IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	

PLAINTIFFS' JOINT SUPPLEMENTAL BRIEF
CONCERNING RECENTLY DECIDED AUTHORITIES

Plaintiffs State of Indiana and 39 public school corporations jointly file this supplemental brief regarding four recent federal court decisions bearing on issues in this case, two from the Supreme Court of the United States and two from the United States Courts of Appeals: (1) *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); (2) *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) ("*UARG*"); (3) *King v. Burwell*, No. 14-1158, 2014 WL 3582800 (4th Cir. July 22, 2014); and (4) *Halbig v. Burwell*, No. 14-5018, 2014 WL 3579745 (D.C. Cir. July 22, 2014). *Halbig* and *King* involve challenges to the same Internal Revenue Service regulation ("IRS Rule") at issue in this case. *UARG* confirms that a federal agency has no authority to "tailor" regulations to advance policies that are inconsistent with the laws passed by Congress. *Hobby Lobby* confirms that the employer mandate is a tax, which reinforces Plaintiffs' viable Tenth Amendment arguments. All four cases confirm that Defendants' Motion to Dismiss (Dkt. 36) and Cross-Motion for Summary Judgment (Dkt. 61) should be denied, and that Plaintiffs' Motions for Summary Judgment (Dkt. 44, 46) should be granted.

I. The *Halbig* decision confirms that Plaintiffs win on Count I, because ACA § 1401 does not authorize tax credits via federal Exchanges, and the *King* decision rejects the Federal Government's *Chevron* step one argument.

A. On July 22, 2014, the U.S. Court of Appeals for the District of Columbia Circuit held "that the ACA unambiguously restricts the section 36B premium assistance tax credit to insurance purchased on Exchanges 'established by the State.'" *Halbig*, 2014 WL 3579745 at *1. The court explained that it was deferring to Congress's supremacy in setting federal policy through valid legislation, and on this issue, the judiciary's "limited role serves democratic interests by ensuring that policy is made by elected, politically accountable representatives, not by appointed, life-tenured judges." *Id.* at *17. Those precepts require the same result here, namely, this Court should follow *Halbig* and declare the IRS Rule invalid as a matter of law.

In *Halbig*, the Federal Government made many of the same threshold arguments it makes here. The D.C. Circuit rejected the argument that a tax-refund suit is an adequate substitute for an Administrative Procedure Act (APA) suit, holding, *inter alia*, that a tax refund's retrospective relief is inferior to the prospective relief of vacating the rule under the APA. *Id.* at *5-6. This Court should do likewise.

On the merits, the D.C. Circuit identified three necessary attributes of the Exchange through which premium assistance credits are available: The Exchange must be (1) the equivalent of the Exchange a state would establish if it elected to do so; (2) established under the authority of Section 1311; and (3) established by the state, itself. *Id.* at 7. The court then evaluated the federal Exchange against these criteria and concluded that while it met the first two through the phrase "such Exchange" in Section 1321 and through the ACA's definition of "Exchange" codified at 42 U.S.C. § 300gg-

91(d)(21), it did not meet the third criterion because it was not "*established by the state*." *Id.* at * 8 (emphasis original). The court was impelled to this finding because the Federal "[G]overnment offer[ed] no textual basis—in sections 1311 and 1321 or elsewhere—for concluding that a federally-established Exchange is, in fact or in legal fiction, established by a state." *Id.* at * 9. *See* School Pls.' Mem. Supp. Mot. Summ. J. ("Schools' MSJ Br.") [Dkt. 51] at 21-32; State's Mem. Supp. Mot. Summ. J. ("State's MSJ Br.") [Dkt. 45] at 5-8; School Pls.' Reply Br. Supp. Mot. Summ. J. ("Schools' MSJ Reply Br.") [Dkt. 63] at 3-7; State's Reply Br. Supp. Mot. Summ. J. ("State's MSJ Reply Br.") [Dkt. 65] at 6-15.

