IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*,

Plaintiffs,

v.

KATHLEEN SEBELIUS, *et al.*,

Defendants.

Civ. No. 13-623 (PLF)

OPPOSITION-REPLY

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

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INTRODUCTION

No legitimate method of statutory construction would interpret the phrase "established by the State" in the ACA's subsidy provisions to mean "established by the State *or the federal government*." The Act expressly contemplates both state-established and federally established Exchanges; where it specifically refers to one type or the other, the courts must give effect to that language. The Government's sole textual hook for the IRS Rule is its backwards claim that the Act, by directing the HHS Secretary to establish "such Exchange" if a state *failed to*, creates a "legal fiction" by which states are "deemed" to have established the HHS-established Exchanges, even though it is a state's *failure* to establish an Exchange that triggers the Secretary's obligation in the first place, and even though Congress demonstrably knew how to expressly "deem" other Exchanges to be state-established when it wanted to, as it did for territorial Exchanges.

The above would be conclusive even if legislative history contradicted the statutory text, and even if there were no rational reason for Congress to distinguish between state and federal Exchanges. But it does not, and there surely is. Indeed, the ACA's restriction of subsidies to state-established Exchanges is neither a legislative novelty nor remotely surprising. Congress has long evaded the constitutional bar on commandeering states by offering them "deals" they could not refuse, conditioning federal benefits for the state or its residents on state compliance with federal directives. Indeed, Congress indisputably did so elsewhere in the ACA, threatening states with the cut-off of all Medicaid funds unless they expanded the eligibility criteria for that program. The ACA's subsidy provisions offered an analogous "deal" to entice states to establish Exchanges—because Congress desperately wanted (wisely, in hindsight) the states to assume responsibility for that logistically nightmarish and politically toxic task. And just as there is no indication in the legislative record that anyone worried about states rejecting the Medicaid "deal," there is no indication that anyone worried about states rejecting the Exchanges "deal."

If a state had nonetheless *rejected* the Medicaid "deal," that would plainly have required cutting off that state's Medicaid funds, notwithstanding Congress's obvious goal of *expanding* Medicaid. Similarly, while denying subsidies to states rejecting the Exchanges "deal" will mean fewer subsidies than Congress optimally desired, that is the inevitable effect of a state rejecting a deal that Congress *had* to offer to induce state participation. Of course, it is likely (if not certain) that Congress would have accomplished *both* of its policy objectives—state-run Exchanges *and* subsidies everywhere—had the IRS not preemptively *eliminated* the irresistible incentive of subsidies, thus predictably leading many states to reject a "deal" that offered them nothing.

The Government unsurprisingly resorts to *Chevron* deference to save its Rule, but that principle does not help it, for four reasons. *First*, deference is triggered only if the statutory text is *ambiguous* and intended as an implicit delegation to the agency. Yet the subsidy provisions directly and unambiguously answer the question presented. *Second*, the IRS is entitled to *no* deference in interpreting the statutory language that the Government claims is ambiguous, which is not found in the Internal Revenue Code at all. At best, the IRS and HHS jointly administer some intertwined ACA provisions, but the D.C. Circuit denies deference where no single agency has controlling authority. *Third*, any deference would here be displaced by the venerable canon requiring tax exemptions and credits to be provided *unambiguously*. *Fourth*, ambiguity only allows the IRS to adopt reasonable constructions of the statute—and rendering express statutory text nugatory is the epitome of an *unreasonable* construction, as the D.C. Circuit has held.

Finally, the Government's and amici's naked policy argument that plain statutory text should be ignored because subsidies are so "important" is, of course, nothing but a transparent effort to induce the Court to do what one amicus correctly notes it cannot do: "rewrite legislation in accord with [the Court's] own conceptions of prudent public policy." (Dkt. No. 54, at 6.)

ARGUMENT

I. THE IRS RULE CONTRADICTS THE ACA'S UNAMBIGUOUS TEXT, AND IS THEREFORE CONTRARY TO LAW.

Plaintiffs' argument is simple and compelling: Section 1311 of the ACA instructs states to establish Exchanges, but § 1321 authorizes the federal government to establish Exchanges in states that fail or decline to. 42 U.S.C. §§ 18031(b)(1), 18041. In the subsidy provisions at issue, the Act clearly states that subsidies are available for coverage "enrolled in through an *Exchange established by the State under section 1311*" of the Act. 26 U.S.C. § 36B(c)(2)(A)(i); *see also* § 36B(b)(2)(A). As a matter of indisputable plain text, "Exchange established by the State under section 1311" does not include an Exchange established by HHS under § 1321.

Moreover, three key structural elements of the Act confirm that Congress understood the difference between state-established and HHS-established Exchanges, and did not intend to treat them identically for all purposes—and that the Government well knows this.

First, the ACA elsewhere uses the broader phrase "Exchange established under this Act." *E.g.*, ACA, § 1312(d)(3)(D)(i)(II). By treating the narrower phrase "Exchange established by the State under section 1311" as meaning "an Exchange established under this Act," the IRS Rule violates the basic canon that "differing language" in "two subsections" of a statute should not be treated as having "the same meaning." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Second, in addressing the situation of U.S. territories that wanted to establish their own Exchanges, Congress provided that such a territory "shall be treated as a State" under the Act. ACA, § 1323(a)(1). This confirms that when Congress wanted to "deem" a non-state Exchange to be established by a state even though another entity established it, it clearly "knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994). Yet, just two sections earlier, in § 1321, Congress included no such equivalency language when describing the HHS Exchanges.

Third, the Government itself realizes that HHS Exchanges are not the equivalent of state Exchanges. The ACA appropriated unlimited sums to help "States" establish Exchanges. ACA, § 1311(a). So if the Government truly believed its own argument—that the HHS Secretary is "deemed" a "State" under § 1311 when she establishes a fallback Exchange under § 1321, then it would have used that appropriation to pay for creation of federal Exchanges. Yet HHS *did* not, and even acknowledged that it *could* not. *See* Amy Goldstein & Juliet Eilperin, *Challenges Have Dogged Obama's Health Plan Since 2010*, 2013 WLNR 27607716, WASH. POST, Nov. 2, 2013 (noting that responsibility for federal Exchange was given to Centers for Medicare and Medicaid Services for "financial" reasons, because ACA "provided plenty of money to help states build their own insurance exchanges," but "no money for the development of a federal exchange").

The ACA's text and structure thus confirm that Congress intended to condition subsidies on state participation in Exchanges, which also makes perfect sense as a policy matter, because such a scheme would provide a powerful incentive for states to create the complex, controversial Exchanges. The Government's contrary arguments (*see* Dkt. No. 50, "Opp.") are meritless.

A. An Exchange Established by the Federal Government Is Unambiguously Not "an Exchange Established by the State."

At the threshold, the Government must establish that the relevant statutory language—"an Exchange established by the State under section 1311 of the [ACA]"—is ambiguous. Without textual ambiguity, the Government's arguments from legislative structure, history, and purpose are inapplicable. *See Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563 (2013) (statutory structure can clarify "provision that may seem ambiguous in isolation"); *Performance Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 642 F.3d 234, 238 (D.C. Cir. 2011) (legislative history irrelevant if "statute is unambiguous"); *Consol. Rail Corp. v. United States*, 896 F.2d 574, 579 (D.C. Cir. 1990) (legislative purpose irrelevant for "unambiguous statutes").

Try as it might, however, the Government cannot inject any ambiguity into the clear-as-day statutory text. Its basic argument—which does not actually claim ambiguity in the *subsidy provisions*—is that other ACA provisions create, *sub silentio*, a "legal fiction" whereby when a state fails to establish an Exchange and HHS steps in to establish one instead, the HHS Secretary is "deemed" to be the state and the state is "deemed" to have established the HHS-established Exchange. Calling this a legal fiction is simply an admission that the IRS Rule rewrote the law.

1. The central provision, for the Government, is § 1321, which directs the federal government to establish Exchanges for states that fail or refuse to create them. That section says that if a state will "not have any required Exchange operational," HHS "shall … establish and operate *such Exchange* within the State" ACA, § 1321(c)(1); 42 U.S.C. § 18041(c)(1) (emphasis added). The word "such," says the Government, implies that the federally established Exchange is to be "the *same entity*" as the state-established Exchange just referenced. (Opp. 30.) And the word "Exchange," the Government adds, is elsewhere defined as "Exchange established under section 1311," ACA, § 1563(b)(21), thus confirming that the Exchange that HHS must establish is to be the same as an Exchange under § 1311, *i.e.*, a state-established Exchange. (Opp. 31-32.)

That is not statutory construction; it is nonsense. The phrase "such Exchange" does, even without the Act's definition of "Exchange," obviously refer back to the Exchanges described in § 1311. But that simply describes *what the Exchange is*, not *who established it*. The term "such," and the definition of "Exchange," confirm that the federal government should establish *the same Exchange* as the state was supposed to have established. The federal Exchange should operate in the same fashion, conduct the same tasks, and perform the same functions. The only difference is that it is *established by the federal government*, not by the state. Yet eligibility for subsidies turns precisely on that distinction—on *who* established the Exchange.

Put another way, the ACA cannot be read as directing the *federal government* to establish a *state-established* Exchange, because a "federally established state-established Exchange" is an oxymoron. To use a hypothetical, if Congress asked states to build airports, and described these airports in great detail (specifying, *e.g.*, air traffic and security procedures), but added that the Secretary of Transportation should construct "such airports" if the states fail to, would anyone even *think* to refer to the latter as "state-constructed airports"? Obviously not. Had Congress in fact wanted federal Exchanges to be "deemed" state Exchanges, it could and would have said so expressly—as it did for territorial Exchanges. ACA, § 1323(a)(1). Indeed, as amicus Families USA points out (Dkt. 54, at 11 n.25), when Congress wants the federal government to step into the shoes of another entity *and be treated as if it were that entity*, it says so. *E.g.*, 28 U.S.C. § 2679(d)(1) (certain suits against federal officers "shall be *deemed* an action against the United States" (emphasis added)). Yet, in § 1321, not only did Congress not use express "deeming" language; it did not even go so far as to say that HHS should establish an Exchange "*for*" or "*on behalf of*" the state, instead referring only to an HHS-established Exchange "*within*" the state.

More generally, it makes no sense to read § 1321 as providing that, when HHS creates an Exchange under that provision, "a state is *considered* to have established an Exchange." (Opp. 36 (emphasis added).) To the contrary, HHS's authority under § 1321 to create an Exchange is only *triggered* by the state's acknowledged *failure* to establish the "required" Exchange under § 1311. In other words, § 1321's *premise* is that an HHS Exchange is *not* an Exchange *established by the State* under § 1311, because the latter can be created only if the former is not.

The Government nonetheless defends its illogical, atextual interpretation by noting that, as defined elsewhere, Exchange means "Exchange established under section 1311," and so the Exchange established by HHS under § 1321 (after the state defaults under § 1311) is somehow

"established by the State under section 1311." But this definition simply confirms what is already obvious: The Exchange created by HHS in the event of state default is the same as the one the state would have created under § 1311. Again, this does not change the dispositive fact that it is *HHS*, not *the state*, establishing the Exchange. Nor can an HHS Exchange be "deemed" to be state-established, because § 1321 contains no "deeming" language and because Exchanges may be established under that section only if there is *no* state-established Exchange. Indeed, if anything, the fact that Exchanges are defined as those established under the section requiring *state-established* Exchanges undermines the Government's argument that the subsidy provisions' reference to "Exchange" somehow also includes *federally established* Exchanges.[1]

Most fundamentally, plugging the global definition of Exchange into § 1321 provides, at most, that Exchanges created by HHS can be treated as Exchanges "established under section 1311." But that does nothing to expand the Exchanges for which subsidies are available to include HHS Exchanges. Subsidies are limited to those who buy coverage through an Exchange "*established by the State* under section 1311." 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added). If federal Exchanges could be deemed established *under § 1311*, this simply means that the subsidy provisions further distinguish *among* § 1311 Exchanges based on *which entity established them*. Only Exchanges established *by the State* under § 1311 receive subsidies. Indeed, the wording of the subsidy provisions might well have resulted from the drafters' recognition that the interplay between § 1321 and the Act's definitional provision creates ambiguity about whether such HHS Exchanges are really "§ 1311" or "§ 1321" Exchanges, thus requiring the unambiguous further specification that subsidies are available only in *state-established* Exchanges under § 1311, not

[1] Amicus Families USA boldly claims that the ACA defines "Exchange" *three* times as state-established. (Dkt. No. 54, at 11.) But two of its claimed "definitions" are simply parts of § 1311, which everyone agrees directs states to establish Exchanges, so not even the Government claims these provisions are relevant. The third reference is to the definitional section discussed above, which, for the reasons noted, does nothing to suggest that the subsidy provisions apply to federal Exchanges.

any Exchanges under § 1311. Accordingly, however one answers the largely metaphysical question of whether HHS Exchanges are "§ 1321" or "§ 1311" Exchanges, they plainly cannot be "Exchanges established by the State under section 1311."

