IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:13-cv-00623-PLF
	)	
KATHLEEN SEBELIUS, in her official capacity as U.S. Secretary of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	
_____	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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Introduction

The Patient Protection and Affordable Care Act ("ACA" or "Act") creates new health insurance Exchanges, along with federal tax credits to help defray the cost of insurance offered on these Exchanges. Congress knew that these credits would be "key" to its goal of "ensuring people affordable health coverage." H.R. REP. NO. 111-443, vol. I, at 250 (2010) (Gov't Ex. 1, ECF 51-1 at 4). Based on a misinterpretation of one lone phrase in the statute – taken completely out of the relevant statutory and legislative context – the plaintiffs seek to deny these tax credits to millions of Americans who need the credits to purchase health insurance on the Exchanges, and who are not before the Court. The Court should reject this claim.

To begin with, there is no plaintiff with standing. The sole individual plaintiff, David Klemencic, may not assert standing based on a purely ideological objection to the receipt of government subsidies. The employer plaintiffs lack any redressible injury, because they could not through this suit prevent their employees, who are absent here, from gaining the tax credits that the employers challenge. The employers' suit is barred, in any event, both by the prudential principle barring third-party tax challenges and by the Anti-Injunction Act. And all of the plaintiffs must raise their tax-related claims in a refund action, not this APA suit.

On the merits, the plaintiffs misinterpret the Affordable Care Act by ignoring all recognized principles of statutory construction. They assert that one phrase in Section 36B, read in isolation, means that the federal tax credits that are the "key" to ensuring affordable coverage are available *only* in state-run Exchanges, and not in the federally-facilitated Exchanges (including those run in partnership with states), which will be the only Exchanges available for citizens of 34 states. However, when read in its entirety and in light of the Act as a whole – as it must be – Section 36B is best to provide the federal tax relief that Congress deemed vital on a

nationwide basis. At least, Treasury reasonably reads the statute to so provide. Contrary to the plaintiffs' theory, and as the defendant's proper textual analysis makes clear, Congress specified that the federally-facilitated Exchange would be the *same* entity as the Exchange that the state is directed to establish. In other words, the federal government stands in the shoes of the state in establishing "such Exchange." 42 U.S.C. § 18041(c)(1). Treasury's reading of the Act gives effect to this and related provisions; the plaintiffs' reading does not. Moreover, Treasury's reading avoids many other anomalies that would flow from the logic of the plaintiffs' theory – including a result that even the plaintiffs now concede would be absurd: that no person could qualify to buy coverage at all through the federally-facilitated Exchange that the Act creates, a result that Congress clearly could not have intended.

Although the reasonableness of Treasury's interpretation is plain once Section 36B is viewed in the proper statutory context, that reading gains equally strong support from the legislative history and purpose. Put simply, the plaintiffs' theory runs contrary to the fundamental purpose of the ACA: expanding the availability of affordable health coverage, a goal that could not be achieved without the premium tax credits. There is no support, other than the post hoc account concocted by the plaintiffs and their *amici*, for the notion that Congress meant for the Act's basic goal to be achieved in some states but not others, or that Congress meant to incentivize states to establish Exchanges by threatening their citizens with the denial of affordable health coverage if they failed to do so. Had Congress intended to make such a dire threat, it would have declared so in a clear statement. No such statement exists.

Treasury's construction of Section 36B is entitled to *Chevron* deference. The plaintiffs' arguments against the application of *Chevron* deference – largely presented for the first time on reply – are wrong. Both Treasury and HHS are fully in agreement that participants in any

Exchange may be eligible for federal premium tax credits, so this is not a case in which to apply the exception to the *Chevron* rule for cases where multiple agencies have offered conflicting interpretations of a statute. Moreover, Treasury's interpretation of a statute creating tax credits is entitled to the same deference as given to those of statutes imposing taxes; recent Supreme Court precedent makes it clear that *Chevron* deference applies to Treasury's interpretation of all of the provisions of the Internal Revenue Code. Accordingly, this Court should defer to Treasury's reasonable interpretation of Section 36B, and reject the plaintiffs' attempt to read one phrase in that provision in isolation so as to deny millions of Americans the tax relief Congress intended them to have under the Affordable Care Act.

Argument

I. This Suit Is Not Justiciable

A. The Individual Plaintiffs Lack Article III Standing

David Klemencic – the only individual plaintiff who has attempted to establish standing – has failed to state a legally cognizable injury under Article III. He does not categorically object to all insurance coverage, and in fact explored the purchase of a catastrophic insurance plan on West Virginia's Exchange, but, after reviewing the "published rates," decided not to make that purchase. ECF 39-1, ¶¶ 1, 3. A "bronze" plan on the same Exchange would offer the same coverage to Klemencic, on more generous terms, and the net cost of that plan would be only $1.70 a month, after Section 36B tax credits are applied. ECF 49-2, ¶ 6. Klemencic objects to these terms, however, because he "oppose[s] government handouts" and therefore wants to disclaim any subsidies that the ACA might provide to him. ECF 24-1, ¶ 8.

On these facts, Klemencic lacks Article III standing: he is not harmed by a provision that affords him a benefit, particularly given his concession that he would have been willing to

pay more for a less generous form of coverage. His purported injury is caused by his "own personal 'wish'" not to accept the benefits that are offered to him, "*i.e.*, [his] personal choice." *McConnell v. FEC*, 540 U.S. 93, 228 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). Klemencic's ideological objection to "handouts" does not state a legal injury now, and certainly did not do so at the time that he filed his complaint, when he thought that a bronze plan would be completely free to him. ECF 29-1. *See Worth v. Jackson*, 451 F.3d 854, 860 (D.C. Cir. 2006) (standing must be shown at outset of case).

