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

| | | |
|---|---|---|
| **DAVID KING, *et al.*,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | |
| **v.** | ) | **Civil Action No. 3:13-cv-630 (JRS)** |
| | ) | |
| **KATHLEEN SEBELIUS, *et al.*,** | ) | |
| | ) | |
| **Defendants.** | ) | |
| | ) | |

**FAMILIES USA'S MOTION FOR LEAVE TO SUBMIT A BRIEF AS *AMICUS CURIAE***

Families USA respectfully requests leave of the Court to file the attached brief of *amicus curiae* (Ex. 1) in support of the Government. All parties have consented to the filing of this *amicus curiae* brief. In support of its motion, Families USA states as follows:

Families USA is a national non-partisan, non-profit organization[1] that for more than 30 years has represented the interests of health care consumers and promoted health care reform in the United States. In 2010, nearly 50 million of these consumers had no health insurance, an all-time high. On behalf of health care consumers, Families USA has addressed the serious financial and medical harms inflicted on the uninsured. For many, these harms are dire. A disproportionate number of the uninsured forego needed medical care because of cost. When they cannot forgo care, they often incur ruinous medical debts. If, as frequently occurs, they cannot pay, health care providers absorb the cost of the uncompensated care and pass it on to

[1] Families USA is not a publicly held company, and has no parent or subsidiary corporations. Families USA respectfully submits its financial disclosure pursuant to Local Rule 7.1 as exhibit 2.

other consumers. That increases the overall cost of medical care, which correspondingly increases the cost of insurance for that care, by $1000 for an average family in 2010.[2]

In advocating on behalf of health care consumers, Families USA has witnessed this cycle firsthand. It has observed the damage inflicted on both the U.S. economy and individual families. And it has backed reforms to break the cycle and achieve universal health insurance coverage. In 2009 and 2010, Families USA actively supported the Affordable Care Act. Representatives of Families USA testified at Congressional hearings on the bill,[3] sponsored studies that informed the statutory design,[4] and advocated for the legislation. In doing so, Families USA sought reforms that would protect all Americans from the risk of catastrophic uninsured medical expenses, spare them the agonizing choice between paying for food or paying for medical care, and guarantee the availability of affordable health insurance coverage. The law that emerged from these efforts, the Affordable Care Act, is a significant advance toward those goals. One of the key ways it made this progress was by granting low-income families tax relief so that they can pay for insurance.

Given its longstanding commitment to health care reform and its role in the adoption of the Affordable Care Act, Families USA has a strong interest in the vitality of the Act, and, therefore, in the premium assistance that is central to it. Further, given its experience in representing the interests of health care consumers, Families USA also offers a unique

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[2] Affordable Care Act ("ACA") § 1501(a)(2)(F).

[3] *E.g.*, *Hearing on the Tri-Committee Proposal for Health Care Reform Before the H. Comm. on Education and Labor* (June 23, 2009) (statement of Ron Pollack, Executive Director, Families USA); *Hearing on Health Reform Before the H. Comm. on Energy and Commerce* (June 24, 2009) (statement of Ron Pollack, Executive Director, Families USA).

[4] *See, e.g.*, Families USA, *Hidden Health Tax: Families Pay a Premium* (May 2009) (care for uninsured adds $1000 annually to price of health insurance policies), *available at* http://www.familiesusa.org/resources/publications/reports/hidden-health-tax.html.

perspective on what this assistance means to real people who already at, or beyond, the cusp of economic hardship, and on the personal tragedies that will result if Plaintiffs succeed in taking that assistance away from them. In addition, the detailed knowledge Families USA has gained regarding the workings of the ACA and the legislative process that produced it enables the organization to disentangle a number of the complicated arguments presented here and to identify expressions of Congressional intent that the parties have not cited. Families USA thus respectfully believes that its perspective and analysis will be useful to the Court as it reviews the Internal Revenue Services' rule extending tax relief to low-income families in states with Federally-facilitated Exchanges.

In short, Families USA's brief will help the court by "assisting in a case of general public interest, supplementing the efforts of counsel and drawing the court's attention to law that might otherwise escape consideration." *Funbus Sys., Inc. v. Cal. Pub. Util. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986) (citation omitted); *see also, e.g., Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 796 F. Supp. 2d 736, 745 (E.D. Va. 2011) (Spencer, J.) (noting consideration of amicus briefing on motion for summary judgment); *Amelia County School Bd. V. Virginia Bd. Of Educ.*, 661 F. Supp. 889, 891 (E.D. Va. 1987) (Spencer, J.) (noting consideration of amicus briefing on motion to remand). For all of the reasons, Families USA respectfully submits that consideration of the attached *amicus* brief will assist the Court in assessing the legal and factual issues presented in this case.

Families USA therefore asks that the Court grant leave to file the attached *amicus curiae* brief.

Dated: November 18, 2013

Respectfully submitted,

/s/ Kristen Ittig

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 18th day of November, 2013, I electronically filed the foregoing with the Clerk using the CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record.

/s/ Kristen Itttig .

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**BRIEF OF *AMICUS CURIAE* FAMILIES USA**

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus* Families USA is a national non-partisan, non-profit organization that for more than 30 years has represented the interests of health care consumers and promoted health care reform in the United States. In 2010, nearly 50 million of these consumers had no health insurance, an all-time high. On behalf of health care consumers, Families USA has addressed the serious financial and medical harms inflicted on the uninsured. For many, these harms are dire. A disproportionate number of the uninsured forego needed medical care because of cost. And a disproportionate number -- 26,100 in 2010 -- die prematurely as a result.[2] Moreover, the uninsured, like everyone else, face medical emergencies, serious accidents and life-threatening illnesses. Hospitals cannot lawfully turn them away, regardless of their ability to pay. Often, these patients incur financially ruinous medical debts. If, as frequently occurs, they cannot pay, health care providers absorb the cost of the uncompensated care and pass it on to other consumers. That increases the overall cost of medical care, which correspondingly increases the cost of insurance for that care. In 2010, uncompensated care for the uninsured raised the price of a health insurance policy by $1000 for an average family.[3]

In advocating on behalf of health care consumers, Families USA has witnessed this cycle firsthand. It has observed the damage inflicted on both the U.S. economy and individual families. And it has backed reforms to break the cycle and achieve universal health insurance

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[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund preparation or submission of this brief. No person, other than amicus and amicus' counsel, contributed money intended to fund preparation or submission of this brief.

[2] *Dying for Coverage: The Deadly Consequences of Being Uninsured*, Families USA (June 2012), *available at* http://www.familiesusa.org/resources/publications/reports/dying-for-coverage.html.

[3] Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, § 1501(a)(2)(F) (2010).

coverage. In 2009 and 2010, Families USA actively supported the Affordable Care Act ("ACA"). Representatives of Families USA testified at Congressional hearings on the bill.[4] Families USA also sponsored studies that informed the statutory design,[5] and it advocated for the legislation. In doing so, Families USA sought reforms that would protect all Americans from the risk of catastrophic uninsured medical expenses, spare them the agonizing choice between paying for food or paying for medical care, and guarantee the availability of affordable health insurance coverage. The law that emerged from these efforts, the Affordable Care Act, is a significant advance toward those goals. One of the key ways it made this progress was by granting low income families tax relief so that they can pay for insurance.

