IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. Scott Pruitt, in his official capacity as Attorney General of Oklahoma,	)	
Plaintiff,	)	
v.	)	**No. 6:11-cv-00030-RAW**
KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; and JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury,	)	
Defendants.	)	

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

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Introduction

Oklahoma asserts that the Treasury Department "perceives … a variance between the plain text of the statute and Congress's overall purpose in enacting" the Affordable Care Act ("ACA"). In its telling, the defendants are asking the Court to ignore that "plain text" in order to uphold the Treasury regulation that is challenged here. Pl.'s Response/Reply to Defs.' Cross-Mot. for S.J. ("Reply") at 27, ECF 94. Oklahoma devotes most of its brief to a rebuttal of this straw argument, and it does not engage with the arguments that the defendants actually put forth.

In truth, both the plain text of the Affordable Care Act – when the Act is read in full, as it must be – and Congress's obvious purpose in enacting the Act point to the same conclusion: Congress intended that participants in all of the Act's Exchanges would be eligible for premium tax credits, whether the Exchange is state- or federally-run. The Act defines the term "Exchange" to mean "a governmental agency or nonprofit entity that is established by a State," 42 U.S.C. § 18031(d)(1), but it does not force the state to operate that entity. Instead, if the state chooses not to establish or operate the "required Exchange," the Act directs the Secretary of Health and Human Services ("HHS") to establish and operate "such Exchange." 42 U.S.C. § 18041(c)(1). When these provisions are read together, as they must be, it is clear that Congress intended for the federally-run Exchange to be the same entity as the Exchange that is defined, by operation of the statute, as the entity "that is established by a State" under Section 18031. Thus, when Section 36B specifies that tax credits are available to pay for premiums for a plan "enrolled in through an Exchange established by the State under [42 U.S.C. § 18031]," 26 U.S.C. § 36B(b)(2)(A), it refers both to state-run Exchanges and to federally-run Exchanges, which are each treated, by operation of law, as entities "established by the State."

The plain text of the statute thus supports Treasury's interpretation of Section 36B. That

interpretation is further confirmed by other provisions in Section 36B itself, which reflect Congress's understanding that federal tax credits would be distributed through the federally-run Exchanges; by the remainder of the ACA, which contains numerous provisions that would become nonsensical under Oklahoma's theory; and by the ACA's purpose and legislative history, which reflect the importance of the premium tax credits to the overall statutory structure. At the very least, Treasury has reasonably interpreted Section 36B in light of these considerations, and its reasonable reading should be accorded *Chevron* deference.

This lawsuit, in any event, is the wrong forum to resolve this question. Oklahoma's reply brief only underscores that it has not raised a justiciable claim. It has not met its burden to show that its own tax circumstances are affected in any way because Oklahoma residents are eligible for the Section 36B tax credit. Oklahoma speculates that it might face a tax under 26 U.S.C. § 4980H for a failure to offer health coverage to its full-time employees. In fact, it already offers coverage to all state employees who will be treated as "full-time" under Section 4980H. Its failure to show that it faces a tax liability for even *one* of its state employees, then, is fatal to its claim of Article III standing. Oklahoma's suit suffers from multiple additional defects: it claims injuries that could not be redressed here; it improperly seeks to litigate third parties' tax liabilities; and it has no cause of action under the Administrative Procedure Act (APA), given that it may pursue its claim in a tax refund action.

In sum, "the plain text of the statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges." *Halbig v. Sebelius*, --- F. Supp. 2d ---, 2014 WL 129023, at *18 (D.D.C. Jan. 15, 2014), *appeal docketed*, No. 14-5018 (D.C. Cir. Jan. 16, 2014); *see also King v. Sebelius*, --- F. Supp. 2d ---, 2014 WL 637365, at *11 (E.D. Va. Feb. 18, 2014), *appeal*

docketed, No. 14-1158 (4th Cir. Feb. 21, 2014) ("when statutory context is taken into account, Plaintiffs' position is revealed as implausible"). If this Court were to reach the merits, Treasury's reasonable construction of Section 36B should be upheld.

Argument

I. Oklahoma's Challenge to the Treasury Regulation Is Not Justiciable

A. Oklahoma Does Not Suffer an Injury in Fact from the Treasury Regulation

1. Oklahoma Has Not Shown that the Treasury Regulation Would Cause It to Be Assessed with the Large-Employer Tax

Oklahoma alleges that it is harmed by the Affordable Care Act's extension of premium tax credits to its residents, because some state government employees might receive those valuable federal tax credits, and their receipt of those tax credits could trigger Oklahoma's own tax liability, as an employer, under 26 U.S.C. § 4980H. *See* Reply 9-14. Oklahoma would only be assessed with a tax under that provision, however, if it were to fail to offer adequate health coverage to its full-time employees and their dependents. *See* 26 U.S.C. §§ 36B(c)(2)(C), 4980H(a), (b). Oklahoma does, in fact, offer qualifying coverage to its full-time employees and their dependents, and for this purpose it defines "full-time employees" as persons, apart from temporary or seasonal employees, who are "scheduled to work at least 1,000 hours per year," that is, at least 19.23 hours per week on average. *2014 Benefits Enrollment Guide* at 33, ECF 92-9. The Affordable Care Act, by contrast, treats an employee as "full-time" for the purpose of the Section 4980H applicable large employer tax if he or she works on average at least 30 hours per week. *See* 26 U.S.C. § 4980H(c)(4). Oklahoma, thus, does not face any under Section 4980H for any failure to offer qualifying coverage to its full-time employees.