B. The Employers' Claims Are Not Justiciable

1. The employers also lack Article III standing. They claim that they are "threatened" by the possibility that they will be assessed with the tax for certain large employers that fail to offer adequate coverage to their full-time employees, 26 U.S.C. § 4980H. But that tax arises, as a matter of law, if one or more of those employees receives a premium tax credit, *see* 26 U.S.C. § 4980H(a), (b), and the employers cannot extinguish their employees' right to such tax credits under Section 36B in this action. *See Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (claim and issue preclusion do not apply to nonparties). Thus, because a hypothetical ruling in the employers' favor could "not effect any change in federal [tax] law that could bind nonparties," their claimed injury is not redressible here. *Urban Health Care Coalition v. Sebelius*, 853 F. Supp. 2d 101, 108 (D.D.C. 2012). In response to this point, the plaintiffs assert that it "is extraordinarily unlikely" that the employees would claim Section 36B tax credits if this Court were to rule in the employers' favor. ECF 57 at 43. The basis for their confidence on this score is not clear. The 18 Golden Chick quick-service restaurant employees referenced by the plaintiffs (ECF 24-3, ¶ 3), for example, would have a powerful incentive to seek tax credits worth, on average, more than $5,000 per person a year, *see* Gov't Ex. 4 (ECF 51-1 at 53). The

employers, then, could not redress the injury they allegedly face from a "threat" of a future Section 4980H tax assessment in this suit. *See, e.g., University Med. Ctr. of S. Nevada v. Shalala*, 173 F.3d 438, 441-42 (D.C. Cir. 1999).

2. The employers also lack prudential standing. Their claims violate the well-established "principle that a party may not challenge the tax liability of another," apart from circumstances where the party stands in the shoes of the absent taxpayer. *United States v. Williams*, 514 U.S. 527, 539 (1995). In response, the plaintiffs cite cases permitting constitutional challenges to be raised with regard to absent third parties' tax liabilities. ECF 57 at 44-45. But this is not a constitutional case; the plaintiffs assert merely that Treasury has exceeded its statutory authority. Prudential principles bar purely statutory challenges to third parties' tax assessments, even where constitutional claims involving "a fundamental right or classification that attracts heightened judicial scrutiny" might be allowed. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 431 (2010). As the plaintiffs correctly note, *Levin* also involved a constitutional claim. ECF 57 at 45. This does not help their argument, however. *Levin* involved a negative Commerce Clause challenge to a state statute awarding tax benefits to third parties; because that claim did not involve "fundamental" constitutional rights, the Court held, prudential doctrines demanded the dismissal of the suit. 560 U.S. at 431. So too here.

3. The employers' claims fail for a third reason: their suit is barred by the Anti-Injunction Act (AIA), 26 U.S.C. § 7421(a). The AIA bars "suit for the purpose of restraining the assessment or collection of *any tax*." 26 U.S.C. § 7421(a) (emphasis added). Because Congress expressly characterized the large employer assessment as a "tax," *see* 26 U.S.C. § 4980H(b)(2), (c)(7), *see also* 42 U.S.C. § 18081(f)(2), it follows that Congress intended the term "tax" to mean the same thing in both sections of the Internal Revenue Code. *See*

Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007). Thus, the AIA bars suits to restrain the assessment or collection of the Section 4980H tax.

The Fourth Circuit in *Liberty University v. Lew*, 733 F.3d 72 (4th Cir. 2013), did not consider this principle of statutory construction, and for that reason the defendants respectfully submit that that court erred in its jurisdictional holding. Indeed, the plaintiffs do not even attempt to defend the Fourth Circuit's reasoning. ECF 57 at 48. They argue, instead, that the AIA does not apply because they are formally asking the Court only to bar the award of Section 36B tax credits to other persons; the employers' relief from the Section 4980H tax, in their view, would merely be a "downstream, collateral consequence[]" of the Court's order. ECF 57 at 49. But the AIA cannot be avoided by creative pleading. The employers' claimed injury is the potential Section 4980H tax assessment, and their only purpose in bringing this suit is to prevent that tax from being assessed or collected. In other words, their suit is "*for the purpose*" of restraining the assessment or collection of a tax. 26 U.S.C. § 7421(a) (emphasis added). The employer plaintiffs "would not be interested in obtaining the declaratory and injunctive relief requested" in their complaint if it did not result, in their view, in relief from the Section 4980H tax. *Alexander v. Americans United, Inc.*, 416 U.S. 752, 761 (1974); *see also Bob Jones Univ. v. Simon*, 416 U.S. 725, 738-39 (1974). Consequently, the AIA bars their suit.

C. The Plaintiffs Must Follow the Form of Proceeding that Congress Specified for Their Claims

The APA directs that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute," unless the statutorily specified review proceeding is "inadequa[te]." 5 U.S.C. § 703; *see also* 5 U.S.C. § 704. There is no dispute that Congress has specified the remedy for the types of claims that the plaintiffs assert here – an action for a tax refund. *See United States v. Clintwood Elkhorn*

Mining Co., 553 U.S. 1, 7 (2008). The plaintiffs dispute only whether a refund action would provide an adequate remedy. It plainly would.