The foregoing is so self-evident and compelling that even HHS regulations themselves were forced to concede (squarely contradicting both the IRS Rule and the Government's defense of it here) that federal Exchanges are "established … *by the Secretary* under *section 1321(c)(1)*" of the ACA, not by a *state* under *§ 1311*. 45 C.F.R. § 155.20 (emphases added). And, as noted, HHS has further conceded the point by not trying to tap the ACA's unlimited appropriation for state Exchanges to pay for the unfunded federal Exchanges. In short, there is no ambiguity as to *who establishes* an "Exchange *established by the State*."

2. Amicus Families USA presses a different argument: that because the phrase "established by the State under section 1311" appears in subsections relating to the *amount* of the subsidy, following a general statement that there "shall" be a tax credit, the former language should not be construed to take back the credit "bestowed" by the latter. (Dkt. No. 54, at 13-14.) But that opening subsection says only that there "shall" be a credit in "an amount equal to the premium assistance credit amount." 26 U.S.C. § 36B(a). And it is the *definition* of "premium assistance credit amount," which turns on the definition of "coverage month," that narrows the operation of the subsidy—*e.g.*, the tax credit can be claimed only by a person who actually *buys* coverage and, even then, only if he buys it *on an Exchange* (and, Plaintiffs contend, only on an Exchange *established by the state*). Moreover, the credit *cannot* be claimed by one who is already eligible for "minimum essential coverage" outside the individual market, such as through an employer. All of these restrictions, the disputed one *and* the undisputed ones alike, are found in the definition of "coverage month." *Id.* § 36B(c)(2).

Nor is it unusual for Congress to use such "legalese," even when constructing conditions to coerce action by states. For example, in 26 U.S.C. § 35, an insurance-related tax credit that was enacted in 2002, the credit is similarly provided for "coverage months," defined as months as to which the taxpayer is covered by "qualified health insurance," which in turn is defined to include state coverage *that meets certain regulatory criteria*. 26 U.S.C. § 35(a), (b), (e)(2). There, as here, Congress conditioned the tax credit for state residents on their state's compliance with certain insurance regulations, and did so through the definition of "coverage month."

* * *

Since it can establish no ambiguity, the Government's other arguments are irrelevant. But, in fact, its other considerations *corroborate* the statutory text, as explained below.

B. Most of the Government's Allegedly Absurd Consequences Are Not At All Absurd, and the Remainder Are Not Consequences of Plaintiffs' Position.

Since the Government's arguments concerning what the subsidy provisions actually say are patently frivolous, it next asks the Court to judicially rewrite the Act's plain language because it contends that adhering to the text would somehow produce absurd results. But there is no absurdity here; interpreting the subsidy provisions to mean what they say does not nullify or contradict any part of the Act. Moreover, the Government's additional arguments about the consequences of interpreting *other* provisions of the Act (using the same or different language) do not create absurd results, do not in any way stem from Plaintiffs' construction of the subsidy provisions, and/or would not be resolved by adopting the Government's contrary construction.

1. The Government alleges certain consequences if federal Exchanges cannot offer subsidies. But none of these consequences is absurd or negates any part of the Act. They reflect, at most, that Congress imposed certain uniform obligations on *all* Exchanges, those with and those without subsidies, some of which obligations would be more easily satisfied by the latter.

Reporting. The Government notes that, under the reporting requirements in § 36B itself, the federal Exchanges would have to report the "aggregate amount of any advance payment" of subsidies as zero, and would not have to report any individualized information "necessary to determine eligibility" for subsidies. 26 U.S.C. § 36B(f)(3). True—but so what? This section lists information that *all* Exchanges (state and federal) must report, clarifying that these uniform requirements apply to an "Exchange under Section 1311(f)(3) *or* 1321(c)." *Id.* (emphasis added). Some data points will be zero or inapplicable for federal Exchanges, but none is superfluous because the same list governs state Exchanges. Meanwhile, other data points (like the "level of coverage … and the period such coverage was in effect," the "premium" charged, and the "name, address and TIN of the primary insured," 26 U.S.C. § 36B(f)(3)(A), (B), (D)) will apply equally to federal Exchanges, and so the federal Exchanges' reports will not be "an empty act" (Opp. 33).

In short, that § 36B creates reporting requirements that reference subsidies in no way indicates that Congress "thought" that subsidies were available on *all* Exchanges. A Congress that "thought" that subsidies were only available on state Exchanges would have enacted the same provision—a *uniform* reporting requirement for *both* types of Exchange, with some questions only relevant to state-established ones. The only alternative would be to have *two* sections detailing reporting requirements, a complete one for state Exchanges with subsidies and then a separate one that needlessly repeated the non-subsidy-related reporting requirements for federal Exchanges. Eliminating such redundancy is extraordinarily sensible draftsmanship, and made particular sense here since Congress "thought" that there would be few, if any, federal Exchanges, given the irresistibility of the subsidy deal it was offering.

Indeed, if anything, the information-sharing provision actually bolsters Plaintiffs' point by providing that it applies to any person carrying out responsibilities of a state Exchange *or* an

Exchange "under section … 1321(c)," 26 U.S.C. § 36B(f)(3)—thus making clear that the former does not include the latter, and that Congress knew how to distinguish between the two.

Exchange Functions. Similarly, the Government contends that, of the eleven functions the ACA directs *all* Exchanges to perform, it would be very easy for federal Exchanges to satisfy one (and part of a second) if Plaintiffs' position is accepted. (Opp. 39.) In particular, because subsidies are not available in federal Exchanges, it will be straightforward for those Exchanges to "make available by electronic means a calculator to determine the actual cost of coverage" net of "any" subsidy. 42 U.S.C. § 18031(d)(4)(G). And the federal Exchange's list of "each individual who was an employee of an employer but who was determined to be eligible for the premium tax credit" will have no names on it (though it will still be required to transfer other information to the Treasury Secretary, such as the names of individuals granted exemptions). *Id.* § 18031(d)(4)(I). Again—so what? Congress included those functions because they will be meaningful for the state-run Exchanges, to which the list of functions principally applies. And Congress subjected the federal Exchanges to the same list because all the other functions—such as certifying health plans, creating a website and a hotline, granting exemptions, establishing a Navigator program, etc., *see id.* § 18031(d)(4)(A), (B), (C), (D), (H), (K)—are equally relevant to the federal Exchanges. Again, there is neither superfluity nor empty gestures here.

Global Application Form. The Government says that federal Exchanges are required to use an application form that facilitates application for various "health subsidy programs," including subsidies under the ACA, which would not be possible if those were unavailable. (*See* Opp. 39-40.) But the Government misstates the law. The cited provision requires the Secretary to "provide *to each State*" such a form, not to use it for the federal Exchanges. 42 U.S.C. § 18083(b)(1)(A) (emphasis added). Moreover, the form is supposed to allow individuals to

apply for "all *applicable* State health subsidy programs," *id.* § 18083(b)(1)(A)(i) (emphasis added), contemplating that not all such programs will be available in all states.[2]

Innovation Waivers. Starting in 2017, states may seek "innovation waivers" from the ACA's scheme, by showing that alternative state reforms would achieve the same ends. If a waiver is granted, the state receives the "aggregate amount" of the subsidies "that would have been paid … had the State not received such waiver." 42 U.S.C. § 18052(a)(3). On Plaintiffs' view, the Government reasons, the innovation waivers would be rendered superfluous, because states would already be free—by failing to establish Exchanges—to "effectively" obtain a waiver. (Opp. 38-39.) That is facially untrue and makes no sense: Innovation waivers allow states to opt out, not just of running Exchanges, but also of the individual mandate and many other ACA provisions, *see* 42 U.S.C. § 18052(a)(2), which they would *not* otherwise be able to do; they also reward states with federal funds from the foregone subsidies. So the waivers are not superfluous because states may opt out of running Exchanges. Anyway, the Government *agrees* that states may opt out of running Exchanges, so it cannot rationally argue that such an opt-out provision renders the innovation waiver superfluous. In short, the Government's superfluity argument has nothing to do with Plaintiffs' view of the subsidy provisions, but purportedly stems from the *undisputed* fact that states may decline to run Exchanges.[3]

[2] The Government also notes that the Act does not require a subsidy applicant to list his "state of residence" when applying to an Exchange for subsidies. (Opp. 41 n.22.) But Congress was providing directions for people applying for subsidies *where available*—*i.e.*, in state-established Exchanges. There are no subsidies in federal Exchanges, so nobody will be filling out subsidy applications there.

[3] Nor is it true that the amounts paid to states who obtain waivers would "always be zero" for states that had not previously established Exchanges. (Opp. 39 n.19.) The provision refers to amounts that "would have been paid" in 2017 and beyond; a state that did not establish an Exchange pre-2017 could still claim innovation funds by stating that it *would have* established an Exchange for future years. In any event, one does not contemplate "waivers" for entities that have not previously complied with the requirements being waived, and Congress obviously did not want to reward states for innovation until *after* they tried the scheme that Congress contemplated (*i.e.*, state Exchanges). Withholding innovation-waiver funds until states establish Exchanges creates a powerful incentive for states to do so.

2. Moving further afield, the Government also identifies consequences that would result under *other* provisions in the ACA, if the phrase "Exchange established by the State" is consistently read literally. The Government's argument appears to be that "established by the State" ought to be ignored *throughout* the Act. But none of these consequences are even peculiar, much less so absurd as to warrant ignoring clear statutory text.

Medicaid Maintenance-of-Effort Rule. The ACA precludes states from tightening their Medicaid "eligibility standards" until "the date on which the Secretary determines that an Exchange established by the State under section 1311 of [the ACA] is fully operational." 42 U.S.C. § 1396a(gg)(1). A state thus cannot restrict Medicaid eligibility unless it first establishes an Exchange. (Opp. 40.) This makes perfect sense because, again, Congress wanted to induce states to run Exchanges, and the maintenance-of-effort proviso creates a "stick" if they fail to. Also, Congress would not have wanted to *reduce* Medicaid for the most impoverished in states where low-income people were already doing without Exchange subsidies.[4]

Regulations on State Exchanges. The Government points to a few regulations that would apply within state-established Exchanges but apparently not to federal Exchanges. *See* 42 U.S.C. §§ 1320b-23(a)(2), 1396w-3(b)(1), 1397ee(d)(3). (Opp. 41 n.22.) But the reason for all of these alleged "anomalies" is quite obvious: The HHS Secretary does not need specific statutory authority to regulate every detail of the operation of Exchanges *that she is already in charge of*. The Secretary has broad authority to take "such actions as are necessary to implement" the federal Exchanges. 42 U.S.C. § 18041(c)(1). So she independently can (and presumably will) do everything that the Act requires the state-run Exchanges to do.

[4] Prospectively, this "stick" may have been invalidated by the Supreme Court's decision on Medicaid in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) ("*NFIB*"). Contrary to the Government (Opp. 40 n.21), that says nothing about congressional intent; nobody doubts that Congress intended to use Medicaid funds to coerce the states to act.

