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.*,	)	**REPLY BRIEF**
Defendants.	)	

REPLY BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The Government asserts a host of purported jurisdictional barriers to this suit, and even tries to defend the indefensible IRS Rule on the merits. But there is no obstacle to this Court's consideration of Plaintiffs' run-of-the-mill APA challenge, which presents the sort of purely legal challenge to final agency action that courts resolve every day. And, on the merits, no degree of creative construction can obfuscate the clarity of the ACA's statutory text, and no degree of deference to administrative agencies can overcome it.

I. The Government concedes that at least two of the four Plaintiffs are, as a result of the IRS Rule, disqualified from an exemption to the ACA's individual mandate for which they would otherwise qualify. Because these Plaintiffs have attested that they do not want to comply with that mandate, they are directly injured by the IRS Rule and so have Article III standing to challenge it. The Government's contrary argument is based on a false factual premise and is meritless, given the obvious financial and other burdens imposed by the individual mandate.

Nor is there any prudential barrier. Contrary to the Government's truly bizarre theory, Plaintiffs are not barred from seeking judicial invalidation of an agency's construction of a statute because they *disagree* with that construction. They are *directly regulated* by the IRS Rule, and the prudential standing doctrine—which concerns suits by third-party *strangers* to regulatory action—therefore does not apply. As for ripeness, it is well-established that purely legal challenges to final agency regulations are presumptively ripe; individuals need not violate the law and incur penalties before being allowed to pursue challenges. And the Government cannot expect Plaintiffs to apply for exemptions that the Government *concedes* they are ineligible for under the IRS Rule, through an application process that has not even been *created*. Finally, this classic APA suit is not precluded by the possibility of bringing an after-the-fact refund suit that would not remedy Plaintiffs' *present* injury. No contrary authority exists.

II. On the merits, the IRS Rule's contradiction of plain statutory text could not be clearer. Congress directed subsidies for coverage purchased on an Exchange established "by *the State*," yet the IRS wants to spend billions on subsidies for coverage purchased on Exchanges established by *the HHS Secretary*. The Government's sole textual defense is so clearly contrary to the English language that it devotes most of its brief to suggesting that absurd consequences would result if the Court refuses to rewrite the ACA's text. But many of these are not absurd at all (or even surprising); and the rest are not consequences of Plaintiffs' position.

In the end, the Government resorts to simplistic accounts of legislative purpose and history, ignoring that Congress reasonably expected all states to establish Exchanges in light of the Act's numerous "carrots" and "sticks" to that end. It was eminently reasonable for Congress to treat states that undertook the costly, complex, controversial job of creating unprecedented Exchanges better than those who foisted this task on the federal government; to believe that incentives were needed to induce cooperation; and to conclude that, as with Medicaid, billions of dollars of subsidies to a state's voters would be an irresistible incentive for its elected officials. Of course, because the Government discarded those incentives when it wrote the IRS Rule, we will not know whether Congress' assumptions were valid unless that Rule is enjoined.

The bottom line is that no legitimate method of statutory construction would interpret the phrase "established by *the State*" to mean "established by *the federal government*." The ACA expressly contemplates both state-established and federally established Exchanges; where the statute uses specific and unambiguous language to refer to one type or the other, the courts must give effect to that language, not disregard it. That would be so even if there were legislative history contradicting the statutory text (there is not) and even if there were no rational reason to distinguish between state and federal Exchanges (there surely is).

III. Finally, the Government argues that the IRS Rule should not be preliminarily enjoined even if Plaintiffs are likely to succeed, because their injury is allegedly reparable (if they are willing to risk incurring penalties) and notwithstanding that the Treasury is poised to spend billions of dollars, millions of Americans are poised to make personal coverage decisions, and thousands of employers are poised to drop employee coverage—all based on the IRS Rule's false promise. That is destructively wrong. In any event, the merits and jurisdictional issues have now been briefed, and so this Court can and should move quickly to a *final* judgment that the Fourth Circuit and Supreme Court could review on an expedited basis.

ARGUMENT

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

The IRS has promulgated a final rule. That Rule injures Plaintiffs, because it disqualifies them from an exemption from the individual mandate, which they do not want to comply with. Plaintiffs therefore want this Court to invalidate the IRS Rule, so that they can apply for that exemption in time for 2014. Otherwise, they will have to either pay out-of-pocket for coverage that they do not want, or violate the individual mandate and risk incurring a penalty. The law does not force them to that choice. All of the Government's contrary arguments lack merit.

A. Plaintiffs Have Article III Standing, Because the IRS Rule Disqualifies Them from Obtaining Certificates of Exemption from the Individual Mandate, Which They Do Not Want To Comply With.

1. Standing requires Plaintiffs to show that they are suffering "injury in fact" caused by the IRS Rule and redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, Plaintiffs do not want to buy comprehensive health coverage for 2014. (Dkt. No. 5 ("SJ") at 10-13.) Under the ACA's individual mandate, however, they must, or pay a penalty. 26 U.S.C. § 5000A. However, Plaintiffs are entitled to certified exemptions if

the cost of "bronze" coverage would exceed 8% of their "projected annual household income." 45 C.F.R. § 155.605(g)(2). If not for the subsidies to which they are entitled under the IRS Rule, Plaintiffs would be entitled to such exemptions, because the cheapest bronze coverage would exceed 8% of their respective projected incomes. (*See* SJ 10-13; *accord* Dkt. No. 18-1 ("Moulds Decl."), ¶¶ 7-10.) Because of the subsidies they are eligible for under the IRS Rule, however, Plaintiffs' cost to buy bronze coverage would drop *below* 8% of their projected incomes. (*See* SJ 10-13; Dkt. No. 5-1, ¶¶ 3-6.) Consequently, they are no longer eligible for certified exemptions.

In sum, the IRS Rule prevents Plaintiffs from obtaining "certificates of exemption" that they would otherwise be legally entitled to, thus forcing them to enroll in comprehensive health coverage for 2014—which they do not want to do—or else incur a penalty. That is a concrete, imminent injury, traceable to the IRS Rule, and redressable by a judgment vacating it.

