IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

The defendants, Kathleen Sebelius, in her official capacity as Secretary of Health and Human Services; Jacob J. Lew, in his official capacity as Secretary of the Treasury; Daniel I. Werfel, in his official capacity as Acting Commissioner of Internal Revenue; the United States Department of Health and Human Services; the United States Department of the Treasury; and the Internal Revenue Service, respectfully request that the Court award them summary judgment with respect to all claims of all parties pursuant to Rule 56 of the Federal Rule of Civil Procedure. The grounds for this motion are set forth in the accompanying memorandum.

Dated: November 12, 2013

Respectfully submitted,

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DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' SUMMARY JUDGMENT MOTION

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Introduction

The Patient Protection and Affordable Care Act ("ACA" or "Act") includes several key measures that will expand the availability of affordable health coverage. Most relevant here, the ACA authorizes federal tax credits and cost sharing subsidies for insurance purchased through new health insurance Exchanges, which are to be operated by states or, where the state chooses not to do so or fails to do so consistent with federal standards, by the federal government. These tax credits, which become available in 2014, are vital to the operation of the Exchanges and will help millions of Americans purchase affordable health insurance, consistent with Congressional intent; indeed, Congress understood that the tax credits would be "key" to its goal of ensuring the availability of affordable health coverage.

The plaintiffs in this case seek to deny these tax credits to millions of Americans who need the credits to purchase health insurance. They assert their claim by reading one phrase of the Act statute incorrectly and out of context, contrary to all recognized canons of statutory construction, and contrary to Congress's intent in providing for tax relief that would be available nationwide. As an initial matter, however, the plaintiffs have failed to show any basis to adjudicate even their own tax liabilities here, let alone those of millions of absent third parties. The only individual plaintiff who has even attempted to show his standing, David Klemencic, acknowledges that he would be willing to pay some price for catastrophic coverage, but alleges that he is unwilling to pay anything for the more generous coverage available to him on the Exchange, because he objects to government subsidies. He cannot show an injury-in-fact from a mere ideological objection to a benefit. The employer plaintiffs also lack standing, because none of their claimed injuries could be redressed here. The tax assessment that the employers seek to avoid would arise if one or more of their employees receives premium tax credits, and

they cannot prevent their employees from receiving those credits in this action. In addition, the employers' claims run afoul of the prudential rule that a plaintiff may not litigate the tax liabilities of absent third parties, and of the Anti-Injunction Act as well. Moreover, Congress has specified that the plaintiffs' claims should be brought in a tax refund action; that remedy is plainly adequate, and so no APA action is available here.

In any event, the plaintiffs are wrong on the merits. Their argument is based on an improper method of statutory construction, in which they read one provision in isolation while turning a blind eye to surrounding provisions and the structure of the Act, as well as legislative history and Congressional purpose. If anything, the plain meaning of the statute is as the Treasury Department reads it. At the very least, Treasury has reasonably interpreted the ACA to provide for the tax credits that the plaintiffs challenge. The plaintiffs agree that, if a state runs an Exchange, individuals can obtain federal tax credits for the insurance they purchase on the Exchange. But they assert that, if the *federal* government itself runs an Exchange, the same individuals cannot receive these *federal* tax credits. That assertion defies the statutory text. To begin with, it ignores Congress's specification in 42 U.S.C. § 18041(c)(1) that a federally-facilitated Exchange is the *same* entity as the Exchange that the Act contemplated that the state would create, as well as its specification in Section 36B itself that the federally-facilitated Exchange would assist in administering the federal premium tax credits. Treasury's reading of the Act gives effect to these provisions, and avoids a series of anomalies that would be created under the plaintiffs' theory. Among other things, under the plaintiffs' reading, not only would federal premium tax credits be unavailable on the federally-facilitated Exchange, but no person could qualify to buy coverage at all (subsidized or not) under a plan offered on that Exchange. Congress plainly did not intend this result.

Moreover, the legislative history reveals that Congress intended the Section 36B premium tax credits to be available nationwide. Indeed, the plaintiffs fail to cite any evidence that their contrary theory was ever contemplated by any legislator. Most fundamentally, their theory runs contrary to the basic purpose of the ACA, which is to expand the availability of affordable health coverage. Federal premium tax credits are a central feature of the system that Congress established to achieve this goal, and it is simply not plausible to contend that Congress meant for these tax credits to be available in some states but not in others. Treasury, then, adopted a permissible construction of Section 36B to provide for eligibility for tax credits for participants in any Exchange, and this Court should defer to the agency's interpretation.

Background

I. The Affordable Care Act

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), to address a crisis in the national health care market, namely, the absence of affordable, universally available health coverage. This case involves four features of the Act: (1) the health insurance Exchanges, which serve as organized marketplaces on which individuals and small groups may buy insurance; (2) federal premium tax credits, which assist individuals with the purchase of affordable insurance on the Exchanges; (3) the minimum coverage provision, which requires most individuals either to maintain qualifying coverage or to pay a tax penalty for the failure to do so; and (4) the tax assessment that applies to some large employers that do not offer affordable, minimum-value coverage to their full-time employees.

A. The Health Insurance Exchanges

For the individual and small-group markets, Congress established health insurance Exchanges to serve "as an organized and transparent marketplace for the purchase of health

insurance where individuals and employees (phased-in over time) can shop and compare health insurance options." H.R. REP. NO. 111-443, pt. II, at 976 (2010) (internal quotation omitted) (Exhibit 1). The Exchanges allow qualified individuals and qualified employers to use the leverage of collective buying power to obtain prices and benefits that are competitive with those of large-employer health plans. 42 U.S.C. §§ 18031-18044. Among other functions, the Exchanges certify the qualified health plans offered on the Exchanges; determine the eligibility of individuals to enroll in these qualified health plans; determine the eligibility of individuals for advance payments of the Act's premium tax credits and cost-sharing reductions (discussed below); and grant certifications that individuals are exempt from the penalty under the Act's minimum coverage provision (also discussed below). 42 U.S.C. § 18031(d)(4); 45 C.F.R. § 155.200 *et seq.* Each Exchange also reports information to the IRS for the purpose of determining whether participants are eligible for premium tax credits. 26 U.S.C. § 36B(f)(3).

The Exchanges offer plans offering different levels of coverage, designated as "bronze," "silver," "gold," and "platinum" coverage. 42 U.S.C. § 18022(d). Each plan offered through an Exchange must provide coverage of essential health benefits, as defined in regulations promulgated by the Department of Health and Human Services (HHS). 42 U.S.C. § 18021(a)(1)(B); *see* 45 C.F.R. §§ 156.20, 156.200(b)(3); *see also* 45 C.F.R. § 156.110 *et seq.* (defining essential health benefits package). A bronze plan offers coverage that is "designed to provide benefits that are actuarially equivalent to 60 percent of the full actuarial value of the benefits provided under the plan." 42 U.S.C. § 18022(d)(1). Silver, gold, and platinum plans are designed to offer benefits equivalent to 70, 80, and 90 percent of the actuarial value of the benefits provided under the plan, respectively. *Id.*

The Exchanges may also offer "catastrophic" plans. 42 U.S.C. § 18022(e); *see* 45

C.F.R. § 156.155. A catastrophic plan must cover at least three primary care visits per year, and it must also cover essential health benefits, but only after the insured person has incurred the annual limitation on cost-sharing expenses. 42 U.S.C. § 18022(c), (e).[1] A catastrophic plan may not impose cost-sharing requirements on recommended preventive health services coverage. 42 U.S.C. § 18022(e); 45 C.F.R. § 156.155(a), (b). Enrollment in these plans is limited to persons who are under 30 years old, or who have been certified as exempt from the minimum coverage provision due to hardship or the lack of affordable insurance. 42 U.S.C. § 18022(e); 45 C.F.R. § 156.155(a).

The Act provides that "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an 'Exchange') for the State." 42 U.S.C. § 18031(b)(1). The Act does not impose any sanction, however, if a state elects not to establish an Exchange that complies with federal standards. Instead, the Act directs that, if the state does not create the "required Exchange," the Secretary of HHS shall "establish and operate such Exchange within the State." 42 U.S.C. § 18041(c)(1); *see* 45 C.F.R. § 155.105(f). A state thus has the option to operate its own Exchange, or to permit the federal government to operate the Exchange for that state in its stead. A state that chooses not to operate its own Exchange, however, loses access to federal grants that would otherwise be available to it to fund the establishment of the Exchange. *See* 42 U.S.C. § 18031(a). In addition, the Act vests the Exchanges with certain regulatory power with respect to health insurers seeking to offer plans on the Exchanges. *See* 42 U.S.C. § 18031(e) (power to certify qualified health plans and to review insurers' proposed premium rates); 42 U.S.C. § 18021(a)(1)(C)(iv) (power to impose additional requirements for qualified health plans). A state that declines to operate its own Exchange,

[1] For 2014, the annual cost-sharing limit is $6,350 for individual coverage and $12,700 for family coverage. 26 U.S.C. § 223(c)(2)(A)(ii); Rev. Proc. 2013-25, 2013-21 I.R.B. 1110.

therefore, forgoes that regulatory power.

State and the federal government also may work together to operate an Exchange. In a "state partnership Exchange," the state assumes responsibility for some of the functions of a federally-facilitated Exchange. *See* Center for Consumer Information and Insurance Oversight (CCIIO), *Guidance on the State Partnership Exchange* at 1 (Jan. 3, 2013) (Exhibit 2). Under this model, states "work with HHS to establish an Exchange that best meets the needs of state residents." *Id.* Seven states, including West Virginia, are participating in the operation of state partnership Exchanges. *See, e.g.*, Letter from Gov. Earl Ray Tomblin to Kathleen Sebelius, Secretary of HHS at 1 (Feb. 15, 2013) (Exhibit 3).

Health plans offered on the Exchanges for 2014 will offer coverage effective on January 1, 2014. 45 C.F.R. § 155.410(c). The enrollment period for plans offered through the Exchanges for 2014 is now open, and will close on March 31, 2014. 45 C.F.R. § 155.410(b).

B. Premium Tax Credits and Cost-Sharing Reductions

Congress also enacted new premium tax credits and cost-sharing reduction payments in order to make health insurance more affordable. The Act establishes federal premium tax credits to assist eligible individuals with household incomes from 100% to 400% of the federal poverty level to purchase insurance through the new Exchanges. 26 U.S.C. § 36B. These tax credits, which are advanceable and fully refundable such that individuals with little or no income tax liability can still benefit, are designed to help make health insurance affordable by reducing a taxpayer's net cost of insurance. For eligible individuals with household income from 100% to 250% of the federal poverty level, the Act also provides for federal payments to insurers to help cover those individuals' cost-sharing expenses (such as co-payments or deductibles) for insurance obtained through an Exchange. 42 U.S.C. § 18071(c)(2); 45 C.F.R. § 155.305(g).

Individuals who purchase coverage either through state-based Exchanges or through federally-facilitated Exchanges can be eligible for these premium tax credits and cost-sharing reductions. 26 U.S.C. § 36B(c), (f); *see* 26 C.F.R. §§ 1.36B-1(k), 1.36B-2(a); 45 C.F.R. § 155.20. The statute imposes certain conditions on eligibility for the tax credits. For example, if the taxpayer is married, he or she must file a joint return to receive the credit. 26 U.S.C. § 36B(c)(1)(C). The credit is available only to persons lawfully present in the United States. 26 U.S.C. § 36B(e). And the taxpayer may not receive a premium tax credit if he or she is eligible for any other form of coverage that qualifies as "minimum essential coverage" under the ACA, such as Medicare or Medicaid. 26 U.S.C. § 36B(c)(2)(B).[2]

The amount of the premium tax credit available to a taxpayer under Section 36B varies depending on the taxpayer's household income. That amount is defined as the difference between the cost of the "applicable second lowest cost silver plan" available on the Exchange to the taxpayer and a defined percentage of the taxpayer's household income. 26 U.S.C. § 36B(b)(2), (b)(3). For example, a taxpayer with income at 200% of the federal poverty level could receive a credit that is equal to the cost of the second lowest cost silver plan available on the Exchange, less 6.3% of the taxpayer's household income. 26 U.S.C. § 36B(b)(3); 26 C.F.R. § 1.36B-3(g). A taxpayer need not purchase a silver plan to receive the premium tax credit. He or she may receive a credit in the same amount (subject to a cap equal to the amount of the premiums for the plan he or she purchases) for a cheaper bronze plan, or for a more expensive gold or platinum plan. 26 U.S.C. § 36B(c)(3)(A). Premium tax credits are not available for

[2] Employer-sponsored coverage is minimum essential coverage under the ACA. Section 36B nonetheless permits an employee who is eligible for, but does not enroll in, such coverage to receive premium tax credits or cost-sharing reductions, if the employer-sponsored plan is unaffordable, meaning that the employee would pay more than 9.5% of his household income for that coverage, or if that plan does not offer minimum value, meaning that it fails to cover at least 60% of the total allowed costs of benefits under the plan. 26 U.S.C. § 36B(c)(2)(C).

the purchase of catastrophic plans, however. *Id.*

The Exchanges also administer a program for the advance payments of the premium tax credits for eligible individuals. 42 U.S.C. §§ 18081-18082. Under this program, the Exchange will determine a taxpayer's anticipated eligibility for the premium tax credit when the taxpayer or a household member applies for coverage under a plan offered on the Exchange and seeks such financial assistance. 42 U.S.C. § 18082(a). If the Exchange approves advance payments of the premium tax credit, the payments will be made directly to the insurer offering the plan in which the individual is enrolled, and the individual will be responsible to pay only the net cost of the premium after those payments are applied. *Id.*

The Congressional Budget Office ("CBO") has projected that, by 2018, twenty million people, or 80% of people who buy non-group insurance policies through Exchanges, will receive premium tax credits. CBO, *Effects on Health Insurance and the Federal Budget for the Insurance Coverage Provisions in the Affordable Care Act: May 2013 Baseline*, tbl. 3 (May 14, 2013) ("*May 2013 Baseline*") (Exhibit 4). It has also projected that the average subsidy, for each person who receives subsidized coverage through the Exchanges, will amount to $5,290 per person in 2014, rising to $7,900 in 2023. *Id.*, tbl. 1. Those credits, on average, will cover nearly two-thirds of the premiums for policies purchased through the Exchanges. CBO, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act*, at 6-7 (Nov. 30, 2009) ("*Analysis of Health Insurance Premiums*") (Exhibit 5).