3. In its furthest stretch, the Government points to allegedly absurd consequences that stem from other provisions of the ACA that *do not even use the same language* as the subsidy provisions (*viz.*, "established by the State"). These provisions thus have nothing to do with Plaintiffs' position or with the subsidy provisions. They neither flow from Plaintiffs' argument here, nor would be resolved by adopting the Government's construction of the subsidy provisions. They are simply irrelevant. And, in any case, the Government misreads them.

Enrollment Through Federal Exchanges. The Government argues that because the ACA defines a "qualified individual" eligible for enrollment through an "Exchange" as one who, *inter alia*, "resides in the State that established the Exchange," 42 U.S.C. § 18032(f)(1)(A), nobody may enroll in a federal Exchange. (Opp. 35-38.) There are numerous flaws in this argument.

At the threshold, proper resolution of this residency requirement has nothing to do with the dispute here. Adopting the Government's view of the subsidy provisions would not fix or avoid this issue, and acceptance of Plaintiffs' view would not complicate its resolution. *All* agree that states are free *not* to establish Exchanges, and so the question of how to treat "resid[e] in the State that established the Exchange" if the state does *not* establish one will arise under both parties' views. The disagreement over whether a state's failure to establish an Exchange affects *subsidies* does not affect, much less resolve, what to do with an eligibility provision *presuming* state-established Exchanges. Specifically, the Government's position is that a federal Exchange should be *deemed* to be state-established (Opp. 36); even if true, however, that would not mean the state *actually established* the federal Exchange. To the contrary, a state's *failure* to establish an Exchange is precisely what *triggers* the provision, § 1321(c), that the Government says authorizes equating federal and state-established Exchanges. So even on the Government's view, nobody in West Virginia "resides in the State that established" the federal Exchange there.

In any event, the Government's interpretation is wrong. Under this eligibility provision, one must be a "qualified individual" "with *respect to an Exchange*," 42 U.S.C. § 18032(f)(1)(A) (emphasis added), and thus (in light of the definitional provision that the Government elsewhere invokes) "with respect to an Exchange established under section 1311," *see* ACA, § 1563(b)(21), to be eligible. Since § 1311 Exchanges are (unlike § 1321 Exchanges) established by states, this eligibility requirement only applies to state-established Exchanges; it does not limit enrollment on federal Exchanges. Thus, contrary to the Government's thesis, Plaintiffs' interpretation of "Exchange established by the State" in the subsidy provisions does not in any way suggest that § 18032(f) precludes enrollment on a federally established § 1321 Exchange.[5]

Alternatively, if this qualification provision is read to apply even to federal Exchanges, an applicant should still be understood to satisfy it based solely on its *first* prong. One who seeks to enroll through the federal Exchange in his state does not *fail* the requirement that he "resid[e] in the State that established the Exchange." The right answer to that question is "N/A," because neither a "yes" nor a "no" answer would be true. The residency provision *assumes* that a state created the Exchange; so it can quite readily be construed as not prohibiting eligibility where that assumption proves false. By contrast, the subsidy provisions do not *assume* a state-created Exchange; they simply *limit subsidies* to such, and that limit can be sensibly applied.

[5] The Government argues that the enrollment provision *does* apply to federal Exchanges because the *Government maintains* that "Exchange" means state *or federal* Exchange under the enrollment provision, just as the Government claims it does under § 1321. (Opp. 37.) But, of course, the *Government*'s interpretation of "Exchange" under the enrollment provision is not relevant to whether *Plaintiffs*' interpretation of "Exchange" relative to the subsidy provisions creates difficulties under that enrollment provision. As noted, it does not, because, as Plaintiffs have never disputed, "Exchange" means "Exchange established under section 1311" and that definition should naturally be applied to the enrollment provision. The Government's contrary argument that "Exchange" should always be defined to include a § 1311 state Exchange *and* a § 1321 federal Exchange either improperly rewrites the statutory definition or improperly accepts the Government's "legal fiction" argument described above. While both of those arguments are wrong, the relevant point here is that they reflect the *Government*'s conception of "Exchange," and thus inherently cannot suggest any difficulty in Plaintiffs' interpretation of that phrase.

Either of these plausible readings is preferable to construing the Act to establish an eligibility criterion that is literally impossible to satisfy, since, if possible, one does not interpret statutes to create such a Catch-22. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995) (statute should not, if it can "be avoided," be construed so as to be "utterly without effect"). But, again, how one chooses to read the eligibility provision is completely beside the point, given that Plaintiffs' argument concerns the scope of the phrase "Exchange *established by the State*," which neither appears in the eligibility provision nor creates a Catch-22.

<u>Abortion Coverage.</u> Finally, the Government contends that Plaintiffs' theory would preclude *states* from banning coverage for abortions in *federal* Exchanges. (Opp. 37 n.17.) But, even if true, that is not remotely surprising, much less absurd. It would be eminently reasonable for Congress to give states power over coverage only for Exchanges that *they* establish, but not allow them to dictate the coverage offered on Exchanges that *the federal government* controls.

In any event, *Plaintiffs'* theory actually has no consequence for the abortion provision. The ACA authorizes states to "prohibit abortion coverage in qualified health plans offered through *an Exchange*." 42 U.S.C. § 18023(a)(1) (emphasis added). Again, whether the generic term "Exchange" is read to include *all* Exchanges or just *state-established* Exchanges is irrelevant to Plaintiffs' argument about the subsidy provisions—namely, that an "Exchange established by the State" cannot be an "Exchange established by HHS"—and can be answered either way without compromising or undermining Plaintiffs' position here. *See supra* n.5.[6]

* * *

[6] The same point answers the claim by amicus Families USA that, on Plaintiffs' theory, no plan on a federal Exchange could be a "qualified health plan." (Dkt. No. 54, at 14.) The statute says that a health plan must, among other requirements, be certified "by each Exchange through which such plan is offered." ACA, § 1301(a)(1)(A). If "Exchange" standing alone includes federal Exchanges, then federal Exchanges can certify plans they offer. If it does not, such plans would not need to be certified at all.

By burying the Court with the operational details of so many irrelevant aspects of the ACA, the Government is seeking to distract from the very simple question that controls this case: Is an Exchange established by HHS "established by the State"? The answer is clearly no.

C. No Legislative History Contradicts the Unambiguous Statutory Text, and the Limited Legislative Discussion of Federal Exchanges Reflects the Consensus That States Would Submit to the ACA's Pressure To Establish Their Own.

The Government argues that the legislative history supports the IRS Rule. (Opp. 44-49.) But it does not identify *any* legislative history that directly discusses, much less answers, the relevant question—*i.e.*, whether subsidies are available on federal Exchanges. In fact, Congress barely discussed the federal Exchanges *at all*, apparently because the overwhelming consensus was that states would submit to the Act's pressures and establish their own Exchanges. What little history exists shows that conditioning subsidies on state participation in Exchanges was proposed early on, adopted by the Senate Finance Committee, and forced onto the House of Representatives when ACA supporters lost their filibuster-proof Senate majority.

Thus, while it is always "inappropriate" to use legislative history to rewrite a statute that is "unambiguous," *Performance Coal*, 642 F.3d at 238, the legislative history is particularly worthless here, given that there is "no basis for the court to conclude that [Congress] voted for a regulatory scheme other than that provided by the words in the statute," *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1092 (D.C. Cir. 1996). As the D.C. Circuit has explained, "[t]he haste and confusion attendant upon the passage of [a] massive bill do not license the court to rewrite it" but rather "are all the more reason for us to hew to the statutory text." *Id.*

1. Although the Government boldly claims that the legislative history "confirms" the IRS Rule, its real argument is that there is no legislative history *contradicting* the IRS Rule—that no legislative history *confirms* that the ACA's text means what it says. To the extent that the Government cites any actual statements by legislators (Opp. 47), they are banal descriptions of

the ACA's scheme, but do not even purport to address the fallback federal Exchanges or delve into the details of who would be eligible for subsidies under what circumstances.[7] The same is true of the generalities quoted by amicus Families USA. (*See* Dkt. No. 54, at 18-22.)

2. The Government's legislative-history argument is thus that surely someone would have said something (other than, of course, expressly in the statute) if Congress had *really* meant to deprive federal Exchanges of subsidies. But Congress barely discussed the fallback federal Exchanges *at all*, so it is hardly a surprise that it never publicly analyzed the subsidiary question whether they would offer subsidies. And there is good reason for that.

As the Government admits, the House initially passed a bill under which the federal government would presumptively operate *all* of the Exchanges. (Opp. 45.) Moderate Senators demanded state-run Exchanges and, as a tool to incentivize participation by states, the Senate enacted a bill that conditioned subsidies on such. The House had little choice but to "silently acced[e]" to that plan (Opp. 46) after the election of Senator Scott Brown deprived ACA-supporters of a filibuster-proof Senate majority. *See* Michael Cooper, *G.O.P. Senate Victory Stuns Democrats*, N.Y. TIMES, Jan. 19, 2010, at A1. To be sure, limited changes to the Senate bill could be and were approved in the special reconciliation process (Opp. 45), but not major structural and potentially deficit-increasing changes like switching from state-based Exchanges back to the House's preferred national exchange.[8] *See* 2 U.S.C. § 644.

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[7] Amusingly, the Government cites Senator Landrieu's statement deeming "very accurate" a poll question describing the draft ACA as creating a "National Insurance Exchange" offering subsidies. 155 Cong. Rec. S13,733 (Dec. 22, 2009). Obviously, that is not accurate at all; the Senate had rejected a national Exchange in favor of state-based Exchanges months earlier. (*See* Dkt. No. 17, at 4.) And the Government cites a Senate Report explaining that the HHS Secretary would establish "state exchanges" in states that failed to do so. S. Rep. No. 111-89, at 19 (2009). But the report surely meant "state-*based* exchanges," not the semantically nonsensical "federally established state-*established* exchanges."

[8] Actually, eleven House Democrats did push for such a change, warning that "millions of people will be left no better off" if the Senate's state-based Exchange approach were adopted, but to no avail. (Govt. SJ Exh. 29, Dkt. No. 51-1, at 252.)

Nobody in Congress talked about federal fallback Exchanges because Congress expected all of the states to accept its offer and establish their own Exchanges (just as it expected all of the states to expand their Medicaid programs in order to continue to receive federal Medicaid funds). *See* Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, N.Y. TIMES, Aug. 4, 2012, at A17 ("Mr. Obama and lawmakers assumed that every state would set up its own exchange."); Elise Viebeck, *Obama Faces Huge Challenge in Setting up Health Insurance Exchanges*, THE HILL, Nov. 25, 2012 ("It's a situation no one anticipated when the [ACA] was written. The law assumed states would create and operate their own exchanges …."). Indeed, the ACA did not even *appropriate funds* for federal Exchanges, confirming that Congress did not think they would be needed. *See* Goldstein & Eilperin, *Challenges*, *supra* (ACA provides "no money for the development of a federal exchange"). So even if one could infer anything from the *absence* of mention of one point in a massive bill spanning thousands of pages, it is hardly surprising that nobody talked about fallback Exchanges never intended to see the light of day.

The Government counters that it was "well known" that states would refuse to create Exchanges (Opp. 48 n.27), and amicus Families USA claims that states were "signaling early on" that they would refuse (Dkt. No. 54, at 16). But the degree to which they have to stretch to find support for those claims is telling. The *only* legislative statement preceding the Act's passage cited by either the Government or the amicus, a letter from Oklahoma's Insurance Commissioner introduced into the record, actually says the opposite—that Oklahoma "support[s] the state-based exchange concept" but needed a "federal grant" to afford "the necessary investment." (Govt. SJ Exh. 25, Dkt. No. 51-1, at 228.) Of course, the ACA ultimately provided such grants. *See* ACA, § 1311(a)(1). Likewise, amicus cites (Dkt. No. 54, at 17 n.38) a blog post by domestic policy commentator Ezra Klein that purports to summarize how the Exchanges work—but tellingly

does not even *mention* the possibility that states may not establish Exchanges. *See* Ezra Klein, *How Do the Exchanges Work?*, WASH. POST, Mar. 22, 2010, *available at* http://voices.washingtonpost.com/ezra-klein/2010/03/how_do_the_exchanges_work.html ("The bill gives states the option of setting up one exchange for individuals and one exchange for small business or simply setting up one exchange that serves both.").

