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 (RWR) **MOTION FOR SUMMARY JUDGMENT**

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
[ORAL ARGUMENT REQUESTED]

Pursuant to Federal Rule of Civil Procedure 56 and this Court's Local Rule 7, Plaintiffs respectfully move this Court for entry of an Order granting summary judgment in their favor. Specifically, Plaintiffs move for summary judgment on the claim that regulations promulgated by the Internal Revenue Service ("IRS"), extending eligibility for premium assistance subsidies to individuals who purchase health insurance through Exchanges established by the federal government pursuant to § 1321(c) of the Patient Protection and Affordable Care Act ("ACA"), exceed the agency's statutory authority and are arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706.

For reasons explained in the supporting memorandum, Plaintiffs contend that there is no genuine disputed issue as to any material fact and that they are entitled to judgment as a matter of law. Consequently, Plaintiffs respectfully pray that this Court grant summary judgment in their favor, declare the IRS regulations unlawful, and enjoin Defendants from applying them.

Dated: June 6, 2013

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JACQUELINE HALBIG, *et al.*, *Plaintiffs*, *v.* KATHLEEN SEBELIUS, *et al.*, *Defendants.*	Civ. No. 13-623 (RWR) **MEMORANDUM OF POINTS AND AUTHORITIES**

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Patient Protection and Affordable Care Act ("ACA" or "the Act") provides federal subsidies for health insurance, if purchased through a marketplace established by a "State." The federal government is not a "State." The subsidies are therefore not available for coverage purchased through federally established marketplaces. Yet the Internal Revenue Service ("IRS") has, without any serious analysis, promulgated regulations that declare precisely the opposite. Those regulations, which purport to dispense billions of dollars in federal spending that Congress never authorized, are plainly contrary to law.

When Congress enacted the ACA, it deliberately chose to authorize states to execute one pillar of the Act—the establishment of health insurance "Exchanges," or marketplaces, where individuals can purchase standardized insurance policies from regulated insurers. Since the Constitution does not permit the federal government to "commandeer" state authorities, however, Congress sought to provide inducements to the states to undertake this responsibility. *See Printz v. United States*, 521 U.S. 898, 935 (1997). Among the inducements offered by the Act is that individuals who buy insurance on a state-established Exchange are eligible for substantial subsidies from the federal treasury. If a state does not establish its own Exchange, however, its citizens will miss out on those federal funds.

As it turns out, that offer was not enough to persuade all of the states to accept this new responsibility. Indeed, thirty-four states have declined to establish Exchanges. As a result, the federal government itself is now responsible for establishing Exchanges in each of those states, as the Act requires as a fallback measure. Under the Act's plain text, the consequence of these states' decisions not to create their own Exchanges is that individuals who buy insurance through the fallback, federally established Exchanges in those states are *not* eligible for premium assistance subsidies. The Act could not be clearer: It authorizes subsidies for policies "enrolled

in through an Exchange established by the *State* under *section 1311* of the Patient Protection and Affordable Care Act." ACA, § 1401(a); 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added). Section 1311 is the section instructing the states to establish Exchanges. If an Exchange was not established by a *state* under *that* section—but by the *federal government* under a *different* section of the Act—no subsidies are available for policies purchased through such Exchange.

That is precisely the result compelled by the Act's unequivocal language. But, with thirty-four states opting out, the IRS apparently determined that the Act's limit on subsidies was bad policy. Among other things, if individuals in those thirty-four states were ineligible for subsidies, many would be unable to afford the comprehensive coverage that the Act's "individual mandate" requires them to purchase, and would therefore be entitled to an exemption from that mandate's penalty. *See* ACA, § 1501(b); 26 U.S.C. § 5000A(e)(1). And if employees in those states were ineligible for subsidies, their employers would be effectively exempt from the Act's "employer mandate" to sponsor certain health coverage for their employees, given the way that mandate is enforced. *See* ACA, § 1513(a); 26 U.S.C. § 4980H.

Refusing to accept those consequences, the IRS promulgated the regulations at issue here, which base eligibility for premium assistance subsidies not on enrollment in coverage "through an Exchange established by the State" (as the statute requires), but rather on enrollment in coverage through *any* Exchange, including a federally established one. Of course, the federal government is not a "State," as the ACA in fact expressly reiterates. Those regulations (together, "the IRS Rule" or "Subsidy Expansion Rule") thus allow for the distribution of billions of dollars of federal funds that Congress never authorized. The IRS Rule contradicts the plain text of the ACA, exceeds the agency's authority, and is contrary to law.

Plaintiffs are moving for summary judgment now, before Defendants respond to the Complaint, because the mandates implicated by the IRS Rule take effect on January 1, 2014. *See* ACA, §§ 1501(d), 1513(d). If—but only if—the IRS Rule is valid, the individual plaintiffs are subject to the individual mandate and must purchase insurance by the end of December 2013, and the business plaintiffs are subject to penalties under the employer mandate and must make decisions concerning sponsoring health coverage for their employees by that time. *See* Compl. ¶¶ 12-18, 25. Thus, Plaintiffs need a determination on the merits far enough in advance of January 1, 2014, to allow them to conform their behavior to the law. Because the validity of the regulation turns on a purely legal question and the administrative record is closed, Plaintiffs are moving for summary judgment now, and hope thereby to avoid the need to litigate a motion for preliminary injunction or temporary restraining order at the eleventh hour.

