UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
	)	CASE NO. 1:13-cv-1612-WTL-TAB
INTERNAL REVENUE SERVICE, et al.,	)	
	)	
	)	
	)	
Defendants.	)	

STATE OF INDIANA'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM IN SUPPORT OF ITS OWN MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

1. The Federal Government's overwrought statutory interpretation arguments cannot negate the simple, straightforward text of the ACA, which specifically says that employer-mandate-triggering tax credit subsidies are available only for those who purchase insurance from an American Health Benefit Exchange "established by the State under [Section] 1311 of the [ACA]." The IRS Rule providing tax credits to those who purchase from an exchange established and operated by the Federal Government is contrary to this text of ACA Sections 1401-02, and it violates the Administrative Procedure Act.[1] The Federal Government argues that applying the plain text of the statute would lead to "anomalies" in other sections of the Act, but most of those supposed "anomalies" actually support the State's interpretations, and none is so troubling as to justify re-writing the statute by regulatory fiat.

The Federal Government premises its entire argument on Congress's desire to achieve near-universal health insurance coverage, but never acknowledges that countervailing policies and interests forced compromises and choices—an obvious one being that Congress created a complex scheme involving purchase mandates and insurance exchanges rather than simply create health insurance as a universal entitlement. The exchange system in turn creates significant burdens for any government undertaking to create one, including not only designing, developing and staffing, but also ongoing funding and being held accountable for the likely complications that attend massive new government programs. *See* State Pls.' Mem. Supp. Mot. Summ. J. ("State's SJ Br.") [dkt. 45] at 9. Congress needed a way to induce states to assume all these burdens, and it

[1] As with the opening briefs supporting the Motion for Summary Judgment, Indiana adopts and incorporates by reference the arguments made by the Schools in their Reply brief [dkt. 63].

settled on providing tax credits for lower income purchasers of insurance on exchanges "established by the State." That inducement, however, would not exist if subsidies were available even where insurance is purchased on Federally-established exchanges.

In this regard, the Federal Government repeatedly stresses the point that various provisions of the ACA "'reflect an assumption that a state-established Exchange exists in each state.'" Defs.' Mem. Supp. Cross-Mot. Summ. J. ("Defs.' SJ Br.") [dkt. 62] at 28 (quoting *Halbig*, 2014 WL 129023, at *16). But that is *precisely* the State's point: Congress thought the ACA as written would induce all 50 States to set up exchanges because sizeable tax subsidies for each States' citizens depended on it.

2. With respect to Plaintiffs' Tenth Amendment Claims, the Federal Government claims a vision of its own power that is plainly not what the Constitution envisions. The Tenth Amendment both establishes the doctrine of enumerated powers, then separately restricts certain exercises even of those delegated powers when they violate the sovereignty of the States. The Federal Government's argument would render both aspects of the Tenth Amendment a virtual nullity.

The Supreme Court has already rebuffed the Federal Government regarding the Affordable Care Act, rejecting both the Federal Government's claim of unlimited power under the Commerce Clause and its refusal to recognize any limit under the Spending Clause. The Federal Government is refusing yet again to heed the Supreme Court's firm instruction regarding the meaningful limits of Federal power under Article I, Section 8, and the implications of the constitutional reality that the States are coequal to the Federal Government in terms of dignity and sovereignty. The Tax Clause does not authorize subjecting the States to a system of direct federal taxation in ACA Section 1513 or

Section 1514, nor does the Commerce Clause permit it through compelling State activity in Section 1513.

This Court must remind the Federal Government of those limits here by entering summary judgment in favor of Plaintiffs and against Defendants and by enjoining enforcement of ACA Sections 1511, 1512, 1513, 1514, and 1515, which cannot be severed one from another. The Court should also declare the Federal Government estopped from enforcing ACA Employer Mandate penalties for the year 2014 against Plaintiffs, in view of the Administration's purported suspension of the Employer Mandate, which on its own is patently unlawful. The Federal Government disclaims any intent to enforce the Employer Mandate for the year 2014, so enjoining it from doing so would cause it no harm while providing Plaintiffs and other employers greater certainty with respect to what the law currently requires.

RESPONSE TO STATEMENT OF MATERIAL FACTS

The Federal Government's response brief spends ten pages ostensibly setting forth "facts" that it considers "material" to this case. That discussion, however, contains many assertions that are either not "material," not "facts," or both. Most of these are obviously irrelevant statements concerning ACA background or statutory and regulatory citations that warrant no response. A few, however, are worth rebutting, including the following:

1. The Federal Government says that in 2009, before the ACA was even enacted, CBO projected that "78% of people who would buy non-group insurance policies through Exchanges (18 million of 23 million) would receive premium tax credits," but that by 2017 only 76% who purchase policies on the exchanges will receive

premium tax credits. Defs.' SJ Br. [dkt. 62] at 6. Projections about the percentage of purchasers who may receive subsidies say nothing about whether the text of Section 36B provides subsidies only to those who purchase plans on a State-run exchange.

2. The Federal Government asserts that "premiums for plans on the Exchanges are substantially lower than what had initially been projected." Defs.' SJ Br. [dkt. 62] at 11. First, neither the phenomenon of "adverse selection" nor the premium costs for plans offered on State and Federal exchanges are material to the issues in this case. They have nothing to do with whether Congress nonetheless authorized premium tax credits only for purchases on State-run exchanges, as the plain text of Section 36B says. Especially when enacting a vast, complex regulatory scheme like the ACA, Congress must balance competing policy interests, and, as a tool to induce States to operate the exchanges, Section 36B represents such a bargain.

Second, the Federal Government cites 2013 data to support its conclusion that premiums are lower than some expected, but the guaranteed-issue and community-rating provisions, as well as the Individual Mandate and premium subsidies, did not go into effect until January 1, 2014, so there is no way to know what the actual impact of these reforms will be. ACA §§ 1201 (codified at 42 U.S.C. §§ 300gg-1, -4), 1501(b) (codified at 26 U.S.C. § 5000A).

3. Similarly, the Federal Government asserts that "[t]he 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." Defs.' SJ Br. [dkt. 62] at 10. For this assertion, the Federal Government submits a study: Linda J. Blumberg & John Holahan,

Health Status of Exchange Enrollees: Putting Rate Shock in Perspective (Urban Institute, July 2013). As with the CBO report addressing plan costs, this study is based on pre-exchange, pre-subsidy data. It does not, and cannot, constitute evidence of what is actually happening in health insurance markets in the wake of the rollout of the Federal and State exchanges at the end of 2013 and the beginning of 2014. More fundamentally, however, the impact of subsidies on these markets says nothing about whether Congress wrote a statute that authorized subsidies only when policies are purchased on exchanges "established by the State[.]" *See* 26 U.S.C. § 36B(b)(2)(A).

