IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AMICUS MEMORANDUM OF COMMONWEALTH OF VIRGINIA
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Commonwealth of Virginia, by counsel, as amicus curiae, in support of Plaintiffs' Motion for Summary Judgment, (Doc. 17), seeking declaratory and injunctive relief against an IRS Rule that extends premium assistance credits to persons enrolled in an Exchange that was not established by a State under the Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, 124 Stat. 119 (ACA), as amended.

INTEREST OF AMICUS

The Commonwealth of Virginia has an interest in preserving the actual statutory scheme agreed to by the people's representatives in the House of Representatives and the Senate because that scheme was animated by a concern for the reserved authority of the States. *See Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551-52 (1985); (Doc. 17, 11 of 31); *see also* U.S. Const. amend. X; Va. Const. art. IX, § 6 ("The police power of the Commonwealth to regulate the affairs of corporations, the same as individuals, shall never be abridged.").

The congressional scheme contemplates States electing not to implement congressional policy, *compare* 42 U.S.C. § 18031(b), *with* 42 U.S.C. § 18041(b), (c), which is the States' sovereign prerogative. *See, e.g.*, *Printz* v. *United States*, 521 U.S. 898, 925, 933, 935 (1997)

("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."). Despite the ACA's panoply of inducements and restrictions designed to procure state support, Virginia and many other States have thus far chosen "to defend their prerogatives by adopting 'the simple expedient of not yielding' to federal blandishments . . . [,] not want[ing] to embrace the federal policies as their own." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2603 (2012) (Roberts, C.J., joined by Breyer and Kagan, JJ.) (quoting *Massachusetts* v. *Mellon*, 262 U.S. 447, 482 (1923)); *see, e.g.*, Ltr. of Va. Gov. Robert F. McDonnell to Sec'y of HHS, Kathleen Sebelius (Dec. 14, 2012), http://www.governor.virginia.gov/utility/docs/HealthcareExchangeLetter.pdf. The IRS has sought to render nugatory this election by ignoring the terms of the law that empowers it, thereby unlawfully intruding into the realm of authority reserved to the States by the Constitution and the ACA, *see Alden* v. *Maine*, 527 U.S. 706, 748 (1999) ("[O]ur federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation"), to the detriment of many of Virginia's families and businesses. *See* (Doc. 1, at 3-7 of 15, ¶¶5-7, 12-18; Doc. 17, 17 of 31). This attempt by the Executive Branch to aggrandize federal authority at the expense of the States and their people should be invalidated by this Court. *See* 5 U.S.C. § 706(2)(A), (C).

ARGUMENT

Although linked to a highly complex body of laws and regulations that are growing in number and complexity every day, this case raises a simple question of statutory interpretation. If a State elects not to establish an Exchange, does the ACA nonetheless authorize the IRS to grant premium assistance credits to persons in that State who enroll in an Exchange established and operated by the Secretary of Health & Human Services? *See City of Arlington* v. *FCC*, 133

S. Ct. 1863, 1871 (2013) ("[T]he question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not.").

The consequences are profound because if 26 U.S.C. § 36B(b)(1), (2)(A) & (B), and (c)(2)(A)(i) do not limit the availability of such subsidies, the IRS can subject persons who would otherwise be exempt to the individual mandate, 26 U.S.C. § 5000A(b), (e)(1), and to the employer penalty. 26 U.S.C. § 4980H(a), (b). But if the requirement that the plans be enrolled in through an "Exchange established through the States" means what it says, persons in a State that has exercised its sovereign prerogative not to establish an Exchange will be free to forego a product they do not want and in some cases cannot afford. This in turn will affect the competitive advantage of such States.

I. The IRS' Authority to Grant Subsidies Is Textually Limited to Qualified Health Plans "Enrolled in Through an Exchange Established by the State," and Cannot Be Interpreted to Permit Subsidization of Qualified Health Plans Enrolled in Through an Exchange Established and Operated by the Secretary of HHS.