STATUTORY, REGULATORY, AND FACTUAL BACKGROUND

A. Congress Calls for States To Establish Insurance Exchanges, with Federal Exchanges as a Fallback Mechanism.

The ACA regulates the individual health insurance market primarily through insurance Exchanges organized along state lines. An Exchange is "a mechanism for organizing the health insurance marketplace to help consumers and small businesses shop for coverage in a way that permits easy comparison of available plan options based on price, benefits and services, and quality." HHS, *Initial Guidance to States on Exchanges*, http://www.healthcare.gov/law/resources/regulations/guidance-to-states-on-exchanges.html (last visited June 5, 2013). Participation in Exchanges also facilitates federal regulation of both insurers (who must comply with numerous requirements to participate in an Exchange) and individuals (who are required by the individual mandate to purchase comprehensive insurance policies).

Although there were some proponents of having the federal government establish and operate the Exchanges, Congress heard extensive testimony criticizing that approach and pushing instead for the Exchanges to be run by states. *E.g.*, Roundtable Discussion on Expanding Health Care Coverage: Before S. Comm. on Finance, 111th Cong. 2, 4, 6 (May 5, 2009). And Senator Nelson of Nebraska, whose vote was critical to the Act's passage, called the "national exchange" approach a "dealbreaker," expressing concern that it would "start us down the road of … a single-payer plan." Carrie Budoff Brown, *Nelson: National Exchange a Dealbreaker*, POLITICO (Jan. 25, 2010), http://www.politico.com/livepulse/0110/Nelson_National_exchange_a_dealbreaker.html. Ultimately, then, Congress enacted a bill that called for the states to establish and operate these Exchanges—a feature emphasized by proponents of the bill, who thereby sought to downplay opponents' charges that the Act would nationalize the health care industry. *See, e.g.*, SENATE DEMOCRATIC POLICY COMM., *Fact Check: Responding to Opponents of Health Insurance Reform* (Sept. 21, 2009), http://dpc.senate.gov/reform/reform-factcheck-092109.pdf ("There is no government takeover or control of health care in any senate health insurance reform legislation …. All the health insurance exchanges … are run by states.").

In particular, the ACA provides: "Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange … for the State that facilitates the purchase of qualified health plans." ACA, § 1311(b)(1); 42 U.S.C. § 18031(b)(1). The Act further directs that such Exchanges "mee[t] the requirements of subsection (d)," *id.*, which in turn sets forth various rules regarding, among other things, the types of insurance that Exchanges may offer, how the Exchanges must operate (*e.g.*, they must provide "a toll-free telephone hotline to respond to requests for assistance"), and how the Exchanges must help the federal government enforce the individual mandate, *see* ACA, § 1311(d); 42 U.S.C. § 18031(d).

Under the Constitution's core federalism commands, however, the federal government cannot *compel* sovereign states to create Exchanges. *See Printz*, 521 U.S. at 935. Congress knew that, and the Act therefore recognizes that some states may not be "electing State[s]," because they may choose not "to apply the requirements" for establishing an Exchange (or may elect to do so yet ultimately "fai[l] to establish [an] Exchange"). ACA, § 1321(b)-(c); 42 U.S.C. § 18041(b)-(c). To address that situation, the Act authorizes the federal government to establish fallback Exchanges in states that do not establish their own. In particular, the Act provides that if a state is "not an electing State" or if the HHS Secretary determines, "on or before January 1, 2013," that an "electing State … will not have any required Exchange operational by January 1, 2014," the Secretary "shall … establish and operate such Exchange within the State." ACA, § 1321(c); 42 U.S.C. § 18041(c). In other words, if a state declined the role that the ACA urged it to accept, that responsibility would fall upon the federal government instead.

In short, the ACA provides for two basic types of Exchanges: those established by states under § 1311 of the Act, and those established by the federal government under § 1321 of the Act, with the latter existing only in states that decline to establish their own.[1]

B. Congress Encourages States To Establish Exchanges by Authorizing Federal Subsidies for Coverage Purchased Through Such Exchanges.

Because Congress could not compel states to establish Exchanges, the Act uses a variety of tools to encourage states to voluntarily play that role. For example, it authorizes federal grants to states for "activities (including planning activities) related to establishing an [Exchange]." ACA, § 1311(a); 42 U.S.C. § 18031(a). The Act also penalizes states that do not create their

[1] Section 1311 of the Act also provides for two variants on state-established Exchanges: regional Exchanges, which "may operate in more than one State" if such states agree; and subsidiary Exchanges, which a "State may establish [to] … serv[e] a geographically distinct area" within the state. *See* ACA, § 1311(f)(1), (2); 42 U.S.C. § 18031(f)(1), (2). These, like ordinary state-established exchanges, are established by states under § 1311 of the Act, and are not legally distinguishable in any respect relevant to this case.

own Exchanges, such as by prohibiting them from tightening their Medicaid eligibility standards. *See* ACA, § 2001(b)(2); 42 U.S.C. § 1396a(gg) (requiring maintenance of eligibility standards until "the Secretary determines that an Exchange established by the State under section 1311 of the [ACA] is fully operational").

