UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

STUART F. DELERY
Assistant Attorney General

JOSH J. MINKLER
Acting United States Attorney

SHELESE WOODS
Assistant United States Attorney

SHEILA LIEBER
Deputy Branch Director

JOEL McELVAIN
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
(202) 514-2988
Joel.McElvain@usdoj.gov

Introduction

Pursuant to this Court's order of July 30, 2014 (ECF 73), the defendants respectfully submit this brief to respond to the plaintiffs' supplemental brief (ECF 75) and to address the relevance of four recent decisions to this case: (1) *King v. Burwell*, --- F.3d ---, 2014 WL 3582800 (4th Cir. July 22, 2014), *petition for cert. filed*, No. 14-114 (July 31, 2014); (2) *Halbig v. Burwell*, --- F.3d ---, 2014 WL 3579745 (D.C. Cir. July 22, 2014), *petition for reh'g en banc filed*, No. 14-5018 (D.C. Cir. Aug. 1, 2014); (3) *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014); and (4) *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). As will be explained below, the unanimous decision of the Fourth Circuit in *King* and Judge Edwards' dissenting opinion in *Halbig* provide further support for the defendants' summary judgment motion. In contrast, the opinion for the panel majority in *Halbig* presents a flawed reading of the Affordable Care Act, and is not persuasive authority. *Utility Air* provides additional support in favor of the defendants' summary judgment motion, as it confirms the principle, as the defendants have urged, that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." 134 S. Ct. at 2441. Finally, *Hobby Lobby* bears no relevance to the plaintiffs' Tenth Amendment claim.

Argument

I. The Unanimous Decision in *King* and Judge Edwards' Opinion in *Halbig* Provide Further Support in Favor of the Defendants' Summary Judgment Motion

The plaintiffs contend that, because the federal government operates the Exchange in Indiana, residents of this state are ineligible for federal tax credits to subsidize the purchase of health insurance on that Exchange. The plaintiffs' theory depends on a reading of a phrase in 26 U.S.C. § 36B(b)(2)(A) in isolation, divorced of its larger context, and even divorced from a consideration of the provision that is explicitly cross-referenced in that phrase. As recent

authorities confirm, the established canons of statutory interpretation demand the opposite approach. "[W]hen conducting statutory analysis, 'a reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather, the meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.'" *King*, at *6 (quoting *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007)); *see also id.* at *14 (Davis, J., concurring); *Halbig*, at *20 (Edwards, J., dissenting). When Section 36B is read in context – as it must be – it is clear that Congress meant for federal premium tax credits to be available for participants in the federally-run Exchanges. At a minimum, Treasury has reasonably read the Act to so provide, and that reading is entitled to *Chevron* deference.

1. Section 36B(b)(2)(A) cannot be read in isolation, as the plaintiffs demand, because it expressly refers to 42 U.S.C. § 18031, which declares that "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an 'Exchange') for the State" that meets certain statutory requirements. 42 U.S.C. § 18031(b)(1). The Act also "permits a State to elect to allow HHS to establish the Exchange on behalf of the State." *Halbig*, at *23 (Edwards, J., dissenting). If a state so elects, the Act directs HHS to establish and operate "such Exchange," that is, the "required Exchange" under Section 18031. *See* 42 U.S.C. § 18041(c)(1). "The use of 'such' can reasonably be interpreted to deem the HHS-created Exchange to be the equivalent of an Exchange created in the first instance by the State. That is, when HHS creates an Exchange under § 18041(c), it does so on behalf of the State, essentially standing in its stead." *Halbig*, at *23 (Edwards, J., dissenting). *See also King*, at *7 (agreeing that this reading is the "stronger position," and upholding that reading under *Chevron* step two); *id.* at *14 (Davis, J., concurring) (concluding that the defendants' reading is compelled under *Chevron* step one). Thus, Section 36B, when read together with 42 U.S.C.

§§ 18031 and 18041, provides that the premium tax credit is available in every Exchange, whether the state itself establishes the Exchange, or whether the federal government stands in the state's shoes to do so.