Amicus also cites articles about opposition to the Act *generally*, *e.g.*, Philip Rucker, *S.C. Senator Is A Voice Of Reform Opposition*, WASH. POST, July 28, 2009, or about state opposition to the *individual mandate* (Dkt. No. 54, at 16-17 nn.35 & 38), but that do not mention Exchanges *at all*. The Government cites a *USA TODAY* editorial that, in arguing for a national Exchange, warned that (among other problems with state-based Exchanges) states might "stall" or be half-hearted in operating them—but not fail to create Exchanges entirely. (Govt. SJ Exh. 26, Dkt. No. 51-1, at 232.) The Government's other article references, not *state* proposals to opt out of ACA Exchanges, as the Government claims, but unspecified "proposals floated around Capitol Hill" to allow, on unspecified terms, "states to 'opt-in' or 'opt-out' of regional health insurance markets or government-sponsored insurers." (Govt. SJ Exh. 23, Dkt. No. 51-1, at 222.) None of this remotely suggests that states threatened to turn down billions of dollars in federal subsidies by not establishing Exchanges, or that any Members of Congress were concerned that they might.

The *only* legislative statement even *suggesting* that states may default came from a single Republican in the House, *after* the ACA passed, speculating that because "up to 37" states were considering "filing a constitutional challenge" to the ACA, they also "may not set up the State-based Exchange." (Govt. SJ Exh. 24, Dkt. No. 51-1, at 226.) Yet even if the congressional majority had not believed that speculation to be ill-founded or mere posturing—which it clearly did, or else it would have funded the federal Exchanges—that isolated warning came too late.

3. The ACA's history confirms that conditioning subsidies on state participation in Exchanges was conscious and intentional. When the Senate began to consider a state-based Exchange model, an influential commentator—so influential that he was invited to the ACA's signing ceremony, http://law.wlu.edu/news/storydetail.asp?id=758—proposed "offering tax subsidies for insurance only in states that complied with federal requirements." Timothy S. Jost, *Health Insurance Exchanges: Legal Issues*, O'Neill Institute, Georgetown Univ. Legal Ctr., no. 23 at 7, April 27, 2009, http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1022&context=ois_papers. That was hardly a novel suggestion; Congress, after all, used—*in the very same Act*—the same "too good to turn down" offer of huge federal grants to coerce states to expand Medicaid. *NFIB*, 132 S. Ct. at 2601 ("Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it."). And Congress had previously conditioned *other* tax credits on states' compliance with federal wishes with respect to health insurance. *See* 26 U.S.C. § 35(a), (e)(2); *supra* at p.9.

The Senate Finance Committee adopted Jost's proposal, and its chair used the conditional nature of the subsidies to justify his committee's jurisdiction over the Exchanges and related regulations of health coverage in the draft ACA; that is, the *Finance* Committee had jurisdiction over health issues only because the bill *conditioned* "tax credit" subsidies, within its bailiwick, on states creating Exchanges subject to regulation. (Govt. SJ Exh. 30, Dkt. No. 51-1, at 257.) *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, 156 (2013).

4. The Government also invokes reports by the Congressional Budget Office ("CBO") and Joint Committee on Taxation ("JCT"). In estimating the cost of premiums in the

Exchanges, CBO assumed that subsidies would be generally available. (*See* Opp. 46.) Of course, when it conducted that analysis in March 2010, no state had yet opted out of establishing an Exchange, so there would have been no principled basis to assume otherwise. Regardless, CBO has since admitted that it "did not perform a separate legal analysis of that issue," so its assumption cannot possibly be probative of anything (much less sufficiently probative to warrant disregarding statutory text). (*See* Govt. SJ Exh. 17, Dkt. No. 51-1, at 210.)

As for the JCT report, it actually refers repeatedly to "state" Exchanges in its discussion of the subsidies and related provisions. JCT, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Care Act"* at 12 (Mar. 21, 2010) (referring, in discussion of subsidy eligibility, to "individuals who purchase health insurance *through a State exchange*"); *id.* at 15 ("premium tax credit for health insurance purchased *through a State exchange*"); *id.* at 41 ("premium tax credit … for health insurance purchased *through a State exchange*"); *id.* at 38 ("health insurance *through a state exchange* with respect to which a tax credit … is allowed or paid"); *id.* at 39, 40 (same, referring six times to "*State exchange*") (emphases added). By contrast, the JCT report *never* refers to federal Exchanges. If anything, this *undermines* the IRS Rule.

5. Amicus Families USA cites subsequent legislation purportedly supporting the IRS Rule. (Dkt. No. 54, at 24-26.) But the cited measures changed only the definition of income for subsidy eligibility purposes, and the extent to which taxpayers must repay subsidies if their income turns out to be higher than projected; neither the bills nor the House reports say anything at all about federal Exchanges. *See* P.L. 111-309 (Dec. 15, 2010); P.L. 112-9 (Apr. 14, 2011); P.L. 112-56 (Nov. 21, 2011). That is not surprising; since subsidies are not available on federal Exchanges, those Exchanges are irrelevant to amendments tweaking the value of the subsidies or

the clawback provisions. As for the CBO, it did not state any assumptions about subsidies for federal Exchanges in its analyses of these bills. Anyway, the first two measures were passed in late 2010 / early 2011, at which time CBO could not have assumed that federal Exchanges would be needed in 2014; the last was passed after the IRS Rule was promulgated, so the CBO would properly have estimated costs based on *that Rule's* provision of subsidies for federal Exchanges.

D. Congress Had Good Reasons To Distinguish Between State-Established and Federally Established Exchanges and Thereby Encourage the Former.

Finally, the Government simplistically argues that the ACA's goal was to make insurance "affordable," and blocking subsidies in federal Exchanges would hinder that goal. (Opp. 42-44.) Yet particularly with a complex Act like the ACA, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam). Rewriting a law "to further what a court perceives to be Congress's general goal … is simply too susceptible to error to be tolerated within our scheme of separated powers." *Consol. Rail*, 896 F.2d at 579.

Granted, Congress wanted insurance to be affordable—but it also wanted states to establish Exchanges. This was not, contrary to the Government (Opp. 50), some type of *favor* to the states: Nobody *wanted* to take on the politically, financially, and logistically arduous task of creating these novel websites—and, as recent events have shown, that reluctance was well-founded. Rather, the point of having the states establish the Exchanges was precisely to keep the federal government *out* of the entire business: As critical swing vote Senator Ben Nelson put it, a federal Exchange "would start us down the road of federal regulation of insurance and a single-payer plan." *Nelson: National Exchange a Dealbreaker*, POLITICO, Jan. 25, 2010. Conditioning the subsidies on state participation in Exchanges was a perfectly sensible (and perhaps the only) way to achieve such participation (just as the ACA's conditions on Medicaid funds were a

sensible way to ensure that states expanded Medicaid). Only because the IRS Rule gave states the "quid" of subsidies without demanding the "quo" of Exchanges did the scheme collapse. And only if the IRS Rule is vacated, and the original "deal" restored, will we find out whether Congress was right to expect total or near-total state participation in Exchanges.[9]

Amicus Families USA argues that Congress could not have intended to "punish" states for refusing to establish Exchanges, because no individual legislator made overt threats and states apparently did not get the message. (Dkt. No. 54, at 17-24.) But, of course, statutory language is what sets out the federal conditions in a "deal." It is that language, if followed, that puts the states on notice of the condition; individual Members of Congress do not engage in bilateral negotiations over the "deal." Here, that statutory condition was never properly conveyed to the states, because the IRS preemptively eliminated it.[10]

Ultimately, the truly irrational course would have been for Congress to ask states to engage in the thankless, controversial task of establishing Exchanges, but offer *no incentives* to do so—to treat states that refused to establish Exchanges *just as well* as those that agreed to bear that burden. Yet the Government is not only arguing that Congress intended just that, but also that any other scheme would be so implausible as to warrant disregard of clear statutory text.

[9] For the same reasons, there is nothing inconsistent between Plaintiffs' position and Klemencic's position in the original *NFIB* litigation. (*Cf.* Opp. 44.) Yes, Congress intended the Exchanges to offer subsidized coverage—but it also intended and expected the Exchanges to be established by states.

[10] In any event, there is no evidence that the states were unaware of the condition. The amicus cites a document issued by the National Governors Association in April 2010. (Dkt. No. 54, at 23.) But that document distinguishes between "a state-based Exchange" operated by a state, and a "federally established/operated Exchange" run by HHS, and says that federal subsidies will be provided if one buys coverage "through a state-based Exchange." *Implementation Timeline for Federal Health Reform Legislation* at 4-5, http://www.nga.org/files/live/sites/NGA/files/pdf/1003HEALTHSUMMIT IMPLEMENTATIONTIMELINE.PDF (emphasis added). The amicus also cites another document that *postdates* proposal of the IRS Rule, so it is obvious why that document included no mention of the linkage between subsidies and state Exchanges.

II. *CHEVRON* DEFERENCE CANNOT SAVE THE IRS RULE.

For four independent reasons, the analysis above is unaffected by the rule of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which gives agencies leeway to reasonably construe ambiguity in laws they administer. *First*, the IRS Rule is not entitled to deference because the relevant ACA text is unambiguous. *Second*, even if there were some ambiguity, the ACA at best delegates overlapping jurisdiction to both HHS and the IRS, which under D.C. Circuit precedent precludes deference, particularly given how those agencies have exercised their interpretive authority here. *Third*, the deference principle is trumped here by the "clear statement" rule for tax exemptions and credits. *Fourth*, in any event, the IRS Rule is not a reasonable construction of any ambiguity that may exist in the ACA's text.

A. Because the Relevant Statutory Text Is Unambiguous, The IRS Has No Power To Construe It.

Where, as here, Congress has "unambiguously expressed [its] intent" in the statute, "that is the end of the matter," and no deference is afforded the agency. *Chevron*, 467 U.S. at 842-43. Just this year, for example, the D.C. Circuit has invalidated agency interpretations at *Chevron* "Step One" in *National Association of Manufacturers v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); *American Federation of Government Employees, AFL-CIO, Local 3669 v. Shinseki*, 709 F.3d 29 (D.C. Cir. 2013); *Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499 (D.C. Cir. 2013); and *Natural Resources Defense Council v. EPA*, 706 F.3d 428 (D.C. Cir. 2013).

Two points are worth noting as to "Step One" of *Chevron*. *First*, judges "owe the agency no deference on the existence of ambiguity." *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) ("*ABA*"). Rather, the court must determine *de novo* whether the statute is ambiguous. *Second*, the inquiry into ambiguity is intended to identify whether Congress intended an "implicit delegation of authority to the agency." *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640,

645 (D.C. Cir. 1998). Thus, "ambiguity is not enough per se to warrant deference to the agency's interpretation. The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity." *ABA*, 430 F.3d at 469.

Here, the Government must therefore convince this Court, *de novo*, that "Exchange established by the State" is *ambiguous* as to whether it includes an Exchange established by HHS; and that, through that ambiguity, Congress was implicitly directing the IRS to exercise its discretion as to whether to make subsidies available in federal Exchanges. Neither is plausible. At best, the Government has constructed a highly attenuated "legal fiction" and imposed it onto the ACA's contrary text. Such efforts cannot *create* any ambiguity, and surely not the sort of open-ended ambiguity that suggests a congressional intent to delegate to an agency.

B. No *Chevron* Deference Is Owed, Because the IRS at Best *Shares* Regulatory Authority with HHS, and the Agencies Have Issued Conflicting Regulations.

Chevron deference cannot save the IRS Rule for another reason: It does not apply.