Most importantly, the Act authorizes premium assistance subsidies for state residents who purchase individual health insurance coverage through state-established Exchanges. These subsidies take the form of refundable tax credits, which are paid directly by the federal treasury to the taxpayer's insurer, as an offset against the taxpayer's premiums. *See* ACA, §§ 1401, 1412; 26 U.S.C. § 36B; 42 U.S.C. § 18082. Targeted at low- and moderate-income Americans, the subsidy is available to households with incomes between 100 percent and 400 percent of the federal poverty level. *See* ACA, § 1401(c)(1)(a); 26 U.S.C. § 36B(c)(1)(a).[2]

Critically, the subsidy is available only for individuals who purchase insurance through an Exchange *established by a state*. The Act provides that a tax credit "shall be allowed" in a particular "amount," 26 U.S.C. § 36B(a), with that amount calculated based on the number of "coverage months of the taxpayer occurring during the taxable year," *id.* § 36B(b)(1). The Act then defines a "coverage month" as a month for which, "as of the first day of such month the taxpayer … is covered by a qualified health plan … that was enrolled in through an Exchange *established by the State under section 1311* of the [ACA]." *Id.* § 36B(c)(2)(A)(i) (emphasis added). Unless the citizen buys insurance through a state-established Exchange, there are no "coverage months" and therefore no subsidy. Confirming that fact, the value of the subsidy for any particular "coverage month" is based on the monthly premium for a "qualified health pla[n]

[2] Under HHS's 2013 federal poverty guidelines, a single person with annual income between $11,490 and $45,960 could qualify for a premium assistance subsidy. A family of four could qualify if its household income fell between $23,550 and $94,200. *See* Annual Update of the HHS Poverty Guidelines, 78 Fed. Reg. 5182 (Jan. 24, 2013).

… which cover[s] the taxpayer … *and which w[as] enrolled in through an Exchange established by the State under [§] 1311* of the [ACA]," *id.* § 36B(b)(2)(A) (emphasis added); *see also id.* § 36B(b)(3)(B)(i) (referring back to "same Exchange through which the qualified health plans taken into account under paragraph (2)(A) were offered" for purpose of calculating another value bearing upon amount of subsidy). Again, unless the citizen has enrolled in a plan through a state-created Exchange established under § 1311 of the ACA, he gets no subsidy. Evidently believing this offer to be so irresistible that every state would establish an Exchange, Congress did not appropriate any funds in the ACA for the federal government to establish Exchanges, even as it appropriated funds to help states establish theirs, *see* ACA, § 1311(a).

C. Thirty-Four States Decline To Establish Their Own Exchanges.

Exercising the option granted by the Act (and required by the Constitution), thirty-four states have decided not to establish their own Exchanges. *See State Decisions For Creating Health Insurance Exchanges*, Kaiser State Health Facts, http://kff.org/health-reform/stateindicator/health-insurance-exchanges/ ("*State Decisions*") (last visited June 5, 2013).[3] Twenty-seven states have opted out of the Exchange regime completely, while another seven have opted only to assist the federal government with its operation of federally established Exchanges, *see id.*; *see also* Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers, 77 Fed. Reg. 18,310, 18,325 (Mar. 27, 2012) (categorizing "partnership" Exchanges as federally established).

[3] These states are Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. *See State Decisions*, *supra*. Plaintiffs' Complaint alleged that 33 states declined to establish their own Exchanges. (Compl. ¶ 32.) After the Complaint was filed, however, HHS confirmed that Utah would have a federally facilitated Exchange too. *See* Letter from G. Cohen to Gov. G. Herbert (May 10, 2013), http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/utah-marketplace-letter-5-10-2013-508.pdf.

D. The IRS Promulgates a Rule Expanding the Availability of Subsidies.

As described above, premium assistance subsidies will not be available under the text of the ACA in the states with federally established Exchanges, because individuals in those states will not have the opportunity to enroll in health insurance "through an Exchange established by the State under section 1311 of the [ACA]," which is a statutory prerequisite to eligibility for a subsidy. But the IRS has promulgated a regulation ("the IRS Rule" or "the Subsidy Expansion Rule") requiring the federal treasury to disburse subsidies in those states regardless.

Specifically, the IRS Rule states that subsidies shall be available to anyone "enrolled in one or more qualified health plans through an Exchange," and then defines "Exchange" to mean "a State Exchange, regional Exchange, subsidiary Exchange, *and Federally-facilitated Exchange*." *See* Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378, 30,387 (May 23, 2012) (emphasis added). In effect, the IRS Rule eliminates the statutory language restricting subsidies to Exchanges "established by the State under section 1311 of the [ACA]."