Among other analytical points, the D.C. Circuit observed that Congress specified in other sections what non-states could be treated as "States" under the ACA, but did not extend that treatment to the Federal Government. *Id.* at *8 (citing 42 U.S.C. § 18043(a)(1)); *see also* 42 U.S.C. § 18024(d) (defining "State" for ACA purposes as "each of the 50 States and the District of Columbia"). To the court, this differing treatment of federal territories highlights the lack of textual support for the Federal Government: "[T]hat absence is especially glaring given that the ACA elsewhere provides that a federal territory that establishes an Exchange 'shall be treated as a State,' clearly demonstrating that Congress knew how to deem a non-state entity to be a 'State.'" *Id.* at *9. *See* Schools' MSJ Br. [Dkt. 51] at 25; Schools' MSJ Reply Br. [Dkt. 63] at 7-8.

The court rejected as "tilt[ing] at windmills" the Federal Government's argument that adhering to the plain meaning of Section 1401 would lead to "absurd" results. *Id.* at *10, *11-12. The Government has asserted, for example, that enforcing the plain text would yield absurd results under Section 1312 because there would be no "qualified individuals" on federal exchanges. But the court observed that such a result would occur

only if Congress had added the word "only" in the provision. *Id.* (quoting *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004)). In contrast, "[s]ection 1312(a)'s actual language simply establishes the right of a qualified individual to enroll in any qualified health plan … Federal Exchanges might not have qualified individuals, but they would still have customers—namely, individuals who are not 'qualified individuals.'" *Id. See* Schools' MSJ Br. [Dkt. 51] at 42-45; Schools' MSJ Reply Br. [Dkt. 63] at 14-16.

The D.C. Circuit also reasoned that the Federal Government's Medicaid maintenance-of-effort ("MOE") argument actually works *against* its position. *Id.* at *13 (discussing 42 U.S.C. § 1396(a)). Giving Section 1401 its plain meaning "preserve[s] Medicaid benefits for the impoverished residents of states where, as a result of having federally-established Exchanges, subsidies are unavailable[,]" a result that is "sensible, not absurd." *Id. See* Schools' MSJ Reply Br. [Dkt. 63] at 16.

This conclusion is particularly significant in light of the Federal Government's continued (incorrect) insistence that Indiana has somehow acted contrary to continued applicability of the MOE provision that follows from Indiana's interpretation of Section 36B. *See, e.g.,* Defs' Reply Mem. Supp. Cross-Mot. for Summ. J. ("Defs' Reply Br.")[Dkt. 69] at 18-19. In short, the federal government says that Indiana elected to tighten Medicaid eligibility requirements for "parents and other caretaker relatives of dependent children beneficiaries seeking redetermination of continued Medicaid eligibility." Costello Dec., Defs' Cross-Mot. for Summ. J. [Dkt. 61, Ex. 10], at ¶¶ 2-4.

In fact, however, the ACA and HHS's implementing regulations gave Indiana *no* choice in the matter. Effective January 1, 2014, HHS required states to cover caretakers and adults whose income was at or below the level set by the state using a standard

known as MAGI and to designate a maximum standard for this group. 42 CFR 435.110. The maximum standard—which Defendants contend represents "tighter" eligibility requirements—was the higher of the state's AFDC limit on July 16, 1996 or March 31, 2010. However, because Indiana's AFDC standard never changed between 1996 and 2010, those were the same for Indiana. Accordingly, Indiana selected the only maximum it could under HHS's own regulation.[1] Indiana thus has not *elected* to tighten eligibility in contravention of the MOE requirement, *see* State's MSJ Reply Br. [Dkt. 65] at 16-20, the continued applicability of which, as the D.C. Circuit points out, fully supports Indiana's reading of Section 36B, *see* 2014 WL 3579745 at *13.

The D.C. Circuit also rejected the Federal Government's argument that a plain-text meaning would render other provisions superfluous, concluding that without subsidies in federal Exchanges those provisions would still serve the purpose of enforcing the ACA's individual mandate, which the IRS acknowledged in another regulation. *Halbig*, 2014 WL 3579745, at *11 (citing 26 C.F.R. § 1.6055-1(d)(1)).