Premiums for plans on the Exchanges will be substantially lower than previous projections. The cost of a silver plan is, on average, 16% lower than what was contemplated under the CBO's original projections, even before tax credits are considered. Office of the Ass't Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Servs., *ASPE Issue Brief:*

Health Insurance Marketplace Premiums for 2014 at 2-3 (Sept. 25, 2013) (Exhibit 6). After taking tax credits into account, 56% of uninsured Americans may qualify for health coverage for less than $100 per person per month. *Id.* at 3-4.

The Act's success in lowering premiums is attributable in large part to the availability of the Section 36B tax credit. The Act's financial assistance will encourage individuals with lower expected health care costs to participate in the Exchanges, resulting in an expansion of the risk pool, and a decrease in the expected cost of plans offered on the Exchanges. *See* Linda J. Blumberg & John Holahan, *Health Status of Exchange Enrollees: Putting Rate Shock in Perspective* at 2, 8 (Urban Institute July 2013) (Exhibit 7). Because of this economic effect, then, Congress recognized that the Section 36B tax credits "are *key* to ensuring people affordable health coverage." H.R. REP. NO. 111-443, vol. I, at 250 (emphasis added).

C. The Minimum Coverage Provision

Beginning in 2014, the minimum coverage provision requires non-exempted individuals to maintain a minimum level of health insurance or else pay a tax penalty that is reported with their annual income tax return. 26 U.S.C. § 5000A. An individual may satisfy this provision through enrollment in an employer-sponsored health plan; an individual market plan, including a plan offered through the new Exchanges; a grandfathered health plan; certain government-sponsored health coverage programs such as Medicare, Medicaid, or TRICARE; or other coverage recognized by HHS in coordination with the Treasury Department. 26 U.S.C. § 5000A(f). The penalty does not apply to, among others, individuals whose household income is insufficient to require them to file a federal income tax return, who would need to contribute more than 8% of their household income toward coverage (after taking into account any allowable Section 36B premium tax credits), who establish that the requirement would impose a

hardship, or who satisfy certain religious exemptions. 26 U.S.C. § 5000A(d), (e). For 2014, the penalty for an individual will be the greater of $95 or 1.0% of the excess of the taxpayer's household income over a statutory floor, subject to a cap equal to the cost of qualifying insurance. 26 U.S.C. § 5000A(c).[3]

The Exchanges will administer some applications for exemptions from the minimum coverage provision. 42 U.S.C. § 18031(d)(4)(H). In particular, the Exchanges will provide a certificate of exemption to an applicant who shows that, based on his or her projected annual household income, his or her contributions toward coverage would exceed 8% of his or her household income. 45 C.F.R. § 155.605(g)(2); *see* 45 C.F.R. § 155.615(f)(2) (describing procedures for verification of exemption applications on account of lack of affordable coverage). An applicant for an exemption under this unaffordability provision for a given year must apply before the last date on which he is eligible to enroll in a qualified health plan offered on the Exchange, *i.e.*, for the coming year, March 31, 2014. 45 C.F.R. § 155.605(g)(2)(v). An applicant who is denied an exemption may pursue an administrative appeal of that denial before an HHS appeals entity; that appeal may be taken only after the applicant first exhausts any appeals that may be available in the Exchange. 45 C.F.R. § 155.505(b)(2), (c). This process is independent of the IRS's process for assessment of any penalty under the minimum coverage provision, however. The IRS will follow the same procedures for the assessment and collection of that penalty as those that apply to other taxes and penalties under the Internal Revenue Code, subject to limitations on levies and the filing of notices of liens. *See* 26 U.S.C. § 5000A(g).

[3] This tax penalty is assessed on a monthly basis. 26 U.S.C. § 5000A(c). A taxpayer who enrolls in coverage through an Exchange by the end of the open enrollment period for 2014, *i.e.*, March 31, 2014, will not be liable under section 5000A for the months preceding that enrollment. CCIIO, *Shared Responsibility Provision Question and Answer* at 2-3 (Oct. 28, 2013) (Exhibit 8).

D. The Tax Assessment for Certain Large Employers That Fail to Offer Adequate Coverage

The Affordable Care Act prescribes a tax assessment under specified circumstances for certain large businesses that do not offer affordable, minimum value coverage to their full-time employees and their dependents, 26 U.S.C. § 4980H. Under this provision, an applicable large employer that offers health coverage to its full-time employees and their dependents will be subject to a "tax," 26 U.S.C. § 4980H(b)(2), *see also* 26 U.S.C. § 4980H(c)(7), if one or more of its full-time employees "has been certified to the employer under [42 U.S.C. § 18081] as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee." 26 U.S.C. § 4980H(b)(1)(B); *see also* 26 U.S.C. § 4980H(a)(2) (same condition for assessment against applicable large employer that offers no coverage to its full-time employees and their dependents). As noted above, an employee who is eligible for employer-sponsored health coverage is eligible to receive these subsidies only if the coverage offered by the employer fails to meet certain standards for affordable, minimum value coverage. *See* 26 U.S.C. § 36B(c)(2)(C). Accordingly, an applicable large employer that offers coverage to its full-time employees and their dependents that meets these standards will not be subject to the Section 4980H tax. The large employer tax assessment will begin to be applied in 2015. *See* Notice 2013-45, 2013-31 I.R.B. 116.

II. This Litigation

The plaintiffs filed this suit on May 2, 2013. Compl. (ECF 1). They acknowledge that the Act extends premium tax credits to participants in state-based Exchanges, but they contend that these tax credits are not available in the states where they reside, where a federally-facilitated Exchange will operate. They argue that the Treasury Department incorrectly

interprets the ACA to provide for premium tax credits for participants in all of the Exchanges, *see* 26 C.F.R. § 1.36B-1(k), and they seek to challenge the validity of that regulation under the Administrative Procedure Act (APA).

The individual plaintiffs contend that, under this regulation, they will qualify for Section 36B premium tax credits, but that they would not qualify for these credits under their reading of the Act. Compl., ¶¶ 12-15. They contend that this *benefit* will *harm* them, because they would prefer that insurance be *unaffordable*, so that they could qualify for an exemption from the penalty under the minimum coverage provision. *Id*. The three employer plaintiffs contend that each employer employs more than 50 full-time employees, and that each employer operates in a state in which a federally-facilitated Exchange will operate. Compl., ¶¶ 16-18. Each employer plaintiff contends that, if its employees are eligible to receive premium tax credits, it will be "threatened" by the possibility that it will be subject to the Section 4980H tax assessment. *Id*., ¶¶ 16-18. The plaintiffs ask the Court to declare that 26 C.F.R. § 1.36B-1(k) is invalid and to prohibit the "application or enforcement" of the regulation. Compl., p. 14.

Argument

I. The Plaintiffs' Suit Is Not Justiciable

A. The Individual Plaintiffs Lack Article III Standing

"The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Id.* at 1147 (internal quotation omitted). The "threatened injury must be *certainly impending* to constitute injury in fact." *Id.*

at 1147 (emphasis in original). No injury is "certainly impending" against the individuals. Of the individual plaintiffs, only David Klemencic has even attempted to show his own standing. He argues that he is harmed by the fact that Section 36B tax credits are available to him, because the availability of that benefit will cause him "to either pay a penalty or purchase more insurance than he wants," and the possibility of incurring those costs affects his "financial strength and fiscal planning." Compl., ¶ 13.

But one of the comprehensive plans available to Klemencic on the West Virginia Exchange, a bronze-level plan, would cost Klemencic only $1.70 a month. Third Declaration of Donald Moulds, ¶ 6 (attached hereto).[4] Klemencic has acknowledged that he would be willing to buy catastrophic coverage at some price, *see* ECF 39-1, ¶ 1, but he asserts that he does not want to buy a comprehensive bronze plan (which offers the same coverage as a catastrophic plan, on better terms) at any price because he "oppose[s] government handouts," ECF 24-1, ¶ 8. A plaintiff, however, may not base a clam of standing on a mere ideological objection to a government policy. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662-63 (2013). Klemencic's objection to free insurance coverage, then, is not a legally cognizable injury. *See, e.g.*, *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976); *McConnell v. FEC*, 540 U.S. 93, 228 (2003) (political candidates lacked standing to challenge increase to limits on "hard money" contributions; injury was caused by "their own personal 'wish' not to solicit or accept large

[4] At the time that the defendants filed their reply on their motion to dismiss, they had not yet completed their review of premiums on the Exchanges, and thus could not finally determine the amount of the Section 36B premium tax credit available to Klemencic. That review is now completed, and it is now known that the amount of Klemencic's premium tax credit, if his representations are accurate, is more than the cost of the cheapest bronze plan available to Klemencic on the Exchange. Third Moulds Decl., ¶ 5. A further review of the terms of that plan, however, reveals that the plan provides coverage for some non-essential health benefits. Section 36B tax credits would not be applied to pay for the portion of the premium attributable to such benefits. Klemencic's payment for non-essential health benefits on that plan would amount to $1.70 a month. *See* Third Moulds Decl., ¶ 6.

contributions, *i.e.*, their personal choice"), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). *See also Bhd. of Locomotive Eng'rs & Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D.C. Cir. 2006) (self-inflicted injury was not traceable to defendant's actions).

Klemencic has attempted to defend his standing by arguing that the amount of the subsidy he would receive under Section 36B is "speculative," because his income might change. ECF 30 at 9. But it is not the defendants' burden to prove that harm could not possibly occur; instead, the plaintiff bears the burden to show, at the time he files his complaint, that his claimed injury is certainly impending. *See Clapper*, 133 S. Ct. at 1147. *See also Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012), *reh'g denied*, 704 F.3d 1005 (D.C. Cir. 2013), *cert. denied*, 133 S. Ct. 2880 (2013). In sum, Klemencic suffers no harm whatsoever from the fact that free health coverage is available to him under the ACA, and he lacks Article III standing.

B. The Employer Plaintiffs' Claims Are Not Justiciable

1. The Employer Plaintiffs Lack Article III Standing

The employer plaintiffs have also failed to demonstrate their standing. They contend that they are "threatened" by Section 4980H, in that they may be assessed with the tax under that provision, if one or more of their full-time employees receives a premium tax credit. Compl., ¶ 17. Because this claim depends on speculation as to "the acts of third parties not before the court," the employer plaintiffs have failed to allege an Article III injury. *See Grocery Mfrs. Ass'n*, 693 F.3d at 176. Where, as here, "a plaintiff's asserted injury arises from the Government's regulation of a third party that is not before the court, it becomes 'substantially more difficult' to establish standing." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562

(1992)). In such a case, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. The employer plaintiffs have not made such a showing.

Moreover, any injury that the employers face would not be redressable in this action. Their employees, such as the 18 employees of the Golden Chick quick-service restaurants described in J. Allen Tharp's declaration (ECF 24-3, ¶ 3), would not be bound by any judgment in this action. *See Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (claim and issue preclusion ordinarily cannot apply to nonparties, given the "deep-rooted historic tradition that everyone should have his own day in court"). Thus, even if this Court were to attempt to award relief in the employers' favor, it could not prevent their employees from seeking premium tax credits under 26 U.S.C. § 36B. And the large employer tax assessment under Section 4980H arises if such a credit is allowed or paid for at least one of the employer's full-time employees. *See* 26 U.S.C. § 4980H(a), (b).