Oklahoma does not dispute this point, but it argues that it still may be assessed with the Section 4980H tax, because it does not offer health coverage to some employees whom it treats

as seasonal, but whom, it contends, will be treated as "full-time" under Section 4980H. Reply 12-13. It refers to a statute that provides that seasonal employees of the state Tourism, Parks, and Recreation ("TPR") Department who work less than 1,600 hours per year will not gain coverage through their employment. Okla. Stat. tit. 74, § 2241(B). Since the 30-hour-per-week threshold for full-time employment under Section 4980H amounts to 1,560 hours in a 52-week year, Oklahoma apparently reasons, there might be some TPR employees who exceed 1,560 hours for the year, but fall short of 1,600 hours, and thus would be treated as "full-time" under the ACA and as "seasonal" under Oklahoma law. Oklahoma surmises that its failure to offer coverage to such employees would trigger the Section 4980H tax, and it suggests that employee TMW is one such employee. *See* Affidavit of Preston L. Doerflinger, ¶ 49(A), ECF 87-12.

Oklahoma is simply wrong in its calculation of TMW's hours, however. It notes that TMW worked 1,574 hours over the course of the ten months that he or she was employed by the state from March 2011 to December 2011, and argues that TMW did not gain coverage under Oklahoma law during that time. But Oklahoma law does not measure hours of employment, for the purposes of health coverage, by the calendar year; instead, TPR employees are entitled to health coverage if they work more than 1,600 hours "in any twelve-month period." Okla. Stat. tit. 74, § 2241(B). TMW thus was entitled to health coverage under Oklahoma law by virtue of his or her employment for 1,893 hours over the first full twelve months of employment, from March 2011 to February 2012. *See* Doerflinger Aff. ¶ 49(A).

Oklahoma nonetheless contends that, if Section 4980H had been in effect when TMW was hired, it would have incurred tax liability under Section 4980H for a failure to offer coverage more quickly to that employee. It is mistaken. Under Section 4980H, Oklahoma is permitted to use a "look-back" period of as long as twelve months to assess whether newly-hired

employees with variable hours or newly-hired seasonal employees will qualify as full-time. It also may apply a 90-day "administrative period" after the look-back period expires before coverage begins for any employees who are found to be full-time under this method. 26 C.F.R. § 54.4980H-3(d)(1), (d)(3). Thus, if Section 4980H had been in effect when TMW was hired, Oklahoma would not have faced any tax for a failure to offer coverage to TMW before June 2012, by which time TMW would have received coverage under the operation of state law.

Oklahoma asserts that it could not have used the "look-back" method for employee TMW, asserting that, under 26 C.F.R. § 54.4980H-3(d)(2)(i), it would have needed to offer coverage to TMW no later than July 2011 to avoid the Section 4980H tax. Reply 13. Oklahoma does not explain its reasoning on this score, but the cited regulation provides that an applicable large employer may not rely on the "look-back" method for a newly-hired, non-variable-hour employee, if it is "reasonably expected" that the employee will work on a full-time basis. *See* 26 C.F.R. § 54.4980H-3(d)(2)(i). There is no reason to believe that this limitation would have applied with respect to TMW's employment, however. There is no record evidence indicating whether Oklahoma expected, at the time that TMW was hired, that he or she would consistently work an average of at least 30 hours per week in the state's employment over the initial measurement period. Indeed, if Oklahoma had so expected, then TMW would not have been a "seasonal" employee under state law, and he or she would have gained a right to coverage under state law from the start of his or her employment. *See 2014 Benefits Enrollment Guide* at 33.[1]

[1] It is not *impossible* for Oklahoma to incur a Section 4980H tax for a failure to offer coverage to an employee who does not gain coverage under Oklahoma law. If the TPR Department were to hire a seasonal employee with the expectation that that employee would work for more than 1,560 hours, but less than 1,600 hours, over a twelve-month period, then that employee would be treated as full-time for the purposes of Section 4980H, yet would not gain coverage under Oklahoma law. It is, at best, highly speculative that any such employees exist, and Oklahoma could not meet its burden to prove an Article III injury-in-fact with speculation that it might face

Oklahoma, then, is unable to show that it faces Section 4980H tax liability for even *one* of its employees. It bears the burden to prove, at the summary judgment stage, that it suffers an injury from the regulation that it seeks to challenge. *See Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005). Because the Affordable Care Act's extension of federal tax credits to Oklahoma residents does not result in any tax liability for Oklahoma for any of its employees, it has failed to meet this burden.[2]

2. Oklahoma Does Not Suffer Any Injury from the Act's Recordkeeping and Reporting Requirements that Is Traceable to the Treasury Regulation

Oklahoma asserts that is injured by the Treasury regulation in a second way. It claims that it faces an injury from the Affordable Care Act's recordkeeping and reporting requirements for large employers, 26 U.S.C. § 6056. Oklahoma notes that an "applicable large employer required to meet the requirements of section 4980H with respect to its full-time employees" is subject to these recordkeeping and reporting requirements, 26 U.S.C. § 6056(a), and surmises that, if it could avoid the Section 4980H tax under the theory that it pursues here, it would no longer need to comply with Section 6056. Reply 8-9. Oklahoma misreads the statute and the regulations. In fact, it will be subject to the same recordkeeping and reporting requirements under Section 6056, whether or not it incurs any Section 4980H tax liability. Thus, the relief that

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a tax in such a rare circumstance. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013); *see also Morgan v. McCotter*, 365 F.3d 882, 888 (10th Cir. 2004) ("mere possibility" of "future injury" is inadequate to establish injury-in-fact). Oklahoma, in any event, does not contend that any such employees exist.

[2] Because Oklahoma cannot show that it will incur liability under 26 U.S.C. § 4980H(b) for even one employee, its claim that it would incur the larger assessment "of not less than $71,940,000," Doerflinger Aff. ¶ 21, under 26 U.S.C. § 4980H(a), necessarily fails as well. Oklahoma persists in this claim, Reply 14 n.6, but it fails to acknowledge that it would only incur this liability if it did not offer coverage to five percent or more of its 36,000 full-time employees. 26 C.F.R. § 54.4980H-4(a). Oklahoma *does* offer adequate coverage to its full-time employees and their dependents, so it will not incur the Section 4980H(a) tax.

it seeks in this lawsuit would not excuse it from its obligations under Section 6056.