Concerning the legislative history, the court expressed skepticism that such an inquiry is permissible when (as here) the statutory language is clear, but examined it anyway because the result did not alter the outcome. *Id.* at *13-14.[2] For example, the

[1] Notably, the overall dollar amount per family *rose* under the new MAGI-based AFDC standard, yet, owing to *another* ACA restriction against using resource deductions and exclusions (*see* 42 U.S.C. § 1396a(e)(14)(A)-(B)), Indiana's SPA ultimately tightened eligibility.

[2] The D.C. Circuit highlighted the narrowness of its legislative history discussion by adding that "only when apparently plain language compels an odd result might we look to legislative history to ensure that the literal application of a statute will not produce a result demonstrably at odds with the intentions of its drafters." *Halbig*, 2014 WL 3579745, at *14 (citations, internal quotation marks, and alterations omitted). Only then do "we ask only whether the legislative history provides evidence that this literal meaning is *demonstrably* at odds with the intentions of the ACA's drafters. Unless

2009 CBO report calculating subsidy costs based on the assumption that subsidies would be paid in every state was as consistent with the view that all states would establish their own Exchanges as it was with subsidies being paid on the federal Exchange. *See id* at *14. The court also noted that an earlier version of the legislation would have restricted subsidies if a state refused to cooperate with the proposed legislative predecessors, showing that Congress expressly contemplated this incentive approach. *Id.* at *15 (discussing S. 1679, 111th Cong. § 3104 (2009)).[3]

More significantly, the Federal Government's primary legislative history argument has been that Congress intended the ACA to cover as many people as possible, and therefore would have intended to subsidize as many as possible. *Id.* at *15-16. But the D.C. Circuit rejected this overgeneralized logic, noting that "the Supreme Court has repeatedly warned, 'it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law' because 'no legislation pursues its purposes at all costs.'" *Id.* at *17 (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987)). Consequently, courts "cannot assume . . . that section 36B single-mindedly pursues its lofty goals." *Id. See* State's MSJ Br. [Dkt. 45] at

---

evidence in the legislative record establishes that it is, we must hew to the statute's plain meaning, even if it compels an odd result." *Id.* (quoting *Garcia v. United States*, 469 U.S. 70, 75 (1984) (internal quotation marks and other citations omitted).

[3] The dissent in *Halbig* declares that "no State even suggested that the lack of subsidies factored into its decision whether to create its own Exchange." *Halbig*, 2014 WL 3579745 at *31. Not so. On November 15, 2012, then-Governor-elect Pence advised then-Governor Daniels that he was opposed to Indiana establishing its own exchange, identifying the "legal uncertainties" around "whether the employer tax penalty even applies to businesses in the absence of a state-based exchange" as one of the reasons. *See* http://mikepence.com/exchange (last visited on August 6, 2014). The "employer tax penalty" is triggered when a full-time employee receives a premium assistance tax credit and other necessary conditions are met. *See* 26 U.S.C. § 4980H (ACA § 1513).

9-12; Schools' MSJ Br. [Dkt. 51] at 35-37; State's MSJ Reply Br. [Dkt. 65] at 23-25; Schools' MSJ Reply Br. [Dkt. 63] at 18-20.

More particularly, the court observed that, while the Federal Government deemed it "inconceivable" that Congress would have risked destabilizing the ACA by limiting subsidies to state exchanges, no one denies that Congress took that risk in the U.S. territories, as well as in another major part of the bill that was ultimately repealed by Congress in 2013, when it imposed mandates without premium support. *See Halbig*, 2014 WL 3579745 at *16. Thus, "Congress twice did exactly that the government … insist[s] it never would: introduce significant adverse selection risk to insurance markets." *Id.*

Ultimately, with legislative history so scant, the Court of Appeals concluded that "Section 36B plainly makes subsidies available only on Exchanges established by states. And in the absence of any contrary indications, that text is conclusive evidence of Congress's intent." *Id.* at *17. As Judge Randolph said, concurring, "[t]o hold otherwise would be to engage in distortion, not interpretation. Only further legislation could accomplish the expansion the government seeks." *Id.* (Randolph, J., concurring).