4. The Federal Government also includes in its "Statement of Material Facts" various assertions about the course of this litigation. They use this as an opportunity to repeat the canard that the State somehow "waived" its Tenth Amendment arguments during the course of briefing the Motion to Dismiss. Defs.' SJ Br. [dkt. 62] at 13. Needless to say, this assertion does not constitute an uncontested material "fact." In its tendered sur-reply brief, [dkt. 56a], the State explains in painstaking detail why the Federal Government's waiver argument is implausible. Just for starters, the State spent more than five times as many pages discussing the merits of its Tenth Amendment argument in its Motion to Dismiss brief than the Federal Government did in its brief. State's Resp. to MTD Br. [dkt. 38] at 22-28; Defs.' MTD Br. [dkt. 37] at 31-32. With this brief, the Court will now have over 35 pages of briefing from both sides devoted to the Tenth Amendment claims, so there is no reason to proceed as if the issue has not been sufficiently briefed.

ARGUMENT

I. Plaintiffs Must Prevail on Their APA Claim Because Plain Text—Not Broad Divinations of Legislative Intent—Controls

A. Statutory text says only State exchanges established under ACA Section 1311 trigger the Employer Mandate

The Federal Government wrote more than 25 pages attempting to explain why the Court should ignore the plain language of the statute. *See* Defs.' SJ Br. [dkt. 62] at 14-39. It argues that the Court must look at the whole Act instead of the language of the specific provision at issue. *Id.* at 14. But it does not—and cannot—provide any explanation as to why the legislature twice used the words "established by the State under [Section] 1311 of the [ACA]" if that was not what the legislature intended the statute to say. *See* 26 U.S.C. § 36B(b)(2)(A); 26 U.S.C. § 36B(c)(2)(A)(i); *see also* 26 U.S.C. § 36B(b)(3)(B)(i) (referring to the "established by the State" language); 26 U.S.C. § 36B(b)(3)(C) (same); 26 U.S.C. § 36B(e)(1)(A) (same).

1. "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (internal quotations omitted). The Seventh Circuit has held that courts must begin statutory analysis "with the words of the statute. The language of a statute controls when that language is sufficiently clear." *Jones v. Hanley Dawson Cadillac Co.*, 848 F.2d 803, 806-07 (7th Cir. 1988) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976)).

Congress' statutory design—taken as a whole—involves the States joining the ACA system. None of the cases the Federal Government cites—*Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010);

Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 239 (2004); *Wells Fargo Bank v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 694 (7th Cir. 2011)—ignored the plain meaning of statutory text—and *ignore* specific phrases such as "established by a State" *and* statutory cross-references such as "under 1311"—to somehow fish around for a countertextual meaning. Where statutory language clearly expresses something, this Court does not look elsewhere for incompatible meanings. *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1047 (7th Cir. 2013). A reading contrary to that suggested by the Federal Government is compelled by the plain language of the ACA.

The words of Section 36B could not be clearer. Unless a taxpayer enrolls through an exchange "established by the State under [Section] 1311 of the [ACA]," the taxpayer has no "coverage months" and therefore no "premium assistance credit amounts." *See* School Pls.' Mem. Supp. Mot. Summ. J. ("Schools' SJ Br.") [dkt. 54] at Part I.B. The legislature chose these words, and they mean that if the taxpayer's State is served by the Federal exchange, no premium assistance subsidies are available. Nothing about that language is ambiguous. The Supreme Court has specifically expressed a longstanding "unwillingness to soften the import of Congress' chosen words even if [it] believe[s] the words lead to a harsh outcome[.]" *Lamie*, 540 U.S. at 538. This unwillingness to change statutory language "results from 'deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill.'" *Id.* (quoting *United States v. Locke*, 471 U.S. 84, 95 (1985)).

The Federal Government's "textual" argument is based around its suggestion that "Congress's use of the phrase 'such Exchange' in Section [1321(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 [Section 1311]." Defs.' SJ Br. [dkt. 62] at 17. It cannot explain, however, how HHS could possibly establish the State-created governmental agency or State-created non-profit entity that is required to establish the exchange within the meaning of Section 1311. ACA § 1311(d)(1); 42 U.S.C. § 18031(d)(1). The answer is, of course, that HHS could never create such a State agency. This is not a power possessed by any Federal entity. As such, the Federal Government's interpretation of the text cannot be correct. The language in Section 1321 directing HHS to create "such Exchange" can mean only "an American Health Benefit Exchange," not "an Exchange established by the State under 1311."

In addition, if the Federal Government actually believed that exchanges run by HHS are deemed to be State-run exchanges, the Federal exchanges would be funded by the same unlimited appropriation that the ACA authorized for "State" exchanges. ACA § 1311(a). However, HHS has acknowledged instead that it had no access to that pool of money. *See* Amy Goldstein & Juliet Eilperin, *HealthCare.gov: How Political Fear Was Pitted Against Technical Needs*, Wash. Post, Nov. 2, 2013, *available at* http://www.washingtonpost.com/politics/challenges-have-dogged-obamas-health-plan-since-2010/2013/11/02/453fba42-426b-11e3-a624-41d661b0bb78_story.html (noting that responsibility for the Federal exchange was given to Centers for Medicare and Medicaid Services for "financial" reasons, because ACA "provided plenty of money to help states build their own insurance exchanges," but "no money for the development of a federal exchange").

2. The Federal Government suggests that its reading of the statute is entitled to deference because "a contrary reading is not compelled by the plain language of the

Act[.]" Defs.' SJ Br. [dkt. 62] at 15. As discussed above, this is not true. The IRS's atextual interpretation of the Act is not entitled to *Chevron* deference.

Chevron makes it clear that when Congress directly addresses an issue, this Court "must give effect to the unambiguously expressed intent of Congress." *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). The Federal Government admits that "the court must [first] determine whether Congress has directly spoken to the precise question at issue." Defs.' SJ Br. [dkt. 62] at 37 (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)). It goes on to argue that by using the words "established by the State under [Section] 1311 of the [ACA]," 26 U.S.C. § 36B(b)(2)(A), "Congress has made its intent clear that federal premium tax credits are available for participants in federally-run Exchanges . . . and Treasury's reading of Section 36B should prevail under *Chevron* step one." Defs.' SJ Br. [dkt. 62] at 37. This is nonsense. It is far from "clear" that by using the words "established by the State" and specifically mentioning Section 1311, that Congress plainly meant "established by HHS" under Section 1321. The Plaintiffs, not the Federal Government, should win under *Chevron* Step One because the plain text refers only to exchanges "established by the State[.]"