The plaintiffs assert that they should not be put to the choice of "violating" the "individual and employer mandates" in order to bring a refund suit. ECF 57 at 46-47. This argument is squarely foreclosed. *See Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2600 (2012) ("imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act"); *Liberty Univ.*, 733 F.3d at 97-98. It is well-settled that a tax refund action provides an adequate remedy at law, even though the tax must first be imposed before the suit is brought. *See, e.g.*, *Bob Jones Univ.*, 416 U.S. at 742; *Americans United*, 416 U.S. at 762.

Cohen v. United States, 650 F.3d 717 (D.C. Cir. 2011), is not to the contrary. That case involved a challenge to an IRS administrative mechanism for the submission of a particular type of refund claim. Because the suit challenged the "adequacy of the agency procedure itself," the question whether a tax refund remedy was adequate was "for all practical purposes identical" to the merits of the suit, and the suit could proceed. *Id.* at 733. The court took pains to note, however, that "challenges to the validity of an individual tax" must be brought in a refund suit. *Id.* The plaintiffs do not challenge IRS procedures, but instead argue that they should not be subject to a tax liability. That claim must be brought in a refund action.[1] *See, e.g.*, *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009); *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1270 (D.C. Cir. 2005).

[1] The plaintiffs also argue that a refund action would not be adequate, because Klemencic wishes to receive a certificate of exemption from the 26 U.S.C. § 5000A tax penalty. ECF 57 at 47. This is a red herring. Klemencic does not need a certificate of exemption to challenge that assessment. He can present precisely the same theory that he now advances in the forum that Congress designated, a tax refund action. There is no reason, then, to disregard Congress's choice of that forum for Klemencic to challenge the Section 5000A tax penalty that might be assessed against him, which would amount at the most to $100 for 2014.

II. Section 36B is Best Read, and at a Minimum Is Reasonably Read, to Provide that Participants in Federally-Facilitated Exchanges May Be Eligible for Federal Premium Tax Credits

On the merits, the plaintiffs continue to insist that the Court read one phrase in 26 U.S.C.§ 36B(b)(2)(A) in isolation, without reference to the remainder of that section, the larger structure of the Affordable Care Act, or the Act's purpose and history. ECF 57 at 4. All established canons of statutory interpretation demand precisely the opposite approach. "In making the threshold determination under *Chevron*, 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. It is a 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." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (internal quotations and alterations omitted). *See also, e.g., Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ*., 550 U.S. 81, 98-99 (2007); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). When read in context, as Section 36B must be, it is clear that Congress intended for federal premium tax credits to be available for participants in the federally-facilitated Exchanges. Because Treasury offers the best reading of the Act, or at the very least a reasonable reading of the Act, its interpretation must be sustained under *Chevron*.

A. Treasury Reasonably Reads Section 36B Together with 42 U.S.C. §§ 18031 and 18041 to Provide that Participants in Federally-Facilitated Exchanges May Be Eligible for Federal Premium Tax Credits

Section 36B(b)(2)(A) cannot be read in isolation, 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). *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."). Section 18031 thus presumes that the state is to establish an Exchange, but also accounts for the possibility that a state may not do so, by directing that, if a state will "not have any *required Exchange* operational by January 1, 2014, … the Secretary shall (directly or through agreement with a not-for-profit entity) establish and operate *such Exchange* within the State[.]" 42 U.S.C. § 18041(c)(1) (emphasis added). The "required Exchange" is the Exchange that the state is directed to establish under Section 18031. Thus, the federally-facilitated Exchange *is* the Exchange that the state is directed to establish under Section 18031: the federal government stands in the shoes of the state in establishing "such Exchange."

It follows from the foregoing that the Section 36B 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. This reading is necessary to make sense, for example, of Section 18031(d)(1), which directs that an Exchange shall be an entity "that is established by a State." That phrase, coupled with Section 18041(c), reflects that the federally-facilitated "Exchange" is the Exchange that the state is directed to establish. That is, the Act takes the state-established Exchange as a given, and directs the federal government to act to bring the Exchange into operation if the state does not to do so, or fails to do so sufficiently.[2]

The ACA's definitional provisions confirm this reading. The Act treats "Exchange" as

[2] The plaintiffs do not respond at all to this point that Section 36B and 42 U.S.C. §§ 18031 and 18041 must be read together. They do, however, purport to find meaning in another provision, 42 U.S.C. § 18043, which sets up a mechanism for the establishment of Exchanges in the territories. ECF 57 at 6. The reason why the Act treats territories separately is clear. Territorial residents do not ordinarily pay federal income tax, 26 U.S.C. §§ 931-33, and so Congress needed some mechanism other than federal premium tax credits to put the Act into effect for the territories. Residents of all fifty states, of course, do pay federal income tax, whether or not their state has established its own Exchange.

a defined term; to confirm this point, it is capitalized each time it appears in the Act. The term is defined 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. The plaintiffs acknowledge this point, but they argue that an Exchange would not be established "by a state." ECF 57 at 7. But the plaintiffs miss the point. By defining "Exchange" one way regardless of the identity of the operator, the Act makes clear its intent to create one type of Exchange, not classes of Exchanges.