Section 6056 and Treasury's regulations under that provision clarify that every applicable large employer will be subject to the recordkeeping and reporting requirements, whether or not that employer owes a tax under Section 4980H. The Act defines an "applicable large employer" as any person that employs, with respect to a calendar year, "at least 50 full-time employees (including full-time equivalent employees)." 26 C.F.R. §§ 54.4980H-1(a)(4), 301.6056-1(b)(2). If two or more persons are treated together as a single "applicable large employer" under Sections 4980H and 6056, then each such person is defined to be an "applicable large employer member." 26 C.F.R. §§ 54.4980H-1(a)(5), 301.6056-1(b)(3). (If only one person is treated by itself as the large employer, then the terms "applicable large employer" and "applicable large employer member" refer to the same entity. 26 C.F.R. §§ 54.4980H-1(a)(5), 301.6056-1(b)(3).)

Under the Treasury regulations, with an immaterial exception, "every applicable large employer member must make a section 6056 information return with respect to each full-time employee." 26 C.F.R. § 301.6056-1(d)(1). The employer's return must report information concerning the coverage that it offers to its employees; each full-time employee's share of the cost of premiums; the number of full-time employees for each month during the calendar year; and the identity of each full-time employee, and the months, if any, that the employee was covered under the employer's plan. *Id.* The employer is also required to provide a report to each of its full-time employees regarding the coverage that it offers. 26 C.F.R. § 301.6056-1(f).

Under Section 6056, then, there is no exception from the recordkeeping and reporting requirements for applicable large employers that do not owe the Section 4980H tax. Every applicable large employer must file a return, whether or not a tax is owed. *See* 79 Fed. Reg. 13,231, 13,235 (Mar. 10, 2014) ("In accordance with section 6056, the regulations provide for

each ALE member to file a section 6056 return with respect to its full-time employees."). Thus, Oklahoma would not be excused from these recordkeeping and reporting obligations even if it were to prevail here, and any injury that it suffers from these obligations is neither traceable to the Treasury regulation that it challenges here, nor redressable by any relief that it requests in this action. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (traceability and redressability are components of the "irreducible constitutional minimum of standing").

The Treasury regulation at issue in this lawsuit simply confirms that Oklahoma residents are eligible for a valuable federal tax benefit, and that regulation causes no injury to the State of Oklahoma. Oklahoma accordingly lacks standing to challenge that regulation.

B. Even If Oklahoma Suffered an Injury in Fact from the Large-Employer Tax, That Injury Could Not Be Redressed Here

Oklahoma lacks Article II standing for a second reason. Even if it would incur a tax under Section 4980H, that injury would not be redressable here. No judgment in this action could bind absent parties, namely, the Oklahoma state employees whose receipt of tax credits, Oklahoma contends, would trigger its liability for the applicable large employer tax. If any such employee exists (and Oklahoma has not shown that one does, as discussed above), he or she could bring his or her own claim for the tax credit, in a separate lawsuit. If that employee were to prevail, Oklahoma's liability for the applicable large employer tax would still be triggered. Thus, absent parties could bring independent suits to vindicate their rights, which would trigger the same harm that Oklahoma claims as its injury here, and Oklahoma's injury is not redressable in this litigation. *See, e.g., Nova Health Sys.*, 416 F.3d at 1158-59.

Oklahoma contends that those individuals might be deterred from bringing a claim if this Court were to rule in its favor. Reply 14-15. The Tenth Circuit rejected the same reasoning in *Nova Health Systems*. There, the Court emphasized that "it must be the effect of the court's

judgment on the defendant that redresses the plaintiff's injury, whether directly or indirectly." 416 F.3d at 1159. "'If courts may simply assume that everyone (including those who are not proper parties to an action) will honor the legal rationales that underlie their decrees, then redressability will always exist. Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power.'" *Id.* (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring)). Oklahoma also suggests that Treasury might not treat "premium tax credits" awarded in other suits as the same "premium tax credits" that trigger a Section 4980H tax. Reply 15. The ACA does not permit such a distinction; the employer's tax arises upon its employee's receipt of "any premium tax credit allowed under section 36B." 26 U.S.C. § 4980H(c)(3). In sum, because this Court could not extinguish any absent employees' claims to Section 36B tax credit, Oklahoma lacks an injury that could be redressed in this action.

C. Oklahoma Lacks Prudential Standing to Seek to Adjudicate the Tax Liabilities of Absent Third Parties

It is well established "that a party may not challenge the tax liability of another." *United States v. Williams*, 514 U.S. 527, 539 (1995). This rule applies with particular force in cases involving federal taxes, given that Congress has consistently legislated to prevent plaintiffs from litigating third parties' federal tax liabilities, even in cases where the litigation might affect the plaintiff's own liability to the government. *See* Defs.' Mem. in Supp. of Their Cross-Mot. for S.J. and in Opp. to Pl.'s Mot. for S.J. ("Defs.' Mem.") at 18-19 & n.5, ECF 91-1. Moreover, where a plaintiff seeks to *increase* the federal tax liabilities of third parties who are absent from the case, as Oklahoma does here, the courts appropriately decline to entertain such requests, to avoid judicial interference that would "seriously disrupt the entire revenue collection process." *Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174, 1177 (5th Cir. 1993).