Thus, the future conduct of the employees would trigger the Section 4980H assessment for the employers, no matter whether this Court purports to make a declaration of those employees' rights under the Internal Revenue Code in this case. A ruling in the employers' favor would "not effect any change in federal [tax] law that could bind nonparties." *Urban Health Care Coalition v. Sebelius*, 853 F. Supp. 2d 101, 108 (D.D.C. 2012). As a result, the employers could not obtain relief from the injury that they claim would arise from the "threat" of being subject to the Section 4980H assessment. *See id*. at 109 (injury not redressable where relief in instant suit would not prevent nonparties from relitigating issue). The employer plaintiffs thus lack standing to pursue this action. *See also Lujan*, 504 U.S. at 569 (plurality

opinion); *University Med. Ctr. of S. Nevada v. Shalala*, 173 F.3d 438, 441-42 (D.C. Cir. 1999); *Comite de Apoyo a los Trabajadores Agricolas v. U.S. Dep't of Labor*, 995 F.2d 510, 514 (4th Cir. 1993).

The employer plaintiffs contend that their injury would be redressed because, if they prevail, 26 C.F.R. § 1.36B-1(k) would be vacated with nationwide effect. ECF 24 at 20.[5] The vacatur would, in their view, necessarily bind the restaurant's employees, because absent this regulation, "there would be no basis for providing" tax credits to those employees. *Id*. But this makes no sense; 26 C.F.R. § 1.36B-1(k) is an interpretive regulation, not a legislative regulation. Even if the rule announcing the Treasury Department's interpretation of the statute were invalidated, the employees could still bring their own claims advancing their own interpretation of Section 36B to provide for tax credits for participants in federally-facilitated Exchanges. The employer plaintiffs thus would remain under the "threat" of tax assessments under 26 U.S.C. § 4980H no matter what happens in this litigation, given that their employees could bring their own claims for premium tax credits, thereby triggering the employers' tax liabilities if those employers fail to provide adequate coverage to their full-time employees. The employer plaintiffs accordingly lack Article III standing.[6]

2. The Employer Plaintiffs Lack Prudential Standing

The employer plaintiffs lack standing for an additional reason. They seek to litigate the federal tax liabilities of their employees, who are not before the court. Their claims thus run afoul of the prudential "principle that a party may not challenge the tax liability of another,"

[5] This premise is wrong, in any event. *See infra*, pp.52-55.

[6] Moreover, if the employer plaintiffs somehow could allege a redressible injury, their employees would be indispensable parties to this case, for the reasons that the defendants have previously explained. ECF 23; ECF 29.

apart from circumstances where the party stands in the shoes of the absent taxpayer. *United States v. Williams*, 514 U.S. 527, 539 (1995). Under this principle, the Supreme Court has expressed doubt (without directly deciding) "whether a third party ever may challenge IRS treatment of another." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976); *see Am. Soc'y of Travel Agents v. Blumenthal*, 566 F.2d 145, 150 n. 3 (D.C. Cir. 1977) (same). At most, the door is "barely ajar" for third party challenges in tax litigation. *Wright v. Regan*, 656 F.2d 820, 828 (D.C. Cir. 1981), *rev'd sub nom. Allen v. Wright*, 468 U.S. 737, 748-49 (1984) (closing the door). *See also Women's Equity Action League v. Cavazos*, 879 F.2d 880, 885 n.3 (D.C. Cir. 1989) (recognizing "the well-established position that, ordinarily, one may not litigate the tax liability of another").

Congress has consistently legislated with this understanding. For example, a person whose property is subject to a levy by the IRS to satisfy a third party's tax debt may bring a wrongful levy action to challenge the procedural validity of the IRS's action. In such a proceeding, however, "the assessment of tax upon which the interest or lien of the United Sates is based shall be conclusively presumed to be valid." 26 U.S.C. § 7426(c). Similarly, a person who owns property subject to a tax lien arising from a third party's tax debt may bring a quiet title action under 28 U.S.C. § 2410 to litigate the validity of the tax lien; the validity of the underlying tax assessment may not be questioned in that proceeding. *See, e.g., Arford v. United States*, 934 F.2d 229, 232 (9th Cir. 1991). And, in limited circumstances, a person who owns property subject to the federal tax lien may pay a third party's tax debt and bring a refund action to litigate the validity of the lien. The limitations of 26 U.S.C. § 7426(c) apply to such a suit, and consequently the plaintiff is "bound by the assessment on the property." *First Am. Title Ins. Co. v. United States*, 520 F.3d 1051, 1054 (9th Cir. 2008). In short, it is "crystal clear" –

even in circumstances where the challenge would affect the plaintiff's own liability to the government – that "only the taxpayer may question the assessment." *United States v. Formige*, 659 F.2d 206, 208 (D.C. Cir. 1981); *see also In re Campbell*, 761 F.2d 1181, 1185 (6th Cir. 1985).

Despite the wealth of precedent that reiterates this principle, the plaintiffs have denied that there is any prohibition at all against litigating third parties' tax liabilities. In prior briefing, they quoted a passage in *Hibbs v. Winn*, 542 U.S. 88 (2004), which recited that "numerous federal-court decisions – including decisions of [the Supreme] Court reviewing lower federal-court judgments – have reached the merits of third-party *constitutional* challenges to tax benefits without mentioning the TIA [Tax Injunction Act, 28 U.S.C. § 1341]." *Id.* at 110 (emphasis added). In their quotation, however, the plaintiffs omitted the word "constitutional," ECF 24 at 25, thereby distorting the meaning of the passage. There is a basic distinction between the "run-of-the-mine tax case," alleging that the taxing agency exceeded its statutory authority, and a tax suit that "involve[s] [a] fundamental right or classification that attracts heightened judicial scrutiny," such as an Establishment Clause claim, or an Equal Protection claim of racial discrimination. *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2335, 2336 (2010). Ordinary prudential principles bar the former kind of claim, even in cases where the latter claim might be permitted to proceed. *See id.* All of the cases that the plaintiffs cited for the proposition that third-party tax challenges may go forward are Establishment Clause or racial discrimination cases, and thus none of those cases provides any support for the claim that a plaintiff may challenge an absent party's tax liability in the "run-of-the-mine" tax case raising purely statutory claims. *See* ECF 24 at 25.[7]

[7] The one exception is the district court's decision in *Tax Analysts & Advocates v. Schultz*, 376

Moreover, this prudential principle applies with special force where, as here, a plaintiff seeks to *increase* the tax liabilities of absent third parties. Even if the door is "barely ajar" for plaintiffs to seek to decrease a third party's tax liability, the door should remain firmly shut for those plaintiffs who ask a federal court to impose *additional* federal tax obligations on absent parties. A court could not award such relief to a plaintiff in an APA action without inserting itself inappropriately into the process of tax administration:

> Congress has erected a complex structure to govern the administration and enforcement of the tax laws, and has established precise standards and procedures for judicial review of tax matters. Even if the plaintiffs succeeded in gaining the relief they seek [to prohibit favorable tax treatment for third parties] … the affected taxpayers, who are not parties, would remain free to challenge any deficiencies asserted. … It is obvious that the relief the plaintiffs seek, if granted, would seriously disrupt the entire revenue collection process.

Apache Bend Apartments, Ltd. v. United States, 987 F.2d 1174, 1177 (5th Cir. 1993). *See also Louisiana v. McAdoo*, 234 U.S. 627, 632 (1914) (declining to adjudicate third-party challenge to favorable tax treatment for another taxpayer, because the maintenance of such actions "would operate to disturb the whole revenue system of the government").[8]

The employer plaintiffs, therefore, may not bring an action under the APA to seek to increase the federal tax liabilities of their employees. As in *Apache Bend Apartments*, this

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F. Supp. 889 (D.D.C. 1974). That court's holding as to prudential standing, however, was overruled by *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 144 (D.C. Cir. 1977).

[8] The Internal Revenue Code demonstrates a textual commitment that matters concerning the validity or amount of a taxpayer's tax debt are reserved for litigation between that particular taxpayer and the government, without interposition by third parties. The Code expressly directs that only the Secretary of the Treasury (with the approval of the Attorney General) may institute a "civil action for the collection or recovery of taxes." 26 U.S.C. § 7401. *See also* 26 U.S.C. §§ 6402 (refund authority), 6404 (authority to abate assessments), 6406 (rendering Secretary's treatment of assessment to be final); 7121 (closing agreement authority), 7122 (compromise authority). Applying this principle, the courts have prohibited plaintiffs from bringing, for example, *qui tam* actions to litigate other parties' tax liabilities to the federal government. *See United States ex rel. Roberts v. W. Pac. R.R. Co.*, 190 F.2d 243, 247 (9th Cir. 1951); *see also* 31 U.S.C. § 3729(d).

Court could adjudicate the employer plaintiffs' claims only by taking jurisdiction over absent parties and by adjusting the Treasury Department's treatment of those parties – to their detriment – on a wholesale basis. Any such effort would "seriously disrupt the entire revenue collection process," 987 F.2d at 1177, and thus this Court should decline to permit an APA action to proceed in this manner. Indeed, if the employer plaintiffs could bring an APA action to litigate their employees' tax liabilities on the ground asserted here, there would be no apparent reason that they could not bring a similar action to litigate other reasons why their employees should not be eligible for Section 36B premium tax credits, such as the employees' potential eligibility for coverage under a spouse's employer-sponsored plan, 26 U.S.C. § 36B(c)(2)(B), their status as the dependent of another taxpayer, 26 U.S.C. § 36B(c)(1)(D), or any other reason. The APA does not contemplate such interference with the "administration and enforcement of the tax laws," *Apache Bend Apartments*, 987 F.2d at 1177, and consequently the employer plaintiffs lack prudential standing to litigate the tax liabilities of parties not before this Court.

3. The Anti-Injunction Act Bars the Employer Plaintiffs' Claims

This Court lacks jurisdiction over the employer plaintiffs' claims for an additional reason. The employer plaintiffs seek to preclude the assessment or collection of any Section 4980H tax assessment against them. The Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421, divests this Court of jurisdiction to award such relief.[9] The AIA provides that, with statutory exceptions inapplicable here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). "Because of the Anti-Injunction Act,

[9] The Declaratory Judgment Act excepts from its coverage suits for declaratory relief "with respect to Federal taxes." 28 U.S.C. § 2201. The D.C. Circuit interprets this exception and the AIA to be "co-terminous." *Cohen v. United States*, 650 F.3d 717, 730 (D.C. Cir. 2011).

taxes can ordinarily be challenged only after they are paid, by suing for a refund." *Nat'l Fed'n of Indep. Business v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2582 (2012).

In *NFIB*, the Supreme Court held that the AIA does not bar a pre-enforcement challenge to Section 5000A. In so ruling, the Court relied on the "text of the pertinent statutes." *NFIB*, 132 S. Ct. at 2582. It stressed that the AIA "applies to suits 'for the purpose of restraining the assessment or collection of any *tax.*'" *Id.* (quoting 26 U.S.C. § 7421(a)) (Supreme Court's emphasis). "Congress, however, chose to describe the '[s]hared responsibility payment' imposed on those who forgo health insurance not as a 'tax,' but as a 'penalty.'" *Id.* at 2583 (quoting 26 U.S.C. § 5000A(b), (g)(2)). The Court reasoned that "Congress's decision to label this exaction a 'penalty' rather than a 'tax' is significant because the Affordable Care Act describes many other exactions it creates as 'taxes.'" *Id.* (citation omitted).

This reasoning makes clear that the AIA bars the employers' pre-enforcement challenge to the application of Section 4980H against them. In contrast to the minimum coverage provision, Congress expressly used the term "tax" to describe the amounts owed under this provision. Section 4980H(b)(2) caps the "aggregate amount of tax" that an employer may owe under that provision. Section 4980H(c)(7) provides that the "tax imposed by" Section 4980H is "nondeductible." And Section 4980H(c)(7) cross-references 26 U.S.C. § 275(a)(6), which provides that no tax deduction is allowed for "[t]axes imposed by chapters 41, 42, 43, 44, 45, 46, and 54" of the Internal Revenue Code. The "tax" imposed under Section 4980H is nondeductible because it is one of the "[t]axes imposed by" chapter 43. *Id.* Moreover, elsewhere in the Affordable Care Act, Congress again explicitly referred to the "tax imposed by section 4980H of Title 26." 42 U.S.C. § 18081(f)(2). The express description of the Section 4980H tax as a "tax" leaves no doubt that the AIA precludes the employer plaintiffs' claims here.

Section 4980H also uses the term "assessable payments," and in one instance the term "assessable penalties," to refer to the amounts owed under that provision. The Fourth Circuit relied on these terms to conclude that "Congress did not intend the exaction to be treated as a tax for purposes of the AIA." *Liberty Univ. v. Lew*, --- F.3d ---, 2013 WL 3470532, at *5 (4th Cir. 2013). But the use of these terms does not erase the fact that Congress also expressly described the Section 4980H exaction as a "tax." That term has the same meaning in Section 4980H as it does in the AIA. *See* 26 U.S.C. § 7421(a) (barring the restraint of "*any* tax") (emphasis added). *See also Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) (a "standard principle of statutory construction [is] that identical words and phrases within the same statute should normally be given the same meaning"); *Commissioner v. Keystone Consol. Indus.*, 508 U.S. 152, 159 (1993) (applying canon to the Internal Revenue Code).

