IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DAVID KING, *et al.*,	)	
Plaintiffs,	)	No. 3:13-CV-630 (JRS)
v.	)	
KATHLEEN SEBELIUS, *et al.*,	)	**OPPOSITION-REPLY**
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

No legitimate method of statutory construction would interpret the phrase "established by the State" in the ACA's subsidy provisions to mean "established by the State *or the federal government*." The Act expressly contemplates both state-established and federally established Exchanges; where it specifically refers to one type or the other, the courts must give effect to that language. The Government's sole textual hook for the IRS Rule is its backwards claim that the Act, by directing the HHS Secretary to establish "such Exchange" if a state *fails to*, creates a legal fiction by which states are "deemed" to have established the HHS-established Exchanges, even though it is a state's *failure* to establish an Exchange that triggers the Secretary's obligation in the first place, and even though Congress demonstrably knew how to expressly "deem" other Exchanges to be state-established when it wanted to, as it did for territorial Exchanges.

The above would be conclusive even if legislative history contradicted the statutory text, and even if there were no rational reason for Congress to distinguish between state and federal Exchanges. But it does not, and there surely is. Indeed, the ACA's restriction of subsidies to state-established Exchanges is neither a legislative novelty nor remotely surprising. Congress has long evaded the constitutional bar on commandeering states by offering them "deals" they could not refuse, conditioning federal benefits for the state or its residents on state compliance with federal directives. Indeed, Congress indisputably did so elsewhere in the ACA, threatening states with the cut-off of all Medicaid funds unless they expanded the eligibility criteria for that program. The ACA's subsidy provisions offered an analogous "deal" to entice states to establish Exchanges—because Congress desperately wanted (wisely, in hindsight) the states to assume responsibility for that logistically nightmarish and politically toxic task. And just as there is no indication in the legislative record that anyone worried about states rejecting the Medicaid "deal," there is no indication that anyone worried about states rejecting the Exchanges "deal."

If a state had nonetheless *rejected* the Medicaid "deal," that would plainly have required cutting off that state's Medicaid funds, notwithstanding Congress's obvious goal of *expanding* Medicaid. Similarly, while denying subsidies to states rejecting the Exchanges "deal" will mean fewer subsidies than Congress optimally desired, that is the inevitable effect of a state rejecting a deal that Congress *had* to offer to induce state participation. Of course, it is likely (if not certain) that Congress would have accomplished *both* of its policy objectives—state-run Exchanges *and* subsidies everywhere—had the IRS not preemptively *eliminated* the irresistible incentive of subsidies, thus predictably leading many states to reject a "deal" that offered them nothing.

The Government unsurprisingly resorts to *Chevron* deference to save its Rule, but that principle does not help it, for four reasons. *First*, deference is triggered only if the statutory text is *ambiguous* and intended as an implicit delegation to the agency. Yet the subsidy provisions directly and unambiguously answer the question presented. *Second*, the IRS is entitled to *no* deference in interpreting the statutory language that the Government claims is ambiguous, which is not found in the Internal Revenue Code at all. At best, the IRS and HHS jointly administer some intertwined ACA provisions, but *Chevron* deference is inapplicable where no one agency has controlling authority. *Third*, any deference would here be displaced by the venerable canon requiring tax exemptions and credits to be provided *unambiguously*. *Fourth*, ambiguity only allows the IRS to adopt reasonable constructions of the statute—and rendering express statutory text nugatory, as the IRS has done, is the epitome of an *unreasonable* construction.

Finally, the Government's and amici's naked policy argument that plain statutory text should be ignored because subsidies are so "important" is, of course, nothing but a transparent effort to induce the Court to do what one amicus correctly notes it cannot do: "rewrite legislation in accord with [the Court's] own conceptions of prudent public policy." (Dkt. 32-1, at 6.)

ARGUMENT

I. THE IRS RULE CONTRADICTS THE ACA'S UNAMBIGUOUS TEXT, AND IS THEREFORE CONTRARY TO LAW.

Plaintiffs' argument is simple and compelling: Section 1311 of the ACA instructs states to establish Exchanges, but § 1321 authorizes the federal government to establish Exchanges in states that fail or decline to. 42 U.S.C. §§ 18031(b)(1), 18041. In the subsidy provisions at issue, the Act clearly states that subsidies are available for coverage "enrolled in through an *Exchange established by the State under section 1311*" of the Act. 26 U.S.C. § 36B(c)(2)(A)(i); *see also* § 36B(b)(2)(A). As a matter of indisputable plain text, "Exchange established by the State under section 1311" does not include an Exchange established by HHS under § 1321.

Moreover, three key structural elements of the Act confirm that Congress understood the difference between state-established and HHS-established Exchanges, and did not intend to treat them identically for all purposes—and that the Government well knows this.

First, the ACA elsewhere uses the broader phrase "Exchange established under this Act." *E.g.*, ACA, § 1312(d)(3)(D)(i)(II). By treating the narrower phrase "Exchange established by the State under section 1311" as meaning "an Exchange established under this Act," the IRS Rule violates the basic canon that "differing language" in "two subsections" of a statute should not be treated as having "the same meaning." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Second, in addressing the situation of U.S. territories that wanted to establish their own Exchanges, Congress provided that such a territory "shall be treated as a State" under the Act. ACA, § 1323(a)(1). This confirms that when Congress wanted to "deem" a non-state Exchange to be established by a state even though another entity established it, it clearly "knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994). Yet, just two sections earlier, in § 1321, Congress included no such equivalency language when describing the HHS Exchanges.

Third, the Government itself realizes that HHS Exchanges are not the equivalent of state Exchanges. The ACA appropriated unlimited sums to help "States" establish Exchanges. ACA, § 1311(a). So if the Government truly believed its own argument—that the HHS Secretary is "deemed" a "State" under § 1311 when she establishes a fallback Exchange under § 1321, then it would have used that appropriation to pay for creation of federal Exchanges. Yet HHS *did* not, and even acknowledged that it *could* not. *See* Amy Goldstein & Juliet Eilperin, *Challenges Have Dogged Obama's Health Plan Since 2010*, 2013 WLNR 27607716, WASH. POST, Nov. 2, 2013 (noting that responsibility for federal Exchange was given to Centers for Medicare and Medicaid Services for "financial" reasons, because ACA "provided plenty of money to help states build their own insurance exchanges," but "no money for the development of a federal exchange").

The ACA's text and structure thus confirm that Congress intended to condition subsidies on state participation in Exchanges, which also makes perfect sense as a policy matter, because such a scheme would provide a powerful incentive for states to create the complex, controversial Exchanges. The Government's contrary arguments (*see* Dkt. 31, "Opp.") are meritless.

A. An Exchange Established by the Federal Government Is Unambiguously Not "an Exchange Established by the State."

At the threshold, the Government must establish that the relevant statutory language—"an Exchange established by the State under section 1311 of the [ACA]"—is ambiguous. Without textual ambiguity, the Government's arguments from legislative structure, history, and purpose are inapplicable. *See Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563 (2013) (statutory structure can clarify "provision that may seem ambiguous"); *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 304-05 (4th Cir. 2000) (legislative history and purpose irrelevant if "terms of a statute are clear and unambiguous"). (Actually, even ambiguity would not help the Government here, in light of the canon requiring tax credits to be *unambiguous*. *See infra*, Part II.C.)

Try as it might, however, the Government cannot inject any ambiguity into the clear-as-day statutory text. Its basic argument—which does not actually claim ambiguity in the *subsidy provisions*—is that other ACA provisions create, *sub silentio*, a legal fiction whereby when a state fails to establish an Exchange and HHS steps in to establish one instead, the HHS Secretary is "deemed" to be the state and the state is "deemed" to have established the HHS-established Exchange. Calling this a legal fiction is simply an admission that the IRS Rule rewrote the law.

1. The central provision, for the Government, is § 1321, which directs the federal government to establish Exchanges for states that fail or refuse to create them. That section says that if a state will "not have any required Exchange operational," HHS "shall … establish and operate *such Exchange* within the State" ACA, § 1321(c)(1); 42 U.S.C. § 18041(c)(1) (emphasis added). The word "such," says the Government, implies that the federally established Exchange is to be "the *same entity*" as the state-established Exchange just referenced. (Opp. 17.) And the word "Exchange," the Government adds, is elsewhere defined as "Exchange established under section 1311," ACA, § 1563(b)(21), thus confirming that the Exchange that HHS must establish is to be the same as an Exchange under § 1311, *i.e.*, a state-established Exchange. (Opp. 18.)

That is not statutory construction; it is nonsense. The phrase "such Exchange" does, even without the Act's definition of "Exchange," obviously refer back to the Exchanges described in § 1311. But that simply describes *what the Exchange is*, not *who established it*. 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. The federal Exchange should operate in the same fashion, conduct the same tasks, and perform the same functions. The only difference is that it is *established by the federal government*, not by the state. Yet eligibility for subsidies turns precisely on that distinction—on *who* established the Exchange.