1. While the ACA's subsidy provisions are part of the Internal Revenue Code, the provisions that establish state and federal Exchanges are found in a chapter of Title 42 of the U.S. Code that is the domain of HHS. *See* 42 U.S.C. §§ 18031, 18041. Critically, the Government has never claimed that the language of *26 U.S.C. § 36B* is ambiguous. Rather, it argues that the ACA *as a whole* is ambiguous, because "such Exchange" in *§ 1321(c)* creates ambiguity as to whether federal Exchanges can be deemed, through some "legal fiction," established by states.

But § 1321 is not part of the Internal Revenue Code, and addresses the powers of *HHS*— or, as the statute says, the "Secretary" (not "the Commissioner"). The IRS has no power to enforce or administer § 1321. It therefore is entitled to no deference when it purports to construe that provision. *See U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1015-16 (D.C. Cir. 2002) (no deference to *FAA* under *Chevron* where *Secretary of Interior* had "authority to interpret that

[disputed] statutory term"); *Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 250 F.3d 778, 782 (D.C. Cir. 2001) (no *Chevron* deference where agency interpretation rested, "in part," on "legislative enactments that are not part of its enabling statute"); *Cheney R.R. Co. v. R.R. Ret. Bd.*, 50 F.3d 1071, 1073-74 (D.C. Cir. 1995) (no deference where issue "turn[ed] on the interpretation" of laws that were "not the Board's governing statutes"); *Dep't of Treasury v. Fed. Labor Relations Auth.*, 837 F.2d 1163, 1167 (D.C. Cir. 1988) ("[W]hen an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference."). Indeed, the IRS itself recognizes that it has no authority or competence to construe "Exchange" or the "such Exchange" language, which is why the IRS Rule simply adopts and defers to HHS's definition of "Exchange." 26 C.F.R. § 1.36B-1(k); Part II.B.2, *supra*.

It does not matter that the subsidy provisions in the Internal Revenue Code use the term "Exchange" and cross-reference § 1311 of the ACA. The same dynamic was present in *Shinseki*, where a law administered by the Secretary of Veterans Affairs ("VA") used the term "collective bargaining" and cross-referenced another law, the Federal Service Labor-Management Relations Statute ("FSLMRS"). *See* 709 F.3d at 33. The latter statute defined "collective bargaining," and the D.C. Circuit held that it owed no deference "to the VA's interpretation of the FSLMRS because the VA does not administer that statute." *Id.* The same is true here: The key provisions under the Government's theory are §§ 1311 and 1321 of the ACA, but the IRS clearly "does not administer" those provisions, and so its interpretation is owed no deference. *See id.*

2. At best, the IRS Rule purports to construe portions of the ACA that it and HHS effectively *jointly* administer, given the way the statutory provisions interact with one another. At most, then, the powers of these agencies are intertwined because the statutory provisions are intertwined. As noted, the IRS Rule itself actually provides only that subsidies will be available

on any "Exchange," and then adopts by cross-reference the *HHS* definition of that term. *See* 26 C.F.R. § 1.36B-2(a) (providing eligibility for subsidy if one enrolls in coverage "through an Exchange"); *id.* § 1.36B-1(k) (providing that "Exchange has the same meaning as in 45 C.F.R. § 155.20"). HHS's current definition of "Exchange"—which is applicable to its own, distinct regulations—includes all Exchanges, "regardless of whether the Exchange is established and operated by a State … or by HHS." 45 C.F.R. § 155.20. The IRS Rule thus operates only by incorporating an HHS definition originally intended for other purposes. Thus, eligibility for subsidies under the IRS Rule is wholly dependent on *HHS's* interpretative regulation of "Exchange," which *HHS* can change at any time, without any control or input by the IRS.

The (at best) intertwined nature of IRS and HHS jurisdiction over the relevant provisions precludes *Chevron* deference. The D.C. Circuit "decline[s] to defer to an agency's interpretation of a statute when more than one agency is granted authority to interpret the same statute"; "[i]n such cases, it cannot be said that Congress implicitly delegated to one agency authority to reconcile ambiguities or to fill gaps, because more than one agency will independently interpret the statute." *Salleh v. Christopher*, 85 F.3d 689, 692 (D.C. Cir. 1996). Accordingly, "[w]hen a statute is administered by more than one agency, a particular agency's interpretation is not entitled to *Chevron* deference." *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000). "The alternative would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all." *Rapaport v. U.S. Dep't of Treasury*, 59 F.3d 212, 216-17 (D.C. Cir. 1995); *accord DeNaples v. Office of Comptroller of Currency*, 706 F.3d 481, 488 (D.C. Cir. 2013) ("We have repeatedly pointed to the agencies' joint administrative authority … to justify refusing deference to their interpretations.").

Thus, the dispositive question for the applicability of *Chevron* deference is whether Congress intended a *particular* agency to resolve any ambiguity in the statutory text. That is surely not the case for the ACA as a whole, nor with respect to the subsidy provisions in tandem with §§ 1311 and 1321 of the ACA. The IRS at most *shares* regulatory authority with HHS, and thus is entitled to no deference for an interpretation of those provisions. In light of HHS's role, it simply "cannot be said that Congress implicitly delegated to [the IRS] authority to reconcile ambiguities" about whether subsidies are available on federal Exchanges. *Salleh*, 85 F.3d at 692.

3. This conclusion is particularly appropriate here, because HHS and the IRS have in fact interpreted "the same statute … differently." *Rapaport*, 59 F.3d at 216. There is thus not only a *potential* for conflict—which itself suffices to deprive the agencies of deference—but an *actual* conflict. In particular, while the IRS Rule construes the word "such" in § 1321(c) to mean that federal Exchanges are somehow established by states, HHS has given the word "such" a *different meaning*. In June 2013, HHS proposed (and later promulgated) a regulation providing that a state may permissibly establish an Exchange that either serves the individual market *or* small businesses (the latter is called a SHOP Exchange); it had previously ruled "that a State must elect to carry out *both* these functions in order to establish an 'Exchange.'" 78 Fed. Reg. 37031, 37043 (June 19, 2013) (emphasis added). In defending this change, HHS explained that the phrase "such Exchange" in § 1321(c) supported it: The direction to the HHS Secretary to establish "such" Exchange means the *particular sort of Exchange—i.e.*, individual or SHOP—that the state declined to establish, suggesting that the state may establish one without the other. *See id.* Thus, HHS's construction is *not* that "such" creates a bizarre legal fiction under which federal Exchanges are deemed state-established, but that "such" *differentiates* between the *two* types of Exchanges that states "shall" establish (and that HHS will establish if the state defaults).

Moreover, as previously explained, the HHS definition of "federally-facilitated Exchange" directly *conflicts* with the position taken by the IRS Rule. Under the Rule, federal Exchanges created under § 1321 are "deemed" to be "established by *the State* under *section 1311*." But HHS itself says that a federal Exchange is "an Exchange established … *by the Secretary* under *section 1321(c)(1)*." 45 C.F.R. § 155.20 (emphases added). The two sets of regulations are thus fundamentally incompatible, further confirming that agency deference is not appropriate here.[11]

In short, the IRS has identified a purported ambiguity in a provision that is not part of its organic act, that it does not administer, and that HHS has construed to mean something else. The IRS Rule then "resolves" that "ambiguity" by adopting a "legal fiction" that directly contradicts extant HHS regulations in an area of dual jurisdiction. No *Chevron* deference applies here.

C. Moreover, *Chevron* Deference Is Displaced Here by the Venerable "Clear Statement" Rule for Tax Exemptions and Credits.

Chevron deference is premised on the assumption that the agency has authority to resolve statutory ambiguity and consequently may expand the statute's reach beyond what the statute's language unambiguously compels. But that authority to expansively interpret ambiguities is not available if other canons of construction require narrowly construing the statute to extend no further than its plain language. Specifically, where established principles of statutory construction require a clear or unambiguous statement of congressional intent to infer certain results, an agency cannot construe ambiguous statutory text to achieve those results. Indeed, a contrary rule would eliminate these canons of construction entirely in the agency context. *See* Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) (explaining that these canons "forbid administrative agencies from making decisions on their own" by depriving them of their "ordinary discretion" to construe an "ambiguous statutory provision").

[11] Furthermore, as explained below, the IRS and HHS apparently cannot even agree on how to *calculate* subsidies under the ACA—including for Plaintiff David Klemencic. *See* Part III.A.2.b, *infra*.

Thus, for example, if a statute is ambiguous but one construction "would raise serious constitutional problems," there is no deference to an agency adopting it; rather, the court will adopt the contrary construction unless "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988). In other words, the courts require a *clear statement* that Congress intended the result of dubious constitutionality; ambiguity plus agency interpretation is not sufficient. *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (holding that "canon of constitutional avoidance trumps *Chevron* deference"). Similarly, in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), a statute was "ambiguous" as to whether it applied overseas, but the Court held that the EEOC's view that it did could not "overcome the presumption against extraterritorial application." *Id.* at 250, 258. Justice Scalia elaborated that, in light of that presumption, the EEOC could not infer extraterritoriality from "mere implications" from ambiguous language. *Id.* at 260 (Scalia, J., concurring in part and in judgment). Likewise, in *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court held that the presumption against retroactivity means that "a statute that is ambiguous with respect to retroactive application is construed … to be unambiguously prospective," such that "there is, for *Chevron* purposes, no ambiguity in such a statute." *Id.* at 320 n.45. There are many more examples of cases holding that various presumptions and clear statement rules effectively trump or displace *Chevron* by giving the ambiguity itself a dispositive meaning. *See, e.g.*, *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444-45 & n.8 (D.C. Cir. 1988) (refusing to defer because Indian law canon provides that if law "can reasonably be construed" in Tribe's favor, "it *must* be construed that way"); *Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 982 (D.C. Cir. 1990) ("An agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it.").

As relevant here, a venerable canon of construction repeatedly applied by the Supreme Court holds that tax credits (and deductions and exemptions) "must be expressed in clear and unambiguous terms." *Yazoo & Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 183 (1889). The D.C. Circuit has accordingly held that a statute must "unquestionably and conclusively" establish such a credit or exemption. *Stichting Pensioenfonds Voor De Gezondheid v. United States*, 129 F.3d 195, 198 (D.C. Cir. 1997). Critically, such tax benefits "are not to be implied; they must be unambiguously proved," *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988); and "must rest … on more than a doubt or ambiguity," *United States v. Stewart*, 311 U.S. 60, 71 (1940). If "doubts are nicely balanced," the Supreme Court has said, that defeats the claimed tax exemption. *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933); *see also Telecom*USA, Inc. v. United States*, 192 F.3d 1068, 1072 (D.C. Cir. 1999) ("[A] taxpayer who seeks a deduction bears the burden of demonstrating a clear entitlement."). Only that "extremely high standard" properly respects Congress's "exclusive authority to collect taxes" and "the importance of taxation" to the national revenue and operation of the government. *Stichting*, 129 F.3d at 197-98.[12]

In light of this well-established rule for how to treat ambiguity in the Tax Code—namely, allowing money to be drawn from the Treasury only when the congressional custodian of the federal purse has unambiguously authorized a withdrawal—*Chevron* deference is displaced with respect to this dispute over the proper interpretation of 26 U.S.C. § 36B, which authorizes a tax credit. Just as presumptions and clear statement rules prevent agencies from applying ambiguous laws extraterritorially or retroactively or to create constitutional doubts, the clear statement rule of *Yazoo* and *Wells Fargo Bank* prevents agencies from providing a tax credit unless Congress

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[12] While some of these cases speak primarily of tax *exemptions*, the same logic and same principle govern the availability of tax *deductions* and *credits*, too. *See MedChem (P.R.), Inc. v. Comm'r*, 295 F.3d 118, 123 (1st Cir. 2002) (describing doctrine as applicable to "deduction or credit"); *Randall v. Comm'r*, 733 F.2d 1565, 1567 (11th Cir. 1984) (per curiam) ("[A]ll deductions or credits … are not allowable unless Congress specifically provides for them.").

has *unambiguously* allowed it. The availability of § 36B tax credits in federal Exchanges "must be unambiguously proved," *Wells Fargo Bank*, 485 U.S. at 354; the IRS cannot by regulation extend or expand the credits by resting on "doubt or ambiguity" in the ACA, *Stewart*, 311 U.S. at 71. As such, any ambiguity in § 36B must as a matter of law be construed against availability of the subsidy, and so "there is, for *Chevron* purposes, no ambiguity in [the] statute for [the IRS] to resolve." *St. Cyr*, 533 U.S. at 320 n.45. Put another way, so long as § 36B "can reasonably be construed" to restrict the ACA's premium tax credit to state-established Exchanges, "it *must* be construed that way." *Muscogee (Creek) Nation*, 851 F.2d at 1445.