2. The ACA's definitional provisions confirm this reading. The Act defines the term "Exchange" to mean "an American Health Benefit Exchange established under [42 U.S.C. § 18031]." 42 U.S.C. §§ 300gg-91(d)(21), 18111. So, when the Act instructs the Secretary to establish "such Exchange," it instructs that "the Secretary shall … establish and operate such [American Health Benefit Exchange established under 42 U.S.C. § 18031]." 42 U.S.C. § 18041(c)(1). The federally-facilitated Exchange, then, *is* the Section 18031 Exchange. *See King*, at *7; *Halbig*, at *23 (Edwards, J., dissenting); *see also* 42 U.S.C. § 18031(d)(1) ("An Exchange shall be a governmental agency or nonprofit entity *that is established by a State*." (emphasis added)). "Therefore, the phrase 'established by the State" in § 36B is reasonably understood to take its meaning from the cognate language in the incorporated definition in § 18031, which embraces Exchanges created by HHS on the State's behalf." *Halbig*, at *23 (Edwards, J., dissenting); *see also King*, at *14 (Davis, J., concurring) ("the contingency provision [of Section 18041(c)] does not create two-tiers of Exchanges; there is no indication that Congress intended the federally-operated Exchanges to be lesser Exchanges and for consumers who utilize them to be less entitled to important benefits").

3. This reading is further confirmed by 26 U.S.C. § 36B(f)(3). This provision directs every Exchange, expressly including the federally-run Exchanges, to provide information to Treasury and to taxpayers regarding the payments of premium tax credits. "The self-evident primary purpose of [Section 36B(f)(3)] – reconciling end-of-year premium tax credits with advance payments of such credits – could not be met with respect to Exchanges created by HHS

on behalf of a State if these Exchanges were not authorized to deliver tax credits. … It is thus plain from subsection (f) that Congress intended credits under § 36B to be available to taxpayers in States with HHS-created Exchanges." *Halbig*, at *28 (Edwards, J., dissenting). Section 36B therefore, when read in full, and in conjunction with the provisions of the ACA describing the Exchange, 42 U.S.C. §§ 18031 and 18041, makes plain that Congress envisioned the federally-facilitated Exchange to be the same entity as the Exchange that the state is directed to establish.

4. Nor is the plaintiffs' reading of Section 36B compatible with the remainder of the Act, when the statute is read, as it must be, as a whole. In particular, the logic of the plaintiffs' theory would produce the implausible result that nobody would be eligible to buy insurance offered on the federally-facilitated Exchange – with or without a subsidy. This is so because a "qualified individual" who is eligible to buy insurance on the Exchange is defined as an individual "who resides in the *State that established the Exchange*." 42 U.S.C. § 18032(f)(1)(A)(ii) (emphasis added). "There is no separate definition of 'qualified individual' for States with HHS-created Exchanges. If an HHS-created Exchange does not count as established by the State it is in, then there would be no individuals 'qualified' to purchase coverage in the 34 States with HHS-created Exchanges. That would make little sense." *Halbig*, at *30 (Edwards, J., dissenting). *See also King*, at *9 (noting that "the defendants make the better of the two cases" as to Section 36B(f)(3) and 42 U.S.C. § 18032, but declining to base its ruling on these grounds).

As another illustrative example, "the ACA requires States to 'ensure' that low-income children who are not covered under the State's child health plan are enrolled in a health plan that is offered through 'an Exchange established by the State under [§ 18031].'" *Halbig*, at *30 (Edwards J., dissenting) (quoting 42 U.S.C. § 1397ee(d)(3)(B)). "Here again, the statute simply presumes the existence of such State-established exchanges. The statute's objective of

'assur[ing] exchange coverage for targeted low-income children' would be largely lost if States with HHS-created Exchanges are excluded. There is nothing in the statute to indicate that Congress meant to exclude benefits for low-income children in the 34 States in which HHS has established an Exchange on behalf of the State." *Id.* (Edwards, J., dissenting).