Put another way, the ACA cannot be read as directing the *federal government* to establish a *state-established* Exchange, because a "federally established state-established Exchange" is an oxymoron. To use a hypothetical, if Congress asked states to build airports, and described these airports in great detail (specifying, *e.g.*, air traffic and security procedures), but added that the Secretary of Transportation should construct "such airports" if the states fail to, would anyone even *think* to refer to the latter as "state-constructed airports"? Obviously not.

Had Congress in fact wanted federal Exchanges to be "deemed" state Exchanges, it could and would have said so expressly. The ACA used such express "deeming" language with respect to territorial Exchanges, ACA, § 1323(a)(1), and an earlier House version of the bill—which provided for a single national Exchange but allowed states to "opt-in" to run the Exchanges themselves—also stated *expressly* that, if a state did opt-in, "any references in this subtitle to the Health Insurance Exchange … shall be deemed a reference to the State-based Health Insurance Exchange." H.R. 3962, § 308(e), 111th Cong. (2009) (Govt. SJ Exh. 13, Dkt. 31-1, at 175-76).

Indeed, as amicus Families USA points out (Dkt. 32-1, at 11 n.24), when Congress wants the federal government to step into the shoes of another entity *and be treated as if it were that entity*, it invariably says so expressly. For example, 28 U.S.C. § 2679(d)(1) allows the United States to "step into the shoes" of federal officers who are sued: It *expressly* provides that such a suit "shall be *deemed* an action against the United States." *Id.* (emphasis added). Likewise, the Bankruptcy Code allows a bankruptcy trustee "to stand in the shoes of an hypothetical creditor of the debtor to effect a recovery from a third party." *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1523 (10th Cir. 1990). That statute, too, *expressly* provides that the trustee "shall have … the rights and powers of" such creditors. 11 U.S.C. § 544(a). And federal law allows the FDIC to "ste[p] into the shoes" of failed banks, *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994);

it does so by *expressly* providing that the FDIC "shall, … by operation of law, succeed to … all rights, titles, powers, and privileges" of such banks. 12 U.S.C. § 1821(d)(2)(A)(i).

Nobody has provided even a *single* example of a situation in which Congress "deems" one entity to be another *without saying so*. Yet, in § 1321, not only did Congress not use *any* such express language; it did not even say that HHS should establish an Exchange "*for*" or "*on behalf of*" the state, which would have been a more natural (albeit indirect) way of indicating that HHS was somehow acting as the state. Instead, the ACA says only that HHS shall establish an Exchange "*within*" the state, which has no "stepping into the shoes" connotation at all.

More generally, it makes no sense to read § 1321 as providing that, when HHS creates an Exchange under that provision, "a state is *considered* to have established an Exchange." (Opp. 23 (emphasis added).) To the contrary, HHS's authority under § 1321 to create an Exchange is only *triggered* by the state's acknowledged *failure* to establish the "required" Exchange under § 1311. In other words, § 1321's *premise* is that an HHS Exchange is *not* an Exchange *established by the State* under § 1311, because the former can be created only if the latter is not.

The Government nonetheless defends its illogical, atextual interpretation by noting that, as defined elsewhere, Exchange means "Exchange established under section 1311," and so the Exchange established by HHS under § 1321 (after the state defaults under § 1311) is somehow "established by the State under section 1311." But this definition simply confirms what is already obvious: The Exchange created by HHS in the event of state default is the same as the one the state would have created under § 1311. Again, this does not change the dispositive fact that it is *HHS*, not *the state*, establishing the Exchange. Nor can an HHS Exchange be "deemed" to be state-established, because § 1321 contains no "deeming" language and because Exchanges may be established under that section only if there is *no* state-established Exchange. Indeed, if anything, the fact that Exchanges are defined as those established under the section requiring *state-established* Exchanges undermines the Government's argument that the subsidy provisions' reference to "Exchange" somehow also includes *federally established* Exchanges.[1]

Most fundamentally, plugging the global definition of Exchange into § 1321 provides, at most, that Exchanges created by HHS can be treated as Exchanges "established under section 1311." But that does nothing to expand the Exchanges for which subsidies are available to include HHS Exchanges. Subsidies are limited to those who buy coverage through an Exchange "*established by the State* under section 1311." 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added). If federal Exchanges are deemed established *under § 1311*, this simply means that the subsidy provisions further distinguish *among* § 1311 Exchanges based on *which entity established them*. Only Exchanges established *by the State* under § 1311 receive subsidies. Indeed, the wording of the subsidy provisions might well have resulted from the drafters' recognition that the interplay between § 1321 and the Act's definitional provision creates ambiguity about whether such HHS Exchanges are really "§ 1311" or "§ 1321" Exchanges, thus requiring the unambiguous further specification that subsidies are available only in *state-established* Exchanges under § 1311, not *any* Exchanges under § 1311. Accordingly, however one answers the largely metaphysical question of whether HHS Exchanges are "§ 1321" or "§ 1311" Exchanges, they plainly cannot be "Exchanges *established by the State* under section 1311."

The foregoing is so self-evident and compelling that even HHS regulations themselves were forced to concede (squarely contradicting both the IRS Rule and the Government's defense of it here) that federal Exchanges are "established … *by the Secretary* under *section 1321(c)(1)*"

[1] Amicus Families USA boldly claims that the ACA defines "Exchange" *three* times as state-established. (Dkt. 32-1, at 10-11.) But two of its claimed "definitions" are simply parts of § 1311, which everyone agrees directs states to establish Exchanges, so not even the Government claims these provisions are relevant. The third reference is to the definitional section discussed above, which, for the reasons noted, does nothing to suggest that the subsidy provisions apply to federal Exchanges.

of the ACA, not by a *state* under *§ 1311*. 45 C.F.R. § 155.20 (emphases added). And, as noted, HHS has further conceded the point by not trying to tap the ACA's unlimited appropriation for state Exchanges to pay for the unfunded federal Exchanges. In short, there is no ambiguity as to *who establishes* an "Exchange *established by the State*."

2. Amicus Families USA presses a different argument: that because the phrase "established by the State under section 1311" appears in subsections relating to the *amount* of the subsidy, following a general statement that there "shall" be a tax credit, the former language should not be construed to take back the credit "bestowed" by the latter. (Dkt. 32-1, at 13.) But that opening subsection says only that there "shall" be a credit "equal to the premium assistance credit amount." 26 U.S.C. § 36B(a). It is the *definition* of "premium assistance credit amount," which turns on the definition of "coverage month," that narrows the operation of the subsidy—*e.g.*, the tax credit can be claimed only by a person who actually *buys* coverage and, even then, only if he buys it *on an Exchange* (and, Plaintiffs contend, only on an Exchange *established by a state*). Moreover, the credit *cannot* be claimed by one who is already eligible for "minimum essential coverage" outside the individual market. All these restrictions, the disputed one *and* the undisputed ones alike, are found in the definition of "coverage month." *Id.* § 36B(c)(2).

Nor is it at all unusual for Congress to use the statutory provision setting forth coverage criteria to establish conditions that coerce action by states. For example, an insurance-related tax credit enacted in 2002 is similarly provided for "coverage months," defined as months as to which the taxpayer is covered by "qualified health insurance," which in turn is defined to include state coverage *that meets certain regulatory criteria*. 26 U.S.C. § 35(a), (b), (e)(2). There, as here, Congress conditioned the tax credit for state residents on their state's compliance with certain insurance regulations, and did so through the definition of "coverage month."

* * *

Since it can establish no ambiguity, the Government's other arguments are irrelevant. But, in fact, its other considerations *corroborate* the statutory text, as explained below.

B. Most of the Government's Allegedly Absurd Consequences Are Not At All Absurd, and the Remainder Are Not Consequences of Plaintiffs' Position.

Since the Government's arguments concerning what the subsidy provisions actually say are patently frivolous, it next asks the Court to judicially rewrite the Act's plain language because it contends that adhering to the text would somehow produce absurd results. But there is no absurdity here; interpreting the subsidy provisions to mean what they say does not nullify or contradict any part of the Act. Moreover, the Government's additional arguments about the consequences of interpreting *other* provisions of the Act (using the same or different language) do not create absurd results, do not in any way stem from Plaintiffs' construction of the subsidy provisions, and/or would not be resolved by adopting the Government's contrary construction.

1. The Government alleges certain consequences if federal Exchanges cannot offer subsidies. But none of these consequences is absurd or negates any part of the Act. They reflect, at most, that Congress imposed certain uniform obligations on *all* Exchanges, those with and those without subsidies, some of which obligations would be more easily satisfied by the latter.