The Federal Defendants claim authority to offer "premium tax credits" to not only "taxpayers who obtain coverage through a State Exchange," but also to taxpayers who obtain coverage through any Exchange. *See* Health Insurance Premium Tax Credit (IRS Rule), 77 Fed. Reg. 30,377, 30,378, 30,387 (May 23, 2012). They maintain that position in the face of the plain language of 26 U.S.C. § 36B, which provides that a taxpayer's entitlement to a "premium assistance credit" turns on enrollment in a "qualified health plan offered in the individual market within a State . . . *and* which w[as] enrolled in through an Exchange established by the State under 1311 of the [ACA]," 42 U.S.C. § 18031. 26 U.S.C. § 36B(b)(2)(A). The IRS Rule offers no reasoned defense of this interpretation.

In the section of the IRS Rule entitled "Explanation of Provisions and Summary of Comments, the IRS responds to the issue "whether the language in Section 36B(b)(2)(A) limits

the availability of the premium tax credit only to taxpayers who enroll in qualified health plans on State Exchanges," as follows:

> The 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 State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.

77 Fed. Reg. 30,378, *see id.* at 30,387.

That the IRS is *not* delegated this authority could hardly be more clear. The "qualified health plan" must be "enrolled in through an Exchange *established by the State under section 1311* of the [ACA]." 26 U.S.C. § 36B(b)(2)(A) (emphases added). Congress reiterated and confirmed this limitation, removing any possible ambiguity or question of scrivener's error, in subsection (c) of § 36B in defining "coverage month" for determining the availability of premium assistance credit. 26 U.S.C. § 36B(c)(2)(A)(i) (requiring that the enrollee be "covered by a qualified health plan [1] described in subsection (b)(2)(A) [2] that was enrolled in through an Exchange established by the State [3] under section 1311 of the Patient Protection and Affordable Care Act"). And Congress again distinguished, in § 36B no less, between Exchanges established by the States under 42 U.S.C. § 18031 and those established by the Secretary of HHS under 42 U.S.C. § 18041, further reinforcing the conclusion that Congress meant what it said in 26 U.S.C. § 36B. *See* (Doc. 38, 21-22 of 42). Moreover, the ACA defined "State," giving the term its natural definition: "each of the 50 States and the District of Columbia." 42 U.S.C. § 18024(d). That being so, an exchange established by the Secretary of the Department of Health and Human Services is certainly not an exchange "established by the State," nor does the

Secretary establish such exchange "under section 1311 of the [ACA]," but under the authority of section 1321 of the ACA. *See* 42 U.S.C. § 18041(c).

To reach the conclusion it did, the IRS Rule interprets § 36B(b)(2)(A) and (c)(2)(A)(i) to render superfluous their entire modifying clauses, leaving only the requirement that the plan be "enrolled in . . . through an Exchange." 26 C.F.R. §§ 1.36B-2(a)(1); 1.36B-3(c)(1)(i). Interpreting the authority to run to subsidizing persons enrolled in non-State Exchanges violates the semantic canon *expressio unius est exclusio alterius* as well as the rule against surplusage. Simply ignoring statutory limitations, here on which qualified health plans may be subsidized, is not a course open to the agency. *See Fin. Planning Ass'n* v. *SEC*, 482 F.3d 481, 488 (D.C. Cir. 2007) ("'To read out of a statutory provision a clause setting forth a specific condition or trigger to the provision's applicability is . . . an entirely unacceptable method of construing statutes.'" (quoting *Natural Res. Def. Council* v. *EPA*, 822 F.2d 104, 113 (D.C. Cir. 1987))).