2. The Government concedes, at least as to Plaintiffs Hurst and Levy, that the above calculations are correct—*i.e.*, that they would be eligible for certificates of exemption absent the IRS Rule, but because of that Rule will be disqualified from that exemption and therefore forced to spend $62.49 and $148.72 per month, respectively, for comprehensive coverage (or pay a fine). (*See* Moulds Decl., ¶¶ 8-9.) The Government thus concedes that the IRS Rule forces these Plaintiffs, on pain of monetary penalty, to procure and spend their own money on a product they do not want. It nonetheless contends that this compelled activity and expenditure somehow does not "injure" them, because buying that product and bearing that cost would—in the Government's view—be preferable to buying unsubsidized catastrophic coverage, a distinct product that the IRS Rule also precludes Plaintiffs from buying (*see* ACA, § 1302(e)). (*See* Dkt. No. 18 ("Opp.") at 12-13.) The Government's argument is flawed at every level.

First, as a factual matter, Plaintiffs never said that they wanted catastrophic coverage. They said that they did *not* want to buy comprehensive, ACA-compliant coverage. (*See* Dkt. No. 5-3, ¶ 8 (Hurst); Dkt. No. 5-4, ¶ 8 (Levy).) And, by disqualifying them from an individual mandate exemption, the IRS Rule precludes Hurst and Levy from eschewing *any* coverage for 2014. The Government simply ignores this pleaded injury.

Accordingly, Plaintiffs are indisputably injured because the Government does not dispute that requiring people to buy insurance injures them if they do not want to buy *any* insurance; the diminution in funds caused by the government-mandated purchase restricts their ability to buy products of their own choosing. And, contrary to the Government's apparent belief, Plaintiffs need not specify in advance what they will do with their money if the government-compelled purchase is invalidated; they establish injury simply by declaring that they would not, absent the IRS Rule, buy the government-mandated product. That is why the plaintiffs in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"), had standing to challenge the individual mandate, without any judicial inquiry into what they would do with their money if the mandate were struck down. In other words, it makes no difference what Plaintiffs would do with the money that they would save if the IRS Rule is invalidated and they are thus exempted from the individual mandate; the cognizable, Article III injury is that the Rule compels them to spend their money on a government-compelled product that they do not want.

Second, although it is of no moment, Plaintiffs would obviously be injured even if they had stated that they wanted to buy catastrophic coverage (which the IRS Rule prevents them from buying) instead of the government-mandated comprehensive coverage. This compelled expenditure injures them because it costs them money to purchase a product they do not desire. This is true regardless of whether the Government thinks their choice is economically irrational.

It is for *Plaintiffs* to decide whether to buy any insurance and, if so, what kind. The limitation on Plaintiffs' use of their own money causes injury, regardless of whether the Government believes that it is economically unreasonable to buy *no insurance* (because the economic value of insurance, in light of the "low" subsidized premiums, clearly exceeds the economic risk of being uninsured) or because the Government believes that it is economically unreasonable to buy *catastrophic* insurance (because the economic value of the government-mandated comprehensive insurance with subsidies is greater than the value of catastrophic coverage without them).

Anyway, it is not true that catastrophic coverage would necessarily cost more than subsidized bronze coverage for Hurst or Levy. The subsidy values will not be known until *after* 2014. While those values are *estimated* before the year begins based on *projected* income, ACA, § 1412, a taxpayer must repay some or all of the subsidies if his actual income turns out to be higher. 26 U.S.C. § 36B(f)(2). Thus, the IRS Rule forces Plaintiffs to buy an expensive product that *might* end up being subsidized to an *unknown* extent, and precludes them from buying a cheaper product at a fixed price. A plaintiff could reasonably not prefer that trade, and therefore may challenge a rule forcing him to take it, even under the Government's paternalistic theory.

Finally, wholly apart from what they *spend* on insurance, Plaintiffs are injured because they are forced to go through the activity of buying it (a particularly tortuous activity given the malfunctioning Exchanges) and to contract with insurers. Even if this compelled time-wasting and contracting resulted in a product that the Government fully reimbursed Plaintiffs for, the compelled activities are uncompensated, burdensome restrictions on freedom constituting Article III injury. *See Wilcox Elec., Inc. v. FAA*, 119 F.3d 724, 728 (8th Cir. 1997) (plaintiffs "suffer the requisite injury simply because their activities are being limited"); *NCAA v. Califano*, 622 F.2d 1382, 1389 (10th Cir. 1980) ("Compulsion by unwanted and unlawful government edict is injury

per se."). For this reason, the Government argues elsewhere that requiring citizens to go through the process of obtaining *free* government identity cards imposes an *unconstitutional* burden on the right to vote. *See* Devlin Barrett, *Voter ID Targeted in North Carolina*, WALL ST. J., Sept. 30, 2013. *A fortiori*, being forced to go through the process of buying insurance on an Exchange is at least an injury-in-fact under Article III.[1]

B. There Is No "Prudential Standing" Barrier to Plaintiffs' Challenge.

The Government further contends that Plaintiffs cannot pursue this suit even if they are concretely injured, since they lack "prudential" standing. (Opp. 14-15.) That is wrong.

1. Prudential standing is meant to restrict third-party strangers to regulatory action from suing to enforce the law. It requires the plaintiff's interest to fall "arguably within the zone of interests to be protected or regulated by the statute." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). This test "is not meant to be especially demanding," *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987), and "the benefit of any doubt goes to the plaintiff," *Match-E-Be-Nash-She-Wish Band v. Patchak*, 132 S. Ct. 2199, 2210 (2012).