Moreover, the Fourth Circuit erred in reasoning that it would be "anomalous" to treat the minimum coverage provision (which is not subject to the AIA) and Section 4980H differently. 2013 WL 3470532, at *6. Section 4980H, unlike the minimum coverage provision, is enforceable by levies and by the filing of notices of liens. *Compare* 26 U.S.C. § 5000A(g) (limiting summary collection powers for the minimum coverage provision penalty) *with* 26 U.S.C. § 4980H(d) (imposing no similar limitations). The AIA serves to protect these summary administrative measures from pre-enforcement interference. *See United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 10 (1974). It was thus perfectly logical for Congress to treat the Section 4980H tax like all other taxes in the Internal Revenue Code for purposes of the AIA, even though it did not intend the AIA to pose a jurisdictional bar against a suit challenging the constitutionality of the minimum coverage provision. Certainly, where Congress intended that an exaction be collectible by these summary administrative measures, it did not intend also to

defeat that purpose by permitting pre-enforcement suits to restrain that collection.[10]

C. The Plaintiffs Must Follow the Form of Proceeding That Congress Specified

The APA generally provides for judicial review of agency action, but it does not duplicate other causes of action that Congress has created. In such cases, "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute," unless that proceeding is "inadequa[te]." 5 U.S.C. § 703. Likewise, under 5 U.S.C. § 704, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Congress has specified the judicial remedy that is available for the plaintiffs here – an action for a tax refund. That remedy is adequate, and as a result, the plaintiffs must bring their claims in that proceeding, and not in this APA action.

The APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (quoting Attorney General's Manual on the Administrative Procedure Act 101 (1947)). "When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate

[10] This case is unlike *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013). That case involved a challenge to regulations that require certain group health plans to provide coverage for recommended preventive health services, including coverage for contraceptive services approved by the FDA as prescribed by a health care provider. Those regulations trigger freestanding, non-tax legal obligations; HHS could enforce the regulations with respect to certain insurers and group health plans. 42 U.S.C. § 300gg‐22. The Secretary of Labor is also authorized to enforce the requirement. 29 U.S.C. § 1132(a)(5). An employer that violates the regulations would also be subject to a tax assessment. *See* 26 U.S.C. § 4980D. Under the Tenth Circuit's reasoning, the AIA did not bar the challenge, because the Section 4980D tax "is just one of many collateral consequences that can result from a failure to comply with the contraceptive-coverage requirement." 723 F.3d at 1127. Here, in contrast, there are no "collateral consequences" that the employers could face, apart from a tax assessment. Section 4980H imposes only a tax on large employers that fail to provide adequate coverage for their employees, and no other legal consequence arises for such employers.

the previously established special statutory procedures relating to specific agencies." *Id.*; *see also Darby v. Cisneros*, 509 U.S. 137, 146 (1993).

The plaintiffs here seek to preclude the possibility that they will be assessed for a liability under Section 5000A or Section 4980H of the Internal Revenue Code. Congress has specified that a tax refund suit is the form of proceeding that a plaintiff must follow to dispute his or her liability for such assessment. The district courts have jurisdiction to hear "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." 28 U.S.C. § 1346. Before bringing such a suit, the taxpayer "must comply with the tax refund scheme established in the Code," *United States v. Clintwood Elkhorn Mining Co*., 553 U.S. 1, 4 (2008), including the requirements that the tax has been assessed, that the taxpayer has made payment in full, and that he or she has filed an administrative claim for a refund before bringing suit. *See United States v. Dalm*, 494 U.S. 596, 609-10 (1990). Congress thus has specified the form of proceeding that the taxpayer must follow "in an unusually emphatic form." *Clintwood Elkhorn Mining Co*., 553 U.S. at 7 (internal quotation omitted). Indeed, the Supreme Court has observed that "we cannot imagine what language could more clearly state that taxpayers seeking refunds of unlawfully assessed taxes must comply with the Code's refund scheme before bringing suit[.]" *Id*. at 8.

Moreover, Congress took care to specify that the sort of claims that the employer plaintiffs seek to advance here should be brought instead in the context of a refund action. "The Secretary shall prescribe rules … for the *repayment* of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax

credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment." 26 U.S.C. § 4980H(d)(3) (emphasis added). The statute thus directly contemplates that an employer's remedy, in a case where its employee's Section 36B tax credit is disallowed, will arise after the employer's *payment* of the tax owed. That is, the employer must proceed in a refund action, as would any other taxpayer.

Because Congress has explicitly established a proceeding for review of tax claims such as those that the plaintiffs assert here, the only question remaining under 5 U.S.C. §§ 703 and 704 is whether a tax refund proceeding would accord plaintiffs with an adequate remedy. It plainly would. A refund action would afford the plaintiffs here payment in full, with interest, of any overpayment of their federal tax obligations, if they prevail. "[T]he alternative remedy need not provide relief identical to relief under the APA, so long as it offers relief of the same genre." *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (internal quotation omitted). And "where a statute affords an opportunity for *de novo* district-court review, the court has held that APA review was precluded because Congress did not intend to permit a litigant challenging an administrative denial to utilize simultaneously both the review provision and the APA." *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1270 (D.C. Cir. 2005) (internal quotation and alterations omitted). Tax refund actions are *de novo* proceedings. *See Democratic Leadership Council v. United States*, 542 F. Supp. 2d 63, 70 (D.D.C. 2008). Thus, it may not be presumed that Congress intended a taxpayer to proceed both in a refund action and in a pre-enforcement APA action, and this APA suit is barred.

The plaintiffs have argued that a refund action would not provide an adequate remedy, asserting that to bring such an action, they would be required to "violate the law and seek an

after-the-fact remedy." ECF 24 at 33. This is plainly wrong. Neither Section 5000A nor Section 4980H imposes legal obligations on the plaintiffs, other than the possibility of a tax assessment. *See NFIB*, 132 S. Ct. at 2600 ("imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act"); *Liberty Univ.*, --- F.3d ---, 2013 WL 3470532, at *14 (Section 4980H "does not punish unlawful conduct, and leaves large employers with a choice for complying with the law – provide adequate, affordable health coverage to employees or pay a tax"). There is no sense, then, in which the plaintiffs are put to the "Hobson's choice," ECF 24 at 30, of violating the law or forgoing their challenge, if review is deferred. Indeed, in the field of tax law, it is well established that a refund action provides an adequate remedy at law, and that a taxpayer may not seek pre-enforcement review before a tax is assessed and collected. *See, e.g.*, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 742 n.16 (1974) ("general equitable principles disfavor[] the issuance of federal injunctions against taxes, absent clear proof that available remedies at law [are] inadequate").[11]

The D.C. Circuit has held that a tax refund action was not an adequate remedy in a "*sui generis*" suit where the plaintiffs challenged the "adequacy of the agency procedure itself, such that the question of the adequacy of the administrative remedy is for all practical purposes identical with the merits of the plaintiff's lawsuit." *Cohen v. United States*, 650 F.3d 717, 732, 733 (D.C. Cir. 2011) (internal quotation and alterations omitted). That case involved a

[11] The individual plaintiffs have argued that a refund action would be inadequate, because they could not obtain a certificate of exemption in such an action. But, as David Klemencic – again, the only individual who has tried to show his standing – has clarified, he seeks a certificate of exemption for the purpose of obtaining relief from the assessment of the Section 5000A tax penalty. ECF 39-1, ¶¶ 3-4. Klemencic may fully litigate the claims that he asserts here in a tax refund action, and he does not need a certificate of exemption to do so. Nor may the plaintiffs establish that a tax refund action would be inadequate by asserting that they would forgo that remedy. The Supreme Court has rejected this argument, holding that "[a] taxpayer cannot render an available review procedure an inadequate remedy at law by voluntarily forgoing it." *Alexander v. Americans United, Inc*., 416 U.S. 752, 762 n.13 (1974).

challenge, not to the validity of a taxpayer's liability to the IRS, but to the adequacy of an IRS administrative mechanism for the submission of refund claims for a particular kind of excise tax. The court made clear, that a pre-enforcement suit involving taxes could proceed only in "cases pertaining to final agency action unrelated to tax assessment and collection." *Id.* at 733. In contrast, "taxpayer challenges to the validity of an individual tax [are] paradigmatic refund suits." *Id.* The plaintiffs here do not bring any procedural challenge to the adequacy of the IRS's refund process, but instead directly challenge the validity of the tax assessments that they may face. They may not prospectively litigate those potential tax liabilities under the APA.

II. The Treasury Department Has Reasonably Construed Section 36B to Provide that Participants in Any of the Exchanges May Be Eligible for Premium Tax Credits

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

Congress has directed that the Treasury Department "shall prescribe such regulations as may be necessary to carry out the provisions of" Section 36B. 26 U.S.C. § 36B(g); *see also* 26 U.S.C. § 7805(a). In the exercise of this authority, after notice and comment, the Treasury Department published a rule that interprets 26 U.S.C. § 36B to provide that participants in any of the Exchanges, whether state-operated or federally-facilitated, may be eligible for federal premium tax credits. 26 C.F.R. § 1.36B-1(k). This regulation is entitled to deference so long as the Treasury Department did not exceed the expansive scope of its rulemaking authority. *See Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011). The familiar two-step framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), governs the Court's resolution of this question.

Under this test, "[f]irst, applying the ordinary tools of statutory construction, the court must determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter[.]" *City of Arlington v. FCC*, 133 S. Ct.

1863, 1868 (2013). Under the second step of the *Chevron* test, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *City of Arlington*, 133 S. Ct. at 1868. In other words, no matter whether the case involves a "big, important" issue or a "humdrum, run-of-the-mill" one, "the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *Id.* (emphasis in original). "If the agency's answer is based on a permissible construction of the statute, that is the end of the matter." *Id.* at 1874-75.

Here, Congress did not express the intent to deprive residents of states with federally-facilitated Exchanges of federal premium tax credits. There are no credible indications based on accepted canons of statutory construction that Congress intended such a result. In fact, if anything, the statute's text, structure, purpose and legislative history clearly establish the opposite. And certainly, at minimum, a permissible reading of the Act is that participants in any of the Exchanges may be eligible for these tax credits.

B. The Plaintiffs' Textual Argument Ignores Settled Principles of Statutory Construction

The plaintiffs argue that 26 U.S.C. § 36B conditions a taxpayer's eligibility for federal premium tax credits on whether his or her state's government has created a state-operated Exchange. In their view, residents of states with federally-facilitated Exchanges are ineligible for these federal tax credits. They premise their theory on an isolated reading of a phrase in 26 U.S.C. § 36B(b)(2)(A), which limits the amount of the credit to no more than the amount of premiums for a qualified health plan in which the taxpayer (or a spouse or dependent) is "enrolled in through an Exchange established by the State under [42 U.S.C. § 18031, *i.e.*, Section] 1311 of the Patient Protection and Affordable Care Act." 26 U.S.C. § 36B(b)(2)(A);

see also 26 U.S.C. § 36B(c)(2)(A). Because the federal government will operate the Exchange in the states where they reside, the plaintiffs reason, they will not enroll in a plan on an "Exchange established by the State," and the amount of their credit under the Section 36B(b)(2)(A) formula must be zero.

But "[c]ourts have a duty to construe statutes, not isolated provisions." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (internal quotation omitted). Thus, "[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004) (internal quotation omitted). "Statutory ambiguity is a creature not just of definitional possibilities but also of statutory context. [The] meaning – *or ambiguity* – of certain words or phrases may only become evident when placed in context." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 98-99 (2007) (emphasis in original; internal quotations omitted). The court also must consider the statute's "history and purpose" in determining whether Congress has clearly expressed its intent for purposes of the *Chevron* test. *See id.* at 93.

The plaintiffs err by ignoring these principles of statutory construction. As elaborated below, the text of Section 36B, when read in full and in conjunction with the Act's other provisions, makes clear that federal premium tax credits are available both in state-operated Exchanges and in federally-facilitated Exchanges. At the very least, a contrary reading is not compelled by the plain language of the Act, and the Treasury Department has reasonably interpreted Section 36B in a manner consistent with Congress's intent to make affordable health coverage available on a nationwide basis. In either case, the plaintiffs' challenge to the Treasury regulation fails under *Chevron.*

C. Section 36B, When Read Together with 42 U.S.C. §§ 18031 and 18041, Provides that Participants in Federally-Facilitated Exchanges May Be Eligible for Federal Premium Tax Credits

Section 36B(b)(2)(A) expressly refers to 42 U.S.C. § 18031, which declares that "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an 'Exchange') for the State" that meets certain statutory requirements. 42 U.S.C. § 18031(b)(1). *See also* 42 U.S.C. § 18031(d)(1) ("An Exchange shall be a governmental agency or nonprofit entity that is established by a State."). Despite this use of the term "shall," however, the Act does not impose any sanction if a state elects not to establish an Exchange that complies with federal standards. Instead, the Act directs that, if a state will "not have any required Exchange operational by January 1, 2014, … the Secretary shall (directly or through agreement with a not-for-profit entity) establish and operate *such Exchange* within the State[.]" 42 U.S.C. § 18041(c)(1) (emphasis added). This language demonstrates that Congress intended the federally-facilitated Exchange to constitute the "required Exchange," that is, the Exchange that the state was directed to establish under Section 18031. In other words, the federal government would stand in the shoes of the state when operating "such Exchange."