Only if the statute is "silent or ambiguous" on a matter, which is not the case here, would the court move to *Chevron* Step Two. *Chevron*, 467 U.S. at 843. But even in Step Two, the Treasury Department is not necessarily entitled to deference because "some questions of law do not depend on agency expertise for their resolution." *Zivkovic v. Holder*, 724 F.3d 894, 897 (7th Cir. 2013). The Federal Government cannot overcome the fact that "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Lamie*, 540

U.S. at 538 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). Neither Treasury, nor this Court, should re-write the statute that Congress enacted, which says that subsidies only apply to State-enacted exchanges.

B. Canons of interpretation confirm that only State exchanges trigger subsidies

Relevant canons of statutory construction, even those invoked by the Federal Government, all favor applying the plain text of Section 36B.

1. **The Rule Against Surplusage**: The Federal Government's interpretation of Section 36B renders much of it superfluous. It cannot explain why Congress twice stated that subsidies apply for persons who enroll through an exchange "*established by the State* under *1311*[.]" 26 U.S.C. § 36B(b)(2)(A) (emphases added); 26 U.S.C. § 36B(c)(2)(A)(i). Use of the words "by the State" deliberately excludes the Federal Government (or "Secretary"), and "1311" deliberately excludes "1321." The fact that Congress included both "State" and "1311" makes it even more clear that it intended the provision to apply exclusively to State-run exchanges.

Because the Federal Government has no explanation as to why Congress used this language if it did not intend to limit subsidies to State-run exchanges, it says instead that surplusage is permitted and that the Plaintiffs' interpretation would render other parts of the ACA superfluous. Defs.' SJ Br. [dkt. 62] at 18 n.2. However, the Supreme Court has held that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23

(1983)). There can be little doubt that Congress intentionally used the terms "by the State" and "1311" in Section 36B.

Congress understands that distinguishing between Federal and State action is important. *See Duncan v. Walker*, 533 U.S. 167, 173-74 (2001) ("[T]he words 'State' and 'Federal' are likely to be of no small import[.]"). In discussing the habeas statute, the Court said the only likely explanation for Congress' omission of the word "Federal" in the statute was because Congress did not intend to refer to federal action. *See id.* at 173. More specifically, "[i]t would be anomalous, to say the least, for Congress to usher in federal review under the generic rubric of 'other collateral review' in a statutory provision that refers expressly to 'State' review, while denominating expressly both 'State' and 'Federal' proceedings in other parts of the same statute." *Id.*

The ACA properly distinguishes between exchanges established by the State and those established by the Secretary in other parts of the Act. For example, the same part of the same subtitle of the Act authorizes the "Secretary of Health and Human Services, *and* the Exchanges established under section 1311" to collect names and Social Security numbers. ACA § 1414(a)(2); 42 U.S.C. § 405(c)(2)(C)(x) (emphasis added). Thus, "*established by the State* under 1311" must mean what it says. "These words cannot be meaningless, else they would not have been used." *United States v. Butler*, 297 U.S. 1, 65 (1936).

2. **The Doctrine of Constitutional Avoidance**: In its opening brief, the State made the point that, by presuming to act as a State in its sovereign capacity, Congress would surely violate the Tenth Amendment every bit as much as if it merely directed the State to do its bidding. State's SJ Br. [dkt. 45] at 13-15. The Federal Government never

responds to this argument, but instead attempts to change the subject by referring to the *Florida* court's unremarkable observation that the directive to States to establish exchanges is optional for States. Defs.' SJ Br. [dkt. 62] at 17 n.1 (citing *Florida ex rel. McCollum 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, NFIB v. Sebelius*, 132 S. Ct. 2566 (2012) (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981)).

The point, however, is not that the ACA requires States to establish exchanges; indeed, the fundamental starting point of this claim is that it does not. Rather, the point is that, under the Federal Government's statutory construction theory, Congress has instead directed the Secretary to displace State legislatures and State officials and to set up and operate an exchange "established by the State under [Section] 1311 of the [ACA.]" The Federal Government never explains how the Constitution authorizes Federal officials to usurp State sovereign authority in this manner, and the need to opt for a statutory construction that avoids a substantial constitutional question favors Plaintiffs' interpretation. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (Canon of constitutional avoidance is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.").

3. **The Rule Against Dependence on State Law**: The United States invokes a supposed rule of statutory construction that courts presume that "Congress when it enacts a statute is not making the application of the federal act dependent on state law." Defs.' SJ Br. [dkt. 62] at 19 (quoting *Halbig v. Sebelius*, No. 13-623, 2014 WL 129023,

at *17 n.12 (D.D.C. Jan. 15, 2014), No. 14-5018 (D.C. Cir. argued Mar. 25, 2014)) (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989)).

First, however, neither the Federal Government nor the court in *Halbig* cites substantial support for this supposed rule of statutory construction. The *Halbig* court's recognition of this rule failed to mention the fact that the rule applies only "*in the absence of a plain indication to the contrary*[.]" *Miss. Band of Choctaw Indians*, 490 U.S. at 43 (emphasis added). The ACA specifically indicates that State law matters.

Second, it is hard to see how this rule helps the Federal Government's position, in any event. Congress made application of *several* parts of the ACA dependent on State law. The provision of the ACA requiring the Secretary to establish an exchange for operation within a State *itself* depends on State law. *See* ACA § 1321; 42 U.S.C. § 18041. It is hardly remarkable that Section 36B would follow from the same premise that varying State laws require varying regulatory responses by the Federal Government.

4. **The Rule Favoring "a nationwide scheme of taxation uniform in its application"**: Nor does *United States v. Irvine*, 511 U.S. 224 (1994), which the Federal Government cites for the proposition 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," *id.* at 238, support the Federal Government's interpretation. *See* Defs.' SJ Br. [dkt. 62] at 38.

First, the Federal Government omits the most critical component of the *Irvine* rule, which is that revenue provisions "are not to be taken as subject to state control or limitation *unless the language or necessary implication of the section involved makes its application dependent on state law*." *Irvine*, 511 U.S. at 239 (emphasis added). That is

precisely what the "language"—or at the very least its "necessary implication"—of Section 36B does. It makes premium tax credits dependent on State law. How else could an exchange "established by a State" arise, except by State law?

Second, as the passage it quotes makes clear, *Irvine* applies only to "revenue laws." *Irvine*, 511 U.S. at 238. "Revenue" laws are not the same as laws authorized under the taxing power. Rather, the Supreme Court has held "that a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally" is not a "revenue" law. *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990). Here, while Sections 36B, 1513 and 1514 are authorized only by the taxing power, they pertain to specific government programs and are not statutes that "raise[] revenue to support the Government generally." Accordingly, the *Irvine* rule of construction does not apply here in any event.