B. Only a few hours after the *Halbig* decision, the Fourth Circuit reached a different result in *King*. It held that Section 1401 was ambiguous, rejected the Federal Government's argument under *Chevron* step one, but ultimately sustained the IRS Rule as a reasonable construction of the ACA under *Chevron* step two. *King*, 2014 WL 3582800 at *13. The route the Fourth Circuit had to travel to arrive at that conclusion, however, demonstrates how little support exists for the Federal Government's position.

Initially, the Fourth Circuit, consistent with the D.C. Circuit, confirmed that the Federal Government's threshold tax-refund action argument was "not persuasive," in part

because the plaintiffs were seeking declaratory and injunctive relief, which was not available in a tax-refund action. *Id.* at *4.

Turning to the merits, the Fourth Circuit addressed whether premium assistance credits were limited to qualified health plans "enrolled in through an Exchange established by the State under [§] 1311 of the [ACA]." *Id.* at *5. The court summarized plaintiffs' primary argument as "the language says what it says, and . . . it clearly mentions state-run Exchanges under § 1311"; if Congress meant to include federally-run Exchanges, "it would not have specifically chosen the word 'state' or referenced § 1311"; and the Federal Government "is not a 'State'". *Id.* at *6.

In response, the court acknowledged that "[t]here can be no question that there is a certain sense to the plaintiffs' position." *Id*. For, "[i]f Congress did in fact intend to make the tax credits available to consumers on both state and federal Exchanges, it would have been easy to write in broader language, as it did in other places in the statute." *Id.*

After addressing the Federal Government's arguments, including the argument that the reference to "such Exchange" in Section 1321(c) means that the federally-established Exchange is really a "state-established" Exchange established by the federal government on behalf of the non-establishing state, the Fourth Circuit concluded that "based solely on the language and context of the most relevant statutory provisions, the court cannot say that Congress's intent is so clear and unambiguous that it 'forecloses[s] any other interpretation.'" *Id.* at * 7 (brackets in original). The court recognized "the common-sense appeal of the plaintiffs' argument; a literal reading of the statute undoubtedly accords more closely to their position." *Id.*

Turning to "other, less directly relevant provisions" of the ACA "to see if they shed any more light on Congress's intent," the court considered the reporting and reconciliation requirements of Section 1401(f) and the residency issue presented in Section 1312. *Id.* at *8. In its briefing in this case, the Federal Government declared Plaintiffs' positions on these sections to be "not plausible" (Defs.' Cross MSJ Br. [Dkt. 62] at 29), an "empty gesture" (*id.*), "absurd" (*id.* at 32), and full of "contortions" (Defs' Cross MSJ Reply Br. [Dkt. 69] at 17). In *King*, however, the Fourth Circuit declared that the plaintiffs "offer reasonable arguments" on these statutory sections, expressed its wariness at "granting excessive analytical weight to relatively minor conflicts within a statute of this size," and declined "to accept the [Federal Government's] arguments as dispositive of Congress's intent." *Id.* at *9. See Schools' MSJ Br. [Dkt. 51] at 32-33; Schools' MSJ Reply Br. [Dkt. 63] at 11-14.

In considering the ACA's legislative history, the court implicitly agreed with Plaintiffs' arguments in this case, because it found that the legislative history was "not particularly illuminating on the issue of tax credits." *Id.* The court recognized that floor statements from Senators touting the wide availability of the tax credits may have been based on "the assumption that every state would in fact establish its own Exchange" and did "not necessarily address the question of whether the credits would remain available in the absence of state-created Exchanges." *Id.* The Fourth Circuit also credited as "at least plausible" the plaintiffs' argument "that Congress would have wanted to ensure state involvement in the creation and operation of the Exchanges," which would "certainly comport with a literal reading of 26 U.S.C. § 36B's text." *Id.* at *10.