Given its longstanding commitment to health care reform and its role in the adoption of the Affordable Care Act, Families USA has a strong interest in the vitality of the Act, and, therefore, in the premium assistance that is central to it. Further, given its experience in representing the interests of health care consumers, Families USA offers a unique perspective on what this assistance means to real people who are already at the cusp of economic hardship, and on the personal tragedies that will result if Plaintiffs succeed in taking that assistance away from them. In addition, the detailed knowledge Families USA has gained regarding the workings of the ACA and the legislative process that produced it enables the organization to disentangle a number of the complicated arguments presented here and to identify expressions of

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[4] *E.g. Hearing on the Tri-Committee Proposal for Health Care Reform Before the H. Comm. on Education and Labor* (June 23, 2009) (statement of Ron Pollack, Executive Director, Families USA), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg50479/html/CHRG-111hhrg50479.htm; *Hearing on Health Reform Before the H. Comm. on Energy and Commerce* (June 24, 2009) (statement of Ron Pollack, Executive Director, Families USA), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Final-Transcript-Health-Comprehensive-Health-Care-Reform-Discussion-Draft-2009-6-23.pdf.

[5] *See, e.g.*, Families USA, *Hidden Health Tax: Americans Pay a Premium* (May 2009) (care for uninsured adds $1000 annually to price of health insurance policies), *available at* http://www.familiesusa.org/resources/publications/reports/hidden-health-tax.html.

Congressional intent that the parties have not cited. Families USA thus respectfully believes that its perspective and analysis will be useful to the Court as it reviews the Internal Revenue Services' ("IRS") rule extending tax relief to low-income families in States with Federally-facilitated Exchanges.

## SUMMARY OF ARGUMENT

In an avowed effort to gut the Affordable Care Act, Plaintiffs interpret it in a manner that is as pernicious as it is implausible. To state the point directly, Plaintiffs ask the Court to take money away from millions of poor people, money Congress granted so they could afford health insurance. That, according to Plaintiffs, is what the statute requires. In other words, Plaintiffs claim that Congress intentionally hurt the people the Act was designed to help and frustrated the purpose embodied in its very name .

To support this counterintuitive premise, Plaintiffs isolate six words from one sub-subsection of the ACA, quarantining them from the rest of the section, from other provisions of the Act, and from common sense. The provision at issue, Section 36B of the Internal Revenue Code, directs that tax credits and subsidies "shall" be made available to low income families. It is in the explanation of how to calculate the amount of these benefits that the language spotlighted by Plaintiffs appears. Sub-sub-subsection 36B(b)(2)(A) bases the computation on the price the taxpayer paid for a policy on "an Exchange established by the State." Plaintiffs leap from this formula to the conclusion that where a State has failed to establish an Exchange and the Federal Government has stepped in to do so as the law directs, the Exchange is not one established by the State. Therefore, Plaintiffs say, subsidies are not available, or more precisely, the subsidies the Act grants add up to zero. Plaintiffs assert that this gambit was purposeful: Congress sought to coerce States by threatening a loss of tax subsidies for their low-income families if they did not establish Exchanges.

The numerous flaws with this theory start with the statutory language. The Act defines "Exchange" *three* times as "an Exchange established by a State," and to signify that it is a defined term, capitalizes the word every time it is used. If a State does not establish an "Exchange," as so defined, the Act directs the Secretary of Health and Human Services to step in and establish "such Exchange." But how can the Secretary establish an "Exchange" that, by definition, must be established by the State? There is only one way. The Secretary must act on behalf of the State. Such legal proxies are common. To recognize such a common legal substitution here, with the Secretary stepping into the shoes of the State, makes sense of the subsidy provision, harmonizes it with scores of other sections, and accords with the basic purpose of the law -- to make affordable insurance available. By contrast, Plaintiffs' reading renders much of the law inoperative. If the Secretary does not step into the shoes of the State when establishing an "Exchange," then no such Federal entity could be an "Exchange" as defined in the statute. To be a "qualified health plan," under the Act, the plan must be certified by an "Exchange." Further, a "qualified individual" is one who resides in the State that "established the Exchange." Plaintiffs' approach thus would leave Federally-facilitated Exchanges with nothing to sell and no one to buy it.

As for why Congress would commit such statutory hara-kiri, Plaintiffs' threat theory conflicts with both the legislative history and the rudiments of logic. To be a threat, a menacing intent must be both communicated by the coercer and received by the target. Neither occurred here. To the contrary, the legislative record is replete with affirmations that tax credits and subsidies are available to enable low-income families in all States to afford health insurance. Plaintiffs' problem is not just that their dog did not bark. It is also that all the other dogs did.

Congress's intent is in particularly sharp relief here given that it amended the tax subsidy provision three times in late 2010 and 2011. Each of those amendments was based -- and scored by the CBO -- on the understanding that the tax credits and subsidies were available in all States. The third of the amendments came after the IRS had proposed the regulation at issue here. And it is that amended provision the Court is asked to construe.

In short, although Plaintiffs employ the argot of litigation, their legal claims are too far-fetched to camouflage their political character. The claims do not belong in a Federal Court.

## ARGUMENT

### I. Plaintiffs Inappropriately Seek to Import a Political Battle into a Legal Forum, in Derogation of the Fundamental Purposes of the ACA

From the moment the President signed the ACA into law on March 23, 2010, political opponents repeatedly, and unsuccessfully, attempted to overturn it. The very next day, they introduced legislation in Congress to repeal the law, and over the next two and a half years, held 46 repeal votes. All failed to achieve the objective. The most recent futile assault on the Act shut down much of the Federal government for 16 days.

Inevitably, the political efforts to snuff out the ACA spilled into the courts. Dozens of lawsuits challenged the statute. They, too, failed. In 2012, the Supreme Court upheld the Act as constitutional in *National Federation of Independent Business v. Sebelius* ("*NFIB*").[6] Even that ruling, however, did not stem the litigation assault, which now sought to subvert rather than overturn the law.

This case is the latest salvo. Brought by the same counsel as in *NFIB*, it rests on a reading of the statute so dubious that no one thought of it until nine months after the bill became

[6] 132 S.Ct. 2566 (2012).

law, and so extreme that its progenitors hailed it as a "threat [to the Act's] survival."[7] According to Plaintiffs, in a statute designed to extend health insurance to millions of uninsured, low-income families, Congress denied them the tax relief they need in order to pay for it, based solely on where they live. And then, to boot, Congress imposed potential penalties on them for not obtaining insurance.