Critically, courts have been clear that *subjects* of agency action have prudential standing *per se*; they are the ones being directly governed and regulated, and therefore could not possibly be deemed too "remote" from the relevant statutory interests to sue. *See Clarke*, 479 U.S. at 399 (zone test only must be met if "plaintiff is not itself the subject of the contested regulatory action"). Quoting *Clarke*, the Fourth Circuit has thus recognized that the "zone of interests" test

[1] With respect to Plaintiffs King and Luck, the Government's declarant appears to disagree with Plaintiffs' declarant regarding the cost of bronze coverage, leading to a factual dispute over whether they may qualify for exemptions from the individual mandate even with the IRS Rule in place. (*See* Opp. 12; *compare* Moulds Decl., ¶¶ 7, 10, *with* SJ 11, 13.) In light of the ongoing technical difficulties with the federal Exchanges, Plaintiffs are unable to review the actual premiums and determine which declarant is correct. It is enough, however, that any one plaintiff has standing—and Hurst and Levy do. *See Watt v. Energy Action Educational Found.*, 454 U.S. 151, 160 (1981); *Shaw v. Hunt*, 154 F.3d 161, 167 (4th Cir. 1998).

applies only "when … 'the plaintiff is not itself the subject of the contested regulatory action.'" *TAP Pharms. v. U.S. Dep't of Health & Human Servs.*, 163 F.3d 199, 203 (4th Cir. 1998). Prudential standing always exists if the plaintiff is directly "subject to the statute." *Id.* at 207. Other Circuits agree. *E.g.*, *Grand Council of Crees v. FERC*, 198 F.3d 950, 955 (D.C. Cir. 2000). Here, because Plaintiffs are the *direct subjects* of the ACA's subsidy provisions and IRS Rule—which purports to make *them* eligible for subsidies—they clearly have prudential standing.

The Government objects that the IRS Rule merely "provides a benefit." (Opp. 15 n.3.) But, as explained, the subsidies are *not* a benefit to Plaintiffs, who would rather remain exempt from the individual mandate. Anyway, it does not matter whether they are labeled a "benefit"; the dispositive point is that the IRS Rule *directly applies to Plaintiffs*; they are the "subject[s]" of the "contested regulatory action," *Clarke*, 479 U.S. at 399, and "subject to the statute," *TAP*, 163 F.3d at 207. The Government has not identified *any* case in which a plaintiff facing sanctions as a result of agency action was found to lack prudential standing to challenge that action.

2. In any case, the Government's argument improperly assumes as its premise that the *Government* is correct *on the merits*. Plaintiffs argue that the Act is intended to make insurance "affordable" only for those to whom it extends subsidies—*i.e.*, citizens in states with state Exchanges; their suit thus advances that "interest." The Government's merits view is that the Act's "interest" is to make insurance "affordable" for *everyone*; it therefore deems Plaintiffs outside that "zone of interests." (Opp. 15.) But, of course, disagreement with the Government about a statute's true "interests" does not render Plaintiffs outside the "zone of interests," and the Court cannot resolve the merits as a means of denying Plaintiffs the chance to make their merits claim. To the contrary, the Court must assume for standing purposes that Plaintiffs are correct on the merits. *See White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 460-61 (4th Cir. 2005).

Thus, the Court must assume, for standing purposes, that denying subsidies for federal Exchanges *furthers* the Act's "interests" in limiting the expenditure of tax dollars and expanding the number of low-income people exempt from the individual mandate. The ACA *cannot* be deemed, for standing purposes, to serve an "interest" in making insurance "affordable" for everyone in every state and in minimizing the number of poor people eligible for exemptions.

Indeed, plaintiffs challenging agency action *always* dispute the agency's construction or application of the relevant statute and routinely bring suit to enforce putative *limits* on agency authority. On the Government's theory, those plaintiffs would lack prudential standing, because enforcing such limits would not serve the overreaching purposes of the general authorities that the agencies broadly construe. But Congress is just as "interested" in *exemptions* from monetary entitlements and compelled actions as it is in the underlying largesse and mandates. The Fourth Circuit squarely held as much in *TAP*, explicating the "principle that when Congress passes a statute regulating a defined class, its intention to limit the class must be given the same respect as its intention to regulate it." 163 F.3d at 207. "Defined limits on the scope of a statute express a congressional purpose to regulate so far, and no farther." *Id.* Hence it did not matter that the plaintiff in *Match-E-Be-Nash-She-Wish* wanted to *stop* an acquisition of land for Indians under a statute that generally *authorized* such, because "issues of land use (arguably) f[e]ll within [the statute's] scope." 132 S. Ct. at 2210 n.7. Nor, in *Bennett v. Spear*, 520 U.S. 154 (1997), did it matter that the plaintiffs were not "seek[ing] to vindicate [the statute's] overreaching purpose of species preservation," because their suit *did* serve "another objective" of the Act. *Id.* at 175, 177. So too here: Plaintiffs properly seek to vindicate the congressional interest in *limiting* subsidies to states with their own Exchanges and the interest in *not* subjecting low-income people in those states to the individual mandate penalty.

C. This Purely Legal Challenge to a Final Agency Regulation Is Unquestionably Ripe for Review, as Ample Fourth Circuit Authority Proves.

The Government next argues that this suit is not ripe because the IRS "has not yet applied" the IRS Rule to Plaintiffs, by providing them a subsidy or penalizing them for violating the individual mandate. (Opp. 15.) But for legal challenges to final rules, *pre-enforcement* APA review is the *norm*. Such review is particularly and classically appropriate where, as here, the regulation threatens parties with sanctions unless they change their behavior.

1. The principal prong of ripeness doctrine looks to "the fitness of the issues for judicial decision," *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); "purely legal" challenges to rules "promulgated in a formal manner" are quintessentially fit, *id.* at 149, 151, even before they are enforced. The Fourth Circuit has repeatedly held that a purely legal challenge to a final rule is fit for pre-enforcement review, because "further factual development will not assist" in its resolution. *Va. Soc'y for Human Life v. FEC*, 263 F.3d 379, 390 (4th Cir. 2001); *see also Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006) ("A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties."); *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 188 (4th Cir. 2007); *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 369 (4th Cir. 2001). Thus, the D.C. Circuit—the preeminent court on administrative law—has "often observed that a purely legal claim in the context of a facial challenge … is 'presumptively reviewable.'" *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005).