The plaintiffs have disputed this point, arguing in prior briefing that "[i]f an entity is 'stepping into the shoes' of another entity, they are necessarily separate." Not so. Congress's use of the phrase "such Exchange" *does not* mean that the federally-facilitated Exchange and the state-sponsored Exchange are "necessarily separate." The phrase means, instead, that the federally-facilitated Exchange is the *same entity* as the earlier-referenced Exchange, that is, the Exchange contemplated under 42 U.S.C. § 18031. *See* Black's Law Dictionary 1570 (9th ed. 2009) ("such" means "[t]hat or those; having just been mentioned"); *see also* Webster's Third New International Dictionary 2283 (1961) ("something previously characterized or specified");

Random House Dictionary of the English Language 1899 (2d ed. 1987) ("being the person or thing or the persons or things indicated"); 2 New Shorter Oxford English Dictionary 3129 (4th ed. 1993) ("the person(s) or thing(s) specified or implied contextually; *spec.* the aforesaid thing or things; it, they, them; that, those").

"Read in context," then, the federally-facilitated Exchange "*must be the same* ['Exchange'] mentioned at the beginning of [the provision] …. Indeed, because there are no other ['Exchanges'] mentioned in the section, there is no other antecedent to which the word 'such' could refer." *Miller v. Clinton*, 687 F.3d 1332, 1344 (D.C. Cir. 2012) (emphasis added). Indeed, Congress frequently uses the term "such" to show that a person or thing is the same entity as the person or thing that it had described before. *See, e.g.*, *Gatlin Oil Co. v. United States*, 169 F.3d 207, 210-11 (4th Cir. 1999) (agency's treatment of the term "such incident" to mean the same incident previously mentioned in statutory text "is permissible because it is grammatically correct and it accommodates the purpose of the Act"); *United States v. Joseph*, 716 F.3d 1273, 1278 (9th Cir. 2013) ("'such' means 'the specific'"); *Alliance 3PL Corp. v. New Prime, Inc.*, 614 F.3d 703, 707 (7th Cir. 2010) ("such" is "legalese for the proposition that 'this use of the word "traffic" refers to the same "traffic" that this clause already mentioned'").

If there were any doubt on this score, the ACA's definitional provisions would resolve that doubt. For each use of the term "Exchange" in Title I of the ACA (which includes 42 U.S.C. § 18041), that term "means an American Health Benefit Exchange established under [42 U.S.C. § 18031]." 42 U.S.C. § 300gg-91(d)(21) (defining term for purpose of Public Health Services Act); *see* 42 U.S.C § 18111 (incorporating this definition for Title I of ACA). Thus, in light of the fact that "Exchange" is a defined term of art in the ACA, Section 18041(c)(1) reads, "the Secretary shall … establish and operate such [American Health Benefit Exchange

established under 42 U.S.C. § 18031]." 42 U.S.C. § 18041(c)(1). The Exchange established by the federal government, then, *is* the Section 18031 Exchange.

The plaintiffs' contrary reading fails to give effect to the ACA's definitional provisions. Moreover, their reading fails to give effect to Section 18031's instruction that each state is to establish an Exchange, or to Section 18041's use of the term "such Exchange" to refer to the state-established Exchange in Section 18031. That reading, accordingly, should be rejected. *See Joseph*, 716 F.3d at 1278 (rejecting interpretation that would render the term "such" superfluous).[12]

Further confirmation is provided within 26 U.S.C. § 36B itself. That provision directs "[e]ach Exchange (or any person carrying out 1 or more responsibilities of an Exchange under [42 U.S.C. § 18031(f)(3) *or 42 U.S.C. § 18041(c)*])" to provide certain information to the Treasury and to taxpayers, including "[t]he aggregate amount of any advance payment" of tax credits or cost-sharing reductions that the taxpayer receives under the ACA, "[a]ny information provided to the Exchange, including any change of circumstances, necessary to determine eligibility for, and the amount of, such credit," and "[i]nformation necessary to determine whether a taxpayer has received excess advance payments" of the credit. 26 U.S.C. § 36B(f)(3) (emphasis added).[13] This provision's cross-reference to 42 U.S.C. § 18041(c) makes clear that

[12] The plaintiffs rely entirely on the canon against surplusage. They contend that an isolated reading of Section 36B(b)(2)(A) is needed to give effect to the provision's use of the phrase "established by a State under [42 U.S.C. § 18031]." Mot. for S.J. (ECF 17) at 14. But, as the Supreme Court has noted with considerable understatement, "instances of surplusage are not unknown" in federal statutes. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006). In any event, "the canon against surplusage assists only where a competing interpretation gives effect to every clause and word of a statute." *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) (internal quotation omitted). The plaintiffs do not offer such an interpretation, so the canon does not help their argument here. *See also* note 15, *infra*.

[13] 42 U.S.C. § 18031(f)(3), referenced in the text quoted above, permits a state-based Exchange

Congress used the term "Exchange" to include the Exchange operated by the federal government under that provision, and that it intended that taxpayers would receive federal tax credits and cost-sharing reductions when purchasing insurance on that Exchange.

Under the plaintiffs' reading, by contrast, Section 36B(f)(3) would direct the federally-facilitated Exchange to perform an empty act; the "amount of such credit," and "the aggregate amount of any advance payment" of such credit to be reported would necessarily always be zero. It is not plausible that Congress meant for the federally-facilitated Exchange to report information that it thought would not exist. "That plaintiffs interpret [Section 36B(f)(3)] to be an empty gesture is yet another indication that their submission is erroneous." *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 878 (D.C. Cir. 2006). *See also Henderson v. United States*, 133 S. Ct. 1121, 1131 (2013) (Scalia, J., dissenting) ("A rudimentary principle of textual interpretation … is that if one interpretation of an ambiguous provision causes it to serve a purpose consistent with the entire text, and the other interpretation renders it pointless, the former prevails.").

The plaintiffs' reading of the text of the Affordable Care Act, then fails to account for the language in Section 18031, Section 18041, and Section 36B itself that clarifies that the federal government stands in the shoes of the state in operating the Exchange where the state has not done so. The plaintiffs' theory, moreover, runs afoul of the canon of construction that assumes that "Congress when it enacts a statute is not making the application of the federal act dependent on state law," in the absence of "plain language" showing that intent. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (internal quotation omitted). The courts

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to contract with an outside entity to perform one or more of the Exchange's responsibilities. Similarly, 42 U.S.C. § 18041(c) permits the Secretary of HHS to enter into an agreement with a non-profit entity to operate a federally-facilitated Exchange.

presume that "federal statutes are generally intended to have uniform nationwide application," *id.*, so as to avert "the danger that the federal program would be impaired if state law were to control," *id.* at 44 (quoting *Jerome v. United States*, 318 U.S. 101, 104 (1943)). This principle applies with special force to federal taxation statutes such as Section 36B. "[T]he revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application." *United States v. Irvine*, 511 U.S. 224, 238 (1994) (quoting *United States v. Pelzer*, 312 U.S. 399, 402-03 (1941)). Thus, "[s]tate law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law." *Burnet v. Harmel*, 287 U.S. 103, 110 (1932).

In sum, Section 36B must be read in its entirety, and also in conjunction with the provisions of the ACA describing the Exchange, 42 U.S.C. §§ 18031 and 18041. When these provisions are read together and as a whole, they make plain that Congress envisioned the federally-facilitated Exchange to be the same entity as the state-operated Exchange, and that it intended Section 36B "to establish a nationwide scheme of taxation uniform in its application," *Irvine*, 511 U.S. at 238 (internal quotation omitted), in which participants in any Exchange in any of the states could be eligible to receive federal premium tax credits. Because the intent of Congress is clear, "applying the ordinary tools of statutory construction," the Treasury Department's interpretation should be upheld under *Chevron* step one. *City of Arlington*, 133 S. Ct. at 1868. At a minimum, Treasury has offered a reasonable reading, which is owed deference under *Chevron*'s second step.

D. The Larger Structure of the Act Confirms that Participants in Federally-Facilitated Exchanges May Be Eligible for Federal Premium Tax Credits

The larger structure of the ACA confirms this result. The Supreme Court has repeatedly

stressed that "an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning." *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013). In other words, "statutory construction is a holistic endeavor," and "a provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563 (2013) (internal quotation and alteration omitted). In this case, the statutory scheme confirms that Congress intended that the federally-facilitated Exchange would constitute the state-operated Exchange, and that participants in either version of the Exchange would be eligible for premium tax credits. The plaintiffs' contrary reading would upset the framework of the ACA in a number of ways.

1. Under the Plaintiffs' Reading of the Act, Nobody Would Be Eligible to Buy Insurance on the Federally-Facilitated Exchanges, a Result that Congress Could Not Have Intended

Under the plaintiffs' theory, nobody could meet the standard for eligibility to buy insurance offered on the federally-facilitated Exchange. The ACA provides that "[a] qualified individual may enroll in any qualified health plan available to such individual and for which such individual is eligible." 42 U.S.C. § 18032(a)(1). The statute defines a "qualified individual" as an individual "who resides in the State that established the Exchange." 42 U.S.C. § 18032(f)(1)(A)(ii).[14] Under the plaintiffs' reading, then, nobody would be a "qualified individual" in a state with a federally-facilitated Exchange. Obviously, Congress did not intend this result. It designed the Exchange, after all, to serve "as an organized and transparent marketplace for the purchase of health insurance." H.R. REP. NO. 111-443, pt. II, at 976. Congress certainly would not have gone to the trouble of creating a federally-facilitated

[14] *See also* 42 U.S.C. § 18032(f)(1)(B) (incarcerated persons excluded from definition of "qualified individual"), (f)(3) (aliens not lawfully present in the United States are excluded from definition of "qualified individual").

Exchange that could serve only as a Potemkin marketplace.[15] "[C]ourts presume that Congress has used its scarce legislative time to enact statutes that have some legal consequence." *Fund for Animals*, 472 F.3d at 877; *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995) (interpretation that would leave a statutory provision "utterly without effect" is "a result to be avoided if possible").

The plaintiffs have offered three arguments in response, none of which is persuasive. First, they have argued that 42 U.S.C. § 18032 does not contain precisely the same language as the language that appears in Section 36B. ECF 39 at 15. But it is not readily apparent what distinction the plaintiffs mean to draw between the phrase "the State that established the Exchange," 42 U.S.C. § 18032(f)(1)(A)(ii), and the phrase "an Exchange established by the State," 26 U.S.C. § 36B(b)(2)(A). Both phrases, quite obviously, refer to the same concept. *See Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("[s]tatutory provisions *in pari materia* normally are construed together to discern their meaning").[16]

Second, the plaintiffs have argued that no person would be eligible to buy insurance on the federally-facilitated Exchange even under the defendants' interpretation. ECF 39 at 16. This is plainly wrong. As discussed above, the defendants read the Act to provide that a state is considered to have established an Exchange under 42 U.S.C. § 18031, and that if a state does not

[15] It would follow, moreover, that the language in Section 36B that the plaintiffs rely upon is surplusage, even under their theory. If residents of a state with a federally-facilitated Exchange could not enroll in coverage through that Exchange, they could not obtain tax credits for that coverage, and there would be no need to specify also that they must enroll in a plan on an Exchange "established by the State under [42 U.S.C. § 18031]." An interpretation that compounds, rather than resolves, any surplusages in the Act is not compelled by the Act's plain language. *See* note 12, *supra*.

[16] The definition of "qualified individual" appears in the section immediately following 42 U.S.C. § 18031, in the same title, subtitle, and part of the ACA as the provision that directs that "[e]ach State shall … establish an American Health Benefit Exchange (referred to in this title as an 'Exchange') for the State," 42 U.S.C. § 18031(b)(1).

take the steps necessary to bring the "required" Exchange into operation, 42 U.S.C. § 18041(c)(1), HHS will stand in the shoes of the state to perform those steps. Thus, residents of a state with a federally-facilitated Exchange "reside[] in the State that established the Exchange"; those persons may buy insurance on the Exchange; and the Exchange would then function as a marketplace, as Congress obviously intended. In contrast, under the plaintiffs' reading, nobody could buy insurance on the federally-facilitated Exchange, a result that Congress could not possibly have intended.

Third, the plaintiffs have argued that the definition of a "qualified individual" applies only where states operate their own Exchange. ECF 39 at 16. They reason that Section 18032 defines eligibility "with respect to an Exchange," and they read the term "Exchange" to refer only to state-operated Exchanges. This argument fails, too. As discussed above, the term "Exchange" in Section 18032 has the same meaning as it does in the phrase "the Secretary shall … establish and operate such Exchange," 42 U.S.C. § 18041(c)(1).[17] The term thus refers both to state-operated and federally-facilitated Exchanges, as the plaintiff themselves have explicitly argued. ECF 39 at 9, 17.[18]

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[17] Indeed, if the plaintiffs were now to deny that the term "Exchange" refers both to state-operated and federally-facilitated Exchanges, their theory would create numerous additional anomalies in the Act. In particular, their theory would upset Congress's compromise regarding coverage for abortions by plans on the Exchanges. The ACA provides that "[a] State may elect to prohibit abortion coverage in qualified health plans offered through an Exchange in such State if such State enacts a law to provide for such prohibition." 42 U.S.C. § 18023(a)(1). If the plaintiffs read the term "Exchange" to refer only to state-operated Exchanges, contrary to 42 U.S.C. § 18041(c)(1), then this authorization would not apply in states with a federally-facilitated Exchange. *See Powerex Corp*., 551 U.S. at 232 ("identical words and phrases within the same statute should normally be given the same meaning"). It is highly doubtful that Congress meant to implicitly exempt federally-facilitated Exchanges on this issue.