Oklahoma denies that any barrier exists to third-party tax litigation, reasoning that this prudential rule would have prevented the Supreme Court from deciding *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"). Reply 15-16. But the individual plaintiffs in *NFIB* sought to litigate their own potential liability under 26 U.S.C. § 5000A. Of course, a taxpayer may litigate his or her own tax liabilities, and the resolution of those cases may set precedent that affects other taxpayers. It is a far different circumstance, however, when a plaintiff seeks relief that would *directly* determine the tax circumstances of parties who are not before the court. That is the relief that Oklahoma seeks here, and its suit is barred by the principle that protects absent parties from third-party tax litigation.

D. Oklahoma Must Proceed in the Forum that Congress Specified, an Action for a Tax Refund

In addition, even if Oklahoma could overcome the Article III and prudential barriers to its suit, it would lack a cause of action under the Administrative Procedure Act (APA). The APA specifies 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. Where Congress has provided a forum for a plaintiff's claim, the plaintiff must proceed in that forum. The APA does not provide a second cause of action, unless the alternative forum is inadequate.

Oklahoma has a forum to litigate any tax liability it might incur under Section 4980H – a tax refund suit. The APA does not duplicate this remedy, and Oklahoma must present its claims in a refund suit. Oklahoma disputes that a refund action would afford it an adequate remedy, arguing that it should not be required first to incur the tax before it may litigate the validity of that tax. Reply 16-17. But that is the ordinary rule in tax litigation; it is well established that a refund action provides an adequate remedy at law, and that a taxpayer may not seek pre-

enforcement review before a tax is assessed and collected. *See, e.g., Bob Jones Univ. v. Simon*, 416 U.S. 725, 746 (1974); *Alexander v. Americans United Inc.*, 416 U.S. 752, 762 (1974). Indeed, Congress specified in Section 4980H itself that a refund proceeding is the right forum for an employer to dispute its liability for the tax under that provision. *See* 26 U.S.C. § 4980H(d)(3) (describing procedure for repayment of tax if an employee's tax credit is later disallowed).

Oklahoma also argues that the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421, would be "superfluous" if pre-enforcement review were not generally available in tax claims. Reply 16. (As the defendants have previously noted, we contend that the AIA also bars this claim, but we recognize that the Court has already ruled to the contrary on this point.) This is incorrect. Even before the enactment of the AIA, there was already a "background of general equitable principles" that disfavored equitable relief concerning taxes, "absent clear proof that available remedies at law were inadequate." *Bob Jones Univ.*, 416 U.S. at 742 n.16. These "equitable principles militating against the issuance of federal injunctions in tax cases existed independently of the Anti-Injunction Act." *Id.* The AIA, where it applies, thus gives these principles jurisdictional force. But the underlying principles, which require a taxpayer to pursue adequate remedies at law, exist separately from the AIA, and are now reflected in the Administrative Procedure Act at 5 U.S.C. §§ 703 and 704. Because a tax refund action would provide Oklahoma with an adequate remedy at law, it lacks a cause of action under the APA.

II. The Text and Structure of the Affordable Care Act Show that Federal Premium Tax Credits Are Available on Federally-Run Exchanges

A. Under Settled Principles of Statutory Construction, a Court Must Construe the Entire Statute, not Isolated Provisions

On the merits, Oklahoma continues to insist that the Court read a phrase in 26 U.S.C. § 36B(b)(2)(A) in isolation, divorced of its larger context, and even divorced from a

consideration of the provision that is explicitly cross-referenced in that phrase. 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 phrase 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." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (internal quotations and alterations omitted). In construing a statute, courts are required to employ all of the "traditional tools of statutory construction," which include the "examination of the statute's text, purpose, history and relationship to other statutes." *Harbert v. Healthcare Serv. Group, Inc.*, 391 F.3d 1140, 1147 (10th Cir. 2004). When it is read in context, using all of the tools of statutory construction – 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, and at the very least a reasonable reading of the Act, its interpretation must be sustained under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

B. Section 36B, When Read in Full and Together with 42 U.S.C. §§ 18031 and 18041, Provides that Federal Premium Tax Credits Are Available on Federally-Run Exchanges

Section 36B(b)(2)(A) cannot be read in isolation, as Oklahoma demands, 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 establishes the 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" in this phrase is the Exchange that Section 18031 directs the state to establish. 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."[3]

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 defines the "Exchange" as an entity "that is established by a State." That phrase, coupled with Section 18041(c)'s reference to "such Exchange," 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 its foundational assumption, and directs the federal government to act to bring the Exchange into operation if the state chooses not to do so, or fails to do so sufficiently.

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

[3] Oklahoma refers to 42 U.S.C. § 18043, which sets up a mechanism to establish Exchanges in the territories. Reply 22 n.10. 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, so Congress needed some mechanism other than the distribution of 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.

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. Oklahoma disputes the relevance of these definitional provisions, Reply 22, but its argument misses the point. Section 18031 itself defines the term "Exchange" as an entity that is established by a state. 42 U.S.C. § 18031(d)(1). When the Act clarifies that the Secretary shall establish the Exchange under 42 U.S.C. § 18031, then, it makes clear that that Exchange is deemed, by the operation of the statute, to be the Exchange that the state is directed to establish under Section 18031.

This reading is further confirmed by 26 U.S.C. § 36B(f)(3). This provision directs every Exchange, expressly including the federally-run Exchanges, to provide information to Treasury and to taxpayers regarding the payments of premium tax credits. This provision, which was enacted as part of Section 36B itself, assumes that tax credits are available on the federally-run Exchanges, and would make no sense if there were no tax credits for those Exchanges to process.