5. More fundamentally, the plaintiffs' reading of Section 36B would undermine Congress's basic goals in passing that legislation. Their theory "would destroy the fundamental policy structure and goals of the ACA that are apparent when the statute is read as a whole. A key component to achieving the Act's goal of 'near-universal coverage' for all Americans is a series of measures to reform the individual insurance market. These measures – nondiscrimination requirements applying to insurers, the individual mandate [that is, the individual coverage provision, 26 U.S.C. § 5000A], and premium subsidies – work *in tandem*, each one a necessary component to ensure the basic viability of each State's insurance market." *Halbig*, at *24 (Edwards, J., dissenting) (quoting 42 U.S.C. § 18091(2)(D)). The plaintiffs' theory would leave the nondiscrimination requirements in place, but remove the other two legs of this "three-legged stool," in states with federally-run Exchanges. As a result, "denying tax credits to individuals shopping on federal Exchanges would throw a debilitating wrench into the Act's internal economic machinery." *King*, at *11.

"[I]t is clear that premium subsidies are an essential component of the regulatory framework established by the ACA. If, as [the plaintiffs] contend, a State could block subsidies by electing not to establish an Exchange, this would exempt a large number of taxpayers from the individual mandate, cause the risk pool to skew toward higher risk people, and effectively cut the heart out of the ACA. … 'Without the federal subsidies, individuals would lose the main incentive to purchase insurance inside the exchanges, and some insurers may be unwilling to

offer insurance inside of exchanges. With fewer buyers and even fewer sellers, the exchanges would not operate *as Congress intended* and may not operate at all.'" *Id.* at *25-*26 (Edwards, J., dissenting) (quoting *Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2674 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); Judge Edwards' emphasis); *see also King*, at *12 & n.5; *id.* at *15 (Davis, J., concurring).

6. The legislative history further confirms that Congress intended for premium tax credits to be available in every state, regardless of which entity operated the Exchange. For example, "the Senate Finance Committee expressly acknowledged that the federal government could 'establish state exchanges.'" *Halbig*, at *31 (Edwards, J., dissenting) (quoting S. Rep. No. 111–89, at 19 (2009)). The three House Committees with jurisdiction over the ACA, the Joint Committee on Taxation, and the Congressional Budget Office likewise recited that tax credits would be available on all of the Exchanges, without distinguishing between state-run or federally-run Exchanges. *Id.* at *31-*32 (Edwards, J., dissenting) (citing reports submitted as defendants' exhibits 16, 24, and 25 in this case). In addition, "[s]everal floor statements from Senators support the notion that it was well understood that tax credits would be available for low- and middle-income Americans nationwide." *King*, at *9 (citing Congressional Record debates submitted as defendants' exhibits 17, 18, and 22 in this case).[1]

[1] The Fourth Circuit did not rely on this legislative history, reasoning that it was "possible" that members of Congress had assumed that every state would establish its own Exchange. *King*, at *9. To the contrary, it was well known at the time that some states would not do so. *See* David D. Kirkpatrick, *Health Lobby Takes Fight to the States*, New York Times A1 (Dec. 28, 2009) (describing numerous state proposals to "opt out" of health insurance Exchanges). *See also* 156 Cong. Rec. H2207 (Mar. 22, 2010) (Rep. Burgess) (as many as 37 states "may not set up the State-based exchange[s]"); 155 Cong. Rec. S12,543-S12,544 (Dec. 6, 2009) (Sen. Coburn) (submitting letter from Oklahoma official stating that her state was unlikely to create an Exchange); Editorial, *Don't Trust States to Create Health Care Exchanges*, USA Today (Jan. 4, 2010) (noting that "[s]ome state officials hostile to reform are already trying to block implementation," and would likely not create Exchanges).

7. It follows from the foregoing discussion that Treasury's regulation "making the tax credits available to all consumers of Exchange-purchased health insurance coverage … is the correct interpretation of the Act and is required as a matter of law." *King*, at *13 (Davis, J., concurring). At a minimum, the regulation is based on "a permissible construction of the statutory language, and the Court "must therefore apply *Chevron* deference and uphold" the rule. *King*, at *13; *see id.* at *10 (citing *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion)). *See also Halbig*, at *19 (Edwards, J., dissenting) ("The Government's permissible interpretation of the statute easily survives review under *Chevron*.").

In sum, the unanimous decision in *King* and Judge Edwards' opinion in *Halbig* provide further confirmation that 26 U.S.C. § 36B, when read in full and in light of the larger statutory scheme of the Affordable Care Act, makes premium tax credits available to participants in all of the Exchanges, whether state- or federally-run.