Ultimately, the Fourth Circuit diverged from the D.C. Circuit's conclusion that the ACA unambiguously limited premium assistance tax credits to Exchanges actually established by the states, because it could not "say definitively that Congress limited the premium tax credits to individuals living in states with state-run Exchanges." *Id.*

Turning to *Chevron* step two, the Fourth Circuit framed and answered the question this way:

> What we must decide is whether the statute permits the IRS to decide whether the tax credits would be available on federal Exchanges. In answering this question in the affirmative we are primarily persuaded by the IRS Rule's advance of the broad policy goals of the Act.

Id. at *11. Focusing on the overarching policy goal of "increas[ing] the number of Americans covered by health insurance and decreas[ing] the cost of health care," the court evaluated what has been called the "three-legged stool" of healthcare reform (guaranteed issue, individual mandate, and premium assistance tax credits) and concluded "that widely available tax credits are essential to fulfilling the Act's primary goals and that Congress was aware of their importance when drafting the bill." *Id.* at *11-12. Calling the IRS Rule "entirely sensible," the court upheld the IRS Rule as a "permissible construction" of the relevant provisions of the ACA. *Id.* at *12.

Of course, if the Fourth Circuit's determination at *Chevron* step one is wrong, one never gets this far. For the reasons explained by the plaintiffs in the summary judgment briefing and by the D.C. Circuit in its *Halbig* decision, no agency action is "sensible" if it contradicts the intention declared by Congress in the plain language of the statute. *See* Schools' MSJ Br. [Dkt. 51] at 21-32; State's MSJ Br. [Dkt. 45] at 5-8; Schools' MSJ Reply Br. [Dkt. 63] at 3-7; State's MSJ Reply Br. [Dkt. 65] at 6-15. Premium assistance tax credits, in the words of Congress, are available to taxpayers who purchase qualified

health plans that were "enrolled in through an Exchange established by the State under [§] 1311." 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i). Neither the Fourth Circuit nor this Court has a "roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that . . . Congress must have intended something broader." *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2034 (2014) (internal quotations omitted).

The concurring opinion of Judge Davis particularly demonstrates the tortured reasoning necessary to sustain the Government's position. To explain his conclusion that Section 36B's plain text permits the IRS Rule, Judge Davis proposed the following analogy:

> If I ask for pizza from Pizza Hut for lunch but clarify that I would be fine with pizza from Domino's, and then I specify that I want ham and pepperoni on my pizza from Pizza Hut, my friend who returns from Domino's with a ham and pepperoni pizza has still complied with a literal construction of my lunch order.

Id. at *15.

It is not clear, however, whether Congress or the IRS is the one ordering and paying for lunch, whether the instructions are statutes or regulations, or whether "my friend" is the IRS Commissioner, an insurance customer, or someone else—all of which are critical to understanding this case. The IRS's authority to offer a coupon for a free pizza must be bestowed by Congress before the IRS may act. In other words, if Congress authorized coupons for free pizza from Pizza Hut, an IRS rule providing additional free pizza coupons for Domino's would exceed the IRS's authority. *That* is this case.

II. The Supreme Court in *UARG* further supports Plaintiffs' Count I APA claim

In *UARG*, 134 S. Ct. at 2444-45**,** the Supreme Court provided additional support for Plaintiffs' position by rejecting the theory that federal agencies may use rulemaking

power to enshrine administrative agendas into law contrary to statutory text. *See Halbig*, 2014 WL 3579745, at *13 (quoting *UARG*, 134 S. Ct. at 2448). There, the Court ruled that a federal agency "must ground its action … in the statute, rather than reasoning divorced from the statutory text." 134 S.Ct. at 2441 (internal citation and quotation marks omitted).