Oklahoma unsuccessfully attempts to salvage some purpose for Section 36B(f)(3) in the federally-run Exchanges under its theory. It asserts that Congress inserted this provision in Section 36B, not to assist with the administration of premium tax credits both on the state and federal Exchanges, but instead to enforce the Act's minimum coverage provision, 26 U.S.C. § 5000A. Reply 22. But Congress expressly described the purpose of the reporting provision in the heading of the provision itself – to assist Treasury in the performance of its duty of "reconciliation of [the] credit with [the] advance credit." 26 U.S.C. § 36B(f). And the Act contains a separate reporting provision that addresses the enforcement of the minimum coverage provision. *See* 26 U.S.C. § 6055. Oklahoma also guesses that Congress enacted Section

36B(f)(3) because Treasury "needs information to fulfill its ACA-imposed duty to conduct a comprehensive 'study on affordable coverage.'" Reply 23. That duty, however, is imposed, not on Treasury, but on the Comptroller General. Pub. L. No. 111-148, § 1401(c). Oklahoma's argument does not explain why Congress directed all of the Exchanges, including the federally-run Exchanges, to report information concerning premium tax credits to Treasury.

Oklahoma further notes that the Section 36B(f)(3) reporting requirements apply to all plans purchased on the Exchanges, including plans that are initially purchased without subsidies. Reply 23. But a taxpayer may choose to purchase a plan without first claiming advance payment of the credit; that taxpayer may claim the full value of the tax credit on the following year's tax return. When that taxpayer later seeks the tax credit, Treasury will need information about the amount of advance payments of the credit (including the fact that the taxpayer has received no advance payments, if that is the case), in order to calculate the tax credit. Accordingly, Treasury needs information concerning every plan purchased on the Exchanges, so as to perform its duty under Section 36B(f)(3) to administer the tax credits for all of the Exchanges.[4]

Oklahoma also argues that the express reference in Section 36B(f)(3) to the federally-facilitated Exchanges "shows that the two [types of Exchanges] are not equivalent." Reply 23. It misreads the statute. Section 36B(f)(3) applies the reporting requirements to "[e]ach Exchange (or any person carrying out 1 or more responsibilities of an Exchange under section 1311(f)(3) or 1321(c) of the Patient Protection and Affordable Care Act [42 U.S.C. §§ 18031(f)(3) or 18041(c)])." The term outside the parenthetical – "Exchange" – refers to both the state-run

[4] Oklahoma also questions why reporting would be required for the "SHOP Exchanges," on which small employers may purchase coverage for their employees. Reply 23. The Section 36B(f)(3) reporting requirements do not apply for the SHOP Exchanges, for the obvious reason that Section 36B tax credits are not distributed on them. *See* 26 C.F.R. § 1.36B-5(a); 79 Fed. Reg. 26,113, 26,116 (May 7, 2014). A different tax credit, not the credit under Section 36B, applies for coverage purchased on the SHOP Exchanges. *See* 26 U.S.C. § 45R.

Exchanges and the federally-run Exchanges, by virtue of the Act's definitional provisions and Section 18041's specification that the Secretary stands in the shoes of the state to establish the federally-run Exchange. The phrase inside the parenthetical clarifies that the reporting requirements apply also to any private parties with which either the state or the Secretary has contracted to perform certain Exchange functions. 42 U.S.C. §§ 18031(f)(3), 18041(c). The full phrase, then, does confirm that Congress understood the state-run Exchanges and the federally-run Exchanges to be equivalent. The far more natural conclusion to draw from Section 36B(f)(3) is the one drawn by Treasury: Congress expected that 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) (interpretations that would render particular provisions pointless should be avoided).

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, once the Court "appl[ies] the ordinary tools of statutory construction," the intent of Congress is clear – or 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).

C. The Act's Larger Structure Confirms that Its References to State-Established Exchanges Include the Exchange Established by the Secretary on a State's Behalf

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 reason for doing so is clear: a provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1200 (10th Cir. 2007) (internal quotation omitted). The reading of Section 36B that Oklahoma offers is not compatible with the rest of the ACA; accordingly, that reading should be rejected.

1. Under Oklahoma's Theory, Nobody Would Be Eligible to Buy Insurance on a Federally-Run Exchange, a Result that Congress Could Not Have Intended

Notably, the logic of Oklahoma's 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, Oklahoma's theory would mean that nobody would be a "qualified individual" in a state with a federally-facilitated Exchange. Congress obviously did not intend this result; without any eligible buyers, there would be no reason for the federally-facilitated Exchange to exist. Indeed, even Oklahoma acknowledges the absurdity of this result. Reply 25.

Oklahoma offers two theories in an attempt to avoid the absurdity that its theory would

create. Neither theory is tenable. First, it argues that there is no definition of a "qualified individual" at all for federally-facilitated Exchanges; it reads Section 18032(f)'s definition of eligibility "with respect to an Exchange" to refer only to state-operated Exchanges. Reply 24. Under this theory, no residence requirement would apply at all for the federally-run Exchanges. But, as discussed above, the term "Exchange" necessarily includes both state-run and federally-run Exchanges, given the Act's definitional provisions and Section 18041(c)'s reference to the federally-run Exchange as "such Exchange." *See supra*, pp. 13-14. Oklahoma's attempt to offer a different definition of "Exchange" solely for purposes of Section 18032 ignores the principle that "'identical words used in different parts of the same statute are presumed to have the same meaning.'" *Robers v. United States*, --- S. Ct. ---, 2014 WL 1757835, at *3 (May 5, 2014) (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006)) (internal quotation and alteration omitted). There is no reason to think that Congress intended to depart from that principle of statutory construction.

Oklahoma's argument on this score would create further absurdities, moreover. If, as Oklahoma would have it (contrary to the Act's definitional provisions and Section 18041), the term "Exchange" refers only to state-operated Exchanges, then no plan would be statutorily eligible to be sold on the federally-run Exchange. Only an "Exchange" has the power to certify "qualified health plans" eligible to be sold on that Exchange. 42 U.S.C. §§ 18021(a)(1)(A), 18031(e)(1). Oklahoma thus would trade one absurdity that its theory creates for another, permitting individuals to buy insurance on an Exchange that has no plans available for them to buy. In sum, then, Oklahoma's "insistence that the Court should read the residence requirement out of the ACA or not apply section [18032] to federally-facilitated Exchanges is a telltale sign that their reading of section 36B is wrong." *King*, 2014 WL 637365, at *12.