II. The Opinion for the Panel Majority in *Halbig* Presents a Flawed Reading of the Act, and Is Not Persuasive Authority

In contrast, the panel majority in *Halbig* concluded that 26 U.S.C. § 36B unambiguously precludes the availability of federal tax credits for participants in federally-run Exchanges. case).[2] Its conclusion was in error. The panel majority acknowledged that its ruling, if upheld, would "likely have significant consequences both for the millions of individuals receiving tax credits through federal Exchanges and for health insurance markets more broadly." *Halbig*, at *17. It felt constrained to adopt an interpretation requiring those results because of what it labeled the "plain meaning" of Section 36B. *E.g., id.* at *7. But the panel majority found that plain meaning only by disregarding the Supreme Court's repeated admonitions that "statutory construction is a holistic endeavor," *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563 (2013),

[2] As noted above, the government has filed a petition for rehearing *en banc* in the *Halbig* appeal.

and that a court must "interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose,'" *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014).

The *Halbig* panel majority nominally acknowledged its duty to consider all of "the ACA's interconnected provisions and overall structure" and to "interpret the Act, if possible, 'as a symmetrical and coherent scheme.'" *Halbig*, at *6 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). In reality, however, the majority found that "plain meaning" by focusing exclusively on a few provisions in isolation. Only after it had done so did it consider the ACA's broader statutory context, structure, and purpose. And when it took that step, the majority asked the wrong question: Rather than seeking to identify the construction that would treat the entire Act "as a symmetrical and coherent scheme," *Brown & Williamson*, 529 U.S. at 133, the majority presumed that its blinkered view of the plain meaning of a single phrase in Section 36B was correct and asked only whether that interpretation would "render … other provisions of the ACA absurd." *Halbig*, at *10. Each step of that analysis was wrong.

1. As discussed above, the ACA makes clear that, when HHS establishes an Exchange on behalf of a state, that Exchange is an Exchange "established by the State under [42 U.S.C. § 18031]" for purposes of the Section 36B tax credit formula. 42 U.S.C. § 18031(b) provides that "[e]ach State shall … establish an [Exchange]." The statute makes clear, however, that states are not required to establish those Exchanges for themselves. 42 U.S.C. § 18041, which provides for "State Flexibility" with respect to Exchanges, allows a state to "elect[]" to establish an Exchange; if the state fails to establish the "required Exchange," then HHS "shall … establish and operate *such Exchange* within the State." 42 U.S.C. § 18041(c)(1) (emphasis added).

As the panel majority acknowledged, the use of the word "such" conveys that the

federally-run Exchange is "the equivalent of the Exchange a state would have established had it elected to do so," *Halbig*, at *7 – that is, the equivalent of an Exchange "established by the State under [42 U.S.C. § 18031]." That conclusion is confirmed by the Act's definitional provisions, which state that an "Exchange" is "an American Health Benefit Exchange *established under section 1311*." 42 U.S.C. §§ 300gg-91(d)(21), 18111 (emphasis added). The panel majority thus properly acknowledged that an Exchange established by HHS on behalf of a State qualifies as one "established under Section 1311 [42 U.S.C. § 18031]." *Halbig*, at *8.

Having come that far, however, the majority stopped too soon: If an Exchange that the State opts to have HHS establish on its behalf qualifies as an Exchange "established under [42 U.S.C. § 18031]," then it necessarily also qualifies as an Exchange "established by the State." 42 U.S.C. § 18031 requires "[e]ach State" to establish an Exchange and does not refer to any other type of Exchange. 42 U.S.C. § 18031(b)(1); *see also* 42 U.S.C. § 18031(d)(1). At a minimum, these provisions "can reasonably be interpreted to deem the HHS created Exchange to be the equivalent of an Exchange created in the first instance by the State." *Halbig*, at *23 (Edwards, J., dissenting); *see King*, at *6-*7.