D. In All Events, the IRS Rule Is Not a Reasonable Construction of the Text.

Even setting aside all of the above, and assuming there exists some ambiguity in the ACA and that the IRS has been delegated authority to construe it, the IRS Rule would *still* fail at "Step Two" of the *Chevron* analysis, which asks whether the agency's construction is "reasonable."

As the D.C. Circuit has explained, "[i]f a statute is ambiguous, an agency that administers the statute may choose a reasonable interpretation of that ambiguity—but the agency's interpretation *must still stay within the boundaries of the statutory text*." *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 23 (D.C. Cir. 2012) (emphasis added). Under Step Two of *Chevron*, "the court's deference to the [agency] is still limited by the particular language" of the statute; "whatever ambiguity may exist cannot render nugatory restrictions that Congress has imposed." *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005). *Chevron*'s second step is "thus not independent of the first: what a court may consider a reasonable interpretation largely depends on the nature and extent of the ambiguity already identified in *Chevron*'s first step." *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996). In particular, "time-honored canons of construction may … constrain the possible number of *reasonable* ways to read an ambiguity in a statute." *Id.*

For all of the reasons discussed in Part I and Part II.C, the IRS Rule is not a *reasonable* construction of the ACA. Any ambiguity that may exist cannot justify ignoring the statutory text, rejecting the numerous applicable canons of construction, and eliminating the incentives Congress created for states to establish Exchanges. Indeed, the IRS Rule "render[s] nugatory" Congress's restrictions on subsidies, *Am. Fed'n of Labor*, 409 F.3d at 384, and therefore fails at Step Two of *Chevron* even if there is room for some discretion. Even assuming the IRS has "some wiggle room …, the statute's language is not as capacious as the agency suggests." *EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 997 (D.C. Cir. 2013).

III. THERE ARE NO JURISDICTIONAL OR PRUDENTIAL BARRIERS TO THIS APA CHALLENGE.

At the motion-to-dismiss stage, this Court held that individual plaintiff David Klemencic had sufficiently alleged standing to challenge the IRS Rule, and that it therefore did not need to address whether any of the other plaintiffs had standing. That remains true. Undisputed facts establish Klemencic's standing, and that is enough to allow this Court to resolve the merits. Although it again need not reach the issue, other plaintiffs have standing too. Finally, as the Court already correctly held, this APA challenge is not precluded by the prospect of an after-the-fact tax-refund suit that would not remedy Plaintiffs' *current* injuries; nor does the Anti-Injunction Act apply to the employer plaintiffs here, as every court has held.

A. Because Plaintiff David Klemencic Indisputably Has Standing, This Court Has Jurisdiction To Resolve the Merits of Plaintiffs' APA Challenge.

This Court held, at the motion-to-dismiss stage, that David Klemencic had alleged facts sufficient to establish standing. Because all of those material facts are undisputed, he has also established standing for purposes of summary judgment. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (at summary judgment, standing must be established through "affidavit or other evidence"). Indeed, it is now *once again* undisputed (based on the Government's *third*

declaration on the matter) that Klemencic would be required to pay *out of pocket* for ACA-compliant coverage under the IRS Rule but not if it is invalidated.

1. It is undisputed that Klemencic need *not* comply with the individual mandate absent the IRS Rule, but *must* comply with the individual mandate (or pay a penalty) in light of it.[13] Because Klemencic does not want to buy any health coverage for 2014 (*see* Dkt. No. 39-1 ("Supp. Klemencic Decl."), ¶ 3)—the IRS Rule injures Klemencic by forcing him to do so.

2. There apparently remains some immaterial disagreement about *how much* Klemencic will have to pay, out of pocket, for coverage. The Government's declarant, Donald Moulds, first swore, on September 27, 2013, that the second-cheapest silver plan on the federal Exchange in West Virginia would cost $438.44 per month, and that Klemencic would therefore have to pay about $18 per month for subsidized coverage. (Dkt. No. 38-1 ("Moulds Decl."), ¶ 4.) (The second-cheapest silver plan matters because the ACA ties the value of the subsidy to that "benchmark" plan. 26 U.S.C. § 36B(b)(2)(B)(i).) On October 18, 2013, a new declaration by Mr. Moulds stated, purportedly based "on data that ha[d] bec[o]me available after" September 27, that the second-cheapest silver plan would actually cost $463.81 per month, and that Klemencic would thus pay *nothing* for subsidized bronze coverage. (Dkt. No. 41.) Now, in a *third* declaration, Mr. Moulds says that he was wrong *both* times, and that Klemencic would pay $1.70 per month for subsidized bronze coverage, because that insurance includes "non-essential" benefits that the subsidy would not cover. (Dkt. No. 49-2 ("Third Moulds Decl."), ¶ 6.)

[13] Absent the IRS Rule, Klemencic would be eligible for an exemption from the individual mandate penalty for 2014, because the cost to him of the cheapest "bronze" coverage on the federal Exchange in West Virginia exceeds 8% of his projected income for 2014. *See* 26 U.S.C. § 5000A(e)(1), (5); 45 C.F.R. § 155.605(g)(2). In particular, Klemencic's projected 2014 income is $20,000. (Dkt. No. 24-1 ("Klemencic Decl."), ¶ 4.) The cheapest bronze coverage available to him would, absent a subsidy, cost $371.28 per month (Dkt. No. 38-1 ("Moulds Decl."), ¶ 4), or approximately 22% of his income. Under the IRS Rule, however, Klemencic would be entitled to a subsidy that would reduce his out-of-pocket costs to below 8% of his income, such that so he could not claim that exemption. *See* 26 U.S.C. § 36B(b)(2)(B), (b)(3)(A)(i) (tying subsidy value to household income); Dkt. No. 24-2, ¶ 22.

a. Ultimately, this factual issue is immaterial. All parties now concede that, under the IRS Rule, Klemencic will be forced to pay *out of pocket* for a product that he does not want. The Government admits that, as its declarant now says, coverage "would cost Klemencic … $1.70 a month." (Opp. 13.) That is classic Article III injury.

b. Although it does not matter, the actual cost to Klemencic would be higher than the Government suggests. Its most recent declaration continues to calculate Klemencic's subsidy using a figure of $463.81 as the second cheapest silver premium, rather than $438.44, which was the figure in Mr. Moulds' initial declaration. The Government has led the Court to believe that this revision was based "on data that ha[d] bec[o]me available" since September 27 (Dkt. No. 41), but rates were due to HHS months earlier. In truth, as Mr. Moulds ultimately explains, the two cheapest silver plans on the Exchange in West Virginia have the *same* premium; his initial declaration therefore used that figure as the cost of the second-cheapest silver plan. His revised declaration, however, purportedly based on "IRS policy," used the *next* cheapest silver plan as the benchmark. (Third Moulds Decl., ¶ 5.) No citation is given for this alleged IRS policy, however, and *HHS*'s policy is to the contrary, as its website—*even as of this filing*—continues to say that the second-cheapest silver plan would cost Klemencic $438.44. (*See* Exh. A.) In all events, the fact that it has taken an HHS Assistant Secretary three tries over six weeks to calculate Klemencic's subsidy, at the least, perfectly illustrates why he cannot accept the Government's assurance that he will be "better off" under the IRS Rule.

c. Moreover, even if Klemencic were entitled to a subsidy that would cover his premiums in full, he would still have standing. The IRS Rule forces him, on pain of penalty, to go through the process of buying a product he does not want and to contract with an insurer against his will. These compelled acts are restrictions on freedom that constitute injury, even if

Klemencic is reimbursed for the *economic* costs. *Wilcox Elec., Inc. v. FAA*, 119 F.3d 724, 728 (8th Cir. 1997) (plaintiffs "suffer the requisite injury simply because their activities are being limited"); *NCAA v. Califano*, 622 F.2d 1382, 1389 (10th Cir. 1980) ("Compulsion by unwanted and unlawful government edict is injury *per se*."). Indeed, the Government argues elsewhere that requiring citizens to obtain *free* identity cards imposes an *unconstitutional* burden on the right to vote. *See* Devlin Barrett, *Voter ID Targeted in North Carolina*, WALL ST. J., Sept. 30, 2013. *A fortiori*, forcing Klemencic to go through the tortuous and time-consuming process of buying insurance on a malfunctioning federal Exchange is at least injury-in-fact.[14]

d. In an argument that is quite difficult to even comprehend, the Government suggests that even being forced to pay for coverage that Klemencic does not want is not Article III injury, apparently because he "acknowledged that he would be willing to buy catastrophic coverage at some price" and only refuses to buy subsidized bronze coverage because of ideological opposition. (Opp. 13.) For one thing, that is irrelevant: Forcing an individual to spend money is *economic* injury, regardless of what motivates the individual in seeking to avoid that financial harm. And whether or not Klemencic would hypothetically be willing to buy *catastrophic* coverage has nothing to do with his standing to challenge a mandate to buy *comprehensive* coverage, which he indisputably does not want.

[14] Further, even if Klemencic's subsidy were *projected* to pay all of his premiums, he would have to repay some or all of it if his *actual* income turns out higher than projected. 26 U.S.C. § 36B(f)(2). For example, if Klemencic earns $21,000 in 2014, and accepting the Government's most recent claim that the second-cheapest silver plan would cost him $463.81 per month, Klemencic would be entitled to a subsidy of (463.81) – (0.0551) x (21,000/12) = $367.39, and so would have to pay (371.28) – (367.39) = $3.89 per month for the cheapest bronze coverage on the Exchange. If Klemencic earns $25,000 in 2014, then (still using the Government's figure) he would be entitled to a subsidy of (463.81) – (0.0692) x (25,000/12) = $319.64, and so would have to pay (371.28) – (319.64) = $51.64 per month for such coverage. (Neither of those sums includes the additional $1.70 per month that Klemencic would pay for "non-essential" health benefits.) Whatever the projected value of Klemencic's subsidy, the IRS Rule thus exposes him to a contingent liability, under which he *may* have to pay for coverage he does not want, which is Article III injury too, under *Clinton v. City of New York*, 524 U.S. 417, 431 (1998). By contrast, if the IRS Rule were invalidated and Klemencic obtained a certificate of exemption, that would *guarantee* that he would pay *nothing*, "notwithstanding any change in [his] circumstances." 45 C.F.R. § 155.605(g)(2)(vi).

Anyway, the Government blatantly misrepresents Klemencic's testimony. His initial declaration clearly stated: "I do not want to purchase comprehensive health coverage in 2014." (Klemencic Decl., ¶ 8.) He observed that, under the IRS Rule, he would be "forced either to pay a tax penalty or to buy comprehensive health coverage," and also "prohibited from purchasing catastrophic coverage," but never said he intended to do the latter. (*Id.* ¶ 7.) When the question arose whether Klemencic, absent the IRS Rule, would buy catastrophic coverage or forgo coverage entirely, he submitted a supplemental declaration making it absolutely clear: "I wish to forgo health coverage entirely in 2014, rather than purchase catastrophic coverage." (Supp. Klemencic Decl. ¶ 3.) The Government is thus putting (irrelevant) words in Klemencic's mouth.

* * *

Jurisdiction exists over a claim so long as one plaintiff has standing to pursue it. *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996). Because Plaintiffs here raise one claim and all seek the same relief of vacatur, this Court may proceed based on Klemencic's standing alone. Nonetheless, Plaintiffs explain below why at least one other set of plaintiffs also has standing.