This reading is further confirmed by 26 U.S.C. § 36B(f)(3). That provision directs every Exchange, as well as persons designated by HHS to carry out the responsibilities of the federally-facilitated Exchange, to provide information to Treasury and to taxpayers regarding payments of premium tax credits. This provision *assumes* that premium tax credits are available on the federally-facilitated Exchange, and it would make no sense if there were no tax credits for that Exchange to process. The plaintiffs speculate that Congress might have intended the federally-facilitated Exchange to make meaningless reports, simply to avoid potential redundancy in drafting the statute. ECF 57 at 10. But there would be no reason for the federally-facilitated Exchange to report *any* of the information listed in Section 36B(f)(3) to Treasury under the plaintiffs' theory; Treasury does not need that information for anything other than the administration of the premium tax credit, particularly given that Treasury already will receive some similar information under a separate reporting provision, 26 U.S.C. § 6055. This is why Congress directed "*[e]ach* Exchange" to provide *all* of the required information,

including reporting on tax credits. 26 U.S.C. § 36B(f)(3) (emphasis added). The far more natural conclusion to draw from this language is the one drawn by Treasury: that Congress expected that federal premium tax credits would be provided in every Exchange. *See Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 878 (D.C. Cir. 2006).

Section 36B, when read in its entirety, 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, and that Section 36B would operate in every state "to establish a nationwide scheme of taxation uniform in its application." *United States v. Irvine*, 511 U.S. 224, 238 (1994) (federal taxing statute not to be read to be "subject to state control or limitation" absent plain language so requiring). Because the intent of Congress is clear, "applying the ordinary tools of statutory construction," and, at the very least, because Treasury has reasonably resolved any statutory ambiguity, its interpretation should be upheld under *Chevron*. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

B. The Larger Structure of the Act Confirms Treasury's Interpretation

It is axiomatic that "in ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004); *see also, e.g.*, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563 (2013); *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013). The plaintiffs ignore this precept, reading Section 36B in isolation. It is thus not surprising that the plaintiffs' theory would upset the Act's structure in a number of ways that Congress could not have intended.

1. Notably, the logic of the plaintiffs' theory would produce the absurd 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 provision defining "qualified individual" for purposes of the federally-facilitated Exchange. Run to its logical conclusion, then, the plaintiffs' theory would mean that nobody would be a "qualified individual" in a state with a federally-facilitated Exchange. Obviously, Congress did not intend this result; without any eligible buyers, there would be no reason for the federally-facilitated Exchange to exist. Even the plaintiffs acknowledge the absurdity of this result. As they put it, Congress did not mean "to establish an eligibility criterion that is literally impossible to satisfy, since, if possible, one does not interpret statutes to create such a Catch-22." ECF 57 at 16, citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995).

The plaintiffs offer two theories seeking to avoid the absurdity that their interpretation would create. However, neither theory is tenable, and this provides further proof that their interpretation is wrong. First, the plaintiffs argue that the definition of a "qualified individual" applies only where states operate their own Exchange. ECF 57 at 15. They read the term "Exchange" in Section 18032(f) – which defines eligibility "with respect to an Exchange" – to refer only to state-operated Exchanges. But, for the reasons shown above, the federally-facilitated Exchange is the same entity as the Exchange that the state is directed to establish, and the Act uses the term "Exchange" to refer to every Exchange, regardless of the identity of its operator. Indeed, the plaintiffs explicitly agree with this point elsewhere in their brief: "The term 'such,' and the definition of 'Exchange,' confirm that the federal government should establish *the same Exchange* as the state was supposed to have established." ECF 57 at

5 (emphasis in original); *see also id.* at 7. The plaintiffs may offer a different definition of "Exchange," applicable to 42 U.S.C. § 18032 alone, only by ignoring the principle that "identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp.*, 551 U.S. at 232. There is no reason to think that Congress intended this result.

Second, the plaintiffs argue (for the first time on reply) that the Court should simply read the residence provision out of the text of Section 18032. Under this new theory, a "qualified individual" would simply be a person "seeking to enroll in a qualified health plan," 42 U.S.C. § 18032(f)(1)(A)(i), and there would be no need to meet the second condition that the person "resides in the State that established the Exchange," 42 U.S.C. § 18032(f)(1)(A)(ii). But the statute specifies that both clause (i) *and* clause (ii) must be met for a person to be a "qualified individual." Congress's use of the term "and" makes it "self-evident" that Congress meant to impose both conditions. *Feist Pubs. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 357 (1991). This Court, then, should decline the plaintiffs' new invitation to "tak[e] a red pen to the statute" by "cutting out" the residence clause. *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1267 (2011).

It would make far more sense to do as Treasury has done, and interpret the Act not to create an absurd result in the first place. As explained above, the Act is best read to create a presumption that a state will create an Exchange, and that, where a state fails to do so adequately, the federal government stands in the shoes of the state to perform whatever actions are necessary to ensure that the Exchange that the state is directed to establish under 42 U.S.C. § 18031 is brought into operation. The Act's definition of a "qualified individual" makes perfect sense, then, under Treasury's approach. Every person "resides in [a] State that established the Exchange" under Treasury's reading, and there is no need to resort to the plaintiffs' contortions to avoid an absurd result.

2. The plaintiffs' theory also would create an unanticipated obligation for states in the operation of their Medicaid programs. As the plaintiffs acknowledge, ECF 57 at 13, it follows from their theory that a state with a federally-facilitated Exchange would never be relieved of the Act's temporary maintenance-of-effort requirement for that state's Medicaid program. 42 U.S.C. § 1396a(gg)(1). It is not plausible that Congress intended this result. If it had so intended, it would have provided "clear notice" of this condition to the states. *See Arlington Central Sch. Dist. v. Murphy*, 548 U.S. 291, 296 (2006). There is no reason to interpret the Act to impose this unexpected obligation, particularly given that the plaintiffs contend that doing so would raise a serious constitutional question, which the court must avoid if possible. *See, e.g.*, *Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d 208, 226 (D.C. Cir. 2013).