[18] In any event, even if the term "Exchange" could be limited as the plaintiffs now (inconsistently) suggest, this would not resolve the dilemma posed by their reading. Under their theory, no statutory definition of qualified individual would apply for the

In sum, Congress plainly intended that all of the Exchanges would operate as marketplaces for the sale and purchase of health insurance, no matter which entity operates the Exchange. Under the plaintiffs' theory, no persons could buy insurance on the federally-facilitated Exchange (and, thus, no insurer would bother to try to sell insurance on that Exchange). Because Congress could not have intended to create a federally-facilitated Exchange that would be completely inoperative, the plaintiffs' reading should be rejected.

2. The Plaintiffs' Reading Would Create Numerous Additional Anomalies that Are Inconsistent with the Basic Statutory Scheme of the ACA

Other provisions in the Affordable Care Act provide further proof that Congress intended the federally-facilitated Exchange to be the same entity as the state-operated Exchange. *First*, the plaintiffs' theory would undermine the ACA's process for state innovation waivers. The ACA enacts a procedure for a state to seek a waiver from some of the Act's provisions. 42 U.S.C. § 18052. Beginning in 2017, if a state has enacted legislation that provides coverage that is "at least as comprehensive," "at least as affordable," and "that reaches at least a comparable number of its residents" as does the coverage provided for under the ACA, and if that legislation would not increase the federal deficit, that state may seek a waiver of certain provisions of the Act. 42 U.S.C. § 18052(a), (b)(1). In particular, the state could seek to opt out of provisions relating to Exchanges, the distribution of premium tax credits and cost-sharing subsidies, and the large employer tax provision (26 U.S.C. § 4980H) and the minimum coverage provision (26 U.S.C. § 5000A). *Id.* The amount of any forgone premium tax credits would then be distributed directly to the state to administer its alternative plan. 42 U.S.C. § 18052(a)(3).

This waiver procedure would be an empty formality if, as the plaintiffs would have it, a

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federally-facilitated Exchanges. It is not plausible that Congress intended this result.

state already had the power to prevent the application of central features of the ACA within its borders, simply by declining to establish its own Exchange. Congress intended a state to be eligible for a waiver only after first enacting an alternative system to provide equally comprehensive and affordable health coverage. Congress certainly did not intend, then, that simply by declining to operate an Exchange, a state could effectively obtain a waiver from providing a functioning and affordable health care system in that state.[19]

Second, under the plaintiffs' theory, the federally-facilitated Exchange would not be able to perform a number of the functions that Congress charged it with (if it could operate at all, in the absence of qualified individuals eligible to buy insurance on the Exchange, *see supra*). The ACA sets forth a number of responsibilities that Exchanges must fulfill, and a number of those functions would be meaningless under the plaintiffs' reading. Under 42 U.S.C. § 18031(d)(4)(G), for example, the Exchange is required to make available an electronic calculator for purchasers to compare the cost of different coverage options, after the application of federal premium tax credits and cost-sharing subsidies. If the plaintiffs' theory were correct, this calculator could only perform a meaningless computation for purchasers in states with a federally-facilitated Exchange. Under 42 U.S.C. § 18031(d)(4)(I), the Exchange is also required to send information to the IRS concerning individuals who are determined to be eligible for federal premium tax credits. If the plaintiffs' theory were correct, the federally-facilitated Exchange would be required to send blank pieces of paper to the Treasury under this provision. And under 42 U.S.C. § 18083, the Exchange is required to use a "single, streamlined form" that facilitates applicants to qualify for "health subsidy programs," which the statute expressly

[19] Under the plaintiffs' theory, moreover, for a state that had not established its own Exchange, the amount of funding under Section 18052's provision for the redirection of Section 36B funds would always be zero. There is no reason to believe that Congress intended such a result.

defines to include Section 36B tax credits. 42 U.S.C. § 18083(b)(1), (e)(1). If the plaintiffs' theory were correct, applicants in states with a federally-facilitated Exchange would fill out paperwork for financial assistance that they could never qualify for. It is not plausible to claim that Congress intended any of these results. Rather, a straightforward reading of these provisions makes clear that federal tax credits are to be available to participants on any Exchange, including an Exchange operated by the federal government.

Third, the plaintiffs' reading would create an unanticipated obligation for states in the operation of their Medicaid plans. The ACA expands the scope of eligibility for the Medicaid program, beginning January 1, 2014. *E.g.*, 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).[20] As a bridge until that date, the ACA provides, as a condition of continued federal funding, that participating states shall maintain their then-existing eligibility standards, until the effective date of the ACA's Medicaid eligibility expansion provisions. In particular, this "maintenance of effort" provision directs states, as a condition for the receipt of federal Medicaid funds, not to impose any "eligibility standards, methodologies, or procedures" under their Medicaid state plan, or any applicable waiver, that are "more restrictive" than the standards that the state had in place as of the date the ACA was enacted. 42 U.S.C. § 1396a(gg)(1). This condition applies until "the date on which the Secretary determines that an Exchange established by the State under [42 U.S.C. § 18031] is fully operational." *Id.* As the plaintiffs acknowledge, ECF 39 at 14, under their theory, a state with a federally-facilitated Exchange would *never* be relieved of this maintenance-of-effort requirement.[21] It is not plausible that Congress intended this result; if it

[20] The Supreme Court has held that HHS may not withdraw existing Medicaid funds for a state's failure to comply with this eligibility expansion provision. *NFIB*, 132 S. Ct. at 2607 (plurality opinion).

[21] The plaintiffs candidly note "[p]rospectively" that they anticipate a constitutional challenge to

had so intended, it certainly would have stated so more directly. *See Arlington Central Sch. Dist. v. Murphy*, 548 U.S. 291, 296 (2006).[22]

In sum, the "statutory scheme," *Adoptive Couple*, 133 S. Ct. at 2563, confirms further that Congress intended the federally-facilitated Exchange and the state-operated Exchange to be the same entity, and that federal premium tax credits would be available under either version of the Exchange. The plaintiffs' contrary theory is fundamentally inconsistent with the intended operation of the Exchanges and with numerous other features of the Act. Treasury's interpretation avoids the incongruities that the plaintiffs' reading would create. That interpretation is the better reading of the Act, and it is certainly, at minimum, a permissible one.

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this maintenance-of-effort provision if the Court adopts their reading of the Act. ECF 39 at 14. Ordinarily, however, litigants ask courts to interpret statutes to resolve constitutional doubts, not to create new ones. *E.g.*, *Clark v. Martinez*, 543 U.S. 371, 385 (2005).

[22] This list of anomalies in the plaintiffs' theory is far from exhaustive. Other examples abound. *See, e.g.*, 26 U.S.C. § 125(f)(3) (effective 2014) (exclusion from employee's gross income for benefits offered in a cafeteria plan would apply for plans offered on a federally-facilitated Exchange, but not on a state-operated Exchange); 42 U.S.C. § 1320b-23(a)(2) (pharmacy benefits managers would provide certain pricing information to HHS if the plan is offered on a state-operated Exchange, but not on a federally-facilitated Exchange); 42 U.S.C. § 1396w-3(b)(1)(D) (federally-facilitated Exchange would not be subject to provisions concerning coordination of Medicaid and CHIP benefits); 42 U.S.C. § 1397ee(d)(3)(B) (federally-facilitated Exchange would not be obligated to enroll children in CHIP program in the Exchange, as states would in certain circumstances); 42 U.S.C. § 1397ee(d)(3)(C) (*"[w]ith respect to each State,"* HHS must review and certify whether qualified health plans offer benefits for children that are at least comparable to those offered in the state's CHIP plan, but this review extends only to plans "offered through an Exchange established by the State under [42 U.S.C. § 18031]"; thus, HHS could not fulfill this obligation in "each State" with a federally-facilitated Exchange) (emphasis added); 42 U.S.C. § 18054(c)(3)(A) (individual enrolled in a multi-state health plan in a federally-facilitated Exchange would not be eligible for premium tax credit, contrary to statutory direction that such individual "shall be eligible for credits under section 36B of Title 26 … in the same manner as an individual who is enrolled in a qualified health plan"); 42 U.S.C. § 18081(a) (directing HHS to create program to collect information needed to determine an applicant's eligibility for federal premium tax credits, without including state of residence among relevant factors).

E. The Purpose of the Affordable Care Act Confirms that Participants in Federally-Facilitated Exchanges May Be Eligible for Federal Premium Tax Credits

The plaintiffs fundamentally err by suggesting a reading of the ACA that would undermine Congress's basic goals in passing that legislation. Their theory is in tension with the principle that a law must be interpreted in light of its "object and policy": "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Maracich v. Spears*, 133 S. Ct. at 2203 (internal quotation omitted). In other words, in evaluating the plaintiffs' theory, the court must guard against "the danger that the federal program would be impaired if state law were to control," and thus must "look to the purpose of the statute to ascertain what is intended." *Mississippi Band of Choctaw Indians*, 490 U.S. at 44 (internal quotation omitted).

When it enacted the ACA, Congress "'intended to solve a national problem on a national scale.'" *Id.* (quoting *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 123 (1944)). Congress's basic goal in enacting Section 36B was "[t]o ensure that health coverage is affordable," and "to help offset the cost of private health insurance premiums." S. REP. NO. 111-89, at 4 (2009) (Exhibit 9); *see also* H.R. REP. NO. 111-443, vol. II, at 977. Indeed, Congress recognized that the Section 36B tax credits "are *key* to ensuring people affordable health coverage." H.R. REP. NO. 111-443, vol. I, at 250 (emphasis added). Congress's goal would be undermined if the plaintiffs were to prevail here; many individuals would find it difficult (if not impossible) to obtain affordable health coverage if they were to be deprived of tax credits worth, on average, more than $5,000 annually.[23] But the effects would be even broader. A substantial adverse selection effect would arise, because healthier individuals would lose a powerful incentive to

[23] *See* CBO, *May 2013 Baseline*, at tbl. 1 (estimating that federal premium tax credits will average $5,290 per person in 2014, rising to $7,900 in 2023).

purchase coverage. According to the calculations of one health care economist, without the minimum coverage provision and subsidized insurance coverage, premiums for single individuals would be *double* the amount anticipated under the ACA.[24] The result would be "essentially no increase" in the number of persons enrolled in individual coverage. *Id.*

Indeed, Congress heard testimony that this adverse selection effect would undermine the ability of the Exchanges to offer affordable coverage. As CBO put the issue, "[i]f no subsidies were provided, the total premiums charged to nonfederal enrollees would probably be much higher than those observed in the program today – so the number of new enrollees would probably be limited." CBO, *Expanding Health Insurance Coverage and Controlling Costs for Health Care: Testimony Before the S. Comm. on the Budget*, at 19 (Feb. 10, 2009) (written testimony of Douglas W. Elmendof, Director, CBO) (Exhibit 11) (discussing proposal to allow uninsured persons to enroll in federal employees' plans without subsidies).[25]

As Representative Andrews put it the day before the House voted to enact the ACA:

> [W]e've heard almost universally across the House that people say they want to avoid discrimination based on pre-existing conditions. It's hard to find a member who says he or she is not for that. In order to accomplish that and not spike premiums for insured people, you have to have a larger pool of people that are covered eventually. … [P]eople say, well, why do you have to have the subsidies? Well, to get people into this marketplace, if somebody's making $25,000, $35,000, $40,000 a year, you can have all the marketplace you want, but they can't buy in without the subsidies. … [T]his easy answer, which is so glibly stated by people, 'Let's just take care of the pre-existing condition problem,' it doesn't fit together if you don't take the next step and the next step

[24] *See* Jonathan Gruber, *Health Care Reform Is a "Three-Legged Stool": The Costs of Partially Repealing the Affordable Care Act* at 5 (Center for American Progress Aug. 2010) (Exhibit 10) (analyzing effect of proposed repeal of minimum coverage provision, and additional effect of repeal of subsidy provisions as well).

[25] *See also Health Reform in the 21st Century: Insurance Market Reforms: Hearing Before the H. Comm. on Ways and Means*, 111th Cong. 13 (Apr. 22, 2009) (statement of Uwe Reinhardt, Prof. of Econ., Princeton Univ.) (Exhibit 12) (noting importance of "adequate public subsidies" to achievement of Congress's purposes in health reform legislation); *id*. at 50 (statement of Linda Blumberg, Principal Res. Assoc., Urban Inst.) (same).

and the next step and make it work."

H.R. 4872, the Reconciliation Act of 2010: Hearing Before the H. Comm. on Rules 71 (Mar. 20, 2010) (Exhibit 13).