2. That is also the only interpretation that harmonizes Section 36B with numerous other provisions of the ACA, which demonstrate that tax credits are available on all Exchanges, including those established for States by HHS. *See* Defs.' Mem. in Supp. of Cross-Mot. for S.J. (ECF 62) at 21-29 (collecting examples of ACA provisions that are incompatible with the logic of the plaintiffs' theory). For example, as discussed above, the panel majority's reading of the Act cannot be reconciled with the reporting provisions in Section 36B itself, which require federally-run Exchanges to report information to the IRS for use in administering tax credits, including data "necessary to determine eligibility for, and the amount of, such credit," 26 U.S.C.

§ 36B(f)(3). Nor can that reading be reconciled with 42 U.S.C. § 18032, which defines a "qualified individual" eligible to buy insurance on an Exchange as a person who "resides in the State that established the Exchange." 42 U.S.C. § 18032(f)(1)(A)(ii).

In addition, the Act provides that, as a condition of receiving federal Medicaid funds, a State may not tighten its Medicaid eligibility standards between March 2010 and the date when "an Exchange established by the State under [42 U.S.C. § 18031] is fully operational." 42 U.S.C. § 1396a(gg)(1); *see also id.*, § 1396a(gg)(3) (permitting waivers of this maintenance-of-effort provision for budgetary reasons, but only until December 31, 2013). This was intended to be a temporary transitional provision. Under the panel majority's view, however, it is an obligation that extends forever in States that opt to have HHS establish Exchanges on their behalf. It is not plausible that Congress intended this result. Indeed, if Congress had intended to impose such a condition, it would have said so directly, thereby giving individuals and States themselves clear notice of the consequences of a State's decision.[3]

The panel majority found that none of these inconsistencies and anomalies met "the high threshold of absurdity" required to overcome a statute's "plain meaning." *Halbig*, at *13 & n.10. But "absurdity" was the wrong test. The majority erred by purporting to discern the plain meaning of one provision before considering all relevant provisions of the Act. A court "should not confine itself to examining a particular statutory provision in isolation. Rather, the meaning

[3] The defendants have noted that Indiana has restricted Medicaid benefits in a manner that would violate the maintenance-of-effort provision, if that provision had remained in effect. ECF 62 at 25-26; ECF 69 at 11-12. Indiana now argues, for the first time, that it has not done so. ECF 75 at 4-5. This new argument was available to Indiana during the summary judgment briefing, and it exceeds the agreed scope of supplemental briefing. It accordingly should be disregarded. In any event, Indiana is incorrect. It has restricted income standards for continued eligibility for benefits for certain parents and caretakers of children who are Medicaid beneficiaries. ECF 61-10, ¶¶ 2-7. Indiana wrongly asserts that HHS regulations required this result; those regulations allowed it to maintain the pre-existing income eligibility standards. 42 C.F.R. § 435.110(c)(2)(i).

– or ambiguity – of certain words or phrases may only become evident when placed in context." *Nat'l Ass'n of Home Builders*, 551 U.S. at 666.

Moreover, the panel majority's efforts to rationalize the numerous perverse consequences of its reading only confirmed the difficulties with its interpretation. *See Utility Air*, 134 S. Ct. at 2446 (courts "are not free to adopt unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness"). For example, the majority acknowledged that, under its view, there are no "qualified individuals" in a State with an Exchange run for the State by HHS. *Halbig*, at *12. To circumvent that problem, the majority declared that individuals need not be "qualified" to shop on an Exchange. *Id*. But that reading is untenable for at least two reasons. First, numerous provisions make clear that "qualified individual" status is a prerequisite to participation in an Exchange.[4] Second, the panel majority's view yields still further anomalies. For example, the ACA allows a plan to be offered on an Exchange only if "the Exchange determines that making available such health plan through such Exchange is in the interests of *qualified individuals* and qualified employers in the State." 42 U.S.C. § 18031(e)(1)(B) (emphasis added). Under the majority's view, a federally-run Exchange could never make this determination for an individual-market plan because, by definition, there would be no "qualified individuals" in the State for which the Exchange was established.