The implausibility of this premise, and the unreasonable textual exegesis on which it rests, signal the political essence of Plaintiffs' claims and their mismatch with the judicial forum. From the earliest days of the Republic to the most recent Supreme Court term, the Court has insisted that Federal judges are not "empowered to rewrite legislation in accord with their own conceptions of prudent public policy."[8] One reason for this limitation is that the people affected by the legislation, while represented in Congress, may not be (and here, are not) before the Court. The Executive Branch, to be sure, represents all Americans, but by itself, it is not a

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[7] Michael Cannon, *ObamaCare: The Plot Thickens*, 14 Harvard Health Pol. Rev. 36, 38 (2013); *see also, e.g.*, Sarah Kliff, *Could One Word Take Down Obamacare?*, Wash. Post, Jul. 16, 2012 (quoting Michael Cannon: "the Achilles' heel" of the ACA), *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/16/could-a-missing-word-take-down-obamacare/; Tyler Durden, *Legal Glitch "Has the Potential to Sink Obamacare,"* L.A. Times, Oct. 26, 2013 (quoting Michael Cannon), *available at* http://www.zerohedge.com/news/2013-10-26/legal-glitch-has-potential-sink-obamacare; Dan Diamond, *Could Halbig et al v. Sebelius Sink Obamacare*, The Health Care Blog (June 11, 2013) (quoting Michael Greve: "This is for all the marbles."), *available at* http://thehealthcareblog.com/blog/2013/06/11/could-halbig-et-al-v-sebelius-sink-obamacare/. Michael Cannon, one of the original expositors of Plaintiffs' theory, has written a slew of articles on how to undermine the ACA. *See, e.g.*, Michael Cannon, *50 Vetoes: How States Can Stop the Obama Health Law*, Cato Institute, *available at* http://object.cato.org/sites/cato.org/files/pubs/pdf/50-vetoes-white-paper_1.pdf; Michael Cannon, *Dislodging Obamacare*, L.A. Times, Nov. 30, 2012, *available at* http://articles.latimes.com/2012/nov/30/opinion/la-oe-cannon-defeat-obamacare-20121130; Michael Cannon, *No to Exchanges, Expansion*, Cato Institute, *available at* http://www.cato.org/publications/commentary/no-exchanges-expansion; Michael Cannon, *Save the Knives for ObamaCare: Four Ways to Actually Defund the ACA*, Forbes, Oct. 18, 2013, *available at* http://www.forbes.com/sites/michaelcannon/2013/10/18/save-the-knives-for-obamacare-four-ways-to-actually-defund-the-aca/.

[8] *United States. v. Rutherford*, 442 U.S. 544, 555 (1979); *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013); *see also Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855).

suitable representative for specific subgroups or individuals directly at risk of harm in a particular lawsuit. Nor do Plaintiffs purport to bring this case as a class action, in which they might speak for others affected by the statute. Plaintiffs represent only their own interests.

If Plaintiffs' perspective is limited, however, the potential impact of their claims is not. For example, Plaintiffs describe with anodyne formalism the relief they seek: "a preliminary and permanent injunction prohibiting the application or enforcement of the IRS Rule."[9] The impassive language, however, cannot obscure the import of this request. Plaintiffs would take money away from more than 17.2 million people at the bottom of the economic ladder -- individuals making as little as $11,490 a year.[10] The vast majority of people eligible for the premium tax credit -- 95 percent -- are in working families,[11] and the money that Plaintiffs would deny them is provided by the Federal Government so they can afford to buy health insurance. For these families and individuals, who are not legal or political combatants in the health care reform battles, the effect is anything but anodyne and formal. Under the Act, a single parent in Florida with two children, earning $41,000 in 2014 (more than two-and-a-half times the minimum wage), would pay only $2726 for a silver-level insurance policy, after a tax credit of $3013. Absent the tax credit, the family would bear the entire $5739 cost of health insurance, or would do without. Similarly, an unmarried 60 year old in Texas earning $25,000 in 2014 would

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9 Compl., Pt. 5, ¶ 2.

10 Families USA, *Help Is at Hand: New Health Insurance Tax Credits for Americans* (Apr. 2013), at 6, *available at* http://familiesusa2.org/assets/pdfs/premium-tax-credits/National-Report.pdf.

11 *Lower Taxes, Lower Premiums: The New Health Insurance Tax Credit*, Families USA Foundation (Sept. 2010), *available at* http://www.familiesusa.org/assets/pdfs/health-reform/Premium-Tax-Credits.pdf.

receive a tax credit of $4655 for health insurance, reducing the cost of a silver level policy to $1729. Absent the tax credit, she would pay the full price of $6384, or would do without.[12]

Doing without is not a speculative or unlikely outcome. It is the status quo for many millions of people. One woman in Northcross, Georgia, whose job as a nanny does not provide health insurance, has been without coverage for six months. "[M]y No. 1 priority," she reported, "is taking care of my rent. . . . It's very scary. Anything could happen."[13] Another individual without health insurance is a part-time accountant in Texas. She has diabetes, high blood pressure, and high cholesterol that is not being adequately treated. She has been unable to afford the digital mammogram her doctor recommended a year ago to examine a lump in her breast. "I try not to worry and just pray on it," she said.[14]

The statistics confirm that these individuals are not atypical, that millions like them would suffer if this Court granted Plaintiffs' request and denied low income families the tax relief they need in order to purchase insurance. If these families could no longer afford insurance, the impact would potentially be devastating. People without insurance are more than twice as likely than the insured to delay or forgo needed care.[15] As a result, the uninsured are sicker and more likely to die prematurely than people with insurance.[16]

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[12] *See* Kaiser Family Foundation, Subsidy Calculator, *available at* http://kff.org/interactive/subsidy-calculator/. The hardship exemption from the statute could excuse these taxpayers from the penalty for not obtaining insurance, but they still would not have insurance or qualify for Medicaid.

[13] Misty Williams, *Voices on Health Care*, Atlanta Journal-Constitution, Sept. 23, 2013.

[14] Ricardo Alonso-Zaldivar, *The Haves and Have-Notes as Health Care Markets Open*, Associated Press, Sept. 11, 2013, available at http://bigstory.ap.org/article/haves-and-have-nots-health-care-markets-open.

[15] *The Uninsured and the Difference Health Insurance Makes*, Kaiser Comm. on Medicaid & the Uninsured (Sept. 2012), *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/01/1420-14.pdf.

[16] *See* Institute of Medicine, *Coverage Matters: Insurance and Health Care* (2001).

In addition to physical harms, Plaintiffs' requested relief would cause significant financial injury to low-income people who are not before the Court. For these Americans, as for all of us, medical expenses are often unavoidable. Even the healthiest individuals can get hit by a car or develop cancer. When such an event occurs, the medical costs can be staggering. The average cost of an appendectomy in 2010 was $13,123.[17] Drug treatment for a common form of cancer cost more than $150,000 a year.[18] The uninsured are thus at constant risk of an unaffordable medical bill.[19] The upshot, as Congress found in adopting the ACA, is that "[h]alf of all personal bankruptcies are caused in part by medical expenses."[20]

This cascade of hardships exemplifies how altering the central mechanisms of legislation as complex, extensive (covering 17 percent of the economy), and vital as the ACA can generate far-reaching effects, from the systemic to the most granular level. Those effects also illustrate why the design and implementation of such mechanisms are best left to Congress and the agencies it designates, rather than to the courts. Even apart from the strong presumption mandated by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[21] in favor of the IRS's reading of the statute, this Court should be wary of policy-based and political claims advanced under the guise of textual fidelity, to the detriment of millions of people not before the

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17 *Id.* at 14.