B. Although This Court Need Not Reach the Issue, the Texas Restaurants Also Have Standing To Challenge the IRS Rule.

As Plaintiffs have previously explained, the employer plaintiffs—and, in particular, the Texas restaurants including GC Restaurants and the Olde England's Lion and Rose parties ("the Restaurants")—have standing to challenge the IRS Rule because, by making subsidies available in Texas, the Rule forces the Restaurants to sponsor coverage for their full-time employees or else almost certainly incur a devastating financial penalty. The Government's various contrary arguments, all of which relate to the Restaurants' employees, are legally wrong.

1. To reiterate, the Restaurants do not want to sponsor ACA-compliant coverage for all of their full-time employees. (Dkt. No. 24-3 ("Tharp Decl."), ¶ 4.) However, if they fail to do so, and even one of their full-time employees obtains subsidized coverage on the federal Exchange in Texas, then the Restaurants will incur a devastating fine. 26 U.S.C. § 4980H(a)(2). Given that GC Restaurants alone has approximately 18 employees paid at wages that render them eligible for a subsidy (Tharp Decl. ¶ 3),[15] it is highly likely that at least one employee will do so, triggering that penalty. Due to that huge threatened liability, the Restaurants must and will bear the substantial cost of sponsoring health coverage for their full-time employees, absent relief in this Court. (Tharp Decl. ¶ 5.) Such compliance costs constitute a quintessential injury. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988); *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 480 (D.C. Cir. 1986); *Ass'n of Private Sector Colleges v. Duncan*, 681 F.3d 427, 458 (D.C. Cir. 2012); *Liberty University v. Lew*, No. 10-2347, 2013 WL 3470532, at *6-7 (4th Cir. July 11, 2013); *Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 287 (6th Cir. 1997).

2. The Government's response centers on the claim that the threat to the Restaurants arises from their *employees*' receipt of the subsidies, rather than from the IRS Rule directly.

a. The Government first invokes a line of authority under which "a plaintiff's standing fails where it is purely speculative that a requested change in government policy will alter the behavior of regulated third parties that are the direct cause of the plaintiff's injuries." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004). The Government argues that because the Restaurants' injury flows from receipt of subsidies by employees, rather than directly from the IRS Rule, this line precludes standing.

[15] W-2 income does not always equal household income, of course, but the IRS has recognized in a related ACA context that it is reasonable for employers, who lack perfect information, to assume that it does. *See* 26 C.F.R. § 54.4980H-5(e)(2)(ii). Moreover, of these 18 employees, 11 are not married and therefore are highly unlikely to have any other source of household income and certain not to have coverage offered by a spouse's employer. (Tharp Decl. ¶ 3.)

The Government misunderstands the cases. Of course plaintiffs cannot challenge agency action if third parties triggering their injuries could continue their harmful behavior even absent that action. For example, in *National Wrestling*, the plaintiffs' injury was their schools' decision to eliminate men's wrestling; they could not challenge an agency's policy guidance where there was "nothing but speculation" to suggest that "schools would act any differently" absent that guidance. *Id.* at 940. Whatever the court ruled, the schools "would remain free to eliminate or cap men's wrestling teams." *Id.*; *see also, e.g.*, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-43 (1976) (no standing to challenge grant of favorable tax treatment to hospital that did not serve indigents, because even if tax status were changed, it was speculative that hospital would serve indigents); *Univ. Med. Ctr. of So. Nev. v. Shalala*, 173 F.3d 438, 441-42 (D.C. Cir. 1999).

By contrast, where the challenged agency action *permits* injurious third-party conduct that would otherwise be unlawful or impossible, the D.C. Circuit has been clear that standing exists. In such a case, the agency action is a but-for cause of the injury; relief would therefore stop it. As explained in *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (en banc), "constitutional standing is met when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly cause[s] the plaintiff's injuries." *Id.* at 440; *see also, e.g.*, *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 46-47 (D.C. Cir. 1994) (standing to challenge agency order allowing third party conduct, because "injurious private conduct is fairly traceable to the administrative action contested … if that action authorized the conduct"); *Int'l Ladies' Garment Union v. Donovan*, 722 F.2d 795, 811 (D.C. Cir. 1983) (standing where "relief sought … would make the injurious conduct of third parties … illegal").

Here, the challenged agency action—*i.e.*, the IRS Rule—"permit[s]" and "authorize[s]" the Restaurants' employees to obtain subsidies, which they otherwise would be unable to do

under Plaintiffs' view of the law, which must be accepted for standing purposes. *Animal Legal*, 154 F.3d at 441-42; *Tel. & Data*, 19 F.3d at 47. If Plaintiffs are correct that the IRS Rule is foreclosed because subsidies are unavailable in federal Exchanges under the ACA's text, there will be no subsidies on the federal Exchange in Texas. Consequently, the Restaurants would not face the threat of a massive penalty under the employer mandate, and would not be coerced by that threat to sponsor employee coverage. It is particularly inappropriate for the Government here to object to establishing standing through this link, because that link is *precisely* the *enforcement mechanism* the Act itself has chosen—*i.e.*, that the threat of an employee receiving a subsidy will force the employer to provide insurance. *See* 26 U.S.C. § 4980H.

b. The Government responds with the bizarre claim that even if this Court agrees that the ACA's text unambiguously precludes subsidies in federal Exchanges and therefore vacates the IRS Rule, *eliminating* the Rule which *causes* the Restaurants' injury will somehow not *redress* that injury. This is purportedly because, although this Court's decision will fully redress any injury, the Government speculates that one of the Restaurants' employees might sue in a different court and that this other court might enter a *conflicting judgment* which *revives* the injury fully redressed by this Court's judgment. (Opp. 15-16.) Specifically, the Government hypothesizes a suit by the employees in Texas under the *Act itself*, in which the hypothetical court not only rejects this Court's conclusion that the Act *forbids* such subsidies, but concludes that "an Exchange established by the State under section 1311" *must* be interpreted to encompass "an Exchange established by HHS under section 1321." (Opp. 16.) (The hypothetical suit obviously could not be brought under the IRS Rule itself, because it would already have been vacated across-the-board. *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998).)

But, of course, the only redressability inquiry is whether the plaintiff's "injuries are redressable *in this suit*," *City of Dania Beach, Fla. v. FAA*, 485 F.3d 1181, 1186 (D.C. Cir. 2007), not whether that complete relief can be *undone* by *another* court's *conflicting* judgment. Were it otherwise, no suit would *ever* be justiciable. District courts routinely disagree; that hardly means that none ever has jurisdiction. For example, if a company sues the EPA to vacate a regulation precluding certain practices the company is engaging in, standing is plainly not defeated by the prospect that a private party could sue the company in another court or Circuit, invoking the vacated rule or underlying law to claim the company's practice is illegal.

The obvious reason for this rule is that redressability analysis assumes that the plaintiff will prevail not only in the district court, but also on appeal. Otherwise the risk of *appellate* reversal would mean that the district court could not redress *any* alleged injury and no one would ever have standing. The question is thus not whether *this Court's* vacatur of the IRS Rule would redress the Restaurants' injury, but whether a vacatur *affirmed by the D.C. Circuit and Supreme Court* would. And even the Government cannot dispute that it would. If the Supreme Court affirms that the ACA cannot reasonably be read to allow subsidies in federal Exchanges, that will be settled law and any suit by the employees seeking the opposite ruling would be foreclosed.

Further illustrating the fallacy of the Government's reasoning, the redressability inquiry asks only whether, if the plaintiff is correct on the merits, a favorable ruling would "likely" redress his injury. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Thus, plaintiffs "need not negate every conceivable impediment to effective relief no matter how speculative, nor are they required 'to *prove* that granting the requested relief is *certain* to alleviate' their injury." *Int'l Ladies'*, 722 F.2d at 811 (quoting *Community Nutrition Inst. v. Block*, 698 F.2d 1239, 1248 (D.C. Cir. 1983)). The Supreme Court has accordingly upheld standing so long as "the practical

consequence of [the favorable ruling] would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Utah v. Evans*, 536 U.S. 452, 464 (2002). Indeed, if the rule were otherwise, nobody could *ever* challenge agency action under the APA, given the well-established rule, *see SEC v. Chenery Corp.*, 332 U.S. 194 (1947), that even after judicial vacatur an agency may reach the same result using different reasoning. *See FEC v. Akins*, 524 U.S. 11, 25 (1998) (making this point). The critical question, in short, is not whether it is *hypothetically conceivable* that a plaintiff's injury might still occur even if he wins his suit, but rather whether it would *likely* still occur.

Obviously, if this Court holds that the IRS Rule is unambiguously contrary to the ACA and therefore vacates it, a hypothetical suit by the Restaurants' employees, seeking subsidies directly under the statute and without the benefit of the IRS Rule, is extraordinarily unlikely to be brought or to succeed. The Government's hypothetical is thus, at best, an utterly "speculative" impediment to redress of the Restaurants' injury. *Int'l Ladies'*, 722 F.2d at 811. The "practical consequence" of vacatur, at the very least, is "a significant increase" in the likelihood that no employee of the Restaurants will be awarded a subsidy. *Utah*, 536 U.S. at 464. Contrary to the Government, the Restaurants' injury is thus clearly redressable in this suit.

c. The Government further argues that *prudential* considerations operate to preclude the employer plaintiffs from bringing suit. In particular, the Government contends that a litigant may never challenge the tax liabilities of others, and therefore that the Restaurants lack prudential standing even if they have Article III standing. (Opp. 16-20.)

At the outset, this suit does not challenge anyone's tax liabilities. Plaintiffs seek vacatur of an IRS regulation that authorizes tax credits; if that rule is vacated, many people would thus be ineligible for those credits, but nobody is asking this Court to rule on the tax liabilities of any

individual. The Restaurants seek precisely the same relief as Klemencic—vacatur of the IRS Rule. Even the Government concedes that he is not barred from seeking this relief, even though it would equally affect the tax liabilities of others, and so there cannot be a prudential bar to the Restaurants seeking the same relief. In other words, while the effect of *any* plaintiff's prevailing is that millions of others' tax credits will be affected, this is the inevitable consequence of APA challenges to rules which affect many people. That Klemencic's victory will increase the Restaurants' employees' "tax liabilities" (along with millions of others') does not convert his suit into a "challenge" to those individuals' taxes—and the same is true of the Restaurants' identical challenge. Were it otherwise, *NFIB* could not have been decided, because that challenge would have affected the tax liabilities of many taxpayers—by eliminating the individual mandate "tax."

In any event, assuming *arguendo* that this standard APA challenge can somehow be converted into a challenge to third parties' tax status, there is absolutely no prudential bar to such suits. Plaintiffs have cited a plethora of cases proving that point. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 110 (2004); *Byrne v. Pub. Funds for Pub. Schs. of N.J.*, 442 U.S. 907 (1979); *Franchise Tax Bd. of Cal. v. United Ams. for Pub. Schs.*, 419 U.S. 890 (1974); *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Grit v. Wolman*, 413 U.S. 901 (1973); *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990); *Minn. Civil Liberties Union v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978); *McGlotten v. Connally*, 338 F. Supp. 448, 453-54 (D.D.C. 1972); *Tax Analysts & Advocates v. Shultz*, 376 F. Supp. 889, 892 (D.D.C. 1974).[16]

[16] And none of the Government's cases holds otherwise. Some expressly decline to address the issue. *Simon*, 426 U.S. at 36 n.14; *Am. Soc'y of Travel Agents v. Blumenthal*, 566 F.2d 145, 150 n.3 (D.C. Cir. 1977); *Apache Bend Apts., Ltd. v. United States*, 987 F.2d 1174, 1177 (5th Cir. 1993) (en banc). In others, third-party challenges were rejected on *other*, unexceptional grounds. *Allen v. Wright*, 468 U.S. 737, 754-59 (1984) (Article III standing); *Louisiana v. McAdoo*, 234 U.S. 627 (1914) (sovereign immunity). And some courts actually *allowed* the challenges. *United States v. Williams*, 514 U.S. 527, 538 (1995); *Women's Equity Action League v. Cavazos*, 879 F.2d 880, 885 n.3 (D.C. Cir. 1989).