The Federal Defendants' only textual response to this clear limitation within the delegation of authority is to posit that the Secretary of HHS's fall-back authority under 42 U.S.C. § 18041(c) "makes clear that Congress intended the federally-facilitated Exchange to constitute the referenced state-operated Exchange." (Doc. 38, 19 of 42.) But 42 U.S.C. § 18041(c)(1)(A), (B) provides such authority only in the event that a State does not timely establish an Exchange complying with the ACA's requirements under 42 U.S.C. § 18031(b), and grants only this authority: to "establish and operate such Exchange within the State." 42 U.S.C. § 18041(c)(1). The Secretary's authority, under 42 U.S.C. § 18041(c), to "establish and operate such Exchange *within the State*" cannot plausibly be read as authority to establish and operate an "Exchange established *by the State*," much less one established "under" 42 U.S.C. § 18031(b), which grants

the Secretary no establishment authority and authorizes the only type of Exchange for which § 36B permits premium assistance credit.

Instead of this disharmonious construction, 42 U.S.C. § 18041(c)(1)'s reference to "such Exchange" should be more plainly interpreted as a direction to the Secretary of HHS to establish an Exchange under 42 U.S.C. § 18041 *in the place of* that which a State is authorized to establish under 42 U.S.C. § 18031, not an indication that it is "stand[ing] in the shoes of the state." (Doc. 38, 19 of 42); *see* Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule To Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119, 158-64 (2013) (collecting evidence from the Act and the legislative history "that PPACA supporters knew how to craft language ensuring that Exchanges created by different levels of government would operate identically, yet opted not to create such equivalence with respect to the availability of tax credits in state-run versus federal Exchanges."). And Federal Defendants' analogy is simply inapt. HHS does not seek to stand in the shoes of the non-electing State, but to assume its identity—to itself be exercising authority under 42 U.S.C. § 18031 *as a State*, which it is not. 42 U.S.C. § 18024(d).

That the Secretary is delegated authority to establish "such Exchange *within the State*" also undermines the Federal Defendants' reading of 42 U.S.C. § 18041(c)(1). First, if that delegation were intended to carry the meaning suggested by the Federal Defendants, modifying "such Exchange" by "within the State" is an odd word choice; why not "for the State," which connotes both geographic limitation and equivalency, or "on behalf of the State," or "in the stead of the State"? That Plaintiffs' reading makes proper sense of the delegation of authority under 42 U.S.C. § 18041(c)(1) is made plain, again, by § 36B, which itself contemplates an Exchange operating "within a State," but not "established by the State," *see* 26 U.S.C. § 36B(b)(2)(A), and

evinces an awareness that Exchanges established by the State under ACA section 1311 are *not* identical to Exchanges established by the Secretary of HHS "within a State" under ACA section 1321. *See id.* § 36B(f)(3).

But the IRS Rule does more violence to the ACA than that, essentially reading into 42 U.S.C. § 18041(c)(1) the sentence, "An Exchange established and operated by the Secretary shall be treated as an Exchange established by a State under section 1311 of the ACA." Had Congress intended to enact such a provision, it certainly could have, as it did with regard to Exchanges established by a U.S. territory, *see* 42 U.S.C. § 18043(a)(1) (providing that a territory that "elects . . . to establish an Exchange . . . and establishes such an Exchange . . . *shall be treated as a State*" (emphasis added)), even going so far as to explicitly authorize and appropriate funding for premium assistance "to residents of the territory obtaining health insurance coverage through the Exchange" established by the territory. 42 U.S.C. § 18043(b)(2), (c). In sum, the IRS Rule's interpretation requires the court to both add and subtract from the text of the ACA.

II. Congress Plainly Intended to Adopt the State/Federal Distinction in § 36B To Induce State Involvement in the Implementation of the ACA, a Purpose That the IRS Cannot Now Ignore.

Instead of providing for equivalency between State and Federally-facilitated Exchanges, Congress chose to pursue two objectives in its provisions of premium assistance: provide federal subsidies to persons of lesser means to reduce the cost of obtaining the requisite coverage and also induce the States, in the interest of obtaining federal dollars for its citizens, to establish an Exchange. The IRS Rule, in ignoring the express limitations on its delegated authority to issue premium assistance credits, not only exceeds its authority to the tune of billions in federal revenues, but also defeats both the dual objectives of Congress and the States' exercise of their sovereign prerogatives. Even were legislative history an appropriate tool for interpreting the

plain text at issue, and it is not, Federal Defendants fail even to support this extraordinary departure with any evidence from the legislative record affirmatively suggesting the federal-state Exchange equivalency the IRS adopted.