<u>Reporting.</u> The Government notes that, under the reporting requirements in § 36B itself, the federal Exchanges would have to report the "aggregate amount of any advance payment" of subsidies as zero, and would not have to report any individualized information "necessary to determine eligibility" for subsidies. 26 U.S.C. § 36B(f)(3). True—but so what? This section lists information that *all* Exchanges (state and federal) must report, clarifying that these uniform requirements apply to an "Exchange under Section 1311(f)(3) *or* 1321(c)." *Id.* (emphasis added). Some data points will be zero or inapplicable for federal Exchanges, but none is superfluous

because the same list governs state Exchanges. Meanwhile, other data points (like the "level of coverage … and the period such coverage was in effect," the "premium" charged, and the "name, address and TIN of the primary insured," 26 U.S.C. § 36B(f)(3)(A), (B), (D)) will apply equally to federal Exchanges, and so the federal Exchanges' reports will not be "an empty act" (Opp. 19). Nor is this reporting designed only to allow for calculation of subsidies; after all, the Exchanges must report this information for *all* enrollees, even those who have not applied for subsidies.

In short, that § 36B creates reporting requirements that reference subsidies in no way indicates that Congress "thought" that subsidies were available on *all* Exchanges. A Congress that "thought" that subsidies were only available on state Exchanges would have enacted the same provision—a *uniform* reporting requirement for *both* types of Exchange, with some questions only relevant to state-established ones. The only alternative would be to have *two* sections detailing reporting requirements, a complete one for state Exchanges with subsidies and then a separate one that needlessly repeated the non-subsidy-related reporting requirements for federal Exchanges. Eliminating such redundancy is extraordinarily sensible draftsmanship, and made particular sense here since Congress "thought" that there would be few, if any, federal Exchanges, given the irresistibility of the subsidy deal it was offering.

Indeed, if anything, the information-sharing provision actually bolsters Plaintiffs' point by providing that it applies to any person carrying out responsibilities of a state Exchange *or* an Exchange "under section … 1321(c)," 26 U.S.C. § 36B(f)(3)—thus making clear that the former does not include the latter, and that Congress knew how to distinguish between the two.

<u>Exchange Functions.</u> Similarly, the Government contends that, of the eleven functions the ACA directs *all* Exchanges to perform, it would be very easy for federal Exchanges to satisfy one (and part of a second) if Plaintiffs' position is accepted. (Opp. 25-26.) In particular, because

subsidies are not available in federal Exchanges, it will be straightforward for those Exchanges to "make available by electronic means a calculator to determine the actual cost of coverage" net of "any" subsidy. 42 U.S.C. § 18031(d)(4)(G). And the federal Exchange's list of "each individual who was an employee of an employer but who was determined to be eligible for the premium tax credit" will have no names on it (though it will still be required to transfer other information to the Treasury Secretary, such as the names of individuals granted exemptions). *Id.* § 18031(d)(4)(I). Again—so what? Congress included those functions because they will be meaningful for the state-run Exchanges, to which the list of functions principally applies. And Congress subjected the federal Exchanges to the same list because all the other functions—such as certifying health plans, creating a website and a hotline, granting exemptions, establishing a Navigator program, etc., *see id.* § 18031(d)(4)(A), (B), (C), (D), (H), (K)—are equally relevant to the federal Exchanges. Again, there is neither superfluity nor empty gestures here.

Global Application Form. The Government says that federal Exchanges are required to use an application form that facilitates application for various "health subsidy programs," including subsidies under the ACA, which would not be possible if those were unavailable. (*See* Opp. 26.) But the Government misstates the law. The cited provision requires the Secretary to "provide *to each State*" such a form, not to use it for the federal Exchanges. 42 U.S.C. § 18083(b)(1)(A) (emphasis added). Moreover, the form is supposed to allow individuals to apply for "all *applicable* State health subsidy programs," *id.* § 18083(b)(1)(A)(i) (emphasis added), contemplating that not all such programs will be available in all states.[2]

[2] The Government also notes that the Act does not require a subsidy applicant to list his "state of residence" when applying to an Exchange for subsidies. (Opp. 27 n.15.) But Congress was providing directions for people applying for subsidies *where available*—*i.e.*, in state-established Exchanges. There are no subsidies in federal Exchanges, so nobody will be filling out subsidy applications there, and no federal Exchange would ever be confused about whether a particular applicant is eligible for a subsidy.

Innovation Waivers. Starting in 2017, states may seek waivers from the ACA's scheme, by showing that alternative state reforms would achieve the same ends. If a waiver is granted, the state receives the "aggregate amount" of the subsidies "that would have been paid … had the State not received such waiver." 42 U.S.C. § 18052(a)(3). On Plaintiffs' view, the Government reasons, these waivers would be superfluous, because states would already be free—by failing to establish Exchanges—to "effectively" obtain waivers. (Opp. 24-25.) That is facially untrue and makes no sense: Innovation waivers allow states to opt out, not just of running Exchanges, but also of the individual mandate and other ACA provisions, *see* 42 U.S.C. § 18052(a)(2), which they could *not* otherwise do; they also reward states with federal funds from the foregone subsidies. So the waivers are not superfluous because states may opt out of running Exchanges. Anyway, the Government *agrees* that states may opt out of running Exchanges, so it cannot argue that such an opt-out renders the innovation waiver superfluous. In short, the Government's superfluity argument has nothing to do with Plaintiffs' view of the subsidy provisions, but purportedly stems from the *undisputed* fact that states may decline to run Exchanges.[3]

2. Moving further afield, the Government also identifies consequences that would result under *other* provisions in the ACA, if the phrase "Exchange established by the State" is consistently read literally. The Government's argument appears to be that "established by the State" ought to be ignored *throughout* the Act. But none of these consequences are even peculiar, much less so absurd as to warrant ignoring clear statutory text.

[3] Nor is it true that the amounts paid to states who obtain waivers would "always be zero" for states that had not previously established Exchanges. (Opp. 25 n.12.) The provision refers to amounts that "would have been paid" in 2017 and beyond; a state that did not establish an Exchange pre-2017 could still claim innovation funds by stating that it *would have* established an Exchange for future years. In any event, one does not contemplate "waivers" for entities that have not previously complied with the requirements being waived, and Congress obviously did not want to reward states for innovation until *after* they tried the scheme that Congress contemplated (*i.e.*, state Exchanges). Withholding innovation-waiver funds until states establish Exchanges creates a powerful incentive for states to do so.

Medicaid Maintenance-of-Effort Rule. The ACA precludes states from tightening their Medicaid "eligibility standards" until "the date on which the Secretary determines that an Exchange established by the State under section 1311 of [the ACA] is fully operational." 42 U.S.C. § 1396a(gg)(1). A state thus cannot restrict Medicaid eligibility unless it first establishes an Exchange. (Opp. 26-27.) This makes perfect sense because, again, Congress wanted to induce states to run Exchanges, and the maintenance-of-effort proviso creates a "stick" if they fail to. Also, Congress would not have wanted to *reduce* Medicaid for the most impoverished in states where low-income people were already doing without Exchange subsidies.[4]

Regulations on State Exchanges. The Government points to a few regulations that would apply within state-established Exchanges but apparently not to federal Exchanges. *See* 42 U.S.C. §§ 1320b-23(a)(2), 1396w-3(b)(1), 1397ee(d)(3). (Opp. 27 n.15.) But the reason for all of these alleged "anomalies" is quite obvious: The HHS Secretary does not need specific statutory authority to regulate every detail of the operation of Exchanges *that she is already in charge of*. The Secretary has broad authority to take "such actions as are necessary to implement" the federal Exchanges. 42 U.S.C. § 18041(c)(1). So she independently can (and presumably will) do everything that the Act requires the state-run Exchanges to do.

3. In its furthest stretch, the Government points to allegedly absurd consequences that stem from other provisions of the ACA that *do not even use the same language* as the subsidy provisions (*viz.*, "established by the State"). These provisions thus have nothing to do with Plaintiffs' position or with the subsidy provisions. They neither flow from Plaintiffs' argument here, nor would be resolved by adopting the Government's construction of the subsidy provisions. They are simply irrelevant. And, in any case, the Government misreads them.

[4] Prospectively, this "stick" may have been invalidated by the Supreme Court's decision on Medicaid in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) ("*NFIB*"). But, contrary to the Government, that raises no doubts about Congress's *intent*.

Enrollment Through Federal Exchanges. The Government argues that because the ACA defines a "qualified individual" eligible for enrollment through an "Exchange" as one who, *inter alia*, "resides in the State that established the Exchange," 42 U.S.C. § 18032(f)(1)(A), nobody may enroll in a federal Exchange. (Opp. 21-24.) There are numerous flaws in this argument.

At the threshold, proper resolution of this residency requirement has nothing to do with the dispute here. Adopting the Government's view of the subsidy provisions would not fix or avoid this issue, and acceptance of Plaintiffs' view would not complicate its resolution. *All* agree that states are free *not* to establish Exchanges, and so the question of how to treat "resid[e] in the State that established the Exchange" if the state does *not* establish one will arise under both parties' views. The disagreement over whether a state's failure to establish an Exchange affects *subsidies* does not affect, much less resolve, what to do with an eligibility provision *presuming* state-established Exchanges. Specifically, the Government's position is that a federal Exchange should be *deemed* to be state-established (Opp. 23); even if true, however, that would not mean the state *actually established* the federal Exchange. To the contrary, a state's *failure* to establish an Exchange is precisely what *triggers* the provision, § 1321(c), that the Government says authorizes equating federal and state-established Exchanges. So even on the Government's view, nobody in West Virginia "resides in the State that established" the federal Exchange there.