Third, as the State pointed out in its earlier brief, Congress has otherwise offered tax incentives that depend on whether the State adopts policies that advance federal priorities. *See, e.g.*, 26 U.S.C. § 35(e)(2) (conditioning whether an individual's health plan is qualified to receive favorable treatment on whether the State complies with federal standards); *see also* School Pls.' Resp. Cross-Mot. Summ. J. ("Schools' Resp. SJ Br.") [dkt. 63] at Part III.A.2. The Federal Government offers the response that (a) this section has expired, and (b) the State "misdescribe[d]" that provision. Defs.' SJ Br. [dkt. 62] at 32 n.9. First, whether a provision of the tax code has expired hardly bears on whether it represents a particular legislative tactic similar to the one at issue here. Second, the Federal Government's own description of Section 35(e)(2) only confirms the

State's point, *i.e.*, that it made federal tax credits dependent (at least in some respects) on State policy—there, whether States designated additional eligible insurance policies meeting criteria dictated by the Federal Government. As for the timing of Section 35(e)(2)'s expiration, it accords with Congress's desire to make all insurance tax credit subsidies dependent on the willingness of States to shoulder the burden of establishing and operating the exchanges.

C. No supposed "absurd results" or "anomalies" arise from applying the plain text of Section 36B, and the Federal Government's claims to the contrary cannot justify re-writing the Act

Lacking as it does any textual support for its argument, the Federal Government suggests that the language the legislature chose should be rewritten by itself and the court, relying alternatively on supposed "absurd" results and "anomalies" that might arise in other parts of the ACA. *See* Defs.' SJ Br. [dkt. 62] at 22-29. These supposed outcomes are either chimeras or reasonable consequences of legislative tradeoffs, and none justifies agency or judicial action to rewrite the Act.

1. There are no absurd results

The Federal Government argues that other parts of the ACA would be "absurd" if Section 36B is read to mean what it says—*i.e.*, that HHS is not a State. Defs.' SJ Br. [dkt. 62] at 22-29. If plain textual meaning is clear, as it is here, a court should only treat the text as ambiguous if the plain meaning would "lead to absurd results[.]" *Lamie*, 540 U.S. at 536. Absurdity, however, is a high standard. While the Federal Government might have preferred that Congress enact tax credit subsidies for all taxpayers no matter who establishes the exchange that enrolls them, it does not—and cannot—contend that it

was *absurd* for Congress instead to use subsidies to induce States to establish their own exchanges.

Furthermore, the absurd results doctrine "does not license courts to improve statutes (or rules) substantively, so that their outcomes accord more closely with judicial beliefs about how matters ought to be resolved." *Jaskolski v. Daniels*, 427 F.3d 456, 461 (7th Cir. 2005). "Equitable motivations do not give courts the authority to improve upon the plain language of a statute." *Young v. Schmucker*, 409 B.R. 477, 481 (N.D. Ind. 2008). As explained in the School Plaintiffs' brief, the "absurdities" proposed by the Federal Government can all be reasonably explained. *See* Schools' Resp. SJ Br. [dkt. 63] at Part III.A.5.

In all events, any such "absurd" results in *other* sections of the Act cannot not justify re-writing the text of Section 36B.

2. No "anomalies" justify rewriting the statute

The Federal Government also calls attention to what it terms "anomalies" that applying the plain text of Section 36B would create throughout the remainder of the ACA. The State will focus particular attention on the supposed anomalies relevant to Medicaid and a few other incidental impacts the Federal Government mentions but fails to explain.

a. The alleged Medicaid-related "anomalies" only confirm that Congress fully expected every State to establish an exchange

The Federal Government asserts that insisting on a plain-text reading of Section 36B would somehow disrupt operation of Medicaid under the ACA in light of Congress's

use of identical text elsewhere in the Act. The Federal Government's concerns are overblown and do not justify rewriting Section 36B.

- *Termination of Maintenance of Effort Requirements*: The Federal Government says that the State's reading of Section 36B would render the Medicaid "maintenance of effort" requirement perpetual with respect to States that do not adopt exchanges under Section 1311. Defs.' SJ Br. [dkt. 62] at 25-26. It says "Indiana itself has relied on the expiration of this provision" because "[e]ffective January 1, 2014, . . . Indiana, with HHS's approval, amended its state plan to reduce the income threshold for benefits for" some categories of potential Medicaid beneficiaries. *Id.* at 26.

First, Indiana did not "amend" its "state plan" as the Federal Government asserts. What the Federal Government is apparently referring to is its approval of Indiana's request for a one year renewal of the Healthy Indiana Plan, which operates as a demonstration project pursuant to a waiver granted by CMS under Section 1115 of the Social Security Act. The waiver expires at the end of 2014. In ways pertinent to the maintenance of effort provision of the ACA, Indiana's State Medicaid plan has not changed from where it stood when the ACA was passed in 2010.

Nor does the State's plain text reading of Section 36B present an "anomaly" with respect to HHS's renewal of the Healthy Indiana Plan. By the ACA's terms, the maintenance of effort provision applies until the date that the "Secretary determines that an Exchange established by the State under section 18031 of this title is fully operational[.]" 42 U.S.C. § 1396a(gg)(1). First, this text simply underscores the point that Congress assumed every State would establish an exchange—as evidenced by the

fact that its initial exchange-related appropriation did not include funds for a federal exchange. *See* ACA § 1311(a).

Second, whatever one thinks about the meaning of "established by the State," the expiration of the maintenance of effort requirement is not self-enforcing but depends on a declaration by the Secretary. Indiana could not *itself* conclude that a Federally-run exchange constitutes one "established by the State" and is therefore sufficient to terminate the maintenance of effort provision—only the Secretary can make declaration necessary to end the maintenance of effort requirement. 42 U.S.C. § 1396a(gg)(1). Incredibly (given the Federal Government's position in this case), the Secretary has never formally made this declaration with respect to Indiana. With respect to Indiana's Medicaid plan, that is of little moment, since Indiana has not altered its plan since the ACA was enacted—*i.e.*, its "effort" has been, and remains, "maintained." With respect to the Healthy Indiana Plan, however, the Secretary has approved Indiana's changes notwithstanding the lack of formal declaration under Section 1396a(gg)(1), no matter *what* the meaning of "established by the State" is. HHS has affirmatively treated the maintenance of effort requirement as expired notwithstanding the terms of Section 1396a(gg)(1). Indiana is entitled to rely on that approval and to structure its programs given how the law is currently being enforced, even as it pursues claims that may undercut that enforcement.