Indeed, plaintiff David Klemencic himself once agreed with this point. Klemencic was one of the petitioners before the Supreme Court in the *NFIB* litigation. *See* 132 S. Ct. 1133 (2012) (mem.). As he put the issue in his brief to the Supreme Court only last year, he believed that, "[w]ithout the subsidies driving demand within the exchanges, insurance companies would have absolutely no reason to offer their products through exchanges …. [T]he insurance exchanges cannot operate *as intended by Congress* absent [the Section 36B tax credits and additional provisions]." Brief for Private Petitioners on Severability at 51-52, *Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566 (2012) (Nos. 11-393 & 11-400), 2012 WL 72440 at *51-*52 (Exhibit 14) (emphasis added). Yet Klemencic now asserts that Congress had the opposite intent when it enacted Section 36B.

F. The Legislative History of the Act Confirms that Participants in Federally-Facilitated Exchanges May Be Eligible for Federal Premium Tax Credits

If Congress had intended to penalize states for a failure to establish an Exchange by depriving those states' citizens of federal premium tax credits, Congress would have explained those terms clearly and directly at the time that the Act was passed. *See Arlington Cent. Sch. Dist.*, 548 U.S. at 296 ("we must ask whether the [Act] furnishes clear notice" of the conditions that Congress allegedly created); *see also Mississippi Band of Choctaw Indians*, 490 U.S. at 43 (plain language required before Congress will be presumed to intend federal law to turn on state action). Indeed, such a dramatic condition on the availability of federal premium tax credits would have been a central feature of Congress's reform effort. But there is not a word in the

legislative history that anybody in Congress contemplated such a result. "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991); *see also Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 63 (2004).

Instead, the legislative history consistently points to the conclusion that Congress meant premium tax credits to be available in every state, consistent with Treasury's rule. *First*, the House passed a bill that explicitly so provided. Its bill created a federal Exchange that would operate as the default Exchange, unless a state received a waiver to operate its own Exchange. H.R. 3962, 111th Cong., §§ 301, 308 (2009) (Exhibit 15). The bill provided for tax credits for participants in any of the Exchanges. *Id.*, §§ 308(b)(1)(A)(iv), 341(a). If the Senate-passed bill had changed this scheme to provide for tax credits in some states but not others, one would expect House members to have noticed this change. There is no indication, however, that any member of Congress believed that the two bills differed on this issue. Instead, the House recognized that, under the ACA, "[f[or states that choose not to operate their own Exchange, there will be a multi-state Exchange run by the Department of Health and Human Services," and the Exchanges would "provide[] premium tax credits to limit the amount individuals and families up to 400% poverty spend on health insurance premiums." House Committees on Ways and Means, Energy and Commerce, and Education and Labor, *Health Insurance Reform at a Glance: The Health Insurance Exchanges* at 1-2 (Mar. 20, 2010) (Exhibit 16).

Moreover, the House paid careful attention to the amount of federal premium tax credits that would be available under the ACA. As a condition to the enactment of the ACA, the Senate accepted the House's amendments to Section 36B in contemporaneously-enacted legislation, the Health Care and Education Reconciliation Act of 2010 (HCERA), Pub. L. No. 111-152, 124 Stat. 1029. HCERA adjusted the income formula for the calculation of federal

premium tax credits, establishing credits in the amounts that the House had initially provided for but that had been reduced in the Senate's version of the legislation. *Id.*, § 1001(a), 124 Stat. at 1030-31. It is doubtful that the House would have paid such close attention to the *amount* of federal premium tax credits, while at the same time silently acceding to legislation that foreclosed federal premium tax credits *entirely* in some states.

Second, although the language that became 26 U.S.C. § 36B was developed in the Senate Finance Committee, that Committee did not at any time express any intent to condition the availability of federal premium tax credits on the existence of a state-operated Exchange. To the contrary, to the extent that the issue arose at all, the Finance Committee expressed its understanding that the federally-facilitated Exchange would be the *same entity* as the state-operated Exchange. Its bill provided that, if a state did not establish an operational Exchange (in the bill's parlance, an "interim exchange") within the time contemplated in the bill, then "*the Secretary* would be required to contract with a nongovernmental entity to establish *state exchanges* during this interim period." S. REP. NO. 111-89, at 19 (emphasis added). The committee would not have used such language in its report if it had believed the Secretary-established Exchange was a different entity from the "state exchange."

Third, the Congressional Budget Office's ("CBO") cost analyses provide further proof that Congress understood that the federal premium tax credits would apply nationwide. CBO played a central role in Congress's deliberations on the ACA. CBO, along with the Joint Committee on Taxation ("JCT"), prepared analyses that estimated the cost of premiums in the Exchanges and the numbers of individuals who would enroll in plans on the Exchanges; these analyses assumed that tax credits would be available in every state. *See, e.g.*, CBO, *Analysis of*

Health Insurance Premiums, at 6-7.[26] Congress relied heavily on these estimates in debating the merits of the ACA; indeed, the Act itself recites that Congress adopted CBO's findings. Pub. L. No. 111-148, § 1563(a), 124 Stat. 119, 270-71 (2010). There is no indication anywhere in the legislative record that any member of Congress took issue with CBO's assumption that tax credits would be available nationwide. *See* 155 Cong. Rec. S12,764 (Dec. 9, 2009) (Sen. Baucus) (Exhibit 18) (discussing CBO's finding that most participants in "the exchange" would receive premium tax credits, reducing their overall costs); 155 Cong. Rec. S13,559 (Dec. 20, 2009) (Sen. Durbin) (Exhibit 19) (describing comprehensive availability of tax credits).

To the contrary, members of Congress consistently affirmed that tax credits would be available in every state. Senator Landrieu quoted a poll question describing the ACA as legislation in which "[l]ower and middle income people would receive subsidies to help them afford" insurance bought on a "[n]ational [i]nsurance Exchange," and declared that description to be "very accurate." 155 Cong. Rec. S13,733 (Dec. 22, 2009) (Exhibit 20). Senator Johnson noted that the ACA would "form health insurance exchanges in every State" and would "provide tax credits to significantly reduce the cost of purchasing" coverage on the Exchanges. 155 Cong. Rec. S13,375 (Dec. 17, 2009) (Exhibit 21). Similarly, Senator Bingaman noted that the ACA would create "a new health insurance exchange in each State which will provide Americans … refundable tax credits to ensure that coverage is affordable." 155 Cong. Rec.

[26] *See also* Letter from Douglas W. Elmendorf, Director, CBO, to Rep. Darrell Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives at 1 (Dec. 6, 2012) (Exhibit 17) ("To the best of our recollection, the possibility that those subsidies would only be available in states that created their own exchanges did not arise during the discussions CBO staff had with a wide range of Congressional staff when the legislation was being considered. Nor was the issue raised during consideration of earlier versions of the legislation in 2009 and 2010, when CBO had anticipated, in its analyses, that the credits would be available in every state.").

S12,358 (Dec. 4, 2009) (Exhibit 22).[27]

Fourth, the JCT prepared a report on the ACA's tax provisions. That report further confirms that Congress intended federal premium tax credits to be available for the purchase of insurance on the federally-facilitated Exchange. The JCT stated that the Section 36B premium tax credit "subsidizes the purchase of certain health insurance plans through an exchange," without specifying that the entity that operates the exchange would be relevant in any way. JCT, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Care Act"* 12 (Mar. 21, 2010) (Exhibit 27). To be sure, a JCT report is prepared by committee staff, not legislators. But, because that staff is closely involved in the formulation of taxing provisions such as Section 36B, the courts have recognized that the JCT's reports are "highly indicative of what Congress did, in fact, intend." *Miller v. United States*, 65 F.3d 687, 690 (8th Cir. 1995) (internal quotation omitted). *See also Fed. Power Comm'n v. Memphis Light, Gas & Water Div.*, 411 U.S. 458, 472 (1973) (JCT report is a "compelling contemporary indication" of Congressional intent). If Congress had intended federal premium tax credits to be available only in states with state-operated Exchanges, the JCT report would have made note of that fact.

In sum, all of the legislative history points to the same conclusion: Congress intended

[27] Nor could these statements be explained away by asserting that Congress assumed that every state would establish an Exchange. It was well known that some states would not do so. *See* David D. Kirkpatrick, *Health Lobby Takes Fight to the States*, New York Times A1 (Dec. 28, 2009) (Exhibit 23) (describing numerous state proposals to "opt out" of health insurance marketplaces). *See also* 156 Cong. Rec. H2207 (Mar. 22, 2010) (Rep. Burgess) (Exhibit 24) (as many as 37 states "may not set up the State-based exchange"); 155 Cong. Rec. S12,543-S12,544 (Dec. 6, 2009) (Sen. Coburn) (Exhibit 25) (submitting letter from Oklahoma official stating that her state was unlikely to create an Exchange); Editorial, *Don't Trust States to Create Health Care Exchanges*, USA Today (Jan. 4, 2010) (Exhibit 26) (noting that "[s]ome state officials hostile to reform are already trying to block implementation," and would likely not create Exchanges).

that the federal premium tax credits would be available for the participants in every Exchange, as part of "a nationwide scheme of taxation uniform in its application," *Irvine*, 511 U.S. at 238. Nothing in the legislative history supports the plaintiffs' contrary theory. If Congress had intended such a dramatic result, surely some legislative history would so indicate. Some dog, somewhere, would have barked. That silence is a powerful indication that the plaintiffs' reading of the Act is incorrect.

G. The Plaintiffs' Assertion that Congress Had a Contrary Purpose is Not Plausible

Despite the foregoing, the plaintiffs assert that Congress had a completely different purpose in enacting Section 36B. They claim that, in order to encourage states to create their own Exchanges, Congress deliberately decided to condition individual taxpayers' eligibility for federal tax credits on whether or not that taxpayer's state government created an Exchange. This assertion is implausible. Congress, after all, did not set out to create Exchanges (whether state- or federally-operated) simply for the sake of creating Exchanges. It did so, instead, as part of a comprehensive scheme to expand the availability of affordable health coverage. *See* S. REP. NO. 111-89, at 9 ("The purpose of Title I would be to ensure that all Americans have access to affordable and essential health benefits coverage … by establishing State exchanges to provide greater access to and information about [qualified health plans and] by making health benefits coverage more affordable with premium credits and cost-sharing subsidies[.]"); H.R. REP. NO. 111-443, vol. II, at 989 (describing same purpose for the Exchange). There is simply no credible indication that Congress would have sacrificed the Affordable Care Act's central mechanism for providing affordable coverage, simply to give states the incentive to create their own Exchanges.

Congress did, of course, intend to provide for states to be given the first option whether

or not to operate an Exchange. That is why Congress enacted the statute that it did, presuming in the first instance that "[a]n Exchange shall be a governmental agency or nonprofit entity that is established by a State," 42 U.S.C. § 18031(d)(1), but directing the federal government to stand in the shoes of the state to create the Exchange if the state chose not to take the necessary action to do so, 42 U.S.C. § 18041(c)(1). Thus, as Senator Baucus put it, the ACA "fundamentally gives States the choice to participate in the exchanges themselves or, if they do not choose to do so, to allow the Federal Government to set up the exchanges." 155 Cong. Rec. S13,832 (Dec. 23, 2009) (Exhibit 28). It does not follow, however, that a Congress that sought to show that it was *solicitous* of state's interests in choosing whether or not to operate their own Exchanges would try to prove the point by *threatening* to deprive that state's residents of tax credits, amounting to billions of dollars annually, if the state did not comply.

It is noteworthy that Congress directed HHS to establish a federally-facilitated Exchange not only when the state *chooses* not to operate its own Exchange, 42 U.S.C. § 18041(c)(1)(A), but also when the state affirmatively wants to establish an Exchange but fails to meet relevant federal standards, 42 U.S.C. § 18041(c)(1)(B). It is inconceivable that Congress would have wanted to punish a state for such a regulatory lapse by denying its innocent residents the tax credits they need to afford health insurance.

Given the implausibility of the plaintiffs' theory, it is not surprising that there is absolutely *no* evidence that any member of Congress had the intent that the plaintiffs now ascribe to that body. In prior briefing, the plaintiffs have cited to two sources that they claimed would show Congress's intent to deprive participants in the federally-facilitated Exchange of premium tax credits. *See* ECF 39 at 19, 21. Neither source even remotely suggests this proposition. *See* Letter from Rep. Doggett, et al. (Jan. 11, 2010), available at

www.myharlingennews.com/?p=6426 (Exhibit 29); U.S. Senate, Committee on Finance, *Executive Committee Meeting to Consider Health Care Reform* at 325-327 (Sept. 23, 2009) (Exhibit 30).

If Congress had intended for the Section 36B tax credits to serve as an incentive to induce the states to set up their own Exchanges, Congress would have needed to explain clearly what the consequences for the states would be. *See Arlington Cent. Sch. Dist.*, 548 U.S. at 296 ("we must ask whether the [Act] furnishes clear notice" of the conditions that Congress allegedly created). For this and other reasons, as discussed above, the courts demand a clear statement of congressional intent before they will presume that Congress intended the application of federal law to depend on a state government's action. *Mississippi Band of Choctaw Indians*, 490 U.S. at 43; *see also Irvine*, 511 U.S. at 238-39.