3. The plaintiffs' theory would also undermine the ACA's process for state innovation waivers. As the defendants have noted, beginning in 2017, a state that has enacted legislation to provide its own deficit-neutral system of comprehensive, affordable health coverage may seek to opt out of some of the Act's provisions. 42 U.S.C. § 18052. In particular, if a waiver were approved, the state could opt out of the application of premium tax credits under Section 36B; federal funds in the amount of the forgone tax credits would be distributed directly to the state to administer its alternative plan. 42 U.S.C. § 18052(a)(3), (b)(1). Congress thus specified the terms of the deal that it offered to the states – the state could gain approval for Section 36B (and related provisions) not to apply within its borders, but only after the state enacted its own comprehensive health reform legislation meeting specified criteria. This offer would be pointless under the plaintiffs' reading. The plaintiffs argue that Section 18052 would not be fully superfluous under their theory. ECF 57 at 12. But the issue is not whether the plaintiffs could salvage some way for Section 18052 to have some limited effect; perhaps the waiver

provision could survive in some minimal form. But such an outcome would be a far cry from the system that Congress intended, which is one that ensures that comprehensive, affordable health coverage is available in every state, either under the system specified by the ACA or under an alternative, equally comprehensive system enacted by the state.

4. Recognizing the gravity of these anomalies, the plaintiffs encourage the Court not to concern itself with the damage that the logic of their theory would wreak on the structure of the ACA, because HHS could use its regulatory power to try to fill the numerous gaps that their theory would create. ECF 57 at 13. This cavalier argument does not speak, however, to how *Congress* intended the Act to operate. In any event, it is not apparent how the plaintiffs believe that regulations could restore the operation of (for example) the Act's provision for the coordination of CHIP benefits with the Exchanges. The Act instructs states to ensure that low-income children (who are not Medicaid-eligible) have access to plans in an Exchange, if there is a funding shortfall in the state's CHIP program. 42 U.S.C. § 1397ee(d)(3)(B). The Act also directs HHS, "[w]ith respect to each State," to certify whether plans offered through an "Exchange established by the State under [42 U.S.C. § 18031]" provide benefits for children that are at least comparable to those offered in the state's CHIP plan. 42 U.S.C. § 1397ee(d)(3)(C). It is not apparent how the plaintiffs would contend that HHS could fulfill this statutory obligation for "each State" under their theory. In contrast, if the federal government stands in the shoes of the state to operate the Exchange where the state does not do so, then Section 1397ee does not impose an obligation on HHS that is impossible to fulfill.

C. Treasury's Interpretation Comports with Congress's Clear Purpose in Enacting the Affordable Care Act

The plaintiffs' acontextual interpretation of Section 36B would undermine Congress's basic goals in passing that legislation. Their theory runs contrary to the principle that the Act

must be interpreted in light of its "object and policy." *Maracich v. Spears*, 133 S. Ct. at 2203; *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44 (1989) (court must "look to the purpose of the statute" in order to guard against "the danger that the federal program would be impaired if state law were to control"). Congress's goal in enacting Section 36B is obvious; it recognized that the Section 36B tax credits "are *key* to ensuring people affordable health coverage." H.R. REP. NO. 111-443, vol. I, at 250 (Gov't Ex. 1, ECF 51-1 at 4) (emphasis added). The defendants have explained – and the plaintiffs have not disputed – that, without Section 36B tax credits, millions of Americans living in states with federally-facilitated Exchanges would find it impossible to buy affordable insurance; the cost of premiums would rise significantly for millions more Americans; and the ACA's insurance reforms, including the ban on discrimination by insurers on the basis of pre-existing conditions, would be undermined. ECF 49-1 at 42-44. Congress clearly did not intend such a result and, as explained above, the proper interpretation of the text of the Act does not by any means require such a result.

However, the plaintiffs persist in a post hoc argument divorced from legislative reality, claiming that Congress did so intend, because it wanted to incentivize states to create their own Exchanges. ECF 57 at 23. Not only is there no contemporaneous record of any such intent, but this argument makes no sense: Congress did not create the Exchanges as ends in themselves. Rather, it created the Exchanges as part of a comprehensive scheme to expand the availability of affordable health coverage. *See* S. REP. NO. 111-89, at 9 (Gov't Ex. 9, ECF 51-1 at 126); H.R. REP. NO. 111-443, vol. II, at 989 (Gov't Ex. 1, ECF 51-1 at 20). Congress would not have sacrificed the Affordable Care Act's central objective – providing affordable coverage nationwide, including through the use of premium tax credits – simply to give states the incentive to create their own Exchanges.

In any event, if Congress had wanted to create such a powerful incentive, again, it would have given the states "clear notice" that it was doing so. *See Arlington Central Sch. Dist.*, 548 U.S. at 296. Congress knows how to provide this clear notice when it means to impose conditions on the states; the Medicaid program, for example, expressly warns states of the potential consequences of their failure to comply with federal conditions. *See* 42 U.S.C. § 1396c. Here, Congress provided no warning that state residents' eligibility for Section 36B tax credits would purportedly turn on which entity operated the Exchange. Nor did the states receive any such warning; as the plaintiffs concede, "states apparently did not get the message" that Congress supposedly meant to send. ECF 57 at 24.[3] This concession is fatal to the plaintiffs' theory under *Arlington Central School District*.