In particular, the Court considered whether EPA could modify a numeric threshold Congress wrote into a statute for regulating pollutants, the better to facilitate the administration's policy goals. *Id.* at 2434. But the Court ruled that "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Id.* at 2445. It "reaffirm[ed] the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Id.* at 2446.

Here, as confirmed by ACA "architect" Jonathan Gruber, Congress required States to establish Exchanges and join the ACA system for their citizens to receive subsidies, betting that the financial incentives would be too great to pass up. *See, e.g.*, James Taranto, *Gruber vs. Gruber*, Wall St. J., July 25, 2014, *available at* http://online.wsj.com/articles/best-of-the-web-today-gruber-vs-gruber-1406318853 (last visited Aug. 6, 2014) ("if you're a state and you don't set up an exchange, that means your citizens don't get their tax cuts"). Congress lost the bet; only 14 states have established Exchanges. But as the Court held in *UARG*, a congressional miscalculation as to how States would respond does not yield to the IRS the power to compensate for that error. "The power of executing laws does not include a power to revise clear statutory terms that turn out not to work out in practice." *UARG*, 134 S.Ct. at 2446.

III. The Supreme Court in *Hobby Lobby* confirmed that the Employer Mandate is a tax, such that this Court should deny Defendants' preclusion and waiver defenses and rule for Plaintiffs on Counts II & III

A. In *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), the Supreme Court created a new Tax Clause doctrine providing that mandatory actions directed by Congress that are enforced via tax "penalties," and meet several other criteria such as being codified in the Tax Code and reported on an annual tax return—in that case, the mandate that individuals purchase health care insurance—are in fact taxes under the Constitution. *Id.* at 2594. In *Hobby Lobby*, 134 S. Ct. 1751, the Supreme Court in effect confirmed that the Employer Mandate of ACA Section 1513 *also* is a tax, just as the State has asserted all along in this case. *See, e.g., See, e.g.,* Am. Compl.[Dkt. 22] at ¶¶ 207-09; State's MSJ Br.[Dkt. 45] at 21-23; State's MSJ Reply Br.[Dkt. 65] at 30-32.

To be sure, the *Hobby Lobby* majority opinion was silent as to whether the employer mandate of Section 1513 is an exercise of power from the Commerce Clause versus the Tax Clause. The Court referred to the exaction for noncompliance as a "penalty," *id.* at 2776-77 (majority opinion), but did not specify whether it is a tax penalty versus a commercial penalty. However, the four dissenting Justices spoke directly to the issue, saying that employers violating Section 1513 must pay a "$2,000-per-employee tax." *Id.* at 2798 n.20. If the exaction is a tax, then by definition Section 1513 is predicated upon the Tax Clause, not the Commerce Clause.

Yet there is apparently a fifth vote for the proposition that the Employer Mandate is a tax, as Chief Justice Roberts agreed with that proposition at oral argument in *Hobby Lobby*. During oral argument, former Solicitor General Clement characterized the $2,000 Employer Mandate exaction as a commercial penalty upon businesses. *See* Tr. of Oral

Arg. at 23, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354, 13-356). Justice Sotomayor rejected his assertion, saying, "It's not called a penalty. It's called a tax. . . ." *Id.* At this point, the Chief Justice interjected, "She's right about that." *Id.* at 24. The transcript records the courtroom audience laughing in this ironic situation where the same counsel was making the same argument as in *NFIB*, and the same Chief Justice reasserted from the bench the major doctrinal shift that controlled the outcome of that case. *See NFIB*, 132 S. Ct. at 2594.

Therefore all the *NFIB* majority's Justices confirm Plaintiffs' argument, that for the same reasons Section 1501's Individual Mandate is a tax, the Section 1513 Employer Mandate is likewise a tax, separate and independent from the Section 1514 tax.

Yet the intergovernmental tax immunity doctrine bars Congress both from enacting taxes that discriminate against the States, and also from directly taxing the States, even if those taxes are nondiscriminatory. State's MSJ Reply Br.[Dkt. 65] at 30-32. The Employer Mandate and the tax-and-certification system are two separate direct nondiscriminatory taxes on sovereign States, and therefore violate the Tenth Amendment.