In any event, the Government's interpretation is wrong. Under this eligibility provision, one must be a "qualified individual" "with *respect to an Exchange*," 42 U.S.C. § 18032(f)(1)(A) (emphasis added), and thus (in light of the definitional provision that the Government elsewhere invokes) "with respect to an Exchange established under section 1311," *see* ACA, § 1563(b)(21), to be eligible. Since § 1311 Exchanges are (unlike § 1321 Exchanges) established by states, this eligibility requirement only applies to state-established Exchanges; it does not limit enrollment on federal Exchanges. Thus, contrary to the Government's thesis, Plaintiffs' interpretation of "Exchange established by the State" in the subsidy provisions does not in any way suggest that § 18032(f) precludes enrollment on a federally established § 1321 Exchange.[5]

Alternatively, if this qualification provision is read to apply even to federal Exchanges, an applicant should still be understood to satisfy it based solely on its *first* prong. One who seeks to enroll through the federal Exchange in his state does not *fail* the requirement that he "resid[e] in the State that established the Exchange." The right answer to that question is "N/A," because neither a "yes" nor a "no" answer would be true. The residency provision *assumes* that a state created the Exchange; so it can quite readily be construed as not prohibiting eligibility where that assumption proves false. By contrast, the subsidy provisions do not *assume* a state-created Exchange; they simply *limit subsidies* to such, and that limit can be sensibly applied.

Either of these plausible readings is preferable to construing the Act 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. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995). But, again, how one chooses to read the eligibility provision is completely beside the point, given that Plaintiffs' argument concerns the scope of the phrase "Exchange *established by the State*," which neither appears in the eligibility provision nor creates a Catch-22.

[5] The Government argues that the enrollment provision *does* apply to federal Exchanges because the *Government maintains* that "Exchange" means state *or federal* Exchange under the enrollment provision, just as the Government claims it does under § 1321. (Opp. 23-24.) But, of course, the *Government*'s interpretation of "Exchange" under the enrollment provision is not relevant to whether *Plaintiffs*' interpretation of "Exchange" relative to the subsidy provisions creates difficulties under that enrollment provision. As noted, it does not, because, as Plaintiffs have never disputed, "Exchange" means "Exchange established under section 1311" and that definition should naturally be applied to the enrollment provision. The Government's contrary argument that "Exchange" should always be defined to include a § 1311 state Exchange *and* a § 1321 federal Exchange either improperly rewrites the statutory definition or improperly accepts the Government's "legal fiction" argument described above. While both of those arguments are wrong, the relevant point here is that they reflect the *Government*'s conception of "Exchange," and thus inherently cannot suggest any difficulty in Plaintiffs' interpretation of that phrase.

Abortion Coverage. Finally, the Government contends that Plaintiffs' theory would preclude *states* from banning coverage for abortions in *federal* Exchanges. (Opp. 24 n.10.) But, even if true, that is not remotely surprising, much less absurd. It would be eminently reasonable for Congress to give states power over coverage only for Exchanges that *they* establish, but not allow them to dictate the coverage offered on Exchanges that *the federal government* controls.

In any event, *Plaintiffs'* theory actually has no consequence for the abortion provision. The ACA authorizes states to "prohibit abortion coverage in qualified health plans offered through *an Exchange*." 42 U.S.C. § 18023(a)(1) (emphasis added). Again, whether the generic term "Exchange" is read to include *all* Exchanges or just *state-established* Exchanges is irrelevant to Plaintiffs' argument about the subsidy provisions—namely, that an "Exchange established by the State" cannot be an "Exchange established by HHS"—and can be answered either way without compromising or undermining Plaintiffs' position here. *See supra* n.5.[6]

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By burying the Court with the operational details of so many irrelevant aspects of the ACA, the Government is seeking to distract from the very simple question that controls this case: Is an Exchange established by HHS "established by the State"? The answer is clearly no. And, contrary to the Government's meritless contentions, that answer does not create any anomalies in the operation of the Act.

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[6] The same point answers the claim by amicus Families USA that, on Plaintiffs' theory, no plan on a federal Exchange could ever be a "qualified health plan." (Dkt. 32-1, at 14.) The statute says that a health plan must, among other requirements, be certified "by each Exchange through which such plan is offered." ACA, § 1301(a)(1)(A). If "Exchange" standing alone includes federal Exchanges, then federal Exchanges can certify plans they offer. If "Exchange" does not include federal Exchanges, then plans offered through such Exchanges would not need to be certified at all. Either way, there is no difficulty.

C. No Legislative History Contradicts the Unambiguous Statutory Text, and the Limited Legislative Discussion of Federal Exchanges Reflects the Consensus That States Would Submit to the ACA's Pressure To Establish Their Own.

The Government argues that the legislative history supports the IRS Rule. (Opp. 30-35.) But it does not identify *any* legislative history that directly discusses, much less answers, the relevant question—*i.e.*, whether subsidies are available on federal Exchanges. In fact, Congress barely discussed the federal Exchanges *at all*, apparently because the overwhelming consensus was that states would submit to the Act's pressures and establish their own Exchanges. What little history exists shows that conditioning subsidies on state participation in Exchanges was proposed early on, adopted by the Senate Committees working on the legislation, and forced onto the House of Representatives when ACA supporters lost their filibuster-proof Senate majority and so were unable to authorize spending that the Senate had not already approved.

Thus, while judges must always "stick to [the] duty of enforcing the terms of the statute" when they "are clear and unambiguous," *Sigmon Coal*, 226 F.3d at 305, resort to legislative history is particularly worthless here, where there is "no basis for the court to conclude that [Congress] voted for a regulatory scheme other than that provided by the words in the statute," *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1092 (D.C. Cir. 1996). "The haste and confusion attendant upon the passage of [a] massive bill do not license the court to rewrite it" but rather "are all the more reason for us to hew to the statutory text." *Id.*

1. Although the Government boldly claims that the legislative history "confirms" the IRS Rule, its real argument is that there is no legislative history *contradicting* the IRS Rule—that no legislative history *confirms* that the ACA's text means what it says. To the extent that the Government cites any actual statements by legislators (Opp. 33), they are banal descriptions of the ACA's scheme, but do not even purport to address the fallback federal Exchanges or delve into the details of who would be eligible for subsidies under what circumstances.[7] The same is true of the generalities quoted by amicus Families USA. (*See* Dkt. 32-1, at 18-22.)

2. The Government's legislative-history argument is thus that surely someone would have said something (other than, of course, expressly in the statute) if Congress had *really* meant to deprive federal Exchanges of subsidies. But Congress barely discussed the fallback federal Exchanges *at all*, so it is hardly a surprise that it never publicly debated the subsidiary question whether they would offer subsidies. And there is good reason for that.

As the Government admits, the House initially passed a bill under which the federal government would presumptively operate *all* of the Exchanges. (Opp. 31.) Moderate Senators demanded state-run Exchanges and, as a tool to incentivize participation by states, the Senate enacted a bill that conditioned subsidies on such. The House had little choice but to "silently acced[e]" to that plan (Opp. 32) after the election of Senator Scott Brown deprived ACA-supporters of a filibuster-proof Senate majority. *See* Michael Cooper, *G.O.P. Senate Victory Stuns Democrats*, N.Y. TIMES, Jan. 19, 2010, at A1. To be sure, limited changes to the Senate bill could be and were approved in the special reconciliation process. (Opp. 31.) But measures that would have increased the deficit, like authorizing subsidies in federal Exchanges, would (absent countervailing savings or revenues) have been deemed "extraneous" under the so-called "Byrd Rule" and therefore could not have been implemented through reconciliation, as everyone in Congress would have been well aware. *See* 2 U.S.C. § 644.

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[7] Amusingly, the Government cites Senator Landrieu's statement deeming "very accurate" a poll question describing the draft ACA as creating a "National Insurance Exchange" offering subsidies. 155 Cong. Rec. S13,733 (Dec. 22, 2009). Obviously, that is not accurate at all; the Senate had rejected a national Exchange in favor of state-based Exchanges months earlier. (*See* SJ, Dkt. 5, at 4.) And the Government cites a Senate Report explaining that the HHS Secretary would establish "state exchanges" in states that failed to do so. S. Rep. No. 111-89, at 19 (2009). But the report surely meant "state-*based* exchanges," not the semantically nonsensical "federally established state-*established* exchanges."