Here, Plaintiffs' argument is that the IRS Rule—which is final agency action—conflicts on its face with the ACA's text; that argument is purely legal, not dependent on any future event or contingency. The Government offers no reason why delay would serve the court or parties. It says that no tax assessments have yet been conducted (Opp. 16), but never explains why waiting

for such assessments would aid in resolving the legal issue. Plaintiffs are not asking the Court to assess taxes, or grant exemptions from the individual mandate. (*Cf.* Opp. 16.) Rather, they are asking for vacatur of the IRS Rule, which is precluding them from obtaining such exemptions and so exposing them to the individual mandate. The only question presented is whether the IRS Rule is legally valid, and the answer is not going to become any clearer with more time.

2. Because the legal issue presented is fit for review, Plaintiffs "need not show that delay would impose individual hardship to show ripeness." *Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113, 1120 (D.C. Cir. 2005). Deferring review would, however, impose the hardship contemplated by *Abbott Labs*. There, deferring review put the plaintiffs "in a dilemma"—they could either "comply … and incur the costs," or violate the rule "and risk prosecution" if their challenge later failed. 387 U.S. at 152. Plaintiffs are in exactly the same boat: They can either "comply" with the individual mandate and "incur the costs" of buying coverage, or violate it and risk incurring a tax penalty. *Id.* The law does not put parties to that "Hobson's choice." *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 669 n.2 (4th Cir. 1997) ("We do not require [plaintiff] to make the Hobson's choice suggested by [agency]; either wait until … [it] suffer[s] … economic … loss, or pay the penalties and bring an action … for a refund."). To the contrary, it recognizes that where parties must act "*now*" to comply with a law, deferring review would cause hardship. *Retail Indus.*, 475 F.3d at 188; *see also Satellite Broad.*, 275 F.3d at 369. This Court's decision on the IRS Rule would thus "not [be] an abstract interpretation, but a clarification of the conduct that [Plaintiffs] can engage in without the threat of penalty." *Va. Soc'y*, 263 F.3d at 390.[2]

[2] *Reno v. Catholic Social Services, Inc.*, which the Government cites (Opp. 17), involved an *affirmative benefit*, not (as with the IRS Rule) *an exemption* from a *penalty-imposing mandate*. 509 U.S. 43, 58 (1993). The underlying statute here—the individual mandate—is a typical "duty-creating rule," *id.* at 68 (O'Connor, J., concurring in judgment); just as in *Abbott Labs*, Plaintiffs are forced to either comply or risk penalties, which constitutes classic hardship.

D. Plaintiffs Are Not Forced To Make a "Hobson's Choice" of Forgoing Their Challenge, or Violating the Mandate and Potentially Incurring a Penalty.

Finally, the Government argues that Plaintiffs should violate the individual mandate, pay the penalties, and then sue for *refunds*. (Opp. 17.) Yet that would subject Plaintiffs to precisely the "Hobson's choice" from which pre-enforcement APA review is supposed to free them—*i.e.*, either comply with the individual mandate and thereby forgo their legal challenge, or violate the mandate and thereby risk a penalty if their challenge later fails. *See Abbott Labs.*, 387 U.S. at 152 (review where party faced "dilemma" of complying or "risk[ing] prosecution"). As the Fourth Circuit explained in *Arch Mineral*, courts do not put parties to that dilemma. 104 F.3d at 669 n.2. In such circumstances, a post-enforcement, after-the-fact remedy is not an "adequate" alternative to a pre-enforcement injunctive suit. *See also Bowen v. Massachusetts*, 487 U.S. 879, 904-05 (1988) (rejecting "unprecedented" claim that damages action was "adequate substitute for prospective relief"); *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (unanimously finding alternative remedy inadequate where party forced to accrue "potential liability" in interim).

Indeed, the Government does not cite a *single* contrary case, but rather relies on cases applying the *Anti-Injunction Act* ("AIA"), 26 U.S.C. § 7421(a), which *specifically and expressly* forbids pre-enforcement suits to enjoin tax collection or assessment. *Int'l Lotto Fund v. Va. State Lottery Dep't*, 20 F.3d 589, 590 (4th Cir. 1994); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746-47 (1974). But the Supreme Court has held the AIA inapplicable to the individual mandate penalty, *NFIB*, 132 S. Ct. at 2584, and so the Government cannot and does not argue that the statute bars Plaintiffs' suit. It cannot achieve the same result through a back door, or else the AIA would be superfluous, and suits like *NFIB*, as well as the recent Fourth Circuit challenge to the ACA's so-called employer mandate (which is similarly enforced through a penalty imposed by the IRS), would have been barred too. *But see Liberty Univ., Inc. v. Lew*, No. 10-2347, 2013 BL 184916,

at *10-13 (4th Cir. July 11, 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1127 (10th Cir. 2013) (en banc) (allowing challenge to HHS regulation enforced through tax penalty).[3]

II. PLAINTIFFS WILL PREVAIL ON THE MERITS, BECAUSE THE IRS RULE IS SQUARELY FORECLOSED BY THE STATUTORY TEXT.

Plaintiffs' argument on the merits is simple and compelling: The ACA instructs states to create insurance Exchanges, but also authorizes the federal government to create fallback Exchanges in states that fail or decline to do so. *See* ACA, §§ 1311(b)(1), 1321; 42 U.S.C. §§ 18031(b)(1), 18041. The Act then sometimes refers generically to "an Exchange" or "an Exchange established under this Act," *e.g.*, ACA, §§ 1421(a), 1312(d)(3)(D)(i)(II); but elsewhere refers specifically and expressly to an Exchange "established by the State," like in the provisions at issue here, 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i). No one familiar with the English language could interpret "an Exchange established by the State" to include one established by the federal government. And every imaginable canon of construction confirms that such judicial revision of the Act's plain language is forbidden. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("differing language" in "two subsections" cannot have "same meaning"); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (clauses should not be construed to be "superfluous"); *Custis v. United*