The weakness of the Federal Defendants' legislative history argument—that limiting subsidies to persons enrolled in State established Exchanges is not what Congress intended—is made plain at the outset by their extensive reliance on a bill other than the one that was actually enacted into law. *See* (Doc. 38 at 29-30.) That a bill that was not enacted "explicitly . . . provided" for the legal rule they now contend only confirms that, in crafting the bill that was actually enacted into law and that explicitly provides to the contrary, Congress considered and knowingly rejected the subsidies-for-all approach. Furthermore, the Federal Defendants offer no legislative statements whatsoever that contradict § 36B's plain meaning. And it cannot be gainsaid that withholding federal subsidies from the citizens of States that elected not to establish Exchanges was a seriously discussed policy proposal at the time of the ACA's crafting. *See* Cannon & Adler, *supra* at 154-55.

As noted above, the Federal Government could not actually require the States to bring an Exchange into being. *See Printz*, 521 U.S. at 935. Instead, it had to persuade them by financial and political inducements and pressures. *See generally NFIB*, 133 S. Ct. at 2601-07 (Roberts, C.J., joined by Breyer and Kagan, JJ.); *id.* at 2657-61 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). And there were obvious political, practical and fiscal advantages to persuading the States to share the load of establishing and operating the Exchanges including: shared political accountability; additional personnel as well as technical and local expertise; and, finally, State funding for continued operation and maintenance of State Exchanges, which is not provided for in the ACA. *See* 42 U.S.C. § 18031(a). That few thought that the States would elect not to

establish an Exchange when given this sort of incentive may be suggested by the failure of the ACA to provide *any* funding for the establishment or operation of Exchanges by the Secretary of HHS. *See* Adler & Cannon, *supra* at 166-67 and notes therein.

Nevertheless, however detrimental limiting subsidies to taxpayers enrolled in "Exchanges established by the State under" 42 U.S.C. § 18031 may now appear, plainly this architecture in the ACA was not adopted without purpose or by mistake. The provision of federal money to States to establish Exchanges, 42 U.S.C. § 18031(a), offer of subsidies to individuals in States that established one, 26 U.S.C. § 36B(a), (b), and the restrictions imposed upon their control of related programs until they did so, 42 U.S.C. § 1396a(gg), operate together to provide both incentives for States to participate and disincentives for non-participation, with the aim and assumption being that most if not all of the States would assist in the implementation of the ACA. *See* Adler & Cannon, *supra* at 165-67; (Doc. 39, 26 of 32). Now, with the benefit of hindsight, the IRS Rule seeks to ameliorate the effects of Congress' miscalculation regarding the States' willingness to establish Exchanges. But by extending subsidies to those who enroll in Exchanges not established by the States, the IRS Rule administratively supplants Congress' policy preference for State implementation, and thereby changes the terms of the States' election, subjecting many more individuals and businesses to the ACA's insurance requirements and penalties.

It is not for the IRS, or the federal courts, to conclude that Congress could have better pursued its true objectives had they written the law differently and so assume Article I authority. *See Landstar Express Am., Inc.* v. *FMC*, 569 F.3d 493, 498 (D.C. Cir. 2009) ("As the Supreme Court has repeatedly explained, . . . neither courts nor federal agencies can rewrite a statute's

plain text to correspond to its supposed purposes."). And that is plainly what the IRS has sought to do here.

CONCLUSION

Wherefore, the IRS Rule should be declared invalid and enjoined.

Respectfully Submitted,

COMMONWEALTH OF VIRGINIA,

By: /s/

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[1] Listed counsel have been designated to represent the Commonwealth in this matter, in accordance with D.D.C. Loc. Civ. R. 83.2(f).

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of November 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a copy to all counsel.

/s/
E. Duncan Getchell, Jr.