Nobody in Congress talked about federal fallback Exchanges because Congress expected all of the states to accept its offer and establish their own Exchanges (just as it expected all of the states to expand their Medicaid programs in order to continue to receive federal Medicaid funds). *See* Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, N.Y. TIMES, Aug. 4, 2012, at A17 ("Mr. Obama and lawmakers assumed that every state would set up its own exchange."); Elise Viebeck, *Obama Faces Huge Challenge in Setting up Health Insurance Exchanges*, THE HILL, Nov. 25, 2012 ("It's a situation no one anticipated when the [ACA] was written. The law assumed states would create and operate their own exchanges …."); *see also* Remarks on Health Insurance Reform in Portland, Maine, 2010 Daily Comp. Pres. Doc. 220 (Apr. 1, 2010) (President Obama explaining that, "by 2014, each state will set up what we're calling a health insurance exchange"). Indeed, the ACA did not even *appropriate any funds* for federal Exchanges, confirming that Congress did not think they would be needed. *See* Goldstein & Eilperin, *Challenges*, *supra* (ACA provides "no money for the development of a federal exchange"). So even if one could infer anything from the *absence* of mention of one point in a massive bill spanning thousands of pages, it is hardly surprising that nobody talked about fallback Exchanges never intended to see the light of day.

The Government counters that it was "well known" that states would refuse to create Exchanges (Opp. 33 n.20), and amicus Families USA claims that states were "signaling early on" that they would refuse (Dkt. 32-1, at 16). But the degree to which they have to stretch to support those claims is telling. The *only* legislative statement preceding the Act's passage cited by either the Government or the amicus, a letter from Oklahoma's Insurance Commissioner introduced into the record, actually says the opposite—that Oklahoma "support[s] the state-based exchange concept" but needed a "federal grant" to afford "the necessary investment." (Govt. SJ Exh. 23, Dkt. 31-1, at 221.) Of course, the ACA ultimately provided such grants. *See* ACA, § 1311(a)(1). Likewise, amicus cites (Dkt. 32-1, at 17 n.37) a summary by domestic policy commentator Ezra Klein of how the Exchanges work—which tellingly does not even *mention* the possibility that states may not establish Exchanges. *See* Ezra Klein, *How Do the Exchanges Work?*, WASH. POST, Mar. 22, 2010, http://voices.washingtonpost.com/ezra-klein/2010/03/how_do_the_exchanges_work.html ("The bill gives states the option of setting up one exchange for individuals and one exchange for small business or simply setting up one exchange that serves both.").

Amicus also cites articles about opposition to the Act *generally*, *e.g.*, Philip Rucker, *S.C. Senator Is A Voice Of Reform Opposition*, WASH. POST, July 28, 2009, or about state opposition to the *individual mandate* (Dkt. 32-1, at 16-17 nn.34 & 37), but that do not mention Exchanges *at all*. The Government cites a *USA TODAY* editorial that, in arguing for a national Exchange, warned that (among other problems with state-based Exchanges) states might "stall" or be half-hearted in operating them—but not fail to create Exchanges entirely. (Govt. SJ Exh. 24, Dkt. 31-1, at 225.) The Government's other article references, not *state* proposals to opt out of ACA Exchanges, as the Government claims, but unspecified "proposals floated around Capitol Hill" to allow, on unspecified terms, "states to 'opt-in' or 'opt-out' of regional health insurance markets or government-sponsored insurers." (Govt. SJ Exh. 21, Dkt. 31-1, at 215.) None of this remotely suggests that states threatened to turn down billions of dollars in federal subsidies by not establishing Exchanges, or that any Members of Congress were concerned that they might.

The *only* legislative statement even *suggesting* that states may default came from a single Republican in the House, *after* the ACA passed, speculating that because "up to 37" states were considering "filing a constitutional challenge" to the ACA, they also "may not set up the State-based Exchange." (Govt. SJ Exh. 22, Dkt. 31-1, at 219.) Yet even if the congressional majority had not believed that speculation to be ill-founded or mere posturing—which it clearly did, or else it would have funded the federal Exchanges—that isolated warning came too late.

3. In fact, the ACA's history confirms that conditioning subsidies on state creation of Exchanges was intentional. When the Senate began to consider a state-based Exchange model, an influential commentator—so influential that he was invited to the ACA's signing ceremony, *W&L Law's Jost Invited to Health Care Bill Signing Ceremony*, http://law.wlu.edu/news/storydetail.asp?id=758—proposed "offering tax subsidies for insurance only in states that complied with federal requirements." Timothy S. Jost, *Health Insurance Exchanges: Legal Issues*, O'Neill Institute, Georgetown Univ. Legal Ctr., no. 23 at 7, April 27, 2009, http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1022&context=ois_papers.

That was hardly a novel suggestion; Congress, after all, used—*in the very same Act*—the same "too good to turn down" offer of huge federal grants to coerce states to expand Medicaid. *NFIB*, 132 S. Ct. at 2601 ("Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it."); *see also* ACA, § 10607 (providing for conditional grants to states for development of medical malpractice tort reform). And Congress had previously conditioned *other* tax credits on states' compliance with federal wishes with respect to health insurance. *See* 26 U.S.C. § 35(a), (e)(2); *supra* at p.9; *see also, e.g.*, 26 U.S.C. § 223(a), (c)(1)-(2) (tax credit for individuals enrolled in high-deductible health plans, which was dependent on states' authorizing such high-deductible plans). More generally, using federal grants to coerce state action is a very common congressional practice, forming the basis for the entire Medicaid program, *see* 42 U.S.C. § 1396b, as well as the State Children's Health Insurance Program, *see* P.L. 111-3 (Feb. 4, 2009).

The Senate Committees working on ACA legislation took up Professor Jost's suggestion. The Health, Education, Labor, and Pensions ("HELP") Committee proposed a draft bill that would have conditioned subsidies for a state's residents on the state's adoption of certain "insurance reform provisions" and on its agreement to sponsor coverage for state and local employees. *See* S. 1679, § 3104(a), (d), 111th Cong. (2009). If a state failed to take those steps, "the residents of such state *shall not be eligible for credits*." *Id.* § 3104(d)(2) (emphasis added). The Senate Finance Committee, whose bill ultimately became law, simply conditioned subsidies on state establishment of Exchanges, rather than state adoption of insurance reforms. Its chair used the conditional nature of the subsidies to justify his jurisdiction over the Exchanges and related regulations of health coverage in the draft ACA; that is, the *Finance* Committee had jurisdiction over health issues only because the bill *conditioned* "tax credit" subsidies, within its bailiwick, on states creating Exchanges subject to regulation. (Govt. SJ Exh. 28, Dkt. 31-1, at 250.) *See* Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule To Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119, 156 (2013).

4. The Government also invokes reports by the Congressional Budget Office ("CBO") and Joint Committee on Taxation ("JCT"). In estimating the cost of premiums in the Exchanges, CBO assumed that subsidies would be generally available. (Opp. 32-33.) Of course, when it conducted that analysis in March 2010, no state had yet opted out of establishing an Exchange, so there would have been no principled basis to assume that any federal Exchanges would be necessary. Hence the CBO also did not include, in its budgetary analysis, the costs of running any federal Exchanges. In any event, CBO has since admitted that it "did not perform a separate legal analysis" of the issue, so its assumption is not probative of anything (much less sufficiently probative to disregard statutory text). (*See* Govt. SJ Exh. 15, Dkt. 31-1, at 203.)

As for the JCT report, it actually refers repeatedly to "state" Exchanges in its discussion of the subsidies and related provisions. JCT, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Care Act"* at 12 (Mar. 21, 2010) (referring, in discussion of subsidy eligibility, to "individuals who purchase health insurance *through a State exchange*"); *id.* at 15 ("premium tax credit for health insurance purchased *through a State exchange*"); *id.* at 41 ("premium tax credit … for health insurance purchased *through a State exchange*"); *id.* at 38 ("health insurance *through a state exchange* with respect to which a tax credit … is allowed or paid"); *id.* at 39, 40 (same, referring six times to "*State exchange*") (emphases added). By contrast, the JCT report *never* refers to federal Exchanges. If anything, this further *undermines* the IRS Rule.

5. Amicus Families USA cites subsequent legislation purportedly supporting the IRS Rule. (Dkt. 32-1, at 24-27.) But the cited measures changed only the definition of income for subsidy eligibility purposes, and the extent to which taxpayers must repay subsidies if their income turns out to be higher than projected; neither the bills nor the House reports say anything about federal Exchanges. *See* P.L. 111-309 (Dec. 15, 2010); P.L. 112-9 (Apr. 14, 2011); P.L. 112-56 (Nov. 21, 2011). That is not surprising; since subsidies are not available on federal Exchanges, those Exchanges are irrelevant to amendments tweaking the value of the subsidies or the clawback provisions. As for the CBO, it did not state any assumptions about subsidies for federal Exchanges in its analyses of these amendments. Anyway, the first two measures were passed in late 2010 and early 2011, at which time CBO could not have assumed that federal Exchanges would be needed several *years* down the road; and the last was passed after the IRS Rule was promulgated, so the CBO would at that time properly have estimated costs based on *that Rule's* provision of subsidies for federal Exchanges.