The Federal Government goes so far as to assert that the State, in light of the Secretary's one-year renewal of the Healthy Indiana Plan, is "estopped" from arguing that Section 36B should be applied according to its plain text. The Federal Government obviously does not think much of this theory (and for good reasons), lest it surely would

have included it as a reason to dismiss the case, or at the very least would have raised it as a stand-alone argument in its summary judgment brief. Furthermore, the case cited by the Federal Government, *Matamoros v. Grams*, 706 F.3d 783, 793 (7th Cir. 2013), in no way supports its position. That case *rejected* a claim for equitable estoppel by a former federal prisoner who alleged the U.S. Parole Commission misled him about his parole status. Notably, the Seventh Circuit both questioned whether equitable estoppel can ever be asserted against "the government" (which would include the State) *and* rejected the claim for lack of assertion of wrongdoing on the part of government officials. *Id.* at 793-94. At the very least, these same shortcomings preclude a serious estoppel argument here.

The Federal Government never explains how it is inequitable for the State to seek renewal of its demonstration waiver for the Healthy Indiana Plan while it challenges the ability of another federal agency to, in effect, expand the reach of the Employer Mandate contrary to statute. Even assuming the plain text reading of Section 36B also applies to Section 1396a(gg)(1), Indiana is entitled to structure its health care benefits programs according to HHS's interpretation of the law, even as it challenges that interpretation.

If the Federal Government's point is that the Healthy Indiana Plan will need to change if the State prevails here, that may well be true, but it is hardly remarkable. The Federal Government stresses that tax credit subsidies must be available in every State if the ACA is to be financially feasible for insurance companies selling plans on State and Federal exchanges, who after all must sell their products subject to price controls. Defs.' SJ Br. [dkt. 62] at 10-11. Accordingly, if the IRS Rule is invalid, many statutes and regulations governing health care financing will likely change, and the fate of the Healthy

Indiana Plan will once again be tailored accordingly. The desire to avoid future regulatory uncertainty, however, does not justify ignoring the plain text of Section 36B, which represents Congress's attempt to use tax credit subsidies to induce States to undertake what Congress could not command: State operation of insurance exchanges. If Congress placed a bad bet, HHS is not authorized to negate the loss.

- *Coordination of CHIP Benefits with Exchanges*: The Federal Government argues that it would be "impossible" for HHS to fulfill its obligation under 42 U.S.C. § 1397ee(d)(3)(C) to certify whether plans offered through a State-run exchange provide adequate benefits for children if "Exchange established by the State" is read to mean what it says. Defs.' SJ Br. [dkt. 62] at 27. This argument ignores the simple point that if there is no State-run exchange, there will be no "plans offered through an 'Exchange established by the State'" and would therefore be nothing for HHS to certify. HHS certification is, thus, not impossible, but unnecessary.

Further, any questions regarding CHIP eligibility would presumably be handled by the Secretary herself as she approves plans for the Federal exchange. The Secretary has broad authority to take "such actions as are necessary to implement" the Federal exchanges. 42 U.S.C. § 18041(c)(1). Thus, she independently has the authority do everything that the Act requires the State-run exchanges to do.

This is not an anomaly, but instead demonstrates the simple fact that the Secretary does not need specific statutory authority to regulate every detail of the operation of an exchange that she is already in charge of.

State Innovation Waivers: The Federal Government argues that State innovation waivers, 42 U.S.C. § 18052, "would be an empty formality if . . . 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." Defs.' SJ Br. [dkt. 62] at 28. That is not true. Innovation waivers would allow a State to opt out of the individual mandate and several other ACA provisions that are still mandatory even if tax credit subsidies are not available because a State has not established an exchange. *See* 42 U.S.C. § 18052(a)(2). Plus, only through the innovation waivers program is HHS authorized to pay to the State funds equivalent to tax credit subsidies that might have been payable to a State's citizens under another scenario. Indiana is not laying claim to any such federal dollars on account of not having a State exchange, so clearly the innovation waivers continue to have a substantial role notwithstanding the plain text of Section 36B.

b. Other "anomalies" that the Federal Government mentions do not contravene application of Section 36B's plain text

The federal government gathers a handful of other supposed anomalies in a footnote, but never bothers to explain why they are problematic. Indeed, they are not:

- *Employee Income Exclusion*: 26 U.S.C. § 125(f)(3): This provision says that there are to be no exclusions from gross income for benefits obtained through "an Exchange established under section 1311[.]" Notably, in contrast with the text of Section 36B, Section 125(f)(3) does *not* say that there are to be no exclusions for benefits obtained through "an Exchange *established by a State* under Section 1311." If anything, this textual difference underscores Plaintiffs' point that "established by a State" means something in Section 36B. A plain text reading of Section 36B thus easily facilitates the reading of Section 125(f)(3) that the Federal Government seems to think is appropriate. And even if it does not, that only supports the State's point that Congress assumed the tax

credit inducements would be sufficient to convince states to establish exchanges. There is no "anomaly" here.

- *Pricing Information to HHS*: 42 U.S.C. § 1320b-23(a)(2): Under this provision, pharmacy benefits managers are to provide certain pricing information to HHS "at such times, and in such form and manner, as the Secretary shall specify." The Federal Government apparently thinks it would be anomalous if this text were applied literally, because then there would be no requirement for pharmacy benefits managers to report pricing information with respect to plans sold on a Federal exchange. But if HHS is running the exchange, it presumably already knows this information because it would have obtained pricing information when deciding whether to approve the plan's availability on its exchange. Thus, requiring the pharmacy benefits manager to provide the information is only necessary in a State-run exchange where HHS would be less involved in managing the available plans. Again, this supposed "anomaly" is fully consonant with the State's reading of Section 36B.

- *Coordination of Medicaid and CHIP Benefits*: 42 U.S.C. § 1396w-3(b)(1)(D): This provision requires that the State Medicaid Agency, the State CHIP agency and any State-run exchange use a "secure electronic interface" to ensure that the State determines eligibility for all coverage programs an individual may be eligible for including Medicaid, CHIP, and premium subsidies in the State exchange. Again, this rule makes sense only where the target is a State exchange, not a Federal exchange, which remains fully within the Secretary's control. The Secretary has broad authority to take "such actions as are necessary to implement" the Federal exchanges. 42 U.S.C. §

18041(c)(1). Thus, if HHS is running the exchange, it can use a secure electronic interface without direct instruction from Congress.

- *Electronic Calculator after application of premium tax credits*: 42 U.S.C. § 18031(d)(4)(G): This section requires State-run exchanges to provide an electronic calculator to figure the cost of coverage after application of premium tax credits, and HHS apparently worries it would not apply to the Federal exchange if the plain text applies. *See* 42 U.S.C. § 18031(d)(1) ("An Exchange shall be a governmental agency or nonprofit entity that is established by a State."). But if Federal tax credit subsidies are available only to those who purchase coverage on a State-run exchange, there is no reason for the Federal exchange to provide such an electronic calculator. Again, this differentiation between Federal and State exchanges reinforces the State's position.