The IRS observed, in its description of the Rule, that commentators "disagreed" about whether the ACA's text "limits the availability of the premium tax credit only to taxpayers who enroll in qualified health plans on State Exchanges." *Id.* at 30,378. Responding to that point, the IRS defended its regulations with only the following, brief explanation:

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

Id. Under the IRS Rule, therefore, premium assistance subsidies are available in all of the states, including the thirty-four states that declined to establish their own Exchanges.

E. The IRS's Subsidy Expansion Rule Triggers Other Mandates and Penalties Under the ACA.

By expanding the availability of premium assistance subsidies to individuals who buy insurance even on federally established Exchanges, the IRS's Subsidy Expansion Rule also triggers other mandates and penalties under the Act.

First, the availability of the subsidy triggers the Act's individual mandate penalty for many otherwise-exempt individuals. That mandate requires all "applicable" individuals to obtain "minimum essential coverage." ACA, § 1501(d); 26 U.S.C. § 5000A(a). Failure to comply triggers a penalty. 26 U.S.C. § 5000A(b). But individuals "who cannot afford coverage" are exempt from the penalty. *Id.* § 5000A(e)(1). For an individual to fall within the unaffordability exemption, the annual cost of health coverage must exceed eight percent of annual household income. *Id.* § 5000A(e)(1)(A). For individuals only able to purchase coverage in the individual market, that cost is calculated as the annual premium for the cheapest insurance plan available in the Exchange in that person's state, minus "the credit allowable under section 36B [ACA, § 1401(a)]." *Id.* § 5000A(e)(1)(B)(ii). Thus, by purporting to make a credit "allowable" in states without their own Exchanges, the IRS Rule increases the number of people in those states subject to the individual mandate's penalty. Those persons would otherwise be free to forgo insurance entirely, or to buy inexpensive, high-deductible, catastrophic insurance plans (which are otherwise restricted to individuals under age 30, ACA, § 1302(e)(1)(A), (2); 42 U.S.C. § 18022(e)(1)(A), (2)), without being exposed to penalties.

Second, the availability of the premium assistance subsidy also effectively triggers the "assessable payments" used by the Act to enforce its "employer mandate." Specifically, the Act provides that any employer with 50 or more full-time employees will be subject to an "assessable payment" if it does not offer them the opportunity to enroll in affordable, employer-sponsored

health coverage that provides minimum value. But the payment is only triggered if at least one employee enrolls in a plan, offered through an Exchange, for which "an applicable premium tax credit … is allowed or paid." 26 U.S.C. § 4980H(a), (b). Thus, if no federal premium assistance subsidies are available in a state because that state has not established its own Exchange, then employers in that state may offer their employees non-compliant health coverage, or no coverage at all, without being threatened with liability for any assessable payments under the Act.

F. Injured Individuals and Businesses File Suit To Challenge the IRS Rule.

On May 2, 2013, Plaintiffs filed their Complaint, seeking a declaration that the IRS Rule is invalid to the extent that it authorizes premium assistance subsidies beyond those authorized by the ACA, and an injunction prohibiting such application. Plaintiffs are individuals who reside in states with federal Exchanges and who will be subjected to the individual mandate penalty if (and only if) they are eligible for premium assistance subsidies; and businesses operating in states with federal Exchanges, who will be exposed to the employer mandate's assessable payments if (and only if) their employees are eligible for premium assistance subsidies. (*See* Compl. ¶¶ 12-18, 25.) By purporting to expand the availability of the subsidies, the IRS Rule injures these individuals and businesses, requiring them to alter their behavior by purchasing or sponsoring health coverage that they would otherwise prefer not to purchase or sponsor.

Although Defendants' answer to the Complaint is not due until early July 2013, Plaintiffs are moving for summary judgment now, because the mandates implicated by the IRS Rule are scheduled to take effect on January 1, 2014, just over six months from now. *See* ACA, §§ 1501(d), 1513(d). Plaintiffs therefore will soon be required to take actions to comply with the individual and employer mandates—*if* the IRS Rule is valid. Rather than wait until late 2013 to seek a preliminary injunction or temporary restraining order, Plaintiffs are filing this motion early so that it can proceed on a less rushed timetable, for the benefit of all parties and the Court.

ARGUMENT

By eliminating the ACA's unambiguous limitation on premium assistance subsidies, the IRS Rule authorizes the expenditure of billions of dollars without congressional approval and is plainly contrary to law. No degree of creative construction can obfuscate the clarity of the statutory text here, and no degree of deference to administrative agencies can overcome it. This Court should declare the IRS Rule invalid and enjoin Defendants from applying it.

I. THE IRS RULE IS SQUARELY FORECLOSED BY THE STATUTORY TEXT.

Under the Administrative Procedure Act, agency action must be "set aside" if it is "in excess of statutory jurisdiction, authority, or limitations," or "otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (C). To evaluate the legality of an agency's regulation, a court must therefore measure it against the statutory directive. "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). As the D.C. Circuit has explained, an agency's "failure to respect the unambiguous textual limitations" of a statutory provision is "fatal" to its regulatory efforts. *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 490 (D.C. Cir. 2007); *see also Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011) (reiterating that agency may not "excee[d] the statute's clear boundaries").