D. Congress Had Good Reasons To Distinguish Between State-Established and Federally Established Exchanges and Thereby Encourage the Former.

Finally, the Government simplistically argues that the ACA's goal was to make insurance "affordable," and blocking subsidies in federal Exchanges would hinder that goal. (Opp. 28-30.) Yet particularly with a complex Act like the ACA, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam). Such "general," "somewhat vague" articulations of congressional purpose are hardly the "kind of pellucid expression of legislative intent that would displace a specific textual provision." *Sigmon Coal*, 226 F.3d at 305. "In the absence of *expressed* Congressional intent, we must assume that Congress intended to convey the language's ordinary meaning." *Md. Dep't of Educ. v. Dep't of Veterans Affairs*, 98 F.3d 165, 169 (4th Cir. 1996) (emphasis added).

Granted, Congress wanted insurance to be affordable. Hence the legislative statements quoted by the Government (Opp. 28-30, 33), and the Act's broad headings and subtitles invoked by amicus Families USA (*see* Dkt. 32-1, at 12-13). But Congress *also* wanted states to establish Exchanges. This was not, contrary to the Government (Opp. 36), some type of *favor* to the states: Nobody *wanted* to take on the politically, financially, and logistically arduous task of creating these novel websites—and, as recent events have shown, that reluctance was very well-founded. Rather, the point of having the states establish the Exchanges was precisely to keep the federal government *out* of the entire business: As critical swing vote Senator Ben Nelson put it, a federal Exchange "would start us down the road of federal regulation of insurance and a single-payer plan." *Nelson: National Exchange a Dealbreaker*, POLITICO, Jan. 25, 2010. Conditioning the subsidies on state participation in Exchanges was a perfectly sensible (and perhaps the only) way to achieve such participation (just as the ACA's conditions on Medicaid funds were a sensible way to ensure that states expanded Medicaid). Only because the IRS Rule gave states the "quid" of subsidies without demanding the "quo" of Exchanges did the scheme collapse. And only if the IRS Rule is vacated, and the original "deal" restored, will we find out whether Congress was right to expect total or near-total state participation in Exchanges.

Amicus Families USA argues that Congress could not have intended to "punish" states for refusing to establish Exchanges, because no individual legislator made overt threats and states allegedly did not get the message. (Dkt. 32-1, at 17-24.) But, of course, statutory language is what sets out the federal conditions in a "deal." It is that language, if followed, that puts states on notice of the condition; individual Members of Congress do not engage in bilateral negotiations. Here, that statutory condition was never properly conveyed to the states, because the IRS preemptively eliminated it.[8] And while amicus objects that such a condition would not have been "buried" in technical definitions, the ACA's *undisputed condition on future Medicaid funding* absent state agreement to expansion of the program's eligibility criteria was likewise effectuated through a dense maze of statutory clauses and cross-references: Section 2001 of the ACA added subclause (a)(10)(A)(i)(VII) to a Social Security Act provision defining the contents of a "State plan for medical assistance." And another provision, 42 U.S.C. § 1396b, provides for payments to a state "which has a plan approved under this subchapter." Again, there was no overt or blaring "threat" in the statutory *text*, but everyone understood the plain intent and effect of the coercive Medicaid amendment.

[8] In any event, there is no evidence that the states were unaware of the condition. The amicus cites a document issued by the National Governors Association in April 2010. (Dkt. 32-1, at 23.) But that document distinguishes between "a state-based Exchange" operated by a state, and a "federally established/operated Exchange" run by HHS, and correctly states that federal subsidies will be provided if one buys coverage "through a state-based Exchange." *Implementation Timeline for Federal Health Reform Legislation* at 4-5, http://www.nga.org/files/live/sites/NGA/files/pdf/1003HEALTHSUMMIT IMPLEMENTATIONTIMELINE.PDF (emphasis added). The amicus also cites another document that *postdates* proposal of the IRS Rule, so it is obvious why that document included no mention of the linkage between subsidies and state Exchanges.

Ultimately, the truly irrational course would have been for Congress to ask states to engage in the thankless, controversial task of establishing Exchanges, but offer *no incentives* to do so—to treat states that refused to establish Exchanges *just as well* as those that agreed to bear that burden. Yet the Government is not only arguing that Congress intended just that, but also that any other scheme would be so implausible as to warrant disregard of clear statutory text.

II. *CHEVRON* DEFERENCE CANNOT SAVE THE IRS RULE.

For four independent reasons, the analysis above is unaffected by the rule of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which gives agencies leeway to reasonably construe ambiguity in laws they administer. *First*, the IRS Rule is not entitled to deference because the relevant ACA text is unambiguous. *Second*, even if there were some ambiguity, the ACA at best delegates overlapping jurisdiction to both HHS and the IRS, which precludes deference, particularly given how those agencies have exercised their interpretive authority here. *Third*, the deference principle is trumped here by the "clear statement" rule for tax exemptions and credits. *Fourth*, in any event, the IRS Rule is not a reasonable construction of any ambiguity that may exist in the ACA's text.

The IRS Rule does not represent a serious effort by a responsible agency to construe an ambiguous statute to best serve *Congress*'s goals. It is, rather, an attempt to rewrite the law to promote the *Administration's* policy objectives—*i.e.*, to maximize coverage under the ACA, regardless of who establishes Exchanges and regardless of what incentives that creates. Indeed, the Administration is now apparently preparing to offer, through another administrative "fix," subsidies for coverage *not purchased through an Exchange at all*, but rather through insurers directly. *See* Brett Norman, *CMS Sees Progress with Direct Plan Enrollment*, POLITICO, Nov. 20, 2013. When the Government defends the IRS Rule by professing textual fidelity to the law, this development should be kept in mind.

A. Because the Relevant Statutory Text Is Unambiguous, The IRS Has No Power To Construe It.

Where, as here, Congress has "unambiguously expressed [its] intent" in the statute, "that is the end of the matter," and no deference is afforded the agency. *Chevron*, 467 U.S. at 842-43.

Two points are worth noting as to "Step One" of *Chevron*. *First*, judges "owe the agency no deference on the existence of ambiguity." *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) ("*ABA*"). Rather, the court must determine *de novo* whether the statute is ambiguous. *Second*, the inquiry into ambiguity is intended to identify whether Congress intended an "implicit delegation of authority to the agency." *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998). Thus, "ambiguity is not enough per se to warrant deference to the agency's interpretation. The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity." *ABA*, 430 F.3d at 469.

Here, the Government must therefore convince this Court, *de novo*, that "Exchange established by the State" is *ambiguous* as to whether it includes an Exchange established by HHS; and that, through that ambiguity, Congress was implicitly directing the IRS to exercise its discretion as to whether to make subsidies available in federal Exchanges. Neither is plausible. Even the Congressional Research Service has acknowledged that "a strictly textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS's authority to issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a state-established exchange. Therefore, an IRS interpretation that extended tax credits to those enrolled in federally facilitated exchanges would be contrary to clear congressional intent, receive no *Chevron* deference, and likely be deemed invalid." Cong. Res. Serv., *Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act* at 8 (Jul. 23, 2012).

At best, the Government has constructed a highly attenuated "legal fiction" and imposed it onto the ACA's contrary text. Such efforts cannot *create* any ambiguity, and surely not the sort of open-ended ambiguity that suggests a congressional intent to delegate to an agency.

B. No *Chevron* Deference Is Owed, Because the IRS at Best *Shares* Regulatory Authority with HHS, and the Agencies Have Issued Conflicting Regulations.

Chevron deference cannot save the IRS Rule for another reason: It does not apply.

1. While the ACA's subsidy provisions are part of the Internal Revenue Code, the provisions that establish state and federal Exchanges are found in a chapter of Title 42 of the U.S. Code that is the domain of HHS. *See* 42 U.S.C. §§ 18031, 18041. Critically, the Government has never claimed that the language of *26 U.S.C. § 36B* is ambiguous. Rather, it argues that the ACA *as a whole* is ambiguous, because "such Exchange" in *§ 1321(c)* creates ambiguity as to whether federal Exchanges can be "deemed" to be established by states.

But § 1321 is not part of the Internal Revenue Code, and addresses the powers of *HHS*—or, as the statute says, the "Secretary" (not "the Commissioner"). The IRS has no power to enforce or administer § 1321. It therefore is entitled to no deference when it purports to construe that provision. *See Shanty Town Assocs. v. EPA*, 843 F.2d 782, 790 n.12 (4th Cir. 1988) (no deference to EPA as to "two statutes that EPA does not administer"); *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1015-16 (D.C. Cir. 2002) (no deference to *FAA* under *Chevron* where *Secretary of Interior* had "authority to interpret that [disputed] statutory term"); *Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 250 F.3d 778, 782 (D.C. Cir. 2001) (no *Chevron* deference where agency interpretation rested, "in part," on "legislative enactments that are not part of its enabling statute"); *Cheney R.R. Co. v. R.R. Ret. Bd.*, 50 F.3d 1071, 1073-74 (D.C. Cir. 1995) (no deference where issue "turn[ed] on the interpretation" of laws that were "not the Board's governing statutes"). Indeed, the IRS itself recognizes that it has no authority or competence to construe "Exchange" or the "such Exchange" language, which is why its Rule simply adopts and defers to HHS's definition of "Exchange." 26 C.F.R. § 1.36B-1(k); Part II.B.2, *supra*.