- *Communication of Information to IRS*: 42 U.S.C. § 18031(d)(4)(I): Here, State exchanges are required to send information to the IRS concerning individuals found to be eligible for premium tax credits. Again, if premium tax credits are available only to those who purchase insurance from State exchanges, there is no reason for this rule to apply to the Federal exchanges. A plain-text reading of Section 36B enables a plain-text reading here.

D. A general congressional intent to increase insurance coverage does not authorize the IRS to re-write congressionally-enacted text

The Federal Government argues that the plain language of the statute cannot be read to mean what it says because Congress' intention in passing the ACA was "to increase the number of Americans covered by health insurance and decrease the cost of health care." Defs.' SJ Br. [dkt. 62] at 29 (quoting *NFIB v. Sebelius*, 132 S. Ct. 2566, 2580 (2012)). Thus, the argument goes, if subsidies were only available for State-run

exchanges, fewer people would obtain insurance, and that is not what Congress wanted. So the Court must jump through multiple hoops in order to avoid the actual statutory language and re-write the statute so that Congress' goals are met. This is not how statutory interpretation works.

In examining legislative intent, courts must be mindful that "[i]t is easy to announce intents and hard to enact laws; the Constitution gives force only to what is enacted." *Cont'l Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund*, 916 F.2d 1154, 1157-58 (7th Cir. 1990); *see also Nat'l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 707 (7th Cir. 1994) (stating that courts do not enforce the abstract purposes of the persons who wrote and voted for statutes but rather enforce the rules embedded in the language, which may imperfectly track the purposes).

The version of the ACA that was enacted represents a balance of competing policies and trade-offs. *See, e.g.*, *Rosado v. Wyman*, 397 U.S. 397, 412 (1970) ("The background of [the statute] reveals little except that we have before us a child born of the silent union of legislative compromise."). Particularly important here, Congress wanted the States both to set up their own exchanges and to expand Medicaid, so it provided financial incentives for States to do so. *See* 26 U.S.C. § 36B; 42 U.S.C. § 18082(c).

The Federal Government insists that the billions of dollars of subsidies were not intended to encourage States to establish their own exchanges. Instead, Congress merely "intend[ed] to give states the *option* whether to operate an Exchange." Defs.' SJ Br. [dkt. 62] at 31. In the Federal Government's reading, Congress was "*solicitous* of states' interests in choosing whether to operate their own Exchanges" and, thus, would never

"*threaten*[] to deprive those states' residents of tax credits, amounting to billions of dollars annually, if the states did not comply." Defs.' SJ Br. [dkt. 62] at 32. Yet while ACA Section 1311(a) grants funding to States to set up exchanges, it contains *zero* dollars for federal administration of exchanges. *See* Amy Goldstein & Juliet Eilperin, *HealthCare.gov: How Political Fear Was Pitted Against Technical Needs*, Wash. Post, Nov. 2, 2013, *available at* http://www.washingtonpost.com/politics/challenges-have-dogged-obamas-health-plan-since-2010/2013/11/02/453fba42-426b-11e3-a624-41d661b0bb78_story.html. Congress did not budget for HHS to run an exchange in any State because it assumed the tax credit subsidies would create a sufficient inducement to persuade all 50 State legislatures to create exchanges.

Indeed, this was precisely its approach with Medicaid: "Congress assumed that every State would participate in the Medicaid expansion, given that the States had no real choice but to do so." *NFIB*, 132 S. Ct. at 2608. The Federal Government's statement that it "does not follow" from the overarching goal of expanding the availability of health insurance for Congress to "'threaten[]' to deprive" financial benefits to citizens of non-conforming states, Defs.' SJ Br. [dkt. 62] at 31-32, ignores the fact that this same Congress threatened citizens with the complete loss of Medicaid funding if their States did not do Congress's bidding.

II. To Rebut Plaintiffs' Tenth Amendment Clams, the Federal Government Asserts a Shockingly Broad Claim of Federal Power

The Federal Government is incorrect in saying that Indiana concedes that if *Garcia* is still good law, both Count II and Count III fail. Defs.' SJ Br. [dkt. 62] at 40. *Garcia* had only to do with permitting exercises of the commerce power to override State Tenth Amendment interests; it does not apply to uses of the taxing power. So, only if (1)

Garcia remains the law, *and* (2) both ACA Sections 1513 and 1514 must be understood as exercises of the Commerce power, would Counts II and III of the complaint fail.

The Federal Government claims that both the Employer Mandate—ACA § 1513; 26 U.S.C. § 4980H—and the reporting requirements—ACA § 1514; 26 U.S.C. § 6056—are "valid exercises both of Congress's commerce power and its taxing power." Defs.' SJ Br. [dkt. 62] at 40 n.14. This argument cannot be correct, however, as it would completely subsume the entire federal taxing power as a subset of the commerce power, rendering the Tax Clause, U.S. Const. I, § 8, cl. 1, completely superfluous. And after *NFIB*, Congress cannot compel non-commercial actors such as States to enter into commerce so as to regulate them under the Commerce Clause.

A. The Commerce Clause does not authorize any aspect of the Employer Mandate against States and their political subdivisions, so *Garcia* does not apply

1. *Garcia* is plainly a Commerce Clause case. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985); *see also* State's SJ Br. [dkt. 45] at 23-27. The Federal Government does not deny this. Indeed, it provides no argument refuting the State's claim that *Garcia* should not apply to Title 26 which is predicated on the Tax Clause instead of the Commerce Clause. It also does not adequately refute the State's argument that *Garcia* should be limited to regulations found in Title 29, but instead says merely that "[t]here is no principled rationale to hold that the scope of Congress's power depend on which title of the United States Code it uses." Defs.' SJ Br. [dkt. 62] at 41 n.15.

The "principled rationale," however, is set forth in the State's summary judgment brief. The *Garcia* line of cases involves federal labor law, namely Fair Labor Standards

Act provisions, codified in Title 29, whereas none of the affected statutes in Supreme Court cases in which the Court invalidated statutes on Tenth Amendment grounds subsequent to *Garcia* implicated FLSA or were codified in Title 29. State's SJ Br. [dkt. 45] at 27-28. Further, Commerce Clause cases cannot be extended to those that deal exclusively with the Tax Clause. State's SJ Br. [dkt. 45] at 28-29.

2. As the Plaintiffs argued in the Amended Complaint, Section 1514 was not authorized by the Commerce Clause. Am. Compl. [dkt. 22] at ¶ 216. Unsurprisingly, the Federal Government does not articulate any reasonable argument as to how a pure tax provision such as Section 1514 could be authorized by the Commerce Clause. So even if *Garcia* is good law, Section 1514 is still unconstitutional as a direct federal tax upon the States.