Here, the relevant text of the ACA is "clear and unambiguous," *Dimension Fin.*, 474 U.S. at 368; and the IRS Rule "fail[s] to respect" those "unambiguous textual limitations," *Fin. Planning Ass'n*, 482 F.3d at 490. The ACA repeatedly makes clear that subsidies are available only to individuals who buy insurance through state-established Exchanges, and the IRS Rule wholly eliminates that prerequisite. The Rule is therefore invalid.

A. The ACA provides that an eligible taxpayer shall be entitled to a refundable tax credit in "an amount equal to the premium assistance credit amount of the taxpayer for the taxable year." 26 U.S.C. § 36B(a). That "premium assistance credit amount" is then defined as the sum of the monthly premium assistance amounts "with respect to all coverage months of the taxpayer occurring during the taxable year." *Id.* § 36B(b)(1). A "coverage month" is a month as to which, "as of the first day of such month the taxpayer … is covered by a qualified health plan … that was enrolled in through an Exchange *established by the State under section 1311 of the Patient Protection and Affordable Care Act*." *Id.* § 36B(c)(2)(A)(i) (emphasis added). These provisions are therefore perfectly clear: Unless a taxpayer enrolls in insurance "through an Exchange established by the State under section 1311 of the [ACA]," he has no "coverage months" and therefore no "premium assistance amounts." Eligibility for a subsidy is thus clearly based on whether the individual is enrolled in insurance obtained through a state-established Exchange during the relevant month. If the taxpayer's state is served, instead, by a federal fallback Exchange, then no premium assistance subsidies are available to that taxpayer.

Reinforcing that point, the Act specifies that the premium assistance amount for a given coverage month is equal to the lesser of two values: *First*, "the monthly premiums for such month for [a] qualified health pla[n] … which cover[s] the taxpayer … and which w[as] enrolled in through *an Exchange established by the State under [§] 1311*" of the Act. *Id.* § 36B(b)(2)(A) (emphasis added). *Second*, the excess, over a specified percentage of the taxpayer's average monthly household income, of the "adjusted monthly premium for such month for the applicable second lowest cost silver plan" that is "offered through the same Exchange through which the qualified health plans taken into account under paragraph (2)(A) were offered"—namely, the Exchange "established by the State under section 1311 of the Patient Protection and Affordable

Care Act." *Id.* § 36B(b)(2)(B), (3)(B). Those two figures only make sense, and can only be computed, if the taxpayer's state has established its own Exchange and the taxpayer has procured health insurance through that state-established Exchange.

B. In stark contrast, the regulations promulgated by the IRS provide that a taxpayer is eligible for a premium assistance subsidy so long as he "[i]s enrolled in one or more qualified health plans through an Exchange," with no qualification based on the entity that established the Exchange. 26 C.F.R. § 1.36B-2(a)(1). The regulations then adopt a definition of "Exchange" from HHS regulations that define it to include "State Exchanges, regional Exchanges, subsidiary Exchanges, *and a Federally-facilitated Exchange*." 26 C.F.R. § 1.36B-1(k); 45 C.F.R. § 155.20 (emphasis added). Under the regulations, therefore, an individual who enrolls in insurance even through a federally established Exchange is eligible for a federal subsidy. The regulations, again in contrast to the ACA, also adopt a broad definition of "coverage month," defining it to include any month if, "[a]s of the first day of the month, the individual is enrolled in a qualified health plan through an Exchange" (not just a state-established one). 26 C.F.R. § 1.36B-3(c)(1)(i).

C. As should already be clear, the IRS Rule contradicts the plain and unambiguous text of the ACA. The latter expressly restricts premium assistance subsidies to coverage obtained through "an Exchange established by the State under section 1311" of the Act, but the former expands the availability of those subsidies to coverage obtained through *any* Exchange, including an Exchange established by the federal government under § 1321 of the Act. At the risk of belaboring the obvious, an Exchange that is established by the federal government under the authority of § 1321 of the Act is not "an Exchange established by the State under section 1311 of the [Act]." For one thing, the federal government is not a "State." If there could be any doubt on that score, the Act itself clears it up: "In this title, the term 'State' means each of the 50

States and the District of Columbia." ACA, § 1304(d); 42 U.S.C. § 18024(d). For another, sections 1311 and 1321 of the Act are distinct grants of authority to distinct entities, with the former directing each "State" to "establish an American Health Benefit Exchange" and the latter directing the Secretary of HHS to "establish and operate such Exchange" in states that have failed or declined to create their own.