[3] In a footnote, the Government also contends that Plaintiffs must exhaust their remedies by applying to the Exchange for exemptions that the Government concedes Hurst and Levy are ineligible for. (Opp. 19 n.5.) That is wrong for four reasons. *First*, Plaintiffs are not asking this court to *award* exemptions, only to enjoin a rule blocking them; exhaustion doctrine is thus inapposite. *Ass'n of Flight Attendants v. Chao*, 493 F.3d 155, 158 (D.C. Cir. 2007) (exhaustion required where party "may petition the agencies directly for the *relief they seek in this lawsuit*" (emphasis added)). *Second*, a "remedy for denial of action that might be sought from one agency [HHS] does not ordinarily provide an 'adequate remedy' for action already taken by another agency [IRS]." *Sackett*, 132 S. Ct. at 1372. *Third*, because the IRS Rule renders Plaintiffs legally *ineligible* for exemptions, applying for it "would be futile" and is therefore not necessary. *See Ass'n of Flight Attendants*, 493 F.3d at 159. *Fourth*, the Government has not even *established* a process for applying for exemptions, so there is no existing remedy to exhaust. *See* Kyle Cheney, *Exemptions Pose Another Big Hurdle for Obamacare*, POLITICO, Oct. 15, 2013 (reporting that "HHS says it will take another month at least" to finalize exemption process).

States, 511 U.S. 485, 492 (1994) (that Congress referred generically to Exchanges elsewhere in ACA proves it "knew how to do so" when it wanted).

A. Efforts To Inject Ambiguity Fail, Because an Exchange Established by the Federal Government Is Unambiguously Not "Established by the State."

At the threshold, the Government must establish that the statutory text—"an Exchange established by the State under section 1311 of the [ACA]"—is ambiguous. Without ambiguity, the IRS has no deference to construe the phrase. *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986). And without ambiguity, the Government's avoidance canon and arguments from legislative structure, history, and purpose are inapplicable. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (presumption against incorporation of state law in "absence of a plain indication to the contrary"); *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").

Try as it might, however, the Government cannot inject any ambiguity into the clear-as-day statutory phrase. It presses only two arguments to this end: the first turning on the statute's direction to the federal government to establish "such Exchange" in a state that fails to create its own, and the second relying on the ACA's global definition of "Exchange." Neither can work the alchemy of turning a federally established Exchange into one "established by the State."

1. The Government's principal statutory argument rests on the ACA provision that directs the federal government to establish Exchanges for states that fail or refuse to create their own. The provision says that if a state will "not have any required Exchange operational" by a given date, the HHS Secretary "shall … establish and operate *such Exchange* within the State." ACA, § 1321(c)(1); 42 U.S.C. § 18041(c)(1) (emphasis added). The Government draws from

use of the word "such" that the federally established Exchange is to be "the *same entity*" as the state-established Exchange referenced previously, and that this somehow means that a federally established Exchange *is* "an Exchange established by the State." (Opp. 22.)

That is not statutory construction; it is nonsense. The phrase "such Exchange" does refer back to an antecedent, but that antecedent ("required Exchange") describes *what the Exchange is*, not *who established it*. The term "such" provides 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, perform the same tasks, and play 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. If Congress asked states to build airports, and described these airports in great detail (specifying, *e.g.*, 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 would have said so expressly—just as it stipulated that a territory that establishes an Exchange "shall be treated as a State." ACA, § 1323(a)(1).

Indeed, even HHS regulations concede that a federal Exchange is "established and operated … *by the Secretary*," not by a state. 45 C.F.R. § 155.20 (emphasis added).[4] And the HHS Secretary has implicitly conceded the point by not trying to tap the ACA's appropriation

[4] Since HHS shares responsibility with the IRS to define "Exchange" under the ACA, *Chevron* deference does not apply at all, particularly given the conflicting regulations. *See DeNaples v. Office of Comptroller of Currency*, 706 F.3d 481, 487-88 (D.C. Cir. 2013); *Rapaport v. U.S. Dep't of Treasury*, 59 F.3d 212, 216 (D.C. Cir. 1995).

for state-established Exchanges in order to pay for the otherwise-unfunded federal Exchanges. *See* J. Lester Feder, *HHS May Have To Get 'Creative' on Exchange*, POLITICO, Aug. 16, 2011; *see also* ACA, § 1311(a)(1) (providing unlimited funds to help "States" establish Exchanges). In short, there is simply no ambiguity as to who establishes a *state-established* Exchange.

2. The Government further argues that its construction follows from the ACA's own definition of the term "Exchange" as "an American Health Benefit Exchange established under section 1311 of the [ACA]." ACA, § 1563(b)(21). (Opp. 23.) According to the Government, this necessarily means that when § 1321 of the ACA directs the federal government to establish "such Exchange," it means an Exchange "established under section 1311," and thus that federally established Exchanges are actually established under § 1311. (*Id.*)

But this interpretation, even if correct, does nothing to support the IRS's central, atextual position that § 36B's provision of subsidies for coverage through an Exchange "established by the State" somehow authorizes subsidies for a federally established Exchange. Again, subsidies are limited to those who enroll through an Exchange that is "*established by the State* under section 1311 of the [ACA]." 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added). Even if federal Exchanges could somehow be deemed established *under § 1311* (rather than § 1321), the Act further distinguishes *among* the § 1311 Exchanges based on which entity established them—only those established *by a State* under § 1311 receive the subsidies. The definitional section thus does nothing to justify the Government's construction of the dispositive statutory phrase.

In any event, although it is of no moment, federal Exchanges are not established under § 1311. An Exchange established pursuant to § 1321 cannot, by definition, be established under § 1311. Section 1321 certainly indicates that the federal Exchanges should function *as described in* § 1311—but that hardly means that they are *established under* § 1311. Again, HHS

regulations *contradict* the IRS Rule, defining a federally facilitated Exchange as one "established … *under section 1321(c)(1)* of the [ACA]." 45 C.F.R. § 155.20 (emphasis added).