Oklahoma's second theory is that no residence requirement should apply at all on any of the Exchanges, whether state- or federally-run. Reply 24. It reasons that Section 18032 states that "qualified individuals" are eligible to purchase insurance on the Exchanges, but does not expressly state that non-qualified individuals are not so eligible. But there would be no point to the Section 18032 definition of the term "qualified individuals," if it were not meant to define which "individuals" are "qualified" to participate on the Exchanges. Moreover, under this alternative theory, incarcerated persons and individuals who are not lawfully present in the United States both would be eligible to participate in the Exchanges, contrary to Congress's plain intent to exclude these persons from the Exchanges. 42 U.S.C. § 18032(f)(1)(B), (f)(3).

Finally on this score, Oklahoma argues that, if it should fail in its two attempts to solve the absurdity that its theory creates, "the remedy would be to eliminate the absurdity where it is found." Reply 25. It asserts that the relevant phrase in 42 U.S.C. § 18032 – "resides in the States that established the Exchange" – may be read to include states with federally-run Exchanges, but that the materially identical phrase in Section 36B – an "Exchange established by the State under [42 U.S.C. § 18031]" – must be read *not* to do so. But Section 18032 is the very next section of the Affordable Care Act after Section 18031, in the same title, subtitle, and part of the Act as the provision that directs states to establish Exchanges. Oklahoma's selective reading ignores the principle that adjacent statutory provisions "should be read in harmony." *Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2563; *see also Kloeckner v. Solis*, 133 S. Ct. 596, 606 (2012) (statute should not be read to create an absurdity in "[a]nother section of the statute").

It makes far more sense to do as Treasury has done, and to read 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 to provide, where a state fails to do so adequately, the

federal government will stand in the shoes of the state to perform the actions needed 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 under this approach. Every person "resides in [a] State that established the Exchange," then, and there is no need to resort to the contortions that Oklahoma offers to avoid the absurdities created by its theory.

2. Oklahoma's Theory Would Create Numerous Additional Anomalies that Are Inconsistent with the Basic Statutory Scheme of the ACA

As the defendants have noted, there are numerous additional provisions in the ACA that demonstrate that Congress intended the Act's references to state-operated Exchanges to include the Exchanges that HHS operates on a state's behalf.

The Medicaid maintenance-of-effort requirement. Oklahoma's theory also would create an unanticipated obligation for states in the operation of their Medicaid programs. As Oklahoma itself acknowledges, Reply 25, it follows from its theory that a state with a federally-run 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, it would have said so directly, thereby giving notice to the states and the public of the consequences of the state's decision. *See King*, 2014 WL 637365, at *13.

Oklahoma contends that "this is exactly the result that Congress intended," Reply 25, but its argument cannot be squared with 42 U.S.C. §§ 1396a(gg)(3), which permits a state to obtain a waiver of the maintenance-of-effort requirement upon a certification that the state faces a budget deficit "[d]uring the period that begins on January 1, 2011, and ends on December 31, 2013." Congress obviously chose these dates because, after 2013, the Exchange in each state – whether state- or federally-run – would be in operation. Under Oklahoma's theory, however, not only

would a state with a federally-facilitated Exchange never be relieved of the maintenance-of-effort requirement, that requirement would remain in place even in the face of a state budgetary shortfall. The states simply had no reason to believe that this consequence would follow from the decision to rely on a federally-facilitated Exchange.

Indeed, Oklahoma acknowledges that it has, itself, relied on the expiration of this provision, reducing benefits for pregnant women in a manner that it could not have done if 42 U.S.C. § 1396a(gg)(1) had not expired. *See* Defs.' Mem. 30. Oklahoma attempts to justify the inconsistency in its position, asserting that "*[o]f course* Oklahoma is going to operate under the rules imposed by Defendants …. As such, Oklahoma sought a revision, and HHS granted it." Reply 25 n.12 (emphasis in original). But, if Oklahoma truly believed that the amendment to its state Medicaid plan were illegal, it had an obligation not to seek that amendment. *See* 42 C.F.R. § 430.10 (when it submits State Medicaid plan for approval, the state "giv[es] assurance that [the plan] will be administered in conformity with the specific requirements of title XIX"). It could not rely silently on a legal understanding of its counter-party that it believed to be incorrect. *See Penny v. Giuffrida*, 897 F.2d 1543, 1545 (10th Cir. 1990).

Coordination of CHIP benefits with the Exchanges. Oklahoma's reading is also inconsistent with the ACA's provisions concerning Children's Health Insurance Program ("CHIP") benefits. The Act instructs states to ensure that children (who are not Medicaid-eligible) have access to plans in an "Exchange established by the State under [Section 18031]," 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 comparable to those offered in the state's CHIP plan. 42 U.S.C. § 1397ee(d)(3)(C). Under

Oklahoma's reading, a state with a federally-facilitated Exchange would necessarily be in violation of these CHIP provisions in the event of a funding shortfall, and HHS could not fulfill its certification obligation for "each State."

Oklahoma denies this point, suggesting that a state would have no reason to enroll children in an Exchange that it has not established, and that HHS should instead enroll children "in whatever plans HHS believes are sufficient." Reply 26. This cavalier suggestion is not responsive to the defendants' argument. The point is that, under Oklahoma's theory, the state could never fulfill its obligation under the CHIP program to provide an Exchange plan as a backup to ensure coverage for needy children. Oklahoma's further observation that, under its theory, "there are no subsidies [for these children] to be disqualified from," Reply 26, only confirms the irrationality of its theory. Congress obviously intended the Act's provisions for the coordination of CHIP benefits with the Exchanges to be meaningful, and to offer vulnerable children a seamless guarantee of coverage.