3. The panel majority recognized that its reading would thwart the operation of the ACA's core provisions. "[M]illions of individuals" receiving tax credits through federally-run Exchanges would lose their eligibility for subsidies, *Halbig*, at *17, and the ACA's guarantee of

[4] *See, e.g.*, 42 U.S.C. § 18031(d)(2)(A) ("An Exchange shall make available qualified health plans to qualified individuals and qualified employers."); 42 U.S.C. § 18051(e)(2) (providing that a person eligible for coverage under a different program "shall not be treated as a qualified individual under [42 U.S.C. § 18032] eligible for enrollment in a qualified health plan offered through an Exchange").

affordable insurance for Exchange participants would be rendered illusory. In turn, the individual coverage provision, 26 U.S.C. § 5000A, would cease to apply to millions of people who would then fall within its unaffordability exemption. *Halbig*, at *3. The resulting loss of participants would "bode[] ill for individual insurance markets," which would be threatened with the death spiral the ACA was crafted to avoid. *Id.*, at *16 n.12.

The panel majority's view would also eviscerate the ACA's model of cooperative federalism. 42 U.S.C. § 18041 is expressly designated as affording "State Flexibility" with respect to Exchanges. It provides that, if a State opts not to establish an Exchange for itself, HHS shall establish that Exchange, which is "the equivalent of the Exchange a state would have established." *Halbig*, at *7. Congress thus intended States to have a genuine choice whether to establish Exchanges for themselves or to rely on HHS. On the panel majority's view, however, a federally-run Exchange would not be remotely "equivalent" to its state-operated counterpart because it would lack the central features of tax credits and an effective individual coverage provision. The panel majority's view would also destroy 42 U.S.C. § 18041's express provision of "State Flexibility" by allowing a state to forgo the operation of an Exchange for itself only at the price of crippling its insurance market and depriving its citizens of the tax credits at the heart of the Act. The panel majority identified no reason why Congress would have wanted to create such a perverse and self-defeating scheme, much less why it would do so in a statute intended to provide "near-universal coverage." 42 U.S.C. § 18091(a)(2)(C).[5]

[5] Notably, the panel majority declined to credit the plaintiffs' claim that Congress wanted to put States to this coercive choice in order to pressure them into creating state-run Exchanges. *Halbig*, at *15 n.11. That theory of congressional intent "is nonsense, made up out of whole cloth." *Id.* at *19 (Edwards, J., dissenting). The plaintiffs – again, exceeding the agreed scope of supplemental briefing – now cite to statements from economics professor Jonathan Gruber in 2012, two years after the passage of the ACA, which they claim prove that Congress in fact had this intent. ECF 75 at 12. These post-enactment statements from a non-legislator do not qualify

Moreover, if Congress had wanted to confront States with these drastic consequences and thereby deprive them of a true choice between alternative ways to establish the same Exchanges, it would have said so clearly and directly – and there would have been some contemporaneous recognition of this critical feature of the Act. Congress would not have buried the dire ramifications of a state's choice in a subparagraph containing the technical formula for calculating the tax credit amount – Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

In sum, the statutory text – particularly when considered, as it must be, "with reference to the statutory context, 'structure, history, and purpose,'" *Abramski*, 134 S. Ct. at 2267 – makes clear that Congress intended an Exchange to operate effectively in each state; intended each state to have a real choice between alternative ways to establish the same Exchange; and intended tax credits to serve their necessary and intended function throughout the country. At an absolute minimum, the IRS's interpretation harmonizing the statutory text, structure, and purpose is a reasonable one entitled to deference under *Chevron*.

II. *Utility Air* Provides Further Support in Favor of the Defendants' Summary Judgment Motion

As the foregoing discussion makes clear, the panel majority in *Halbig* erred by "examining a particular statutory provision in isolation," and by disregarding the principle that "the meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Nat'l Ass'n of Home Builders*, 551 U.S. at 666. In contrast, the unanimous

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as legitimate legislative history. *See, e.g.*, *Doe v. Chao*, 540 U.S. 614, 626-27 (2004). In any event, Professor Gruber has clarified that his quoted remarks were mistaken, and that his understanding is that Congress intended that federal tax credits would be available for participants on all of the Exchanges. Jonathan Cohn, *Jonathan Gruber: 'It Was Just a Mistake'*, The New Republic (July 25, 2014), available at www.newrepublic.com/article/118851/jonathan-gruber-halbig-says-quote-exchanges-was-mistake.

opinion for the Fourth Circuit in *King* and Judge Edwards' dissenting opinion in *Halbig* properly followed this principle, and concluded that Section 36B, when read in full and in the context of the entire Act, provides for federal tax credits for participants in the federally-run Exchanges.