The most fundamental canons of construction thus foreclose the IRS Rule, to the extent that it purports to be an interpretation of the ACA's text. For one, the IRS Rule entirely deletes the statutory modifiers "established by the State" and "under section 1311 of the [ACA]," violating the "cardinal principle of statutory construction" that "no clause, sentence, or word [of a statute] shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). For another, the Subsidy Expansion Rule conflates "an Exchange established *by the State*" with a broader phrase found elsewhere in the Act—"an Exchange established *under this Act*." *E.g.*, ACA, § 1312(d)(3)(D)(i)(II) (emphasis added); 42 U.S.C. § 18032(d)(3)(D)(i)(II). The Rule thus violates the basic canon that "differing language" in "two subsections" of a statute should not be treated by the courts as having "the same meaning in each." *Russello v. United States*, 464 U.S. 16, 23 (1983). Moreover, the fact that Congress referred elsewhere in the ACA to this broader category of Exchanges proves that Congress understood the differences between them and, when Congress wanted to refer to *all* Exchanges (including federally established ones), it "knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994). "Were we to ascribe no meaning to this choice of language, we would ignore our duty to pay close heed to both what Congress said and what Congress did not say in the relevant statute." *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 824 F.2d 108, 115 (D.C. Cir. 1987).

D. It is, of course, always impermissible for an executive agency to exceed its statutory authority. But the IRS Rule's departure from the ACA's text is especially forbidden because of its profound effect on the federal treasury. Under the Appropriations Clause of the Constitution, "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. Art. I, § 9, cl. 7. That means, as the Supreme Court has explained, that "the payment of money from the Treasury must be authorized by a statute." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990). Executive agencies are not empowered to disburse federal funds absent such statutory authority; indeed, to do otherwise is a *crime*, showing just how serious Congress is about retaining its power over the Nation's purse. *See id.* at 430; 31 U.S.C. § 1341 (Anti-Deficiency Act); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971) (recognizing that "Congress [i]s normally quite solicitous where the federal purse [i]s involved").

Yet, by promulgating the Subsidy Expansion Rule, the IRS has effectively appropriated *billions* of dollars of premium assistance subsidies that Congress never authorized. That Rule "would impose a potentially burdensome enough impact on the federal treasury that it should be supported by a clear expression of legislative intent in either the statute itself or in the accompanying legislative history." *Norton v. United States*, 581 F.2d 390, 397 (4th Cir. 1978). As shown above, however, not only is the Rule not *supported* by clear legislative expression, it is actually squarely *foreclosed* by clear statutory text and structure. It cannot stand.

II. THE AGENCY'S VAGUE DEFENSE OF ITS RULE IS MERITLESS.

Despite the obvious conflict between the IRS Rule and the ACA's text, the agency defends its regulation with only a single, brief, almost comically vague paragraph, invoking (in general terms) the Act's "language," "structure," "legislative history," and "purpose." 77 Fed. Reg. at 30,378. None of those appeals is even remotely convincing.

A. As to the statutory language, the IRS claims that it "support[s] the interpretation that credits are available to taxpayers who obtain coverage through a … Federally-facilitated Exchange." 77 Fed. Reg. at 30,378. Understandably, the agency does not quote or cite any such purportedly supportive language, because there simply is none. Rather, as shown above, the ACA's text is quite clearly to the contrary. *See* Part I.A, *supra*.

Although the IRS did not make the argument, some have argued that § 1321 of the ACA, which authorizes the federal government to establish fallback Exchanges in states that decline to establish their own, creates an equivalency between the two types of Exchanges. The Act directs the Secretary, where a state "will not have any required Exchange operational by January 1, 2014," to "establish and operate *such* Exchange within the State." ACA, § 1321(c)(1); 42 U.S.C. § 18041(c)(1) (emphasis added). According to some defenders of the IRS Rule, use of the word "such" implies that a federal fallback Exchange is equivalent in all material senses to a state-established Exchange—and that the Act's reference, in its subsidy provisions, to Exchanges "established by the State under section 1311" of the Act should therefore be read as necessarily including Exchanges established by the federal government under § 1321 of the Act, too.

This argument is meritless. To be sure, the quoted provision directs the HHS Secretary to establish, for the opt-out states, federal fallback Exchanges that—apart from the identity of their operating entity—are functionally the same as the ordinary state-established Exchanges. Hence the use of the word "such." But the fact that the *Exchanges* are essentially the same says nothing about *which governmental entity*—state or federal—has *established* the Exchanges. And it is the identity of the establishing entity that distinguishes an Exchange "established by the *State* under section 1311" from an Exchange established by the *federal government* under § 1321. Thus, § 1321's reference to "such Exchange" simply identifies the nature of the Exchange that the

federal government will establish and operate in the event that the state defaults in that regard. It quite obviously cannot and does not alter the clear specification of "State" Exchanges in the subsidy provisions to somehow mean "federal" or something other than "State."

Nor does anything else in the Act suggest that the subsidy provisions' identification of "State" Exchanges was somehow intended to connote "any sort of Exchange" or "federally established Exchange." If Congress intended to refer to both types of Exchanges in § 36B, it would simply have omitted the phrase "established by the State under section 1311" altogether, and referred, as it did elsewhere in the Act, generically to "an Exchange" (*e.g.*, ACA, § 1421(a); 26 U.S.C. § 45R(b)(1)), or to an Exchange "established under this Act" (*e.g.*, ACA, § 1312(d)(3)(D)(i)(II)). *See Russello*, 464 U.S. at 23.