B. The foregoing accentuates that the Federal Government's waiver argument—quietly inserted as two sentences into an unrelated discussion, *see* Defs.' Mem. Supp. Mot. to Dismiss[Dkt. 37] at 31-32—is meritless. Defendants admit all a party must do to avoid waiver is assert some legal basis to survive a Motion to Dismiss. *See* Defs.' Reply Mem. Supp. Mot. to Dismiss ("Defs' MTD Reply Br.")[Dkt. 55] at 16. Indiana's brief in opposition did precisely that in arguing that Sections 1513 and 1514 separately violate both the intergovernmental tax immunity doctrine and limits on the Commerce Clause. *See* State's Mem. Resp. to Mot. to Dismiss [Dkt. 38]at 27-28. In fact,

Indiana discussed the merits of the Tenth Amendment issues more than Defendants did when saying they were waived. Moreover, Defendants' Motion to Dismiss never rebutted the specific contentions in Plaintiffs' Amended Complaint as to why the Employer Mandate is a tax. *See* Am. Compl. [Dkt. 22] at ¶¶ 180, 208, 209, 215, 216. With *Hobby Lobby* corroborating Plaintiffs' argument that the Employer Mandate is a tax, it becomes even clearer that Plaintiffs asserted the requisite legal basis for Counts II & III to survive dismissal.

Hobby Lobby reinforces that Plaintiffs are not precluded, either. *NFIB* was a sea change in the law, declaring (1) a new Tenth Amendment coercion limit to Congress' enumerated powers against the States, (2) a new limit to the Commerce Clause, and (3) a new federal power under the Tax Clause. In each of these three regards *NFIB* was a watershed doctrinal shift in constitutional law. *NFIB* easily satisfies the "clear change of constitutional doctrine" standard Defendants admit is an exception to preclusion. *See* Defs' MTD Reply Br. [Dkt. 55] at 18.[4]

[4] Separately, the Federal Government's preclusion argument regarding Section 1514 is risible, as that provision was never even briefed in that case. And even for Section 1513, the District Court in *NFIB* disclaimed ruling on intergovernmental tax immunity, since it was not raised in the Amended Complaint. *Florida v. HHS*, 716 F. Supp. 2d 1120, 1154 n.14 (N.D. Fla. 2010). Preclusion does not attach without a ruling on the merits. *See Bernstein v. Bankert*, 733 F.3d 190, 226 (7th Cir. 2013).

CONCLUSION

For these reasons, and for those set forth in Plaintiffs' previous briefs, Defendants' Motion to Dismiss and Motion for Summary Judgment should both be denied, and Plaintiffs' Motions for Summary Judgment should be granted.

Respectfully submitted,

GREGORY F. ZOELLER
Attorney General of Indiana

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

Kenneth A. Klukowski
Special Deputy Attorney General
Ashley Tatman Harwel
Heather Hagan McVeigh
Deputy Attorneys General
Office of the Attorney General
Indiana Government Center South
Fifth Floor
302 West Washington Street
Indianapolis, IN 46205
(317) 232-6255

Attorneys for State of Indiana

/s/ Andrew M. McNeil
Andrew M. McNeil
W. James Hamilton
John Z. Huang

Bose McKinney & Evans LLP
111 Monument Circle
Suite 2700
Indianapolis, Indiana 46204
(317) 684-5000

Attorneys for Plaintiff School Corporations

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

Joel McElvain
joel.mcelvain@usdoj.gov

Shelese Woods
shelese.woods@usdoj.gov

Andrew M. McNeil
amcneil@boselaw.com

John Zhi Huang
jhuang@boselaw.com

Winthrop James Hamilton
jhamilton@boselaw.com

s/ *Thomas M. Fisher*
Thomas M. Fisher
Solicitor General

Office of the Indiana Attorney General
Indiana Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6255
Facsimile: (317) 232-7979
Tom.Fisher@atg.in.gov