In sum, when Congress enacted the ACA, it did not enact a statute that would be at war with itself. It did not enact comprehensive reform legislation for the purpose of expanding the availability of affordable health insurance, and at the same time hide a provision in the text that would undermine the possibility that that goal could be achieved. Congress did not intend to set up a mechanism for non-participating states that would create a lesser form of Exchange that Congress knew to be defective and would ultimately fail. The plaintiffs' reading of the ACA to allow for affordable health insurance in some states but not others is implausible. At the very least, it is not a reading that is compelled under *Chevron* Step One.

H. The Treasury Department Has Reasonably Interpreted Section 36B to Provide for Tax Credits for Participants in Federally-Facilitated Exchanges

It follows from the foregoing that 26 C.F.R. § 1.36B-1(k) "is based on a permissible construction of the statute" under *Chevron* Step Two. *City of Arlington*, 133 S. Ct. at 1868. When it promulgated the regulation, the Treasury Department explained that "[t]he statutory

language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a … Federally-facilitated Exchange," and that this conclusion was supported by the "relevant legislative history" as well as "the language, purpose, and structure of section 36B and the Affordable Care Act as a whole." 77 Fed. Reg. 30,377, 30,378 (May 23, 2012). Treasury, certainly, arrived at a permissible construction of the ACA. Given Congress's instruction in the ACA to treat the federally-facilitated Exchange and the state-operated Exchange as the same entity, and its instruction in Section 36B itself that the federally-facilitated Exchange is to assist in administering premium tax credits; the long list of anomalies that a contrary reading would create in the operation of the ACA's provisions; the absence of any legislative history that would support that contrary reading; and the Congressional purpose to expand the availability of affordable health coverage, the Treasury Department reasonably concluded that Section 36B premium tax credits are available for participants in federally-facilitated Exchanges. Summary judgment accordingly should be awarded to the defendants.

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

For the reasons explained above, the text of Section 36B, considered in its entirety and in conjunction with the remainder of the Affordable Care Act, shows that Congress intended that federal premium tax credits would be available on both state-operated and federally-facilitated Exchanges. The defendants pause, nonetheless, to address the stunning overbreadth of the relief that the plaintiffs have sought in their motion for summary judgment. Even if one or more plaintiffs before the Court could present a justiciable claim and then prevail on the merits, those prevailing plaintiffs would be entitled, at most, to relief to remedy their own alleged injuries. Under no circumstances would they be entitled to nationwide relief, especially where

such relief would seriously injure millions of individuals not before the Court.

The plaintiffs ask for a nationwide injunction that would prohibit the Treasury Department from administering Section 36B tax credits in any state with a federally-facilitated Exchange. No injunction should issue here, of any scope, even if the Court were to reject Treasury's construction of the Act. As an initial matter, the plaintiffs would not be entitled to an injunction even as to themselves. A party seeking a permanent injunction must meet the same four-part test that applies for preliminary injunctions. *See Monsanto Co. v. Geerston Seed Farms*, 130 S. Ct. 2743, 2756 (2010). The plaintiffs cannot meet that test. They would not suffer irreparable harm in the absence of an injunction, as this Court has held, given that they have alleged only economic harm. Transcript of Oral Ruling (ECF 46) at 46-47. The public interest and the balance of the equities also strongly weigh against injunctive relief, given the strong interest in avoiding interference with the Treasury Department's performance of its duties in administering the tax laws. *See* Defs.' Mem. in Opp. to Mot. for PI (ECF 38) at 29-31.

Even if one or more plaintiffs could obtain an injunction as to their own tax liability, they plainly would not be entitled to an injunction concerning anyone else, much less the broad injunction they seek that would preclude Treasury from applying its interpretation of Section 36B in *any* circumstance. No such injunction may issue. The APA preserves all of the ordinary principles of equity. *See* 5 U.S.C. § 702(1) ("Nothing herein affects … the power or duty of the court to … deny relief on any other appropriate legal or equitable ground[.]"). One such principle of equity is that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Monsanto Co.*, 130 S. Ct. at 2760 & n.5; *Neb. Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) ("[w]e

have long held that an injunction must be narrowly tailored to remedy the specific harm shown") (internal quotation omitted); *Lever Bros. Co. v. United States*, 981 F.2d 1330, 1338 (D.C. Cir. 1993). If any plaintiffs have standing here, then, and those plaintiffs prevail, the Court should tailor relief that addresses the circumstances of those plaintiffs alone.

The broad injunction that the plaintiffs seek would also run afoul of the principle that nonmutual collateral estoppel does not run against the United States. As the Supreme Court has explained, a contrary rule "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). The Court's approach on this issue "better allow[s] thorough development of legal doctrine by allowing litigation in multiple forums." *Id.* at 163.[28] The plaintiffs err by seeking relief that would circumvent this rule. *See Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001), *overruled in part on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 550 n.2 (4th Cir. 2012).

In addition, the relief that the plaintiffs seek would circumvent the procedures for class certification under Fed. R. Civ. P. 23. Absent class certification, "the usual rule [is] that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (internal quotation omitted); *see Monsanto Co.*, 130 S. Ct. at 2760. The plaintiffs overreach by asking the Court to treat this case in effect as a

[28] The D.C. Circuit has distinguished *Mendoza*, and has upheld a nationwide injunction that the district court found to be necessary to afford the plaintiff in that case (a national association) complete relief, reasoning that a "flood of duplicative litigation" would follow in this circuit on the issue presented there in the absence of a nationwide injunction. *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998). This case poses precisely the opposite concern. Numerous taxpayers, who could not be bound in this action but whose tax benefits would be cast into doubt by a ruling here that purports to adjudicate their claims, would bring a flood of litigation in *other* circuits seeking clarification that they enjoy the benefits owed to them under Section 36B.

one-way class action, without showing that they meet the Rule 23 standards for certification of a class. *See, e.g., Los Angeles Haven Hospice v. Sebelius*, 638 F.3d 644, 664-65 (9th Cir. 2011). It is obvious why the plaintiffs have not sought class certification, given that they seek relief that would plainly be harmful to the vast majority of potential class members. *See* Fed. R. Civ. P. 23(a)(3), (a)(4).

Moreover, this Court should not order equitable relief that purports to determine the tax circumstances of parties who are not present in this case. For the reasons discussed above, it is a well-established principle that one party may not challenge the tax liability of another. *See supra*, pp. 16-20. This Court should decline the plaintiffs' request to award relief that would run afoul of this principle, or that would afford the plaintiffs relief beyond that which they could obtain in a refund action, namely, an adjudication of their own tax circumstances only. Any broader relief would throw the process of tax administration into disarray. Any attempt to adjudicate (and to increase) the tax liabilities of parties not present here, as the plaintiffs request, would "seriously disrupt the entire revenue collection process." *Apache Bend Apartments*, 987 F.2d at 1177. This principle carries special force here, given that the plaintiffs have asserted an idiosyncratic objection to receiving tax credits, and they seek a nationwide injunction barring the provision of these tax credits to millions of Americans who need and want them. Principles of equity counsel instead in favor of maintaining the operation of a central feature of the Affordable Care Act that will enable millions of Americans to receive the substantial tax relief to which they are entitled under the statute.

Conclusion

For the foregoing reasons, the defendants' cross-motion for summary judgment should be granted, and the plaintiffs' motion for summary judgment should be denied.

Dated: November 12, 2013

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

THIRD DECLARATION OF DONALD B. MOULDS

I, Donald B. Moulds, declare as follows:

1. I am the Acting Assistant Secretary for Planning and Evaluation at the U.S. Department of Health and Human Services (HHS). I have held this position since August 2012. In this position, I am responsible for major activities in policy coordination, legislation development, strategic planning, policy research, evaluation, and economic analysis, including analysis of health insurance marketplace premiums. The statements made in this declaration are based on my personal knowledge, information contained in agency files, and information furnished to me in the course of my official duties. I have previously submitted two declarations in this matter.

2. I understand that, according to the August 5, 2013 declaration filed by plaintiff David Klemencic in the above-captioned matter, Mr. Klemencic resides in Cairo, West Virginia (zip code 26337), will be 54 years on January 1, 2014, is not married, and has no dependents. *See* August 5, 2013 Klemencic Decl., No. 24-1. I also understand from this declaration that Mr. Klemencic projects his modified gross income for 2014 to be $20,000. *See id.*

3. On September 27, 2013, I submitted a declaration in the above-captioned matter. *See* Moulds Decl., ECF 38-1. That declaration relied on data, current as of September 18, 2013, regarding health insurance marketplace premiums for 2014 of qualified health plans (QHPs or plans) in the 36 states in which HHS will operate the health insurance exchange in 2014 (in some cases, with support from the state). *Id.* These premium data were published in a publicly available databook, which has not been revised since September 18, 2013. *See* http://aspe.hhs.gov/health/reports/2013/MarketplacePremiums/datasheet_home.cfm. As noted in this databook and in my September 27, 2013 declaration, those premium data were "still under review" and remained subject to revision. *See id.*; Moulds Decl. ¶ 2. Using that tentative premium data and using the facts as set forth in paragraph 2 above, I reported that Mr. Klemencic would pay – before the application of premium tax credits – a monthly premium of $371.28 for the lowest-cost bronze qualified health plan (QHP). *See* Moulds Decl. ¶ 4. I also reported, using the premium data available at that time, that the second-lowest-cost silver QHP would cost Mr. Klemencic $438.44 per month, which, pursuant to 26 U.S.C. § 36B(b)(2), resulted in his eligibility for a premium tax credit of "at least $353.32 per month." *See id.* at ¶ 5. Accordingly, I reported that the lowest-cost bronze QHP "would cost Mr. Klemencic $17.96/month or less" after application of this premium tax credit. *See id.*

4. On October 18, 2013, I submitted a supplemental declaration in the above-captioned matter. *See* ECF 41. That declaration discussed the subsequent revision of the premium data. *See id.* at ¶ 3. Using then-current premium data and using the facts as set forth in paragraph 2 above, I reported that Mr. Klemencic would still pay – before the application of any premium tax credits – a monthly premium of $371.28 for the lowest-cost bronze QHP. *See id.* I also reported that because the monthly premium for the second-lowest-cost silver QHP increased to $463.81, Mr. Klemencic was in turn eligible for an increased premium tax credit of $378.69 under 26 U.S.C. § 36B(b)(2). *See id.* As a

result, I reported that after applying this revised premium tax credit ($378.69) to the monthly premium for the lowest-cost bronze QHP ($371.28), Mr. Klemencic would pay nothing ($0/month) for the lowest-cost bronze QHP in 2014. *See id.*

5. The amount of the premium tax credit for which Mr. Klemencic is eligible increased from what was reported in my September 27, 2013 declaration because the databook referenced in paragraph 3 had tentatively reported a second-lowest-cost silver plan amount in Mr. Klemencic's rating area that was too low, which in turn resulted in a premium tax credit that was too low. *See http://aspe.hhs.gov/health/reports/2013/MarketplacePremiums/longdesc/wv.cfm.* Specifically, in Mr. Klemencic's rating area, the two lowest cost silver plans are priced the same ($438.44/month), and the databook referenced in paragraph 3 used the monthly premium of one of those plans as the second-lowest-cost silver plan amount. This erroneously resulted in the use of the monthly premium amount of the *lowest* cost silver plan – not the monthly premium amount of the "second lowest cost silver plan" as provided by Section 36B(b)(2). In such situations, IRS policy is to treat the silver plan with the next lowest monthly premium as the "second lowest cost silver plan," which, in this case, is the silver plan with a monthly premium of $463.82. We have advised states operating a state-based Exchange of this same IRS policy in response to inquiries pre-dating the open enrollment period for the health insurance Exchanges.

6. My October 18, 2013 declaration accurately reported the cost of the lowest-cost bronze plan available to Mr. Klemencic and the amount of premium tax credits for which he would be eligible.[1] However, further review of the lowest-cost bronze plan available to Mr. Klemencic revealed that this plan offered some non-Essential Health Benefits. As a result, my October 18, 2013 declaration did not account for 45 C.F.R. § 156.470, which prohibits the application of premium tax credits to benefits that

[1] The monthly premium for the second-lowest-cost silver plan and the resulting premium tax credit available to Mr. Klemencic each have subsequently been rounded up by one cent to $463.82 and $378.70 respectively.

are non-Essential Health Benefits. The cost of the non-Essential Health Benefits in the lowest-cost bronze plan in Mr. Klemencic's rating area is $1.70/month. As a result, Mr. Klemencic would have to pay $1.70/month for the lowest-cost bronze plan in his rating area.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed this 12th day of November, 2013, in Washington, District of Columbia.

Donald B. Moulds

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

[PROPOSED] ORDER

Upon consideration of the parties' motions for summary judgment, it is hereby ORDERED that the defendants' cross-motion for summary judgment is granted, that the plaintiffs' motion for summary judgment is denied, and that judgment shall be entered in favor of the defendants.

IT IS SO ORDERED.

Dated: _____

_____
PAUL L. FRIEDMAN
United States District Judge