D. The Legislative History Confirms Treasury's Interpretation

1. The legislative history further confirms that Congress intended for federal premium tax credits to be available in every state, regardless of which entity operated the Exchange. The Congressional Budget Office (CBO) and the Joint Committee on Taxation (JCT) prepared estimates of the budgetary effects of the ACA, predicated on the belief that tax credits would be available nationwide. If anybody believed that CBO and the JCT had erred, the issue would have arisen during Congress's deliberations. It did not. As CBO's director describes, "the possibility that those subsidies would only be available in states that created their own exchanges did not arise during the discussions CBO staff had with a wide range of Congressional staff when

[3] The Commonwealth of Virginia is a case in point. Contrary to the theory now advanced by Virginia's Attorney General (ECF 60), Virginia's Governor did not express any understanding that his decision to forgo a state-operated Exchange would have any consequences for his state's residents. He recited instead that "*the law makes clear*" that "the choice of a state-based, federal, or hybrid/partnership exchange are all equally valid in complying with the law." Letter from Governor McDonnell to Secretary Sebelius, at 1 (Dec. 14, 2012) (emphasis added), available at http://www.governor.virginia.gov/utility/docs/ HealthcareExchangeLetter.pdf.

the legislation was being considered." Letter from Director Elmendorf to Rep. Issa, at 1 (Dec. 6, 2012) (Gov't Ex. 17, ECF 51-1 at 210).

The plaintiffs speculate, without any supporting contemporary evidence, that Congress must have assumed that every state would operate its own Exchange. ECF 57 at 19. But it was well known at the time that some states would resist implementation of the ACA. Numerous proponents of state-level measures vocally declared that they wanted to "lay groundwork for fights about elements of the health care package that are expected to be left up to the state," such as proposals to "allow individual states to 'opt in' or 'opt out' of regional health insurance markets[.]" David D. Kirkpatrick, *Health Lobby Takes Fight to the States*, New York Times A1 (Dec. 28, 2009) (Gov't Ex. 23, ECF 51-1 at 222). As one state senator put it, "We would be essentially telegraphing our intentions. . . . If there was an opt-in, we are essentially stating now that we are not going to opt in." *Id.*[4] The plaintiffs' theory depends on the premise that Congress willfully chose to ignore these "telegraph[s]."

2. The JCT's report provides further confirmation of Congress's intent. The JCT recited in its summary of the ACA's tax provisions that the Section 36B premium tax credit "subsidizes the purchase of certain health insurance plans through an exchange," without specifying that the entity that operates the exchange would be relevant in any way. Gov't Ex. 27 at 12, ECF 51-1 at 237. The plaintiffs respond only by noting that the JCT, elsewhere in its report, sometimes refers to "state exchanges." ECF 57 at 22. But this is beside the point. The JCT's mission is to describe the operation of the tax legislation that it assisted in drafting

[4] The plaintiffs dispute the relevance of this article, asserting that it refers only to federal legislation. ECF 57 at 20. This is not so. The description of Congressional proposals to "'opt out' of regional health insurance markets" perfectly describes H.R. 3590 as it existed at the time (and as later became law); the bill gave states the choice to opt in or opt out of the operation of the health insurance marketplace, that is, the Exchange. As the article recites, multiple states were prepared to "opt out" of any measures that the Act left to the states' discretion.

with precision. If the Committee believed that the identity of the entity running the Exchange had any bearing on eligibility for Section 36B tax credits, it would have noted that condition. It did not, and that is powerful evidence that no such condition exists.

3. In addition, in passing H.R. 3962, its version of health reform legislation, the House unequivocally provided for tax credits to be available in all of the Exchanges, whether state- or federally-run. If any House member believed that the Senate-passed bill had departed from this approach, he or she would have noted this distinction. No such objection was raised. It is not plausible that the House would have tinkered with the amounts of the Section 36B tax credits in enacting HCERA, while ignoring the supposed fact that tax credits would be denied entirely in some states. Although the plaintiffs speculate that the House was silent because it could not have addressed the issue in reconciliation, ECF 57 at 18, this is plainly wrong. The availability of tax credits is a budgetary matter, and could have been addressed through reconciliation in the same manner that HCERA addressed the amounts of these tax credits. *See* 2 U.S.C. § 644.

4. The plaintiffs argue that earlier legislation, the Trade Adjustment Assistance Act (TAAA), provides relevant legislative history. They misdescribe that statute, however. Congress did not "condition[] the tax credit" that it provided on state action. ECF 57 at 9. Instead, Congress provided a tax credit for certain workers displaced by foreign competition, which could be used to offset the costs of several different kinds of qualifying health insurance. Some forms of qualifying insurance are available nationwide, and the TAAA permits states to designate *additional* kinds of insurance that would meet certain minimum standards. 26 U.S.C. § 35(e). The TAAA, then, provides no support for the plaintiffs' claim that Congress intended, in that statute or in the ACA, to make its tax credits available in some states but not others.

The most relevant feature of the TAAA, instead, is its sunset date – January 1, 2014.

Pub. L. No. 112-40, § 241(a), 125 Stat. 401, 418 (Oct. 21, 2011). Congress, obviously, understood that the statute would no longer be required once the Exchange-related provisions of the ACA came into effect in 2014. It is doubtful that Congress would have terminated this program for health insurance tax credits, which it had made available on a nationwide basis for displaced workers, if it had thought that workers in states with federally-facilitated Exchanges would be left with no tax relief at all.[5]

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

Despite their earlier claims that every merits issue in the case "has already been briefed." ECF 44 at 2; *see also* ECF 39 at 25, the plaintiffs now attempt to present several new arguments to contend that *Chevron* deference should not apply. The plaintiffs have waived these new arguments, because "[i]ssues may not be raised for the first time in a reply brief." *Rollins Envtl. Servs. v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991); *see also Long v. United States*, 604 F. Supp. 2d 119, 123 (D.D.C. 2009). In any event, none of their arguments has merit.