More generally, other sections of the Act further confirm that Congress viewed state-run and federally run Exchanges as distinct. Where Congress did want to treat them interchangeably, the Act does so explicitly. For example, another section of the subsidy provisions expressly lists state-established Exchanges and federally established Exchanges *separately*, confirming that it did not view the two types as one. *See* ACA, § 1401(f)(3); 26 U.S.C. § 36B(f)(3) (imposing information sharing mandate on "any person carrying out … responsibilities of an Exchange under *section 1311(f)(3) or 1321(c)* of the [ACA]"); *see also Custis*, 511 U.S. at 492. Rather, when Congress wanted an Exchange to be deemed a "state-established Exchange" for all purposes, it provided for such equivalence explicitly—thus demonstrating that it knew how to equate federal and state Exchanges if it actually wanted to: Section 1323 of the ACA provides that if a U.S. territory establishes an Exchange, it "shall be treated as a State for purposes of such part." ACA, § 1323(a)(1); 42 U.S.C. § 18043(a)(1). Yet there is no provision adopting that type of equivalence language for federal Exchanges.

B. In equally vague and conclusory terms, the IRS invokes the "structure of section 36B and the Affordable Care Act as a whole" to support its Rule. 77 Fed. Reg. at 30,378. Again, that boilerplate statement simply assumes its conclusion. In fact, nothing in the Act's structure supports the Rule's evisceration of the Act's language.

Some have suggested that the structure of the subsidy provision supports the IRS Rule in that it requires all Exchanges—including federal ones—to share certain information with HHS and enrollees, including the "total premium for the coverage without regard to the credit under this section" and the "aggregate amount of any advance payment of such credit" by the federal treasury. 26 U.S.C. § 36B(f)(3). Why would Congress have wanted the federal Exchanges to report the latter, the argument goes, if that amount would necessarily always be zero?

But the information-sharing requirements apply to *all* Exchanges, so it makes perfect sense to require the sharing even of information relevant only to the state-established Exchanges. Other pieces of information are equally relevant to federal Exchanges, including the "total premium" and the "name, address, and TIN of the primary insured and the name and TIN of each other individual obtaining coverage under the policy." *Id.* § 36B(f)(3)(B), (D). The information-sharing provision thus contains no superfluity if federal subsidies are limited to coverage from state-established Exchanges. There are therefore no grounds for any inference to be drawn from the information-sharing provision. (If anything, it confirms the invalidity of the Rule, by demonstrating that Congress understood the difference between state and federal Exchanges, and expressly enumerated both when it so desired.)

C. The IRS further defends its Rule by observing, rather obscurely, that **"**the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges." 77 Fed. Reg. at 30,378. In other words, according to the IRS, the *plain text* of

a statute is somehow insufficient to establish congressional "intent" unless it is accompanied by legislative history confirming that the plain text means what it unequivocally says.

This is plainly improper statutory construction. Legislative history is obviously not needed to reinforce plain statutory language; to the contrary, it is *impermissible* as a matter of black-letter law to examine legislative history to construe such plain text in any circumstance. "Because congressional intent is best divined from the statutory language itself, resort to legislative history is inappropriate when the statute is unambiguous." *Performance Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 642 F.3d 234, 238 (D.C. Cir. 2011); *see also United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 494 (D.C. Cir. 2004) ("[R]esort to legislative history is not appropriate in construing plain statutory language."). Thus, even if legislative history affirmatively demonstrated that Congress assumed that subsidies *would* be available in federal Exchanges, that could not overcome the plain, unambiguous text of the statute, which provides just the opposite.

Yet there is no such legislative history, and the IRS does not claim otherwise. And given that legislative history *contradicting* statutory text is irrelevant, it is patently obvious that the presence or absence of *confirmatory* legislative history means nothing—contrary to the IRS's "reasoning." As the Supreme Court has "stated time and again," courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

> In sum, the legislative history is unhelpful. In determining what the members of Congress intended to vote for, the legislative history provides no basis for the court to conclude that they voted for a regulatory scheme other than that provided by the words in the statute. The haste and confusion attendant upon the passage of this massive bill do not license the court to rewrite it; rather, they are all the more reason for us to hew to the statutory text because there is no coherent alternative intention to be gleaned from the historical record.

Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1092 (D.C. Cir. 1996).

D. In defense of its Rule, the IRS also vaguely invokes the statute's "purpose." 77 Fed. Reg. at 30,378. By this, the agency presumably means that Congress would have "wanted" residents of states that declined to establish Exchanges to be able to afford insurance, and therefore Congress would have "wanted" to subsidize these individuals' insurance too.