The Federal Government's broad assertion that Section 1514 can be authorized by the Commerce Clause—under *Garcia* or any other case—is deeply disturbing. Section 1514 is unquestionably a pure exercise of federal taxing power only, not any form of commercial regulation. Codified at 26 U.S.C. § 6056 in the Tax Code, it involves taxes, tax reporting, and tax certification, is exclusively administered by the Internal Revenue Service, and brings revenue into the United States Treasury. The Federal Government's brief even suggests that Section 1514 is a tax. Defs.' SJ Br. [dkt. 62] at 40 (referring to both Sections 1513 and 1514 as "taxing provision[s]").

The Tax Clause and the Commerce Clause are not interchangeable. They represent separate enumerated powers under the Constitution, concerning very different powers, explicated by separate lines of cases, which articulate very different tests. It is a shocking expansion of federal power to claim that any statutory provision that is

undoubtedly structured as a tax can be saved under the Commerce Clause. This conflates those two separate provisions of Article I, Section 8, into one unified, multifaceted federal power. It creates a constitutional hydra, where lopping off one head merely gives rise to another.

All taxes are paid with dollars, and so in order to pay any tax, the taxpaying entity must have received those dollars as revenue, whether from business (as in a corporation), or incoming taxes (as a governmental unit). The unavoidable implication is that this incoming and outgoing revenue is per se part of commerce, and therefore falls within the ambit of the Commerce Clause. But since all taxes involve incoming and outgoing dollars, the Federal Government's argument would mean that the entire Tax Clause is now subsumed within the Commerce Clause.

This approach could be used for other enumerated powers as well. The Spending Clause, Patent Clause, Raise Armies Clause, Postal Clause, District Clause, and Militia Clause—these and others—could all henceforth be merely a subset of the Commerce Clause. The Federal Government's argument would render Congress' other enumerated powers superfluous, represents a complete rejection of the core limited-government principle underlying the doctrine of enumerated powers, and must be forcefully and explicitly rejected. *See NFIB*, 132 S. Ct. at 2602.

If Congress can indiscriminately claim that any assertion of power can simultaneously be authorized by several of the eighteen Clauses of Article I, Section 8, then the doctrine of enumerated powers ceases to have meaning. That conclusion is particularly unavoidable if the Federal Government can directly tax sovereign States without limit, and couple that with a comprehensive commercial regulatory regime.

Further, the canon against surplusage will not allow such an expansive reading of the Commerce Clause as to render the Tax Clause without independent legal force. *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *see also* State's SJ Br. [dkt. 45] at 7-8 (explaining cases). Yet the Federal Government does not offer anything beyond conclusory *ipse dixit* to say that a tax provision is authorized by the Commerce Clause instead of the Tax Clause.

3. Under the new multi-factor test from *NFIB* set forth by Indiana in its opening brief, State's SJ Br. [dkt. 45] at 21-22, Section 1513 is also a federal tax, so it, too, falls outside the holding of *Garcia*. *NFIB* says that a requirement is a tax when it (1) must be "paid into the Treasury by taxpayers when they file their tax returns[,]" (2) "is found in the Internal Revenue Code and [(3)] enforced by the IRS," which (4) "must assess and collect it in the same manner as taxes," and (5) "produces at least some revenue for the Government." *NFIB*, 132 S. Ct. at 2594 (internal citations, brackets and quotation marks omitted). ACA Section 1513 meets all these requirements, and even the Federal Government admits that it is a tax. Defs.' SJ Br. [dkt. 62] at 39 ("Section 4980H large employer tax"); *id.* at 40 ("Section 4980H applies a tax"); *id.* ("State employers may be subject to this taxing provision").

Yet the Federal Government does not even acknowledge that *NFIB* has articulated a new limit under the Commerce Clause, nor that the principles articulated regarding the Spending Clause in *NFIB* to invalidate the mandatory Medicaid expansion also applies to its Tax Clause counterpart (as they are actually the two halves of the General Welfare Clause, U.S. Const. art. I, § 8, cl.1). States are not inherently commercial actors any more than human beings are inherently commercial actors, and the Commerce Clause

draws a distinction between economic and noneconomic activity. *See United States v. Morrison*, 529 U.S. 598, 616-18 (2000). Indiana already explained why this means that Section 1513 exceeds Congress' commercial authority, State's SJ Br. [dkt. 45] at 23-29, and the Federal Government does not rebut that argument.

B. Intergovernmental tax immunity doctrine bars more than discriminatory taxes

While the Supreme Court holds taxes that discriminate against States violate the intergovernmental tax immunity doctrine, it nowhere says that *all* nondiscriminatory taxes are therefore constitutional. Nondiscriminatory taxes are the "*best* safeguard" against violating the Tenth Amendment, *South Carolina v. Baker*, 485 U.S. 505, 525 n.15 (1988) (emphasis added), not the *only* safeguard. The Court in *Baker* explicitly held that the Constitution also forbids direct taxation of one level of government by another, *i.e.*, that "under current intergovernmental tax immunity doctrine the States can never tax the United States directly[,]" which is "when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities." *Id.* at 523 (internal quotation omitted). The Court added that "[t]he rule with respect to state tax immunity is essentially the same," even if reciprocal immunity is not precisely symmetrical. *Id.* The Federal Government ignores this aspect of the immunity doctrine and offers no argument as to why this direct tax—which would be unconstitutional if Indiana levied it on the United States—is constitutional when roles are reversed.

Subsequent to *Baker*, the Seventh Circuit has specifically held that Congress cannot use its taxing power to "hobble the States." *Travis v. Reno*, 163 F.3d 1000, 1003 (7th Cir. 1998). For example, a 30% revenue tax applicable to all, including State

governments, would be a nondiscriminatory tax, but it would "hobble" the State of Indiana (fiscal year 2013 revenues: $17 billion), requiring numerous programs and agencies to go dormant. Presumably the Federal Government would agree that *this* scheme would violate the intergovernmental tax immunity doctrine, notwithstanding lack of discrimination against States.

Baker did not leave "discrimination" as the sole line that Congress' tax power cannot cross pertaining to the States. After all, the fundamental principle underlying intergovernmental tax immunity is that "the power to tax involves the power to destroy[.]" *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). The Federal Government cannot directly tax the States, and the States cannot directly tax the Federal Government, and neither *Baker* nor any other case holds to the contrary.

This point has a special application when imposing ACA Sections 1513 and 1514 on the States. The Constitution only permits certain types of taxes. *See* U.S. Const. art. I, § 9, cls. 4, 5; amend. XVI. So for Sections 1513 and 1514 to be valid, they have to fit within one of those categories of permissible taxes. Corporations can be subjected to federal taxation because they are inherently commercial actors that enjoy State-granted benefits for doing business in corporate form, a rationale that authorized direct federal taxation even before the adoption of the Sixteenth Amendment. *See Flint v. Stone Tracy Co.*, 220 U.S. 107, 151-55 (1911). But that cannot apply to sovereign States, because State governments do not exist and function at the pleasure of the Federal Government.