18 Neal J. Meropol *et al*., *Cost of Cancer Care: Issues and Implications*, 25 J. Clin. Oncol. 180, 182 (2007).

19 Jessica H. May & Peter J. Cunningham, *Tough Trade-Offs: Medical Bills, Family Finances and Access to Care*, Center for Studying Health System Change, Issue Brief 85 (2004), *available at* http://www.hschange.org/CONTENT/689/689.pdf.

20 ACA, Pub L. No. 111-148, § 1501(a)(2)(E).

21 467 U.S. 837 (1984).

Court. The skepticism should be particularly strong when the claims rest on the implausible premise that Congress deliberately harmed the people the Act was designed to help.

Given the inherent implausibility of Plaintiffs' claims, coupled with the deference due the IRS's reading of the statute, Plaintiffs needed to demonstrate that their interpretation is the only one Congress could have intended. Plaintiffs have not and cannot come close to such a showing. Quite the contrary -- the only interpretation consistent with the language of the statute and the constraints of logic is, as the IRS concluded, that low-income families in all States are eligible for tax relief.

## II. The Language of the ACA Precludes Plaintiffs' Interpretation

Plaintiffs argue that Congress intended to extend premium assistance tax subsidies only to low-income individuals and families who purchase health insurance on a State-run Exchange. This intent, they say, is clear from Congress's directive that the assistance would be calculated based on premiums for health plans "which were enrolled in through an Exchange established by the State under [section] 1311."[22]

The ACA is a long and complicated statute. But the key text of the statute is actually straightforward, and the proper interpretation of it is both ineluctable and dispositive. There are only two steps in this interpretation, involving only three provisions:

- *First*, Congress defined the term "Exchange," with a capital "*E*," *three times*, as an Exchange "established by the State." Section 1311(b)(1) directs "Each state [to] establish an American Health Benefit Exchange *(referred to in this title as an 'Exchange')*." Subsection (d)(1) of the same section reiterates that "[a]n Exchange shall be a governmental agency or nonprofit entity *that is established by a State*." And Section 1563, the definitions section, says it again: "The term 'Exchange' *means* an American Health Benefit Exchange established under section [1311]." The

[22] ACA, Pub L. No. 111-148, § 1401, codified in 26 U.S.C. § 36B(b)(2)(A).

only "Exchange," with a capital "*E*" mentioned in 1311 is the one established by the State. That is what the term "means" each of the 280 times it appears in the statute.

- *Second*, Section 1321(c) directs that if the State does not establish an "Exchange," the Secretary shall "establish and operate such Exchange," with a capital "*E*." There is only one conceivable way the Secretary, a federal official, can establish an "Exchange" that has been defined -- *three times* -- as an entity established by the State: She must act *on behalf of* the State.

To read the statute any other way is illogical and self-contradictory.[23] It would require the Secretary to do something that is, by definition, impossible. In contrast, there is nothing extraordinary about the Secretary acting for, or stepping into the shoes of, or standing in for, or representing, the State. This type of legal substitution happens all the time with proxies, trustees, and agents among others Like many other public and private parties, the Federal Government has undertaken such roles.[24]

These two straightforward steps dissipate the rhetorical fog Plaintiffs have summoned and are sufficient to end the textual analysis. But Plaintiffs' interpretation in fact clashes with many other provisions of the law. Although space does not allow enumeration of all these anomalies, a few examples will illuminate the absurd results that flow from Plaintiffs' theory.

*First*, although a court should not bend unequivocal statutory language to serve some assumed but unstated legislative purpose, that limitation does not empower Plaintiffs to ignore the fundamental objectives of the law. As Justice Scalia has stated in supporting deference to administrative interpretation of statutes under *Chevron*:

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[23] *See*, e.g., *Roschen v. Ward*, 279 U.S. 337, 339 (1929) (Holmes, J.) ("there is no canon against using common sense in construing laws as saying what they obviously mean").

[24] *See, e.g.*, *Michigan v. EPA*, 268 F.3d 1075, 1079 (D.C. Cir. 2001) (federal government steps into the shoes of states and Native American tribes under certain EPA regulations); 28 U.S.C. § 2679(d)(1) (Upon certification by the Attorney General, lawsuit against government employee "shall be deemed an action against the United States . . . and the United States shall be substituted as the party defendant.").

> [T]he 'traditional tools of statutory construction' include not merely text and legislative history but also, quite specifically, the consideration of policy consequences. Indeed, that tool is so traditional that it has been enshrined in Latin: *'Ratio est legis anima; mutata legis ratione mutatur et lex.'* ('The reason for the law is its soul; when the reason for the law changes, the law changes as well.') Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce 'absurd' results, or results less compatible with the reason or purpose of the statute.[25]

The collateral damage Plaintiffs would impose on the very people the Act sought to help strongly signals that Plaintiffs' interpretation is incompatible with the reason or purpose of the statute.

*Second*, Plaintiffs cannot claim to honor the plain language of particular provisions of the ACA while disregarding other statutory language that specifies the function of those provisions.[26] Here, Plaintiffs' interpretation ignores the stated purpose not only of the Act, but also of the Title, subtitle, section, and subsection at issue in this case. Title I of the ACA, in which the disputed provisions appear, bears the heading, "Quality Affordable Care For *All* Americans," not "Quality Affordable Care for *Some* Americans," or "Quality Affordable Care for Americans *in States that Have Set Up Their Own Exchanges*." The applicable subtitle bears a similarly inclusive caption, "Affordable Coverage Choices for *All* Americans." And the section that grants the tax credit Plaintiffs attack is entitled "Refundable tax credit providing *premium assistance*

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[25] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515 (1989).

[26] *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, *the specific context in which that language is used, and the broader context of the statute as a whole*.") (emphasis added); *Ransom v. FIA Card Servs., N.A.*, 131 S.Ct. 716, 723-24 (2011) (interpreting statute based on plain language, statutory context, and broader purpose of statute as a whole).

for coverage under a qualified health plan." The word "assistance" communicates that the goal is to *help* people pay for insurance.

The substantive text of the section at issue, 26 U.S.C. § 36B, reflects and implements these stated purposes. Subsection (a) directs that for applicable taxpayers -- defined as those earning less than 400 percent of the federal poverty level -- "there *shall* be allowed as a credit against the tax imposed by this subtitle for any taxable year an amount equal to the premium assistance credit amount of the taxpayer for the taxable year."[27] Subsection (b), bearing the caption "PREMIUM ASSISTANCE CREDIT AMOUNT," then lays out how to calculate the credit required by preceding provision. It is here, in sub-sub-subsection (b)(2)(A), that the language trumpeted by Plaintiffs appears, in the explanation of how to perform that calculation based on the monthly premiums for qualified health plans "which were enrolled in through an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act."[28] Plaintiffs focus on the quoted words in isolation, cabined from the definitions in the Act, from the provision designating the Secretary as the proxy for the State, and even from the immediately preceding subsection granting a tax credit. Thus, on Plaintiffs' blinkered interpretation, subsection (a) of the refundable tax credit provision awards applicable taxpayers a credit to buy insurance, but then subsection (b) calculates the amount of that credit as *zero* for taxpayers who live in States with Federally-facilitated Exchanges. Had Congress intended to deny such taxpayers a credit, it would not likely have chosen the perverse route of first instructing the IRS to bestow it and then setting the amount of at zero -- the legal equivalent of stone soup.

