. v. Leavitt*, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007).

(1970) (federal law prohibited literacy tests or residency requirements in state elections). The ACA's Exchange provisions do not command Oklahoma to do, or refrain from doing, anything. As this Court has noted, "[t]he provision of federal tax credits to Oklahoma residents does not command Oklahoma officials to take action, or refrain from taking any action. All pertinent conduct takes place at the federal level." Order at 15, ECF 71.

Instead, 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 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 1120, 1154-56 (N.D. Fla. 2010), *rev'd in part on other grounds by NFIB. 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). Because 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 does not violate the Tenth Amendment.[18]

Conclusion

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

[18] At all events, even if Oklahoma were to prevail on any of its claims, this Court should not order any relief broader than that needed to address Oklahoma's particular injuries. *See Los Angeles Haven Hospice v. Sebelius*, 638 F.3d 644, 664-65 (9th Cir. 2011); *Hospice of New Mexico, LLC v. Sebelius*, 691 F. Supp. 2d 1275, 1294 (D.N.M. 2010), *aff'd*, 435 Fed. Appx. 749 (10th 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).

DATED this 19th day of March, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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