* * *

Since the relevant ACA text is unambiguous, the IRS Rule is entitled to no deference (even if *Chevron* applied here). Moreover, because "deference … is still limited by the particular language" at issue, "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). The IRS Rule therefore could not be upheld under *Chevron*'s second prong even if the text *were* ambiguous.

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 frivolous, it contends that the Court should judicially rewrite the Act because adhering to its text would somehow produce absurd results. But there is no absurdity; 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 do not create absurd results, do not stem from Plaintiffs' construction of the subsidy provisions, 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 these reflect, at most, that Congress imposed certain uniform obligations for *all* Exchanges, some of which would be more easily satisfied by those that cannot offer subsidies.

Reporting. The Government notes that 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 those subsidies. 26

U.S.C. § 36B(f)(3). (Opp. 23-24.) True—but so what? Congress listed pieces of information that *all* Exchanges must report. 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 (*e.g.*, the "level of coverage … and the period such coverage was in effect," and the "premium" charged, 26 U.S.C. § 36B(f)(3)(A), (B)) will be equally applicable to federal Exchanges, and so the federal Exchanges' reports will not be "an empty act" (Opp. 24).

Indeed, if anything, the information-sharing provision actually bolsters Plaintiffs' point by referring generically to "an Exchange" (not, as elsewhere in the same statutory section, to "an Exchange established by the State") and by providing that the provision applies to any person carrying out responsibilities of a state *or* federal Exchange—thus making clear that the former does not include the latter, and that Congress knew how to distinguish between the two.

Exchange Functions. Similarly, the Government contends that, of the eleven functions that 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. 26-27.) 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 to facilitate application for various "health subsidy programs," including subsidies under the ACA, which would not be possible if those were unavailable. (Opp. 27.) But that misstates the law. The cited provision requires the Secretary to "provide *to each State*" such form, not to use it for federal Exchanges. 42 U.S.C. § 18083(b)(1)(A) (emphasis added). Moreover, the form is to allow individuals to apply for "all *applicable*" subsidy programs, *id.* § 18083(b)(1)(A)(i) (emphasis added), contemplating that not all will be available in all states.[5]

Innovation Waivers. Starting in 2017, states may seek "innovation waivers" from the scheme created by the ACA, 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, this aggregate amount would be zero for states that never established Exchanges. (Opp. 28-29.) But 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 claim innovation funds by stating that it *would have* established an Exchange for future years had its waiver been denied. And even if a state could not do so, it would hardly be odd if Congress did not want to reward states for innovation until *after* they tried Congress' scheme (*i.e.*, state

[5] In perhaps its silliest argument, the Government contends that a State's decision to not establish an Exchange could not affect subsidy availability because the Act does not require a subsidy applicant to list his "state of residence" among the "eligibility factors" when applying for subsidies. (Opp. 29 n.12.) But Congress was providing directions for people applying for subsidies *where available—i.e.*, in state-established Exchanges. Under the Act, there are no subsidies in federal Exchanges, so nobody will be filling out subsidy applications there.

Exchanges). Withholding innovation-waiver funds until states first establish Exchanges creates a powerful incentive for states to do so—particularly for states that may otherwise be hostile.

Nor is it true that Plaintiffs' reading of the subsidy provisions would render superfluous the Secretary's discretion to grant innovation waivers. (*Cf.* Opp. 29.) Such waivers allow states to opt out of the individual mandate and the many ACA provisions regulating health plans, *see* 42 U.S.C. § 18052(a)(2), which they would not otherwise be able to do.

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 elsewhere read to exclude federal Exchanges. The Government's argument appears to be that "established by the State" should be ignored *throughout* the Act. But these consequences are not even peculiar, much less so absurd as to warrant ignoring clear statutory text.

Medicaid Maintenance-of-Effort Rule. The ACA precludes states from tightening their Medicaid "eligibility standards" until "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. 28.) This makes perfect sense because Congress wanted to induce states to run Exchanges, and the Medicaid "maintenance of effort" proviso creates a "stick" if they fail to do so. By contrast, the Government's counter-textual approach would eliminate this additional inducement for states to establish Exchanges. (Prospectively, this "stick" may have been effectively invalidated by the Supreme Court's decision concerning Medicaid in *NFIB*, 132 S. Ct. at 2607.)

Regulations on State Exchanges. In a footnote, the Government identifies a few other 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)(E), 1397ee(d)(3)(C). (*See* Opp. 29

n.12.) 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 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 in this case or with the subsidy provisions. They neither flow from Plaintiffs' argument here, nor would be resolved by adopting the Government's construction of the disputed language; they are simply irrelevant. And the Government misreads them.

Enrollment Through Federal Exchanges. The Government argues that because the ACA defines a "qualified individual" eligible for enrollment through an Exchange as one (i) who is seeking to enroll in a plan through a particular Exchange and (ii) who "resides in the State that established the Exchange," 42 U.S.C. § 18032(f)(1)(A), nobody is eligible to enroll in a federal Exchange. (*See* Opp. 25-26.) There are numerous flaws in this argument.

At the threshold, proper resolution of this residency requirement has nothing to do with the dispute in this case concerning the subsidy provisions. Adopting the Government's view of the subsidy provisions would not somehow 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 under the Act, 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' view of the Act. The parties' 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 referencing state-established Exchanges. Specifically, the Government's position is that a federal Exchange "constitute[s] the referenced state-operated Exchange" for purposes of the subsidy provisions (Opp. 22); even if that were true, however, it would not mean that the state actually established the federal Exchange. To the contrary, the State's *failure* to establish an Exchange is precisely what *triggers* the provision, 42 U.S.C. § 18041(c), that the Government says authorizes equating federal and state-established Exchanges. Accordingly, even on the Government's view, nobody in Virginia "resides in the State that established" the federal Exchange here.