A recent decision of the Supreme Court reaffirms this principle. In *Utility Air*, the Court considered whether greenhouse gases such as carbon dioxide qualify as "air pollutant[s]," so as to subject stationary sources to certain requirements under Titles I and V of the Clean Air Act. Because the Court had previously held that greenhouse gases generally do qualify as "air pollutant[s]" under that act, *see Massachusetts v. EPA*, 549 U.S. 497, 529 (2007), a reading of that phrase in isolation, and divorced from the statutory context, would lead to the conclusion that those gases also so qualify under the operational provisions of Titles I and V.

The Court rejected that approach, however, and reaffirmed the "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Utility Air*, 134 S. Ct. at 2441 (quoting *Brown & Williamson*, 529 U.S. at 133). Thus, "reasonable statutory construction must account for both 'the specific context in which … language is used' and 'the broader context of the statute as a whole.'" *Id.* at 2442 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); Court's ellipses). The Court further recited that "[a] statutory 'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme … because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" *Id.* (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988); Court's ellipses). Applying these principles, the Court held that a stationary source could not be newly subjected to the challenged requirements under Titles I and V based only on the source's potential to emit greenhouse gases, because the contrary result "would render the statute

unrecognizable to the Congress that designed it." *Id.* at 2444.

The application of these principles leads to the conclusion that Section 36B must be read in full, and in context with 42 U.S.C. §§ 18031, 42 U.S.C. § 18041, the ACA's definitional provisions, and the remainder of that statute. When Section 36B is properly so read, it is clear that Congress intended the federally-run Exchange to be the equivalent of the state-run Exchange, and that federal tax credits would be available for participants in all of the Exchanges.

II. *Hobby Lobby* Has No Relevance for the Plaintiffs' Tenth Amendment Claim Authority

The plaintiffs wrongly assert that *Hobby Lobby* supports their Tenth Amendment claim. ECF 75 at 13. They reason that: (1) Justice Ginsburg's dissenting opinion in that case described the large-employer assessment under 26 U.S.C. § 4980H as a "tax," *see* 134 S. Ct. at 2798 n.20; (2) that provision is therefore an exercise of the taxing power; (3) it cannot, therefore, also be an exercise of the commerce power; (4) the doctrine of intergovernmental tax immunity, rather than the principle of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), therefore governs their Tenth Amendment challenge to that tax; and (5) they prevail under that doctrine.

There is no dispute that Section 4980H is a valid exercise of the taxing power. But federal statutes are often based on more than one enumerated power, as *Hobby Lobby* itself makes clear. 134 S. Ct. at 2761 (describing multiple sources of Congressional authority to enact RFRA and RLUIPA). Congress's authority to enact Section 4980H was based on both its commerce power and its taxing power. *See Liberty Univ. v. Lew*, 733 F.3d 72, 91-98 (4th Cir.), *cert. denied*, 134 S. Ct. 683 (2013). In any event, the Tenth Amendment claim fails, no matter whether it is treated as a challenge to an exercise of the taxing power or of the commerce power. *See, e.g.*, *Garcia*, 469 U.S. at 543-545, 554.

Conclusion

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

Dated: August 22, 2014

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

JOSH J. MINKLER
Acting United States Attorney

SHELESE WOODS
Assistant United States Attorney

/s/ Joel McElvain
SHEILA LIEBER
Deputy Branch Director
JOEL McELVAIN
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
(202) 514-2988
Joel.McElvain@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 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.

Ashley Tatman Harwel
ashley.harwel@atg.in.gov

Heather Hagan McVeigh
heather.mcveigh@atg.in.gov

Thomas M. Fisher
tom.fisher@atg.in.gov

Andrew M. McNeil
amcneil@boselaw.com

John Zhi Huang
jhuang@boselaw.com

Winthrop James Hamilton
jhamilton@boselaw.com

/s/ Joel McElvain
JOEL McELVAIN
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
(202) 514-2988
Joel.McElvain@usdoj.gov