It does not matter that the subsidy provisions in the Internal Revenue Code use the term "Exchange" and cross-reference § 1311 of the ACA. The same dynamic was present in *American Federation of Government Employees, AFL-CIO, Local 3669 v. Shinseki*, 709 F.3d 29 (D.C. Cir. 2013), where a law administered by the Secretary of Veterans Affairs ("VA") used the term "collective bargaining" and cross-referenced another law, the Federal Service Labor-Management Relations Statute. *See id.* at 33. The latter statute defined "collective bargaining," and the D.C. Circuit held that it owed no deference "to the VA's interpretation of th[at statute] because the VA does not administer [it]." *Id.* The same is true here: The key provisions under the Government's theory are §§ 1311 and 1321 of the ACA, but the IRS clearly "does not administer" those provisions, and so its interpretation is owed no deference. *See id.*

2. At best, the IRS Rule purports to construe portions of the ACA that it and HHS effectively *jointly* administer, given the way the statutory provisions interact with one another. At most, then, the powers of these agencies are intertwined because the statutory provisions are intertwined. As noted, the IRS Rule itself actually provides only that subsidies will be available on any "Exchange," and then adopts by cross-reference the *HHS* definition of that term. *See* 26 C.F.R. § 1.36B-2(a) (providing eligibility for subsidy if one enrolls in coverage "through an Exchange"); *id.* § 1.36B-1(k) (providing that "Exchange has the same meaning as in 45 C.F.R. § 155.20"). HHS's current definition of "Exchange"—which is applicable to its own, distinct regulations—includes all Exchanges, "regardless of whether the Exchange is established and operated by a State … or by HHS." 45 C.F.R. § 155.20. The IRS Rule thus operates only by incorporating an HHS definition originally intended for other purposes. Thus, eligibility for subsidies under the IRS Rule is wholly dependent on *HHS's* interpretative regulation of "Exchange," which *HHS* can change at any time, without any control or input by the IRS.

The (at best) intertwined nature of IRS and HHS jurisdiction over the relevant provisions precludes *Chevron* deference. The D.C. Circuit, the pre-eminent authority on administrative law, holds that no deference applies if "more than one agency is granted authority to interpret the same statute"; if so, "it cannot be said that Congress implicitly delegated to one agency authority to reconcile ambiguities or to fill gaps, because more than one agency will independently interpret the statute." *Salleh v. Christopher*, 85 F.3d 689, 692 (D.C. Cir. 1996). Accordingly, "[w]hen a statute is administered by more than one agency, a particular agency's interpretation is not entitled to *Chevron* deference." *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000). "The alternative would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all." *Rapaport v. U.S. Dep't of Treasury*, 59 F.3d 212, 216-17 (D.C. Cir. 1995); *accord DeNaples v. Office of Comptroller of Currency*, 706 F.3d 481, 488 (D.C. Cir. 2013) ("We have repeatedly pointed to the agencies' joint administrative authority … to justify refusing deference to their interpretations.").

Thus, the dispositive question for the applicability of *Chevron* deference is whether Congress intended a *particular* agency to resolve any ambiguity in the statutory text. That is surely not the case for the ACA as a whole, nor with respect to the subsidy provisions in tandem with §§ 1311 and 1321 of the ACA. The IRS at most *shares* regulatory authority with HHS, and thus is entitled to no deference for an interpretation of those provisions. In light of HHS's role, it simply "cannot be said that Congress implicitly delegated to [the IRS] authority to reconcile ambiguities" about whether subsidies are available on federal Exchanges. *Salleh*, 85 F.3d at 692.

3. This conclusion is particularly appropriate here, because HHS and the IRS have in fact interpreted "the same statute … differently." *Rapaport*, 59 F.3d at 216. There is thus not only a *potential* for conflict—which itself suffices to deprive the agencies of deference—but an *actual* conflict. In particular, while the IRS Rule construes the word "such" in § 1321(c) to mean that federal Exchanges are somehow established by states, HHS has given the word "such" a *different meaning*. In June 2013, HHS proposed (and later promulgated) a regulation providing that a state may permissibly establish an Exchange that either serves the individual market *or* small businesses (the latter is called a SHOP Exchange); it had previously ruled "that a State must elect to carry out *both* these functions in order to establish an 'Exchange.'" 78 Fed. Reg. 37,031, 37,043 (June 19, 2013) (emphasis added). In defending this change, HHS explained that the phrase "such Exchange" in § 1321(c) supported it: The direction to the HHS Secretary to establish "such" Exchange means the *particular sort of Exchange—i.e.*, individual or SHOP—that the state declined to establish, suggesting that the state may establish one without the other. *See id.* Thus, HHS's construction is *not* that "such" creates a bizarre legal fiction under which federal Exchanges are deemed state-established, but that "such" *differentiates* between the *two* types of Exchanges that states "shall" establish (and that HHS will establish if the state defaults).

Moreover, as previously explained, the HHS definition of "federally-facilitated Exchange" directly *conflicts* with the position taken by the IRS Rule. Under the Rule, federal Exchanges created under § 1321 are "deemed" to be "established by *the State* under *section 1311*." But HHS itself says that a federal Exchange is "an Exchange established … *by the Secretary* under *section 1321(c)(1)*." 45 C.F.R. § 155.20 (emphases added). The two sets of regulations are thus fundamentally incompatible, further confirming that agency deference is not appropriate here.

In short, the IRS has identified a purported ambiguity in a provision that is not part of its organic act, that it does not administer, and that HHS has construed to mean something else. The IRS Rule then "resolves" that "ambiguity" by adopting a "legal fiction" that directly contradicts extant HHS regulations in an area of dual jurisdiction. No *Chevron* deference applies here.

C. Moreover, *Chevron* Deference Is Displaced Here by the Venerable "Clear Statement" Rule for Tax Exemptions and Credits.

Chevron deference is premised on the assumption that the agency has authority to resolve statutory ambiguity and consequently may expand the statute's reach beyond what the statute's language unambiguously compels. But that authority to expansively interpret ambiguities is not available if other canons of construction require narrowly construing the statute to extend no further than its plain language. Specifically, where established principles of statutory construction require a clear or unambiguous statement of congressional intent to infer certain results, an agency cannot construe ambiguous statutory text to achieve those results. Indeed, a contrary rule would eliminate these canons of construction entirely in the agency context. *See* Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) (explaining that these canons "forbid administrative agencies from making decisions on their own" by depriving them of their "ordinary discretion" to construe an "ambiguous statutory provision").

Thus, for example, if a statute is ambiguous but one construction "would raise serious constitutional problems," there is no deference to an agency adopting it; rather, the court will adopt the contrary construction unless "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988). In other words, the courts require a *clear statement* that Congress intended the result of dubious constitutionality; ambiguity plus agency interpretation is not sufficient. *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (holding that "canon of constitutional avoidance trumps *Chevron* deference"). Similarly, in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), a statute was "ambiguous" as to whether it applied overseas, but the Court held that the EEOC's view that it did could not "overcome the presumption against extraterritorial application." *Id.* at 250, 258. Justice Scalia elaborated that, in light of that presumption, the EEOC could not infer extraterritoriality from "mere implications" from ambiguous language. *Id.* at 260 (Scalia, J., concurring in part and in judgment). Likewise, in *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court held that the presumption against retroactivity means that "a statute that is ambiguous with respect to retroactive application is construed … to be unambiguously prospective," such that "there is, for *Chevron* purposes, no ambiguity in such a statute." *Id.* at 320 n.45. There are many more examples of cases holding that various presumptions and clear statement rules effectively trump or displace *Chevron* by giving the ambiguity itself a dispositive meaning. *See, e.g.*, *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444-45 & n.8 (D.C. Cir. 1988) (refusing to defer because Indian law canon provides that if law "can reasonably be construed" in Tribe's favor, "it *must* be construed that way"); *Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 982 (D.C. Cir. 1990) ("An agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it.").