1. The plaintiffs first repeat their main argument in this case: that *Chevron* deference is not owed because the snippet of statutory language that they rely upon is unambiguous, or because any ambiguity is not of the sort that an agency should resolve. ECF 57 at 25-26. Alternatively, they argue that the Treasury regulation is not reasonable because it contradicts the

[5] In their brief, Messrs. Adler and Cannon offer a similarly creative interpretation of the Act's history. (ECF 61.) They misstate many of their sources; two examples should suffice. Senator Baucus, in his White Paper, did not advocate for premium subsidies to be available in some states but not others. Instead, he called for those subsidies to be available "to make health coverage available for all Americans." Sen. Max Baucus, *Call to Action: Health Reform 2009* at 20 (Nov. 12, 2008). And the group of scholars led by Henry Aaron did not decry the Senate-passed bill's supposed withdrawal of tax credits in some states. Instead, they explained that the Senate-passed and House-passed bills were alike in "offering affordability credits to those who cannot afford health insurance." Letter from Henry J. Aaron, Brookings Institution to Speaker Nancy Pelosi (Jan. 22, 2010), available at http://www.newrepublic.com/blog/the-treatment/47-health-policy-experts-includingme-say-sign-the-senate-bill.

Act's unambiguous text. *Id.* at 33-34. But, for the reasons discussed above and in prior briefing, it is the *plaintiffs'* reading of the Act that is contradicted by the Act's text, structure, purpose, and history. Treasury's interpretation, not the plaintiffs', offers a reading that reconciles the Act as a whole, and that interpretation should prevail under *Chevron* step one. At the very least, it is a reasonable interpretation, which is owed deference under *Chevron* step two.[6]

2. The plaintiffs argue, for the first time on reply, that Treasury is not owed deference, because it shares responsibility for administering parts of the Act with HHS, and the two agencies supposedly disagree with respect to the issues presented here. ECF 57 at 26. This argument is doubly misplaced. First, Treasury and HHS fully agree that residents of every state may be eligible for premium tax credits. There is no reason to deny *Chevron* deference to Treasury's expert judgment, simply because that judgment is also shared by HHS. Second, Congress expressly delegated rulemaking power to Treasury here, so there is no need to speculate whether Congress intended an implicit delegation or not.

As Treasury recited when it proposed the regulation at issue here, it has "work[ed] in close coordination [with HHS] to release guidance related to Exchanges, in several phases." 76 Fed. Reg. 50,931, 50,932 (Aug. 17, 2011). Through this process of close coordination, both Treasury and HHS have issued notice-and-comment regulations reciting that state-operated and federally-facilitated Exchanges are to be treated alike for all purposes relevant here. Treasury, for its part, promulgated 26 C.F.R. § 1.36B-1(k), the regulation challenged here, providing that participants in any Exchange may be eligible for Section 36B tax credits. HHS, likewise, has determined that participants in any of the Exchanges are eligible for advance payments of the

[6] As to the plaintiffs' contention that some unspecified kinds of ambiguity are left to courts, not agencies to resolve, that claim is answered by *City of Arlington*, which disclaimed that distinction, and held instead that "the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." 133 S. Ct. at 1871.

premium tax credits, regardless of who runs the Exchange. *See* 45 C.F.R. § 155.20 (advance payments are provided for eligible individuals enrolled in a plan "through an Exchange"); 45 C.F.R. § 155.305(a), (f) (listing criteria for eligibility for advance payments). HHS has also determined that cost-sharing reductions under 42 U.S.C. § 18071 (which turn on tax credit eligibility) are available for participants in any Exchange. 45 C.F.R. §§ 155.20, 155.305(a), (g).

Given that the two agencies are in full agreement, *Chevron* deference plainly applies here. *See, e.g.*, *Nat'l Ass'n of Home Builders*, 551 U.S. at 665-66 (according *Chevron* deference to regulation jointly issued by Departments of Commerce and Interior under the Endangered Species Act); *see also Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 277-78 (2009) (deferring to agencies' interpretation of shared-administration statute); *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1289 (D.C. Cir. 2004) (same). Indeed, both Treasury and HHS are co-defendants in this suit. Both agencies agree that Treasury has primary authority to interpret Section 36B; they stand behind the consistent interpretations that they presented in their respective rulemakings; and they both agencies "press[] the same interpretation before this Court." *New Life Evangelistic Ctr. v. Sebelius*, 753 F. Supp. 2d 103, 123 (D.D.C. 2010). Consequently, *Chevron* deference applies.[7]

The plaintiffs attempt to avoid the required deference, citing case law holding that, where agencies share authority, it "cannot be said that Congress implicitly delegated authority [to one agency] to reconcile ambiguities or to fill gaps." *Salleh v. Christopher*, 85 F.3d 689, 692 (D.C. Cir. 1996). But there is nothing "implicit" in Congress's delegation here. It *expressly* delegated authority to Treasury to resolve any ambiguities in Section 36B. *See* 26 U.S.C.

[7] *See also Nat'l Treasury Employees Union v. MSPB*, 743 F.2d 895, 916-17 (D.C. Cir. 1984); *Nat'l Home Equity Mtge. Ass'n v. OTS*, 271 F. Supp. 2d 264, 274 (D.D.C. 2003), *aff'd*, 373 F.3d 1355 (D.C. Cir. 2004); *Indiv. Reference Servs. Group v. FTC*, 145 F. Supp. 2d 6, 24 (D.D.C. 2001), *aff'd*, 295 F.3d 42 (D.C. Cir. 2002).