Neither the conclusion nor its premise is sound. Even well-supported conclusions about general legislative purpose do not authorize departure from plain statutory text. "[I]f courts were free to 'correct' what they believe to be congressional oversights by construing unambiguous statutes to the contrary of their plain meaning," the D.C. Circuit has warned, it "would open the way to judicial hijacking of the power to legislate." *Consol. Rail Corp. v. United States*, 896 F.2d 574, 579 (D.C. Cir. 1990). Accordingly, "there must be evidence that Congress meant something other than what it literally said before a court can depart from plain meaning." *Engine Mfrs. Ass'n*, 88 F.3d at 1088; *accord Consol. Rail*, 896 F.2d at 579 ("[A]ny attempt less grounded in the words of the legislature itself to further what a court perceives to be Congress's general goal in enacting a statute is simply too susceptible to error to be tolerated within our scheme of separated powers."). As explained, there is not a scintilla of evidence here that the Act's language is a scrivener's error or otherwise unintentional. Since neither the Act's language nor its structure (nor even its legislative history) manifests a purpose at odds with the plain language of § 36B, the judiciary may not examine Congress's general goal in construing that provision (and has no other reliable basis for discerning such a goal anyway).

In any event, even if it were proper for the judiciary to speculate about general legislative purpose to alter the Act's plain text, it is clear that limiting subsidies to state-run Exchanges is consistent with that purpose. In crafting the subsidy provisions, Congress had to balance two competing purposes—to subsidize the purchase of insurance by lower-income Americans, but

also to encourage states to establish Exchanges. Limiting subsidies to the state-established Exchanges might have undermined the former objective, but it simultaneously promoted the latter. Thus, the "purpose" argument simply asks the judiciary to elevate the former purpose over the latter—but it is plainly improper for courts to so substitute their policy judgments for the Legislature's. *See Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."). Since the Act's plain language unequivocally manifests a purpose to "provide federal subsidies *if* the state establishes the Exchange," interpreting the language to implement a policy of "providing federal subsidies even if the state *refuses* to establish the Exchange" does not further any purpose of the *Act*—only the contrary policy choice of the IRS.

Given the quite plausible concern that states would be reluctant to undertake the thankless job of establishing and operating Exchanges, it made perfect sense for Congress to offer them a seemingly irresistible incentive—namely, billions of dollars in *federal* subsidies to these states' citizens and voters. Congress quite reasonably believed that elected state officials would not want to explain to their constituents that they had deprived them of billions of federal dollars by choosing not to establish an Exchange. And, even now, we do not know how that prediction would have fared in practice, because the IRS's preemptive overriding of the intended congressional bargain in May of 2012 gave the states the "quid" (the subsidies) without requiring the "quo" (establishing and operating the Exchanges).

Looked at another way, Congress simply made the eminently sensible judgment that it should not treat states that reject the option of establishing Exchanges just as well as those who

agree to bear that difficult burden. Rather, it chose to allocate scarce federal resources to those states that were not requiring the federal government to bear the additional expenditure of setting up a federal Exchange. But, however Congress's decision-making is characterized, the decision to eschew federal subsidies in federally run Exchanges is hardly irrational and is fully consistent with the Act's undisputed purpose of encouraging state-run Exchanges.

Indeed, "[t]he [ACA's] authors strongly preferred state-run Exchanges over federal Exchanges, the statute repeatedly uses financial incentives to encourage states and others to comply with the Act's regulatory scheme, and the idea of conditioning tax credits on states creating Exchanges was part of this debate from the beginning." Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule To Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119, 142 (2013). During the legislative debate, one prominent commentator specifically suggested that Congress could induce state participation in Exchanges "by 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, April 27, 2009, http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1022&context=ois_papers. There is therefore good reason to believe that Congress, in the ACA, meant exactly what it said.

E. Because the relevant text of the ACA is unambiguous, as discussed above, the IRS has no authority to construe it—and surely not to contradict it. *See, e.g.*, *Shays v. FEC*, 414 F.3d 76, 109 (D.C. Cir. 2005) (invalidating regulation because it "contradicts [statute's] plain text and thus fails *Chevron* step one"); *Vill. of Barrington*, 636 F.3d at 660 (holding no "special deference" is due when determining whether agency "exceeded the statute's clear boundaries").

CONCLUSION

Just last month, the Supreme Court emphasized the duty of the courts to "tak[e] seriously, and appl[y] rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it." *City of Arlington v. FCC*, 569 U.S. __, 2013 WL 2149789 (2013) (slip op. at 16). In the premium assistance subsidy provisions of the ACA, Congress established a very "clear line" indeed; yet the IRS Rule nonetheless goes "beyond it," on the impermissible bases of vague generalities, rank speculation about congressional intent, and (in the end) the agency's own policy preferences. That Rule is therefore invalid. For these reasons, Plaintiffs respectfully request that this Court enter summary judgment in their favor, declare the challenged IRS Rule to be invalid under the APA, and enjoin Defendants from applying it.

June 6, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2013, I caused true and correct copies of the foregoing Motion for Summary Judgment, Memorandum of Points and Authorities in support, and Proposed Order, along with a Notice of Electronic Filing from ECF, to be served on each of the following via Certified U.S. Mail:

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