As relevant here, a venerable canon of construction repeatedly applied by the Supreme Court holds that tax credits (and deductions and exemptions) "must be expressed in clear and unambiguous terms." *Yazoo & Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 183 (1889). A statute must "unquestionably and conclusively" establish such a credit or exemption. *Stichting Pensioenfonds Voor De Gezondheid v. United States*, 129 F.3d 195, 198 (D.C. Cir. 1997). Critically, such tax benefits "are not to be implied; they must be unambiguously proved," *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988); and "must rest … on more than a doubt or ambiguity," *United States v. Stewart*, 311 U.S. 60, 71 (1940). If "doubts are nicely balanced," the Supreme Court has said, that defeats the claimed tax exemption. *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933); *accord Of Course, Inc. v. Comm'r*, 499 F.2d 754, 758 (4th Cir. 1974) (en banc). Only that "extremely high standard" properly respects Congress's "exclusive authority to collect taxes" and "the importance of taxation" to the national revenue. *Stichting*, 129 F.3d at 197-98; *see also Comm'r v. Swent*, 155 F.2d 513, 517 (4th Cir. 1946) (invoking this canon).[9]

In light of this rule for how to treat ambiguity in the Tax Code—namely, allowing money to be drawn from the Treasury only when the congressional custodian of the federal purse has unambiguously authorized a withdrawal—*Chevron* deference is displaced as to this dispute over 26 U.S.C. § 36B.[10] Just as presumptions and clear statement rules prevent agencies from applying ambiguous laws extraterritorially, retroactively, or to create constitutional doubts, the clear statement rule of *Yazoo* and *Wells Fargo Bank* prevents agencies from providing a tax credit unless Congress has *unambiguously* allowed it. The availability of § 36B tax credits in federal Exchanges "must be unambiguously proved," *Wells Fargo Bank*, 485 U.S. at 354; the IRS cannot by regulation extend the credits by resting on "doubt or ambiguity" in the ACA, *Stewart*, 311 U.S. at 71. As such, any ambiguity in § 36B must as a matter of law be construed against availability of the subsidy, and so "there is, for *Chevron* purposes, no ambiguity in [the] statute for [the IRS] to resolve." *St. Cyr*, 533 U.S. at 320 n.45. Put another way, if § 36B "can reasonably be construed" to restrict the ACA's premium tax credit to state-established Exchanges, "it *must* be construed that way." *Muscogee (Creek) Nation*, 851 F.2d at 1445.

[9] While some of these cases speak primarily of tax *exemptions*, the same logic and same principle govern the availability of tax *deductions* and *credits*, too. *See MedChem (P.R.), Inc. v. Comm'r*, 295 F.3d 118, 123 (1st Cir. 2002); *Randall v. Comm'r*, 733 F.2d 1565, 1567 (11th Cir. 1984) (per curiam).

[10] Of course, where the IRS urges a court to *deny* a tax credit, the canon of construction and *Chevron* deference point in the same direction, and so there is no problem. *E.g.*, *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011).

D. In All Events, the IRS Rule Is Not a Reasonable Construction of the Text.

Even setting aside all of the above, and assuming there exists some ambiguity in the ACA and that the IRS has been delegated authority to construe it, the IRS Rule would *still* fail at "Step Two" of the *Chevron* analysis, which asks whether the agency's construction is "reasonable."

"If a statute is ambiguous, an agency that administers the statute may choose a reasonable interpretation of that ambiguity—but the agency's interpretation *must still stay within the boundaries of the statutory text*." *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 23 (D.C. Cir. 2012) (emphasis added); *see also EEOC v. Seafarers Int'l Union*, 394 F.3d 197, 205 (4th Cir. 2005) (agency interpretation must "harmoniz[e] with the plain language of the statute"). Under Step Two of *Chevron*, "the court's deference to the [agency] is still limited by the particular language" of the statute; "whatever ambiguity may exist cannot render nugatory restrictions that Congress has imposed." *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005). *Chevron*'s second step is "thus not independent of the first: what a court may consider a reasonable interpretation largely depends on the nature and extent of the ambiguity already identified in *Chevron*'s first step." *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996). In particular, "time-honored canons of construction may … constrain the possible number of *reasonable* ways to read an ambiguity in a statute." *Id.*

For all of the reasons discussed in Part I and Part II.C, the IRS Rule is not a *reasonable* construction of the ACA. Any ambiguity that may exist cannot justify ignoring the statutory text, rejecting the numerous applicable canons of construction, and eliminating the incentives Congress created for states to establish Exchanges. Indeed, the IRS Rule "render[s] nugatory" Congress's restrictions on subsidies, *Am. Fed'n of Labor*, 409 F.3d at 384, and therefore fails at Step Two of *Chevron* even if there is room for some discretion.

III. THERE IS NO JURISDICTIONAL OBSTACLE TO THIS ROUTINE, PURELY LEGAL APA CHALLENGE TO A FINAL AGENCY REGULATION.

The Government adopts by reference the standing and ripeness arguments that it pressed in its opposition to Plaintiffs' motion for a preliminary injunction. (Opp. 12-13.) In particular, it contends that Plaintiffs lack standing even though the IRS Rule forces them, on pain of penalty, to buy and pay for a product (comprehensive health coverage) that they do not want; that their challenge to the final IRS Rule is not ripe, even though it is purely legal; and that, instead of a pre-enforcement suit, they must refuse to comply with the individual mandate, pay the resulting tax penalties in 2015, and then bring tax-refund actions to try to recover those sums. All of these arguments are meritless; as Plaintiffs' prior briefing explains at length. (Dkt. 21, at 3-13.)

Plaintiffs add only that, in a challenge pending in the District Court for the District of Columbia, Senior District Judge Paul L. Friedman of that Court squarely rejected the *identical* arguments for dismissal pressed by the Government. Judge Friedman concluded that a plaintiff in that suit, like (at least) Plaintiffs Hurst and Levy here, had Article III standing because as a result of the IRS Rule he would "be forced to buy insurance" and thus "do something he otherwise would not do." (Dkt. 22-1, at 12.) Judge Friedman also found that the plaintiffs there "clearly … have prudential standing" given their direct regulation by the individual mandate and IRS Rule. (*Id.* at 27-28.) He determined that the suit was ripe, as it raised a "purely legal question" and deferring review would cause hardship by subjecting the plaintiffs to a Hobson's Choice of either buying unwanted insurance or risking incurring a tax penalty if their challenge were later rejected. (*Id.* at 31-33.) And he ruled that forcing the plaintiffs to resort to an after-the-fact tax refund suit would, for the same reason, "undermine the purposes of the APA" and not be an "adequate" remedy. (*Id.* at 34.) The conclusions reached by Judge Friedman are entirely correct, required by Fourth Circuit caselaw, and equally applicable here.

IV. THE PROPER REMEDY IN A FACIAL CHALLENGE TO A REGULATION UNDER THE APA IS VACATUR OF THE INVALID RULE.

In an effort to limit its losses, the Government urges this Court to restrict relief to the particular individual plaintiffs in this action. (Opp. 38-40.) That is plainly wrong.

The APA provides that reviewing courts "shall … hold unlawful and set aside" agency action "not in accordance with law." 5 U.S.C. § 706(2). Accordingly, "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989); *accord National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998) (rejecting agency's challenge to "nationwide" invalidation of regulation); *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (APA relief "normally will be a vacatur of the agency's order"). *National Mining* quoted, as "expressing the view of all nine Justices on this question," 145 F.3d at 1409, Justice Blackmun's dissent in *Lujan v. National Wildlife Federation*, which clearly stated that if an APA plaintiff prevails in a challenge to "a rule of broad applicability …, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual." 497 U.S. 871, 913 (1990); *see also id.* at 890 n.2 (majority op.). Consistent with these authorities, the Fourth Circuit has long and routinely affirmed the general invalidation of broad regulations under the APA. *See, e.g.*, *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755 (4th Cir. 2012); *Bedford Cnty. Mem. Hosp. v. Health & Human Servs.*, 769 F.2d 1017 (4th Cir. 1985); *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975). That approach makes perfect sense, because artificially limiting relief to the particular plaintiff in the case, even if the challenged regulation is *facially unlawful*, would only "generate a flood of duplicative litigation" by identically situated parties, thereby wasting judicial resources. *Nat'l Mining*, 145 F.3d at 1409.

Of course, once a court declares a regulation invalid under the APA, injunctive relief is typically redundant, because courts can "assume" that "executive … officials would abide by an authoritative interpretation of the [law] by the District Court." *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). Only in cases like *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001), where the regulation could not have been wholly set aside because the agency's definition of "express advocacy" was concededly only unconstitutional *in part*, *see id.* at 383-85, is tailored injunctive relief necessary. By contrast, the IRS Rule is facially unlawful; it therefore can and should be *vacated*, consistent with the ordinary practice of the Supreme Court, D.C. Circuit, and Fourth Circuit. Moreover, while the court in *Virginia Society* was concerned by the prospect that *nationwide* relief would preclude other Circuits from reaching different conclusions about the regulation's validity, *see id.* at 393-94, that concern can readily be addressed by simply limiting the effect of this Court's order to federal Exchanges within the Fourth Circuit.

Finally, the Government's related objection that an injunction would inappropriately "purport to determine the tax circumstances of parties who are not present in this case" (Opp. 40) is meritless. Vacatur of the IRS Rule would not directly "determine" anyone's taxes; it would just invalidate, on its face, an agency regulation that conflicts with statutory text.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant summary judgment to Plaintiffs, deny summary judgment to Defendants, and vacate the IRS Rule.

November 27, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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