§ 36B(g) ("The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section."); *see also* 26 U.S.C. § 7805(a) ("the Secretary shall prescribe all needful rules and regulations for the enforcement of this title"). This is precisely the language that Congress uses when it intends to delegate rulemaking authority. *See Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 709 (D.C. Cir. 2008).[8] When Congress provides such "a broad grant of rulemaking authority," there is no occasion to "have a court search provision-by-provision to determine whether that delegation covers the specific provision and particular question before the court." *City of Arlington*, 133 S. Ct. at 1874 (internal quotation omitted).

The Supreme Court recently relied on 26 U.S.C. § 7805(a) to uphold Treasury's reasonable interpretation of a tax statute. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 715 (2011). The case involved parallel (and identical) provisions in the Internal Revenue Code and the Social Security Act, the former providing an exemption from FICA taxes for students, and the latter withholding Social Security benefits for the same students. The Court accorded *Chevron* deference to Treasury, even though the case involved, in part, an interpretation of the Social Security Act (which is administered by SSA, not by Treasury). Indeed, the Court noted that Treasury had reasonably considered "the purpose of the Social Security Act," and had "taken into account the SSA's concerns," in upholding the agency's interpretation under *Chevron* step two. *Mayo Found.*, 131 S. Ct. at 715.[9]

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[8] Nor is there any reason to believe that Congress meant to exclude any particular phrase in Section 36B from the scope of this delegation of authority. "As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted" in 26 U.S.C. § 36B(g), the courts would "expect[] [Congress] to do so in language expressly describing an exception." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991).

[9] The D.C. Circuit likewise applies *Chevron* deference where Congress has expressly delegated

3. The plaintiffs also contend, also for the first time on reply, that there is a "clear statement" rule that must be met before tax credits may be provided, and that *Chevron* deference cannot trump this supposed rule. ECF 57 at 30. They cite no case so holding, and no such case exists. Although tax benefits are not to be presumed, that is not a "clear statement" rule. Instead, a tax benefit, "even if not supported by express statutory language," can "nonetheless be recognized if it is in harmony with the statute as an organic whole." *Centex Corp. v. United States*, 395 F.3d 1283, 1295 (Fed. Cir. 2005); *see also Lewyt Corp. v. Commissioner*, 349 U.S. 237, 240 (1955). Thus, Treasury is entitled to *Chevron* deference in its construction of the Internal Revenue Code, whether it is interpreting a statute that imposes a tax, or one that confers a tax benefit. *Mayo Foundation*, again, is instructive. As noted, the case involved Treasury's construction of a tax exemption statute, which the Court found to be ambiguous. 131 S. Ct. at 711-12. Instead of declaring a "clear statement" rule, however, the Court held that Treasury was entitled to resolve the ambiguity under *Chevron*. *Id.* at 712. Indeed, the Court recited the canon that "exemptions from taxations are to be construed narrowly," 131 S. Ct. at 715, as support for its holding that Treasury's construction was reasonable under *Chevron* step two, not to displace the *Chevron* analysis altogether.

IV. At All Events, This Court Should Not Order Equitable Relief Broader than Necessary to Address Any Injuries of the Plaintiffs Before the Court

Even if they prevail, the plaintiffs are not entitled to a nationwide injunction that would injure millions of individuals who are not before the Court. The plaintiffs may not gain relief broader than is necessary to remedy their own injuries, *see Monsanto Co. v. Geerston Seed*

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rulemaking authority, even where an agency shares responsibility over an issue with other agencies. *See Trans Union LLC v. FTC*, 295 F.3d 42, 50 (D.C. Cir. 2002) (according deference "given the broad rulemaking authority the [act] confers on the FTC (*and the other agencies*) to 'prescribe ... such regulations as may be necessary to carry out the purposes of [the act] with respect to the financial institutions subject to their jurisdiction …") (emphasis added).

Farms, 130 S. Ct. 2743, 2760 (2010), and the plaintiffs have offered no reason why they would benefit from an order barring tax relief on a nationwide basis. The plaintiffs rely on 5 U.S.C. § 706, which states that courts may "set aside" agency action found to be unlawful. But the APA simply provides that the court may "set aside" the agency's action for the purpose of considering the case of the plaintiff before it. "Nothing in the language of the APA requires [the court] to exercise such far-reaching power" to issue a nationwide injunction. *Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 394 (4th Cir. 2001), *overruled in part on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 550 n.2 (4th Cir. 2012).

The plaintiffs also rely on *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998). But that case found a nationwide injunction to be necessary to give full relief to the plaintiff, a national association; there is no such need for relief of that scope here. That case also distinguished *United States v. Mendoza*, 464 U.S. 154, 160 (1984), which holds that nonmutual collateral estoppel does not run against the United States, on the theory that venue rules would lead to a "flood of duplicative litigation" in the D.C. Circuit from plaintiffs seeking the same relief as that accorded to the association. 145 F.3d at 1409-10. This case poses precisely the opposite concern. Numerous low- and middle-income taxpayers, who would be harmed by the order that the plaintiffs seek here, would bring claims in *other* circuits seeking clarification that they enjoy the benefits owed to them under Section 36B. This Court cannot prohibit those absent parties from doing so, consistent with the *Mendoza* rule. Equity thus counsels in favor of maintaining the operation of a key feature of the Affordable Care Act, which enables millions of Americans to receive substantial tax relief to which they are entitled.

Conclusion

The defendants respectfully ask that the cross-motion for summary judgment be granted.

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Respectfully submitted,

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