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[27] 26 U.S.C. § 36B(a) (emphasis added).

[28] 26 U.S.C. § 36B(b)(2). The language is repeated in the explanation of how to determine each "coverage month" for applicable taxpayers. *Id.*, § 36B(c)(2)(A).

*Third*, Plaintiffs cannot use a thrice defined term, "Exchange," to mean one thing in some provisions and something else in others. If an "Exchange," as Section 1311 specifies, must be established by a State, and if, as Plaintiffs claim, Section 1321 does not allow the Secretary to step into the shoes of a State, then Plaintiffs' constricted definition of Exchange must apply across the board.[29] Therefore, on Plaintiffs' approach, *no* Federally-facilitated Exchange can qualify as an "Exchange," as defined in the statute. Many anomalies follow. For example, in the States with Federally-facilitated Exchanges, there would be no qualified health plans, because to fall within that definition, the plan must be certified through an "Exchange."[30] With no qualified health plans, the whole structure of the statute would fall apart in those States. The Act would become a health insurance statute without health insurance.

There is yet another reason why Plaintiffs' definitional acrobatics would cause any Exchange set up by the Secretary to be inoperative: the only people who can purchase insurance on an "Exchange" are "qualified individuals." Section 1312(f) of the Act defines a qualified individual as one who "resides in the State *that established the Exchange*." If only the State can establish an "Exchange," and if the Federal Government is not recognized as a stand-in for the State, then there are no "qualified individuals" in States with Federally-facilitated Exchanges. Thus, even if there were qualified health plans in States with Federally-facilitated Exchanges, there would be no qualified individuals to buy them. Applied with the requisite consistency,

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[29] *See, e.g.*, *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007) (explaining it is a "standard principle of statutory construction" that "identical words and phrases within the same statute should normally be given the same meaning"); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("there is a presumption that a given term is used to mean the same thing throughout a statute").

[30] *See* ACA, §1301(a)(1) (42 U.S.C. §18021).

Plaintiffs' interpretation thus leads to nonsensical results. It also renders superfluous the instruction in Section 1321(c) that the Secretary set up an Exchange if the State does not.

In sum, Section 1321 provides that if the State does not establish an "Exchange" under Section 1311, the Federal Government will establish "such Exchange." The only way the Federal government can establish an "Exchange" that is defined as one established by the State, is to step into the shoes of the State. By contrast, Plaintiffs' alternative reading posits that Congress provided for Exchanges with neither a product to sell nor customers to buy it. That reading does not comport with either the language of the statute or common sense. With only one sensible reading of the statute, Congress's intent necessarily is clear, and the IRS has implemented it.[31] But even if the Court were to find the statute ambiguous, the plain language at the very minimum permits the IRS interpretation, and that is sufficient to pass muster under the deferential *Chevron* standard.

## III. The Legislative History of the ACA Disposes of Plaintiffs' Theory That Congress Deliberately Subverted its Own Stated Objectives

Without a logical, much less compelling reading of the statutory language, and encumbered with the implausible premise that the *Affordable* Care Act denied low-income families the tax credits necessary for them to afford the insurance the law requires them to buy, Plaintiffs' last -- indeed, only -- refuge is the legislative history. Because the plain language of the statute allows only one conclusion regarding Congress's intent, the Court, under *Chevron*, need not reach the legislative history. If the Court does consider the legislative record, however, it will find no support for Plaintiffs' theory that Congress intended to threaten State

[31] *Chevron*, 467 U.S. at 842–43.

governments, to issue the ultimatum: "Establish an insurance exchange or we will punish your low income taxpayers!" The lack of support is not surprising, for the theory makes no sense.

In the real world, making a threat is not a thought crime. Logic dictates that to be a threat, an intention to impose harm must be *communicated* by the intimidator and *received* by the target. Here, neither occurred. In the entire record of committee and floor debate, in the contemporaneous public statements, and the assessments of next steps, no one mentioned this supposed "threat" or even hinted at the prospective harm.[32]

The absence of such communications is not due to any universal assumption that all States would establish Exchanges. Some States were signaling early on that they would not do so.[33] As of February 1, 2010, legislators in 34 States had proposed or filed bills or constitutional amendments to nullify the ACA.[34] Although many of these bills focused on the individual mandate, the Exchanges were also very much at issue, and the intensity of opposition to the legislation in many locales was apparent.[35] Indeed, Congressional foes of the Act predicted in debate that as many as 37 States "may not set up the State-based exchange."[36] And the press had

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[32] *See Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17-18 (1987) ("alteration to the basic thrust of the draft bill" would have "at a minimum engendered some debate in the Senate and resulted in a roll call vote").

[33] *See, e.g.*, Philip Rucker, *S.C. Senator Is A Voice Of Reform Opposition*, Washington Post, July 28, 2009 (noting the potential for South Carolina not to develop an exchange), *available at* http://articles.washingtonpost.com/2009-07-28/politics/36871540_1_health-care-reform-health-care-fight-health-care.

[34] "States Seeking to Ban Mandatory Health Insurance," Fox News (Feb. 1, 2010), *available at* http://www.foxnews.com/politics/2010/02/01/states-seeking-ban-mandatory-health-insurance/.

[35] *See, e.g.*, David Kirkpatrick, *Health Lobby Takes Fight to the States,"* N.Y. Times (Dec. 28, 2009) (quoting Florida State Senator: "If there was an opt-in, we are essentially stating now that we are not going to opt in.").

[36] 156 Cong. Rec. H2207 (Mar. 22, 2010) (statement of Rep. Burgess); *see* 155 Cong. Rec. S12,543 (Dec. 6, 2009) (statement of Sen. Coburn).

taken up these predictions.[37] Particularly against that backdrop, there is no basis to assume that Congress acted in ignorance or in error.

### A. No Threat to Cut Off Subsidies to Low-Income Families Was Communicated

Review of the legislative history of the ACA reveals not merely the absence of any communicated threat. It also highlights the shared understanding that tax credits would be available to purchasers on all the Exchanges, Federal and State. For example, on March 20, 2010, the three Committees in the House of Representatives with jurisdiction over the Affordable Care Act -- Ways and Means, Energy and Commerce, and Education and Labor -- issued a summary fact sheet explaining how the Exchanges would operate under the Senate bill as amended by the reconciliation legislation then pending. The description of the Exchanges was inclusive:

> The Senate-passed bill as improved through reconciliation will create state-based health insurance Exchanges, for states that choose to operate their own exchanges, and a multi-state Exchange for the others. The Exchanges will make health insurance more affordable and accessible for small business and individuals.[38]

The summary recognized that there would be both State-run and Federally-facilitated options, but it drew no distinction between them. "The Exchanges," referring to both the State-run and Federally-facilitated variety described in the preceding sentence of the summary, would all make health insurance more affordable. The summary also noted that the Act "[p]rovides premium tax

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[37] *See, e.g.*, Ezra Klein, *How Do The Exchanges Work?* Wash. Post (Mar. 22, 2010), *available at* http://voices.washingtonpost.com/ezra-klein/2010/03/how_do_the_exchanges_work.html; "37 States to Reject Obamacare," Newsmax, Mar. 17, 2010, *available at* http://www.newsmax.com/InsideCover/US-Health-Overhaul-States/2010/03/17/id/353087; Steve Benen, *Prepping for Health Care Reform Nullification*, Wash. Monthly, Sept. 4, 2009, *available at* http://www.washingtonmonthly.com/archives/individual/2009_09/019781.php.