The better reading is the one offered by Treasury, in which the federal government stands in the shoes of the state to operate the Exchange where the state does not do so. Under this reading, Section 1397ee does not impose an obligation on HHS that is impossible to fulfill, and subsidized coverage is available for the children who are protected by the CHIP program. *See Halbig*, 2014 WL 129023, at *14; *King*, 2014 WL 637365, at *13 n.8.

State Innovation Waivers. Oklahoma's 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 Oklahoma's reading. Oklahoma suggests that Congress intended Section 18052 as an incentive to states, reasoning that there would be no funds available to a state for a waiver if the state had not first established its own Exchange, and it further suggests that Congress meant to allow states to waive out of the Act's system of comprehensive, affordable health coverage simply by doing nothing. Reply 27 n.13. To the contrary, Section 18052 underscores Congress's plain intention to ensure that comprehensive, affordable health coverage will be available in every state, either under the system specified by the ACA or under an alternative, equally comprehensive system enacted by the state.

In sum, multiple provisions in the Affordable Care Act "reflect an assumption that a state-established Exchange exists in each state." *Halbig*, 2014 WL 129023, at *16. It defies credulity for Oklahoma to offer a reading in which "these provisions would be nullified when applied to states without state-run Exchanges, leading to strange or absurd results." *Id.* Instead, it makes far more sense to construe these provision "consistently with [the government's] interpretation of the Act – *i.e.*, viewing 42 U.S.C. § 18041 as authorizing the federal government to create 'an Exchange established by the State under [42 U.S.C. § 18031]'" on behalf of the state that elects not to establish the required Exchange. *Id.*

D. Treasury's Interpretation Comports with Congress's Clear Purpose in Enacting the Affordable Care Act and with the Act's Legislative History

As the defendants have shown, Oklahoma's reading of Section 36B would undermine

Congress's basic goals in passing that legislation. In its reply brief, Oklahoma does not attempt to dispute this point. Nor could it do so, given its counsel's admission that the goal of this lawsuit is to ensure that "the structure of the ACA will crumble." Scott Pruitt, *ObamaCare's Next Legal Challenge*, The Wall Street Journal (Dec. 1, 2013). Oklahoma does not offer any further argument on this score, but, presumably, would argue that the Court should simply disregard Congress's intent to enact a statute that is not doomed to "crumble."

But the principle is well established that a statute must be interpreted in light of its "object and policy." *Maracich v. Spears*, 133 S. Ct. at 2203. This principle applies with special force in cases like this one, where a plaintiff asserts that states have been given a veto over federal policy; in such cases, courts are obliged to "look to the purpose of the statute," so as to guard against "the danger that the federal program would be impaired if state law were to control." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44 (1989). This Court, then, must interpret Section 36B in light of Congress's recognition that the tax credits under that provision "are *key* to ensuring people affordable health coverage." H.R. REP. NO. 111-443, pt. I, at 250 (2010), ECF 92-6 (emphasis added).

The defendants have explained – and Oklahoma has 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. Defs.' Mem. 8-10. Congress clearly did not intend such a result and, as explained above, the proper interpretation of the text of the Act precludes that result. Section 36B, then, should be interpreted in keeping with Congress's intent to treat the state-operated Exchange and the

federally-facilitated Exchange as the same entity, and to ensure that premium tax credits would be available for participants on all of the Exchanges.

The legislative history further confirms that Congress intended for premium tax credits to be available in every state, regardless of which entity operated the Exchange. The defendants have referred to multiple sources in the Act's legislative history that confirm that Congress so intended; Oklahoma disputes none of these sources. For example, 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 the legislation was being considered." Letter from Douglas Elmendorf, Director, CBO, to Rep. Darrell Issa, Chair, House Committee on Oversight and Gov't Reform at 1 (Dec. 6, 2012), ECF 92-17.

The JCT's report further confirms 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. 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"* 12 (Mar. 21, 2010), ECF 92-23. The JCT's mission is to describe with precision the operation of the tax legislation that it assisted in drafting. 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.

In addition, in passing H.R. 3962, its version of health reform legislation, the House expressly provided for tax credits to be available in every Exchange, whether state- or federally-run. If any House member believed that the Senate's 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 adjusted the amounts of the Section 36B tax credits in enacting the reconciliation bill, HCERA, while ignoring the supposed fact that tax credits would be denied entirely in some states. Instead, the House recognized that, under the ACA as enacted, "[f]or states that choose not to operate their own Exchange, there will be a multi-state Exchange run by the Department of Health and Human Services," and all of the Exchanges would "provide[] premium tax credits to limit the amount individuals and families up to 400% poverty spend on health insurance premiums." House Committees on Ways and Means, Energy and Commerce, and Education and Labor, *Health Insurance Reform at a Glance: The Health Insurance Exchanges* 1-2 (Mar. 20, 2010), ECF 92-24.

Moreover, the language that became 26 U.S.C. § 36B was developed in the Senate Finance Committee, and that Committee did not at any time express any intent to condition the availability of federal premium tax credits on the existence of a state-operated Exchange. To the contrary, that Committee expressed its understanding that the federally-facilitated Exchange would be treated as the same entity as the state-operated Exchange. *See* S. REP. NO. 111-89, at 19 (2009) (directing "the Secretary" to establish "state exchanges" if the state does not do so); *see also Halbig*, 2014 WL 129023, at *17.