In any event, the Government's interpretation of this different provision 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), and thus "with respect to an Exchange established under § 1311," *see* ACA, § 1563(b)(21), to be eligible to enroll. Since § 1311 Exchanges are (unlike § 1321 Exchanges) established by states, this eligibility requirement only applies to state-established Exchanges, not federal Exchanges. The conclusion that this eligibility rule applies only to a state Exchange "established under § 1311," rather than a federal § 1321 Exchange, is reinforced by the fact that, absent such limitation, the Act would establish an eligibility criterion that is literally impossible to satisfy—and, if possible, one does not interpret statutes to create a Catch-22.

But, again, how one chooses to read this eligibility provision is completely beside the point, given that Plaintiffs' argument concerns the scope of the phrase "an Exchange established by the State," which neither appears in the eligibility provision nor creates a Catch-22.

Abortion Coverage. Finally, the Government contends that *Plaintiffs'* theory would preclude states from banning coverage for abortions in federal Exchanges. (Opp. 27.) That is neither true nor relevant. 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). It is the *Government* that argues that "Exchange" always means Exchanges "under § 1311"—*i.e.*, the provision creating *state*-established Exchanges. (Opp. 23.) Thus, it is the *Government's* argument about "Exchange" (accepted by Plaintiffs) that would preclude states from prohibiting abortions on federal Exchanges. In contrast, Plaintiffs' subsidy provision argument is that an "Exchange established *by the State*," cannot be an "Exchange established by HHS"—acceptance of which would not affect the scope of the abortion provision's discussion of "Exchange."

In any event, it would be eminently reasonable for Congress to give states power over coverage only for Exchanges that *they themselves* establish, but not allow them to dictate the coverage offered on Exchanges that *the federal government* establishes.

* * *

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

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 does not identify *any* legislative history that directly discusses, much less answers, the relevant question—*i.e.*, whether subsidies are available on federal Exchanges. Congress barely discussed federal Exchanges *at all*, apparently because the overwhelming view was that states would submit to the Act's pressures and establish their own Exchanges. What little history does exist shows that conditioning subsidies on state participation in Exchanges was proposed early on, adopted by the Senate, and later forced onto the House of Representatives.

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).

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—or, in other words, that no legislative history *confirms* that the ACA's text means what it says. To the extent that the Government cites any actual, affirmative statements by legislators (Opp. 32-33), they are banal descriptions of the ACA's presumptive scheme—*i.e.*, that it would "provide tax credits to significantly reduce the cost" of insurance, 155 Cong. Rec. S13,375 (Dec. 17, 2009) (Sen. Johnson), or provide "refundable tax credits to ensure that coverage is affordable," 155 Cong. Rec. S12,358 (Dec. 4, 2009) (Sen. Bingaman). These statements are true as far as they go, but do not even purport to address the fallback federally established Exchanges or delve into the details of who would be eligible for subsidies under what circumstances.[6]

2. The Government's legislative-history argument is thus that surely someone would have said something (other, of course, than expressly in the statute) if Congress had *really* meant to deprive federal Exchanges of subsidies. (*See* Opp. 30-34.) But Congress barely discussed the fallback federal Exchanges *at all*. And there is good reason for that.

[6] Amusingly, the Government also 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 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."

As the Government admits, the House initially passed a bill under which the federal government would presumptively operate *all* of the Exchanges. (*See* Opp. 30.) The Senate preferred state-run Exchanges and, as a tool to incentivize participation by states, enacted a bill that conditioned subsidies on such. The House had little choice but to "silently acced[e]" to that plan (Opp. 31) after ACA supporters lost their 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 were approved in the reconciliation bill (Opp. 31), but not major structural changes like switching from state-based Exchanges back to a national model.[7]

Nobody in Congress talked about federal fallback Exchanges—much less the subsidiary question of whether they would offer subsidies—because Congress reasonably 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."). Indeed, Congress did not even *appropriate funds* for federal Exchanges, confirming that it did not think they would ever be needed. *See* Feder, *HHS May Have To Get 'Creative'*, *supra* (ACA "doesn't actually provide any funding" for federal exchanges, while it provides "essentially unlimited sums for helping states"). So even if one could infer anything from the

[7] Actually, eleven House Democrats did push for such a change, warning that "millions of people will be left no better off" if the Senate's state-based Exchange approach were adopted, but to no avail. *See* Letter from Rep. Lloyd Doggett, *et al.*, to President Barack Obama, Jan. 11, 2010, *available at* http://www.myharlingennews.com/?p=6426. It would be hard to conclude that these Members thought the Senate bill authorized subsidies in federal Exchanges.

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.[8]

3. The ACA's history in fact confirms that conditioning subsidies on state participation in Exchanges was intentional. When the Senate began to consider state-based Exchanges, an influential commentator 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, Apr. 27, 2009. The Senate Finance Committee adopted that proposal, and 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, which were within its bailiwick, on the states creating Exchanges and adopting related regulations. *See Exec. Comm. Mtg. to Consider Health Care Reform: Before the S. Comm. on Finance*, 111th Cong. 326 (2009); 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).

[8] The Government says it was "well known" that some states would refuse to create Exchanges. (Opp. 33 n.14.) But its sources do not support that. The letter from Oklahoma's Insurance Commissioner actually stated that Oklahoma "support[s] the state-based exchange" and was "currently in the planning stages for a similar concept," but pleaded for a "federal grant" so that it could afford "the necessary investment." 155 Cong. Rec. S12,543 (Dec. 6, 2009). (The ACA ultimately provided such grants. *See* ACA, § 1311(a)(1).) *USA TODAY*, in arguing for a national Exchange, warned that (among other problems with state-based Exchanges) states might "stall." Editorial, *Don't Trust States To Create Health Care Exchanges*, USA TODAY, Jan. 4, 2010, 2010 WLNR 148256. That leaves only a warning by a single Republican *opponent* of the Act in the House that, because "up to 37" states were considering "filing a constitutional challenge" to parts of the ACA, they also "may not set up the State-based Exchange." 156 Cong. Rec. H2207 (Mar. 22, 2010) (Rep. Burgess). Clearly, however, the congressional majority believed that isolated speculation to be either ill-founded or mere posturing, or else it would have appropriated some funds for federal Exchanges. And if the Government was able to find only a single, speculative legislative reference to the prospect that states would not establish Exchanges, that amply proves that it was not a genuine concern at the time.