[38] Health Insurance Reform at a Glance: The Health Insurance Exchanges (Mar. 20, 2010), http://housedocs.house.gov/energycommerce/EXCHANGE.pdf; *see La v. Holder*, 701 F.3d 566, 573 (8th Cir. 2012) (citing house.gov document collection as an authoritative source of legislative history).

credits to limit the amount individuals and families up to 400% poverty [sic] spend on health insurance premiums."[39] Having referred inclusively to both State and Federal Exchanges, the summary noted only the income criteria for tax relief.[40] If the credits would be available only in State-run Exchanges, then the Committees' broad statement would have been inaccurate and incomplete. It is fair to deduce that the Committees were accurate, and Plaintiffs are wrong.

On March 21, 2010, the Joint Committee on Taxation published an explanation of the tax and revenue provisions in the ACA. The report explained that Section 36B "creates a refundable tax credit (the 'premium assistance credit') for eligible individuals and families who purchase health insurance through *an exchange.*"[41] With precision -- as would be expected of tax specialists -- the report used inclusive language when describing the availability of tax credits, referring to purchases on "*an* exchange," not just on one established by the State.[42] It suggested no geographic limitation on the availability of tax credits.

Senators describing the Exchanges likewise were consistent in using unqualified and inclusive language with regard to the availability of premium tax assistance. The manager of the ACA, Senator Baucus, noted in floor debate on November 21, 2009, that, "[u]nder our bill, new exchanges will provide one-stop shops where plans are presented in a simple, consistent format. . . . Americans will be able to count on the health care coverage they buy. And tax credits will help to ensure <u>*all*</u> Americans can afford quality health insurance."[43] "All" is the most

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39 Health Insurance Reform at a Glance: The Health Insurance Exchanges (Mar. 20, 2010), http://housedocs.house.gov/energycommerce/EXCHANGE.pdf, at 2.

40 *Id.* at 2.

41 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 19, *available at* https://www.jct.gov/publications.html.

42 *Id.* at 16.

43 155 Cong. Rec., S11964 (Nov. 21, 2009).

encompassing of adjectives, and "*all* Americans" includes both those residing in States that establish Exchanges and those where the Federal Government does so.

Further, in the continuing debate on December 9, Senator Baucus noted that, "[a]bout 60 percent of those who are getting insurance in the individual market on the exchange will get tax credits which result in roughly a 60-percent reduction in premiums."[44] This estimate could only be accurate if tax credits were available in all States, not just ones with State-run Exchanges.

On the same day, Senator Durbin, the Majority Whip in the Senate, summarized the tax credit provisions in similarly encompassing terms:

> This bill says, if you are making less than $80,000 a year, we will help you pay your health insurance premiums, give you tax breaks to pay those premiums. That means a lot of people who today cannot afford to pay for health insurance premiums will be able to. They will go to this exchange. They will be able to choose from health insurance options, and they will get a helping hand to pay for health insurance."[45]

Senator Durbin did not say that "if you are making $80,000 a year *and* live in a State with a State-run exchange," the Act would help pay health insurance premiums. He did not say that persons unable to afford health insurance premiums would get a helping hand, *unless* they live in States with Federally-facilitated exchanges. His language embraced residents of all States.

Senator Johnson of South Dakota and Senator Bingaman of New Mexico were likewise inclusive in their comments about the legislation. In his December 9, 2009 statement on the Senate floor, Senator Johnson noted that, "this legislation will create health insurance exchanges in every State through which those limited to the individual market will have access to affordable and meaningful coverage. The exchange will provide easy-to-understand information on various insurance plans, help people find the right coverage to meet their needs, and provide tax credits

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[44] 155 Cong. Rec., S12764 (Dec. 9, 2009).

[45] 155 Cong. Rec., S12779 (Dec. 9, 2009).

to significantly reduce the cost of purchasing that coverage."[46] Similarly, on December 17, 2009, Senator Bingaman stated "[t]he legislation will also form health insurance exchanges in every State," which will "provide tax credits to significantly reduce the cost of purchasing that [insurance] coverage."[47] Without qualification, these senators linked the availability of tax credits to the insurance Exchanges established *in every State.* Their statements are inconsistent with any geographic limitation.

In debating the reconciliation bill on March 25, 2010, Senator Leahy, Chairman of the Senate Judiciary Committee, noted that the legislation "eases the cost-sharing for individuals purchasing insurance on the exchange, and it offers more generous tax credits for those with the lowest incomes who still have trouble affording health insurance."[48] The phrase "[t]hose with the lowest incomes," absent further qualifications, includes people in all 50 States. Plaintiffs' claim that the ACA's generosity was confined to States establishing their own Exchanges cannot be reconciled with Senator Leahy's description. Senators Kerry, Landrieu, Pryor, Franken and Feingold, as well as Representative Sestak, among others, made similar statements reflecting the broad applicability of the low income subsidies offered on the Exchanges.[49]

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[46] 155 Cong. Rec., S12799 (Dec. 9, 2009) (emphasis added).

[47] 155 Cong. Rec., S13375 (Dec. 17, 2009).

[48] 156 Cong. Rec., S1842 (Mar. 25, 2010).

[49] Sen. John Kerry, News Release (Dec. 21, 2009), 2009 WLNR 25632742 ("The Patient Protection and Affordable Care Act will ensure that all Americans have access to quality, affordable health care . . . ."); Sen. Mary Landrieu, *Breaking: Landrieu Supports Passage of Historic Senate Health Care Bill* (Dec. 22, 2009), 2009 WLNR 25819782 ("The exchange will help the uninsured obtain needed coverage and will also help the more than 200,000 Louisiana residents who currently do not have insurance through their employer to get quality coverage at an affordable price. Many of these Louisianians in the exchange will qualify for a tax credit to help them purchase the insurance of their choice."); Sen. Mark Pryor, News Release (Dec. 24, 2009), 2009 WLNR 26018100 (law "provides premium relief for 323,000 Arkansans to make coverage affordable"); Sen. Russell Feingold: *Feingold Issues Statement on the Health Care, Education Affordability Reconciliation Act of 2010* (Mar. 25, 2010), 2010 WLNR 6142152 ("As

The President also discussed how the ACA functioned, and his description of the tax credits likewise admitted of no limitation based on where taxpayers live. On February 25, 2010, the White House held a bipartisan summit on health care reform with Congressional leaders. Describing the operation of the Exchanges to the Congressional leaders, the President linked the availability of tax credits only to affordability, not to geography:

> The basic concept is that we would set up an exchange, meaning a place where individuals and small business could go and get choice and competition for private health care plans the same way that members of Congress get choice and competition for their health care plans. For people who couldn't afford it, we would provide them some subsidies.[50]