Oklahoma disputes none of these points. Instead, it asserts that relevant legislative history can be found in an earlier, expired statute that was never referenced in any of the

Congressional debates over the ACA. It surmises that, in the Trade Adjustment Assistance Act ("TAAA"), 26 U.S.C. § 35(e), "Congress also conditioned eligibility on States taking action so as to render their citizens eligible," and that therefore Congress modeled the ACA after the TAAA. Reply 20. The conclusion does not follow from the premise, but, in any event, Oklahoma misreads the earlier statute. Congress did not "condition[] eligibility" for the tax credit under the TAAA on state action. Instead, Congress provided tax relief 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 were available nationwide, although the TAAA permitted 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 Oklahoma's claim that Congress intended, in that statute or in the ACA, to give states a veto over the nationwide availability of the tax relief that it enacted.

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 needed once Section 36B came into effect in 2014. It is doubtful that Congress would have terminated this program for health insurance tax credits, which were 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.

III. The Treasury Department Has Reasonably Interpreted Section 36B to Provide that Federal Premium Tax Credits Are Available on Federally-Run Exchanges

It follows from the foregoing discussion that 26 C.F.R. § 1.36B-1(k) is, at a minimum, "based on a permissible construction of the statute," and should be upheld under *Chevron* step two. *City of Arlington v. FCC*, 133 S. Ct. at 1868. Congress expressly instructed in the ACA that the federally-run Exchange should be treated as the same entity as the Exchange that the Act

contemplates that the state would establish. Moreover, Congress directed in Section 36B itself that the federally-run Exchange must assist in administering premium tax credits, an exercise that would be pointless if such credits were not available for participants on that Exchange. Oklahoma's contrary theory would create a long list of anomalies in the operation of the ACA's provisions, including, most notably, the anomaly that no individuals would be eligible to buy insurance on the federally-run Exchanges. Oklahoma's theory, further, cannot be reconciled with either Congress's clear purpose to make affordable health coverage available on a nationwide basis, or the Act's legislative history, which shows that Congress understood that premium tax credits would be available for participants in all of the Exchanges. In light of all of these considerations, Treasury reasonably interpreted Section 36B in a manner that is consistent with Congress's intent. That interpretation should be upheld under *Chevron* step two. *See Halbig*, 2014 WL 129023, at *18 n.14; *see also King*, 2014 WL 637365, at *16.

Oklahoma contends that the *Chevron* principle should not apply here, for three reasons. None of Oklahoma's arguments suffices to defeat the deference that is owed under *Chevron* to a regulation, like 26 C.F.R. § 1.36B-1(k), that is published by an agency pursuant to an express grant of rulemaking authority after a process of notice and comment.

First, Oklahoma argues that *Chevron* deference does not apply in cases involving tax benefits. Reply 28-29. As the defendants have shown, *see* Defs.' Mem. 42-43, there is no "clear statement" principle concerning tax benefits that would defeat *Chevron* deference for the Treasury regulation. Indeed, in *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704, 715 (2011), the Court accorded *Chevron* deference to a Treasury regulation that reasonably construed a tax exemption statute. In any event, the question at issue here is not whether tax credits are available under Section 36B or not; all parties agree that they

are. The question instead is whether these tax credits are available on a nationwide basis. The relevant canon, therefore, is the principle that "revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application." *United States v. Irvine*, 511 U.S. 224, 238 (1994). This principle applies with the same force for statutes conferring tax benefits as it does for statutes imposing taxes; in either instance, "the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law." *Lyeth v. Hoey*, 305 U.S. 188, 194 (1938).

Oklahoma denies that its reading of Section 36B violates the uniformity canon, arguing that its interpretation "in fact creates a nationwide scheme of taxation: every person making a qualified purchase (i.e., on a state Exchange) receives a credit." Reply 29 n.14. This misses the point. Under the uniformity canon, courts presume that "Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Mississippi Band of Choctaw Indians*, 490 U.S. at 43. It is no answer for Oklahoma to suggest that, under its theory, the Affordable Care Act would be equally dependent on state law in all fifty states.

Second, Oklahoma argues that *Chevron* deference is defeated by a canon against changes in the "usual constitutional balance between the States and the Federal Government," which it argues that Treasury has violated by disrupting state control "over how State citizens are taxed for their health insurance choices." Reply 29-30. But, as noted, there is simply no principle in the "usual constitutional balance" that gives states control over how the federal government defines the federal tax obligations of federal taxpayers. Oklahoma also refers to large employers whose health coverage offerings will now be "pervasively regulated," but it simply ignores the fact that Congress has already thoroughly regulated health coverage on the large-group market – that is, employer-sponsored health coverage – for decades. *See* Defs.' Mem. 3-4. The

Affordable Care Act breaks no new ground on this score.

Third, Oklahoma repeats its argument that Treasury is not owed *Chevron* deference because the agency shares responsibility for administering parts of the Act with HHS. Reply 30. As the defendants have shown, Defs.' Mem. 40-42, there is a long line of Supreme Court and Tenth Circuit precedent that accords *Chevron* deference in cases where two federal agencies share regulatory authority. Deference is particularly appropriate here, given that Treasury and HHS worked together to develop the relevant regulations, and both agencies are fully in agreement that federal premium tax credits are available for participants in the federally-run Exchanges. Treasury issued its regulation after notice-and-comment, pursuant to Congress's *express* delegation of authority to it to resolve any ambiguities in Section 36B. *See* 26 U.S.C. § 36B(g); *see also* 26 U.S.C. § 7805(a). Treasury has exercised this authority to reasonably construe Section 36B in a manner consistent with the operation of the rest of the statute. Its reasonable construction should be sustained by this Court.[5]

Conclusion

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

[5] Oklahoma does not further pursue its Tenth Amendment challenge to the ACA's Exchange provisions. In any event, as the defendants have shown, the Act follows the model of "cooperative federalism," and the Tenth Amendment is not violated. *See* Defs.' Mem. 44-45.

DATED this 19th day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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