The Government has responded that all of these, save the last (which was reversed on appeal), involved *constitutional* challenges to tax credits, and says that under *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323 (2010), *constitutional* challenges are permitted but not "run-of-the-mine" *statutory* challenges. (Opp. 18.) But *Levin* never drew any such illogical distinction between constitutional and statutory challenges—and could not have, because *Levin* itself was a *constitutional* challenge. 130 S. Ct. at 2328-29. Rather, it distinguished the constitutional challenge there from *other constitutional* challenges to *state* taxes and ruled that the challenge by the competitor had to proceed in *state* court, given comity concerns. *See id.* at 2335-36. Thus, *Levin* distinguished *among* constitutional challenges to *state* tax schemes on grounds of *comity*, not between constitutional and *statutory* challenges to *federal* taxes, where comity is irrelevant.

Indeed, the D.C. Circuit's decision in *Tax Analysts v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), upon which the Government specifically relies to distinguish the district court decision reversed therein, *confirms* that there is no general bar to challenging other's tax liabilities. The D.C. Circuit held that the plaintiff foreign oil companies seeking to eliminate tax breaks for domestic companies were not within the statute's "zone of interests." *Id.* at 135. Were there really a categorical bar to suits challenging third-party tax credits on statutory grounds, as the Government claims, surely the D.C. Circuit would have reversed on that much simpler ground.[17]

The Government once again cites cases that hold, in the context of particular statutory causes of action, that collateral challenges to underlying third-party tax liabilities are improper. *See, e.g.*, *First Am. Title Ins. Co. v. United States*, 520 F.3d 1051, 1053 (9th Cir. 2008); *Arford v.*

[17] The Restaurants, unlike the plaintiff in *Tax Analysts*, are not outside the ACA's "zone of interests," because they are not strangers to the relevant statutory scheme. To the contrary, the ACA was specifically designed to link the payment of subsidies to enforcement of the employer mandate. The Restaurants are thus effectively regulated by the subsidy provisions, per Congress' conscious intent, through integrally related ACA provisions. *See PDK Labs., Inc. v. USDEA*, 362 F.3d 786, 791-92 (D.C. Cir. 2004); *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 600 (D.C. Cir. 2007).

United States, 934 F.2d 229, 232 (9th Cir. 1991); *United States v. Formige*, 659 F.2d 206, 208 (D.C. Cir. 1981) (per curiam); *see also In re Campbell*, 761 F.2d 1181, 1186 (6th Cir. 1985). But there is no such case *under the APA*, which is the cause of action invoked here. There is thus no legal basis for refusing to exercise jurisdiction over the Restaurants' claim here.

C. The Prospect of an After-the-Fact, Inadequate Tax-Refund Action Does Not Preclude Suit by Either the Individual or Employer Plaintiffs.

The Government also returns to another argument that this Court rejected at the motion-to-dismiss stage—namely, that the individual plaintiffs like Klemencic have no APA cause of action here because of the prospect of an after-the-fact tax refund action in 2015 or 2016. (Opp. 23-27.) And the Government contends that the same result applies to the employer plaintiffs, by virtue of the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a). (Opp. 20-23.) For reasons that Plaintiffs have already explained and elaborate below, both arguments are wrong.

1. As to individuals like Klemencic, the Government concedes that the AIA does not apply, because the individual mandate penalty is not a "tax" for AIA purposes. *See NFIB*, 132 S. Ct. at 2584. But it maintains that the AIA is a superfluous nullity, because general principles purportedly preclude pre-enforcement suits like Klemencic's, even though the AIA *permits* them.

This is obviously not the law. If review of a rule affecting primary conduct were not available until *after* that rule were enforced against a regulated party, the party would be forced to choose between complying with the regulation and thereby forgoing his legal challenge, or else violating the regulation and thereby risking incurring punishment or penalty if the challenge is subsequently rejected. The APA—and, in particular, pre-enforcement review of final agency rules under the APA—is meant precisely to free parties from those dilemmas. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967) (review where parties faced "dilemma" of complying or "risk[ing] prosecution"); *Ciba-Geigy Corp. v. U.S. EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986)

(review where party must choose "between disadvantageous compliance or risking imposition of serious penalties*"); Investment Annuity, Inc. v. Blumenthal*, 609 F.2d 1, 8 (D.C. Cir. 1979) (APA "embod[ies] a presumption in favor of judicial review that extends … even to pre-enforcement actions").[18] Here, if individuals like Klemencic comply with the individual mandate due to the threat posed by the IRS Rule, they would *never* be able to bring a refund action and thus *never* obtain judicial review. If they decline to comply, however, they run the risk of incurring a penalty if the Rule is later upheld. A tax-refund remedy would thus plainly not be "adequate."

That is why all federal courts asked to enjoin the individual and employer mandates have heard pre-enforcement suits without finding any jurisdictional barriers. *E.g.*, *NFIB*, 132 S. Ct. 2566 (individual mandate); *Liberty Univ.*, 2013 WL 3470532 (employer mandate); *Ass'n of Am. Physicians & Surgeons, Inc. v. Sebelius*, 901 F. Supp. 2d 19 (D.D.C. 2012) (both mandates); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1127 (10th Cir. 2013) (en banc) (allowing challenge to HHS regulation enforced through tax penalties).[19]

The Government's claim that pre-enforcement APA review is *never* permitted for tax-related challenges is squarely refuted by *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (en banc), in which the D.C. Circuit allowed—over various objections like those raised here—a pre-enforcement challenge to an IRS notice. In particular, the court held that the tax-refund

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[18] The Government has noted that the *Investment Annuity* decision *denied* pre-enforcement review, but it did so because it "conclude[d] that this action is barred by *the Anti-Injunction Act*." 609 F.2d at 4 (emphasis added). *Absent* such an express statutory bar, however, the usual presumption is that the APA permits judicial review, in tax cases and elsewhere.

[19] An after-the-fact remedy would be inadequate here for another reason. Absent the IRS Rule, individuals like Klemencic would be entitled to certificates of exemption that would guarantee that they will not have to pay any individual mandate penalty, "*notwithstanding any change in [their] circumstances*," such as unexpectedly high income during the year. 45 C.F.R. § 155.605(g)(2)(vi) (emphasis added). By contrast, a tax refund would be available after-the-fact only if the individual were exempt based on the facts known at the end of the year. This creates the possibility that, even if the IRS Rule were *invalidated* in the tax refund suit, an individual could *still* face a penalty because of a change in personal circumstances. Only a pre-enforcement ruling on the IRS Rule would allow people to obtain certificates of exemption and thereby avoid this risk.

procedure did not govern because "[t]his suit is an APA action," not an action that would directly allow recovery of "wrongfully assessed tax." *Id.* at 731. The tax refund remedy, explained the court, "would not provide Appellants the equitable relief they seek" because, among other things, it "does not … allow for prospective relief." *Id.* at 732. Tax refunds would also have to be sought case-by-case, and so would not allow for broad vacatur or invalidation of the challenged IRS policy. *Id.* For all of these reasons, the D.C. Circuit found the tax-refund procedure to be inadequate in *Cohen*, and distinguished the cases cited by the Government—which are the same cases the Government cites here—as "paradigmatic refund suits." *Id.* at 733. Although this case presents a different sort of challenge from the one in *Cohen*, that case reinforces that tax refund actions are not always adequate remedies, particularly when the plaintiffs require *prospective* equitable relief from an across-the-board IRS practice or policy, like Plaintiffs here. *See also Bowen v. Massachusetts*, 487 U.S. 879, 904-05 (1988) (rejecting as "unprecedented" the claim that after-the-fact action in Claims Court was adequate alternative for "prospective" relief).

In sum, the APA "adequacy" provision invoked by the Government is nothing more than reiteration of the obvious point that, "[w]hen 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 the previously established special statutory review procedures," such as those under which "National Labor Relations Board orders [are] directly reviewable in the regional courts of appeals." *Id.* at 903. This case clearly does not present that scenario.

2. As to the employer plaintiffs, the Government also argues that the AIA bars relief, urging this Court to reject the Fourth Circuit's holding in *Liberty University* that the employer mandate's "assessable payment" is not a tax for AIA purposes. *See* 2013 WL 3470532 at *4-6. Plaintiffs rely on the Fourth Circuit's clear and persuasive reasoning on that point.

Even if the employer mandate penalty were deemed a tax for AIA purposes, Plaintiffs have already explained that the "purpose" of this suit, and the relief it seeks, is to vacate the IRS Rule governing the availability of subsidies, not to enjoin the IRS from collecting the employer mandate penalty. So the AIA does not apply in any event, because it "only bars suits that seek to restrain the IRS's assessment and collection of taxes." *Seven-Sky v. Holder*, 661 F.3d 1, 9 (D.C. Cir. 2011). It thus "does not apply to an IRS regulation that does not, by its terms, pertain to the assessment or collection of taxes." *Id.* (citing *Foodservice & Lodging Inst., Inc. v. Regan*, 809 F.2d 842 (D.C. Cir. 1987) (per curiam)); *see also Cohen*, 650 F.3d at 724.

The Government's contrary argument has been that the employer plaintiffs' *motive* in preventing subsidies is to avoid the downstream, collateral consequence—the employer mandate penalty. True. But the AIA turns on the *suit's purpose*, not the *plaintiff's motive* or the source of his Article III injury. There is not a single case applying the AIA to bar a suit that did not directly seek to enjoin a tax, simply due to the plaintiff's subjective motive. The Government's cases, *Bob Jones University v. Simon*, 416 U.S. 725 (1974), and *Alexander v. 'Americans United' Inc.*, 416 U.S. 752 (1974), were challenges to IRS revocations of tax-exempt status; restraining the IRS from taxing the organizations' donors was thus the *direct* object and the *only* practical effect of the suits. That is not true of this challenge, which seeks to invalidate the *subsidies* (not the employer mandate penalty) and has obvious non-tax consequences. Nor would it make any sense for subjective motive to be dispositive for the AIA; why would Congress have wanted to bar *employers*, but not *individuals*, from challenging the IRS Rule?

IV. AS THE D.C. CIRCUIT HAS REPEATEDLY HELD, THE PROPER REMEDY IN AN APA CHALLENGE IS NATIONWIDE VACATUR OF THE INVALID RULE.

In an effort to limit its losses, the Government urges this Court to restrict relief to the plaintiffs in this action. (Opp. 52-55.) That is wrong, under clear D.C. Circuit precedent.

The APA provides that reviewing courts "shall … hold unlawful and set aside" agency action that is "not in accordance with law." 5 U.S.C. § 706(2). The D.C. Circuit has accordingly repeatedly ruled that "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989); *accord National Mining Ass'n*, 145 F.3d at 1409-10 (rejecting agency's challenge to "issuance of a nationwide injunction" invalidating regulation); *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (APA relief "normally will be a vacatur of the agency's order"). *National Mining* quoted, as "expressing the view of all nine Justices on this question," 145 F.3d at 1409, Justice Blackmun's dissent in *Lujan v. National Wildlife Federation*, stating that if an APA plaintiff prevails in a challenge to "a rule of broad applicability …, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff … may obtain 'programmatic' relief that affects the rights of parties not before the court." 497 U.S. 871, 913 (1990); *see also id.* at 890 n.2 (majority op.).

These authorities squarely dispose of the Government's objection that Plaintiffs did not certify a class (which the APA does not require); its complaint that nationwide relief would preclude it from relitigating the issue elsewhere (which *National Mining* said was "inevitable" given the D.C. Circuit's role in APA cases, 145 F.3d at 1410); and its contention that Plaintiffs will suffer no irreparable harm (which *National Mining* said there was "no separate need to show" once the court has concluded "that the rule was indeed illegal," *id.* at 1409).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant summary judgment to Plaintiffs, deny summary judgment to Defendants, and vacate the IRS Rule.

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Respectfully submitted,

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