The President even suggested that the wide availability of subsidies, and the consequent expense, was a likely point of contention between Republicans and Democrats:

> We can have an honest disagreement as to whether we should try to give some help to those 27 million people [who] don't have coverage. . . . And this is probably going to be the most contentious, because, you know, there is no doubt that providing those tax credits to families and small businesses costs money. And we do raise revenues in order to pay for that. And it may be that the other side just feels as if, you know what, it's just not worth us doing that."[51]

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many as 358,000 Wisconsinites are expected to qualify for premium tax credits to help them purchase health coverage."); Rep. Joe Sestak: News Release, *Rep. Sestak Votes for Final Passage of Historic Health Care Reform Legislation*, (Mar. 23, 2010), 2010 WLNR 6031395 ("Government would be responsible for ensuring that *every* American has access to quality health insurance by providing subsidies to qualifying low- and middle-income families and expanding Medicaid so more individuals in poverty can participate in the program.") (emphasis added); Sen. Al Franken: *Statement on Comprehensive Health Reform* (Nov. 4, 2009), 2009 WLNR 22128497 ("That's what the subsidies and the exchange are all about: increasing the availability of insurance and making it more affordable for families and small businesses.").

[50] President Barack Obama Hosts a Bipartisan, Bicameral Summit on Health Care, Roll Call, 2010 WL 662003 (Feb. 25, 2010). *See also id.* at 192 ("the way we've structured it through the exchange would be to allow people to pool, allow everybody to join a big group, and for people who can't afford it, to give them subsidies, including small businesses").

[51] *Id.* at 224. Speaking at a town hall on February 2, 2010, the President was similarly clear on the broad availability of subsidies. "It's a very straightforward principle that says we're going to set up an exchange, a pool, where people who don't have health insurance and small businesses who can't afford it right now can buy into a pool. If even after we've driven premiums down because of increased competition and choice, you still can't afford it, we're going to give you a subsidy, depending on your income." President Barack Obama Holds a Townhall Event,

The President's comments are not consistent with the geographic limitation Plaintiffs would impose.

Not only the proponents of the ACA thought that the tax credits would be available in all the States. The opponents also had the same understanding. Republican Congressman Paul Ryan, who subsequently became Chair of the House Budget Committee, asserted during the Committee's markup of the Reconciliation Act on March 15, 2010,[52] that the tax credits were "a new open-ended entitlement that basically says that *just about everybody in this country* -- people making less than $100,000, you know what, if you health care expenses exceed anywhere from 2 to 9.8 percent of your adjusted gross income, don't worry about it, taxpayers got you covered, the government is going to subsidize the rest." He noted further that, "[f]rom our perspective, these state-based exchanges are very little in difference between the House version -- which has a big federal exchange . . . . But what we're basically saying to people making less than 400% FPL . . .don't worry about it. Taxpayers got you covered."[53] "Just about everybody in this country" is quite an inclusive category, and it is not the same as "some people in this country," or "just about everybody in States with State-run exchanges." Congressman Ryan, too, shared the common understanding regarding the broad availability of the tax credits.

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Nashua, New Hampshire, Roll Call (Feb. 2, 2010), 2010 WL 358122, at 18; *see also* Kathleen Sebelius, HHS Secretary, National Press Club (Apr. 6, 2010), *available at* http://gantdaily.com/2010/04/07/hhs-secretary-sebelius-warns-americans-against-health-insurance-crooks ("it makes insurance more affordable for millions of Americans by creating a new insurance marketplace called exchanges and by providing tax credits for those who need additional financial help.").

[52] House Committee on the Budget Holds a Markup on the Reconciliation Act of 2010, Roll Call, 2010 WL 941012 (Mar. 15, 2010).

[53] *See also id.* at 98.

Likewise, Senator Hatch, in the waning hours of Senate debate on December 22, 2009, objected that the ACA ordered States to set up Exchanges. He specifically contrasted this ostensible command with the scenario Plaintiffs allege here, a threat to withhold funding. He stated that, "We have encouraged states to pass legislation, we have bribed them, *we have even extorted them by threatening to withhold federal funds*. But this legislation simply commandeers states and makes them little more than subdivisions of the federal government."[54] Senator Hatch's argument directly refutes Plaintiffs' interpretation of the Act.

**B. No Threat to Cut Off Subsidies to Low-Income Families Was Received**

If Congress intended to coerce States by threatening the loss of tax credits for low-income citizens unless they established an "Exchange," the strategy would have required that the States know they faced that risk. They did not have such an understanding.

Within days after the Senate passed the ACA, the National Governors Association ("NGA") circulated an eight page, single-space document laying out a timeline and identifying key implementation issues for its members.[55] The issues did not include loss of tax relief in States with Federally-facilitated Exchanges. On September 16, 2011, the NGA published an Issue Brief focusing on "State Perspectives on Insurance Exchanges."[56] It, too, enumerated State

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[54] Congressional Record Volume 155, Number 198 (Tuesday, Dec. 22, 2009), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2009-12-22/html/CREC-2009-12-22-pt1-PgS13714-7.htm; *see also* News Release, *Cochran & Wicker: Report Raises Serious Concerns about Costs & Impact of Senate Health Reform Bill* (Dec. 11, 2009), 2009 WLNR 25172897 (citing CMS prediction that 17 million workers would lose employer-sponsored coverage so that employees could qualify "for the subsidized coverage offered through the bill's insurance exchange program").

[55] *See* Implementation Timeline for Federal Health Reform Legislation, *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/1003HEALTHSUMMITIMPLEMENTATIONTIMELINE.PDF.

[56] *See* State Perspectives on Insurance Exchanges: Implementing Health Reform In An Uncertain Environment, *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/1109NGAEXCHANGESSUMMARY.PDF.

concerns regarding implementation of the Exchange provisions. It contained not a hint that the NGA had even thought of the possibility that Federally-facilitated Exchanges were unable to offer premium assistance, let alone that this prospect was the hammer coercing States to establish such Exchanges.

It is particularly telling that in their constitutional lawsuit against the ACA, the State plaintiffs actually challenged the Exchanges as coercive, *but not because of any threatened loss of tax relief for their low-income citizens.* The coercive feature of the Exchange provisions, the States argued, was that States would cede regulatory authority to the Federal government if the Secretary established the Exchanges and set the rules governing insurers who participated.[57] *That* was the incentive for States to participate. If the State officials who authorized and brought these lawsuits had perceived that threat Plaintiffs now raise, they would have included it in their coercion claim.

In sum, despite Plaintiffs' mantra that the language of the statute is crystal clear, no one read the law as they do until months after the statute was enacted. A "threat" that was neither communicated nor received is not a threat. It is a figment.