It is self-evident that these are not capitation taxes, and could not be any other type of direct tax in any event because they are not in proportion to each State's population under the census. *See* U.S. Const. art. I, § 9, cl. 4. Nor are they tariffs or

duties. And they are not income taxes since they are not triggered by income, placing it outside the bounds of the Sixteenth Amendment. *Baker* upheld the tax on State bonds, but as a tax on the income of taxpaying citizens, *not* as a tax on the State itself.

Ultimately, there is no Tax Clause authorization to levy direct taxes on States. Indeed, the lengths the Court went to in *Baker* to explain the difference between direct and indirect taxes shows that the Court still recognizes it would be unconstitutional to tax a co-sovereign directly. "In its modern formulation, Justice Brennan concluded, the doctrine of intergovernmental tax immunity prevents the federal government only from imposing certain taxes directly on the states." *The Supreme Court, 1987 Term*, 102 Harv. L. Rev. 222, 225-26 (1988) (footnote omitted).

That is precisely what the Federal Government does through the Employer Mandate and the certification and reporting systems of Sections 1513 and 1514, respectively. There is no modern case law directly addressing that issue for the same reason there is no recent case on the Third Amendment prohibition on quartering troops in civilian homes: the Federal Government has never before dared do such a thing. Just as the Federal Government had never attempted to impose an Individual Mandate or to coerce the States through congressional spending, this imposition on the States represents an unprecedented assertion of federal power. It is unconstitutional.

C. Section 1514 cannot be severed from Section 1513, which in turn cannot be severed from the other three Sections of ACA Part I.F.2

The Federal Government is incorrect that "plaintiffs bear a heavy burden" regarding severability. Defs.' SJ Br. [dkt. 62] at 42. Its argument (albeit consisting of a single sentence) sounds in the language of a presumption against severability, implying

that Indiana and the Schools have some sort of uphill climb to rebut a presumption.[2] But the Supreme Court makes clear there is no presumption against severability unless Congress inserts a severability clause. State's SJ Br. [dkt. 45] at 30 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)) (holding "the inclusion of such a clause creates a presumption"); *id.* (holding that absent a clause, "Congress' silence is just that—silence"). The word "create" means to "bring into being" or "to give rise to" or "produce," *see American Heritage Dictionary of the English Language* 438 (3d ed. 1996), all of which means the thing in question did not previously exist.[3]

Here, it is the Federal Government that bears a heavy burden regarding the severability of the Employer Mandate from the certification/reporting system. The Treasury Department has already said it is "impractical" to enforce Section 1513 without Section 1514. State's SJ Br. [dkt. 45] at 31-32. The Court must ask "whether the statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685 (emphasis in original). The Federal Government never attempts to explain how the Employer Mandate can function in a manner consistent with Congress' intent without Section 1514.

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[2] Also the Government's citation to the plurality opinion in *NFIB*, 132 S. Ct. at 2607, is inapposite. The plurality was there discussing Medicaid, and expressly noted that in a previous statute a severability clause had been inserted into the chapter of the United States Code containing Medicaid, which would apply to future challenges to parts of Medicaid. *See id.* As Indiana's opening brief makes clear and as is discussed further here, a severability inquiry draws the line in a very different place when a severability clause applies. The Federal Government also fails to discuss critical aspects of severability doctrine. *See* State's SJ Br. [dkt. 45] at 30-32 (discussing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161-62 (2010); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329-30 (2006); *Randall v. Sorrell*, 548 U.S. 230, 262 (2006)).

[3] *Alaska Airlines* further evinces this rule by noting that "the parties disagree as to whether there is a severability clause applicable to the [challenged statute]." 480 U.S. at 686. But the Court then found that under the facts of that case it did not matter whether the disputed clause applied, "for there is no need to resort to a presumption in order to find the [challenged] provision severable in this case. There is abundant indication of a clear congressional intent of severability . . . ." *Id.* So the Court linked the presence of an applicable clause to the existence *vel non* of a presumption of severability.

Indiana continues to assert that, if Sections 1513 and 1514 are invalidated, the remaining Sections 1511, 1512, and 1515 also do not function in a manner remotely similar to Congress' statutory design and its "original legislative bargain[.]" *Id*. More specifically, if the Section 1513 Employer Mandate fails—either on its own merits or because it cannot be severed from an invalid Section 1514—then those remaining provisions cannot still function as intended. The end result is the same. If Section 1514 is invalid, then Section 1513 must fall with it. And if Section 1513 falls either under its own unconstitutional weight, or on account of Section 1514's invalidity, then the remaining three Sections of Part I.F.2 of the ACA fall as an entire unit.

III. This Court Should Estop the Federal Government by Permanently Enjoining Enforcement Sanctions Arising from 2014

The suspension of the tax-and-certification regime and Employer Mandate penalties, while perhaps beneficial, was contrary to law. The resulting uncertainty over how employers should govern themselves in the near term justifies using the Court's equitable powers to grant Indiana injunctive relief.

The Federal Government continues to argue that there is no case or controversy on this point and, thus, the Court cannot grant injunctive relief. Defs.' SJ Br. [dkt. 62] at 42-43. However, statutory text alone implies a sufficient threat of enforcement to justify a case or controversy brought by those threatened, *see Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003), and the statutory text specifically says that the provisions of the statute shall be enforced in 2014. ACA § 1514(d) (providing that 26 U.S.C. § 6056, which requires large employers to report on health insurance coverage, "shall apply to periods beginning after December 31, 2013"); ACA § 1513(d) (providing that 26 U.S.C. §

4980H, which spells out the Employer Mandate, "shall apply to months beginning after December 31, 2013").

The Federal Government does not provide any explanation as to how the President can legally modify statutes, or how a President's unilateral declaration of non-enforcement can be considered "law." It does not offer any legal reassurance to the Plaintiffs on this point. The Plaintiffs are entitled to the protection of being able to rely on an actual source of law. Further, if "[t]he parties are fully in agreement that these provisions will not be applied in 2014," Defs.' SJ Br. [dkt. 62] at 42-43, the Federal Government should not object to injunctive relief that would protect the Plaintiffs.

CONCLUSION

For these reasons, and for the reasons set forth by the Public School Corporations in their Reply in Support of their Motion for Summary Judgment and Response in Opposition to Defendants' Cross-Motion for Summary Judgment, the Court should enter summary judgment for the Plaintiffs on all claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2014, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's Electronic filing system. Parties may access this filing through the Court's system.

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