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.) 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 basis to assume otherwise. Regardless, CBO has since admitted that it "did not perform a separate legal analysis of that issue," so its assumption cannot possibly be probative of anything. *See* Letter from CBO Director Douglas W. Elmendorf to Rep. Darrell Issa (Dec. 6, 2012), *available at* http://www.cbo.gov/publication/43752.

As for the JCT report, it actually refers repeatedly to "state" Exchanges in its discussion of subsidy eligibility and related provisions. *See* 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 (if employee has coverage in group market, he is "ineligible for the premium tax credit for health insurance purchased *through a State exchange*"); *id.* at 41 (employee who is offered employer coverage is "ineligible for a premium tax credit … for health insurance purchased *through a State exchange*"); *id.* at 38 (employer mandate penalty applies if employee "purchased 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.

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 objective. (*See*

Opp. 34-36.) Yet particularly with an Act as complex as 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—but it also wanted to induce states to establish Exchanges, so that the federal government would not bear that burden. Conditioning subsidies on state participation in Exchanges was a perfectly sensible—indeed, the only practicable—way to achieve the latter goal (just as the ACA's conditions on Medicaid funds were a seemingly surefire way of ensuring that states expanded their Medicaid programs). Only because the IRS Rule gave states the "quid" of subsidies without also demanding the "quo" of Exchanges did the scheme collapse. All of the Government's arguments about how the absence of subsidies will adversely affect poor and wealthy people alike (Opp. 35) simply confirm Congress' rationale for conditioning subsidies on a state's decision to run the Exchange, *i.e.*, that it would be unthinkable for elected state officials to alienate voters from all economic strata by turning down billions of free *federal* subsidies.

The truly irrational course would have been for Congress to direct states to establish Exchanges but then offer *no incentives* for them to do so; or, put another way, to treat states that refused to establish Exchanges *just as well* as those that agreed to bear that burden. (The fact that nearly three-quarters of the states declined this "deal" vividly confirms its irrationality.) 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 wholesale disregard of clear statutory text.

III. PLAINTIFFS ARE ENTITLED TO PRELIMINARY RELIEF, BUT IN ANY EVENT THE COURT SHOULD EXPEDITE A FINAL JUDGMENT.

The Government argues that Plaintiffs are not entitled to a preliminary injunction even if they are likely to succeed on the merits. (Opp. 37-40.) That is wrong. In any case, with all of the issues fully briefed, this Court should move swiftly toward an expedited *final* judgment.

1. As to irreparable harm, the Government argues that being forced to purchase an unwanted product is mere "economic loss." (Opp. 38.) But such a fundamental burden on liberty has never been characterized as merely "economic." Anyway, it is well-established that even economic harm is irreparable if it could not be recovered due to sovereign immunity. *See Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 362 (4th Cir. 1991); *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010). The Government responds that Plaintiffs could recover after the fact through a tax refund, but they would not be able to recoup the costs of bronze coverage if they choose to *comply* with the individual mandate rather than risk incurring penalties. Moreover, only *this* suit would free Plaintiffs to obtain a certified exemption and thus *guarantee* that they will not be subject to the individual mandate penalty; a tax refund action, by contrast, would not necessarily succeed, as that would depend on Plaintiffs' actual 2014 income, not their projections. *Compare* 45 C.F.R. § 155.605(g)(2) (certificate of exemption turns on "projected" income), *with* 26 C.F.R. § 1.5000A-3(e) (after-the-fact exemption turns on "household income").

2. As to the public-interest and equity factors, the Government argues that granting relief now would "seriously disrupt the entire revenue collection process." (Opp. 40.) That is empty rhetoric. Enjoining the IRS Rule's subsidies would actually *save* federal funds. On the other hand, as Plaintiffs have explained, clarifying the validity of the IRS Rule now—before the

individual mandate takes effect—is critical for millions of Americans (who are poised to make decisions about their health coverage based on a potentially false premise), and for thousands of employers (who are poised to drop coverage for their employees in the belief that the latter will be better off with subsidies on Exchanges).[9] All taxpayers also share an interest in seeing the Rule's validity adjudicated *before* billions of tax dollars are disbursed without congressional authorization—especially given that, as the Government now insinuates, it would not attempt to recover these funds even if the IRS Rule is later invalidated. (*See* Opp. 40 n.18.) While the Government quibbles over the scope of an appropriate injunction, the basic point is that judicial review of the IRS Rule *now* is infinitely preferable, for all parties, over review after January 1, 2014, after untold decisions are made based upon it.

3. That said, now that the jurisdictional and merits arguments have been fully briefed in connection with the preliminary injunction motion, this Court is poised to move quickly to final judgment, by expediting briefing on the Government's motion to dismiss and/or Plaintiffs' summary judgment motion. Such a course would simplify the inevitable appeal by whichever side loses, and allow the Court of Appeals (and ultimately the Supreme Court) to weigh in quickly and directly on the ultimate merits of Plaintiffs' challenge.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue an injunction enjoining Defendants from applying the IRS Rule.

[9] The Government claims that this effect is "overblown," citing various conflicting studies about the effect of the ACA *as a whole* on employer-sponsored coverage. (Opp. 40 n.19.) But the issue here is not the effect of the ACA as a whole, but rather the effect of the *IRS Rule*. As experts and news accounts confirm, that Rule's promise of subsidies is inducing employers across the country to drop coverage for employees. (*See* Dkt. No. 6-1, ¶¶ 6-12.) *See also* Scott Thurm, *Firms Drop, Rather Than Upgrade, Cheapest Health Plans*, WALL ST. J., at B1, Sept. 26, 2013; *Home Depot To Tap Health Insurance Exchanges for Part-Timers*, REUTERS, Sept. 20, 2013, http://www.reuters.com/article/2013/09/20/us-healthcare-exchanges-homedepot-idUSBRE98I13120130920.

October 23, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 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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