**C. The Subsequent Amendment of Section 36B Reaffirms the IRS Interpretation**

If there were any remnant of doubt regarding the broad availability of tax credits and subsidies on the Exchanges -- and there is not -- Congress's three subsequent amendments of the very section at issue here, 26 U.S.C. § 36B, would deal the fatal blow. The first of these amendments limited the amount that the IRS could recover from taxpayers who overestimated

[57] *See* Compl. ¶ 2, *Florida v. U.S. Dep't of Health & Human Servs.*, Case No. 3:10-CV-91-RV/EMT (N.D. Fla.), *available at* http://myfloridalegal.com/webfiles.nsf/WF/JFAO-85FNM9/$file/Complaint.pdf.

their tax credits and insurance subsidies.[58] By this time, the rumblings about States' defaulting to Federally-facilitated Exchanges had reached high decibels.[59] Nonetheless, the legislation, and the budgetary predictions that propelled it through Congress, reflected the understanding that the subsidies were available in all the Exchanges.[60] These budgetary predictions were especially critical to Congress because a law adopted earlier in 2010 required that any cost increases in the bill be offset with savings elsewhere.[61]

The second amendment of the Exchange subsidy provision broadened the obligation of taxpayers to repay any excess subsidies. Congress crafted this amendment to offset the revenue loss from the accompanying repeal of the requirement that businesses provide 1099s for all payments outside the company. Again, it is apparent from the amendment, the Congressional report on it, and the CBO and JCT projections underlying and accompanying it that the subsidies were available throughout the U.S.[62]

The third of the amendments is particularly probative, because it passed a*fter* the IRS had proposed the rule that Plaintiffs challenge here allowing subsidies for customers using Federally-

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58 P.L. 111-309 (Dec. 15, 2010).

59 *See* pp. 16-17, *supra.*

60 *See* CBO, *Estimate of Effects on Direct Spending and Revenues for H.R. 4994, an Act to Extend Certain Expiring Provisions of the Medicare and Medicaid Programs, and for Other Purposes,* (Dec. 7, 2010) (projecting $600 million cost of this provision in 2014).

61 P.L. 111-139 (Feb. 20, 2010). *See also* Abbe Gluck, *The "CBO Canon" and the Debate over Tax Credits on Federally Operated Health Insurance Exchanges,* Balkinization, July 10, 2012, (legislation should be construed consistently with CBO conclusions on which Congress relies), *available at* http://balkin.blogspot.com/2012/07/cbo-canon-and-debate-over-tax-credits.html.

62 The House Report used broadly inclusive language with regard to the subsidies. *See* Rep. No. 112-16 (Feb. 22, 2011), at 8 ("To become entitled to an advance premium assistance credit under section 36B, an eligible individual enrolls in a plan offered through *an exchange* and reports his or her income to the exchange."); *id.* at 12 ("the provision requires that the exchange, or any person with whom it contracts to administer the insurance program, must report to the Secretary with respect to *any taxpayer's participation in the health plan offered by the Exchange*.") (emphasis added). *See also id.* at 15 (prediction of $674 million in savings in 2014).

facilitated Exchanges, and after HHS had proposed a parallel rule on the obligations of Exchanges.[63] In that amendment to Section 36B, enacted on November 21, 2011, Congress changed the way the subsidies were calculated.[64] The presumption that Congress was aware of the IRS proposal,[65] is even stronger than usual where, as here, the implementation of the ACA received intensive and ongoing Congressional scrutiny. Moreover, by the time of this amendment, the reticence of some States regarding the Exchanges was manifest.[66] Nonetheless, the report on the bill proceeded from the broad premise that the "premium assistance credit is available for individuals . . . with household incomes between 100 and 400 percent of the Federal poverty level."[67] The calculation of the revenue impact of the legislation also is predicated on the availability of the subsidies in all States:

> First, CBO and JCT estimate that many of the individuals who lose Medicaid coverage would become eligible for premium assistance credits and cost-sharing subsidies in the exchanges. The number of people purchasing insurance through the exchanges would increase as a result. Second, we estimate that some people

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63 76 Fed. Reg. 41,780 (Jul. 15, 2011).

64 P.L. 112-56, 125 Stat. 711 (Nov. 21, 2011) (including social security and other federal benefits in modified gross income for purposes of determining eligibility for subsidies). One of the earlier amendments to Section 36B broadened the obligation to reimburse overpayments of tax credits and subsidies. P.L. 112-9, 125 Stat. 36 (Apr. 14, 2011). The other amendment limited the amount that could be recovered in the event of overpayments. P.L. 111-309, 124 Stat. 3285 (Dec. 15, 2010).

65 *New Materials High Tech, Inc. v. Int'l Trade Comm'n*, 161 F.3d 1347, 1355 (Fed. Cir. 1998) (noting that Congress ratifies agency practice when it legislates in that area of law covered by practice, with full awareness of agency's practice, and does not change or refer to that practice).

66 *See* pp. 16-17, *supra*. *See also, e.g.*, Kevin Sack, *Opposing the Health Law, Florida Refuses Millions*, N.Y. Times (Jul. 31, 2011), *available at* http://www.nytimes.com/2011/08/01/us/01florida.html?pagewanted=all&_r=0; Becky Bohrer, *Sean Parnell: Health Care Law Won't Be Implemented in Alaska by My Administration,"* Huffington Post (Feb. 17, 2011), *available at* http://www.huffingtonpost.com/2011/02/17/sean-parnell-health-care-_n_824785.html; Edmund Haislmaier, *A State Lawmaker's Guide to Health Insurance Exchanges* (Mar. 21, 2011), *available at* http://www.heritage.org/research/reports/2011/03/a-state-lawmakers-guide-to-health-insurance-exchanges.

67 House Report 112-254, at 3, *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt254/html/CRPT-112hrpt254.htm.

> who were previously eligible for exchange subsidies would lose eligibility under the expanded MAGI definition that H.R. 2576 would establish, which would reduce the number of people purchasing insurance through the exchanges. CBO and JCT estimate that those coverage effects would, on net, result in an increase in enrollment in health exchanges of roughly one-half million people in any given year over the 2014–2021 period.[68]

If only families in States operating their own Exchanges were eligible for subsidies, these numbers would be wildly inaccurate.

Plaintiffs cannot dismiss these changes as mere subsequent legislative history of minimal probative value. Once Congress amended Section 36B, the amended provision became the enactment that the Court must interpret here.[69]

## CONCLUSION

For all these reasons, and those set forth in the Federal Government's brief, *amicus* Families USA respectfully urges the Court to grant the Federal Government's Motion for Summary Judgment and to deny Plaintiffs' Motion.

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[68] *Id.* at 12. That bill, too, and the revenue predictions that propelled it through the Congress, reflected the understanding that the subsidies were available in all the Exchanges. H. Rep. No. 112-16 (Feb. 22, 2011).

[69] *See U.S. v. Board of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 135 n.25 (1978) (Court is construing 1975 reenactment, not the 1965 enactment of statute).

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Respectfully submitted,

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

| | | |
|---|---|---|
| **DAVID KING, *et al.*,** | ) | |
| **Plaintiffs,** | ) | |
| **v.** | ) | **Civil Action No. 3:13-cv-630 (JRS)** |
| **KATHLEEN SEBELIUS, *et al.*,** | ) | |
| **Defendants.** | ) | |

**FAMILIES USA'S FINANCIAL DISCLOSURE**

Pursuant to Local Civil Rule 7.1(c), Families USA states there is nothing to report under Local Civil Rule 7.1(A)(1)(a) and (b).

Dated: November 18, 2013

Respectfully submitted,

/s/ Kristen Ittig

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