UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STATE OF INDIANA, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
	)	CASE NO. 1:13-cv-1612-WTL-TAB
INTERNAL REVENUE SERVICE, et al.,	)	
	)	
	)	
Defendants.	)	

STATE OF INDIANA'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

GREGORY F. ZOELLER
Attorney General of Indiana

Thomas M. Fisher
Solicitor General
Kenneth A. Klukowski
Special Deputy Attorney General

Ashley Tatman Harwel
Heather Hagan McVeigh
Deputy Attorneys General
Office of the Attorney General
Indiana Government Center South
Fifth Floor
302 West Washington Street
Indianapolis, IN 46205
(317) 232-6255

Attorneys for State of Indiana

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES [CONT'D]

CASES [CONT'D]

FEDERAL STATUTES

FEDERAL STATUTES [CONT'D]

FEDERAL STATUTES [CONT'D]

REGULATIONS

REGULATIONS [CONT'D]

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

OTHER AUTHORITIES [CONT'D]

INTRODUCTION

America's system of limited government rests upon two pillars central to this case: federalism and the rule of law. Parts of the Affordable Care Act and its implementation are injuring Indiana and many public school corporations in ways that bear significant consequences for the Nation in derogation of vitally important constitutional principles. This Court should remedy the situation and redress the Plaintiffs' injuries by granting summary judgment.

Count I requires only straightforward review of a federal regulation under the Administrative Procedure Act. The Affordable Care Act attempts to induce States into participating in the ACA's national overhaul of health care by making federal premium assistance subsidies available only for purchases on ACA exchanges "established by the State under [Section] 1311 of the [ACA.]" 26 U.S.C. § 36B(b)(2)(A). When most States declined to set up exchanges, the Internal Revenue Service purported to extend those subsidies nationwide via regulatory fiat. And because distribution of exchange subsidies is the sole trigger for liability under the ACA's Employer Mandate, Indiana and the Schools have become subject to Employer Mandate penalties as a result of the IRS Rule. This has led to restructuring personnel policies as well reductions in employment and staff hours by government employers. This IRS Rule is contrary to the ACA, and therefore illegal.

Counts II and III in this case "implicate one of our Nation's newest problems of public policy and perhaps our oldest question of constitutional law." *New York v. United States*, 505 U.S. 144, 149 (1992). Under the Constitution's federal system, the Framers broke governmental power into two levels as a safeguard on individual liberty. "The federal system rests on what might at first seem a counterintuitive insight, that freedom is enhanced by the creation of two governments, not one." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (citation and internal quotation marks omitted). The Constitution protects liberty through federalism, "a system of dual sovereignty." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

Intergovernmental immunity is a central aspect of federalism. Congress' capacious powers over the States under the Tax and Commerce Clauses are not boundless. Although the Supreme Court has diminished—yet still not abrogated—the scope of that immunity under the Tax and Commerce Clauses, it remains essential to maintaining two governments that are truly sovereign, not only in their distinct powers, but also in their freedom from control of each other. The Federal Government is immune from the States under the Supremacy Clause, and the States are immune from the Federal Government under the Tenth Amendment.

Finally, through judicial estoppel, the Federal Government should be legally held to the position it took in speeches and blog posts regarding the enforcement of certain sections of the statute.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

President Obama signed the Patient Protection and Affordable Care Act on March 23, 2010. Pub. L. No. 111-148, 124 Stat. 119 (2010). It was amended on March 30, 2010, by the Health Care and Education Reconciliation Act of 2010. Pub. L. No. 111-152, 124 Stat. 1029 (2010), and is hereinafter referred to collectively as the Act or the ACA. The primary goal of the ACA is to create a health insurance system that provides nearly universal coverage while reducing health care costs. The ACA employs four principal means to achieve that goal.

First, beginning in 2014, it requires nearly everyone living in the United States to subscribe to or purchase health insurance, or else pay a penalty (the "Individual Mandate"). ACA § 1501; 42 U.S.C. § 5000A. Second, it encourages States to expand their Medicaid programs to afford coverage to all households with income up to 138% of the Federal Poverty Level. ACA § 1331; 42 U.S.C. § 18051. Third, it requires large employers to provide employees who work more than 30 hours per week with health insurance featuring "minimum essential coverage" (the "Employer Mandate"). ACA § 1513; 26 U.S.C. § 4980H(a)-(b). Fourth, it requires either States or the Federal Government to establish Internet-based "Insurance Exchanges" where health care insurance providers can market minimum essential coverage to individuals who do not qualify for Medicaid or have access to such coverage through their employers. ACA § 1311; 42 U.S.C. § 18031.

The ACA requires that "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange" that will "facilitate[] the purchase of qualified health plans[.]" ACA § 1311(b)(1); 42 U.S.C. § 18031(b)(1). Yet States may choose not to establish such exchanges. Specifically, each State may "elect[] . . . to apply the requirements" for the State exchanges, *or* if "a State is not an electing State . . . or [] the [Health and Human Services] Secretary determines" that the State will fail to set up an exchange before the statutory deadline, "the Secretary shall . . . establish and operate such Exchange within the State[.]" ACA § 1321(b)-(c); 42 U.S.C. § 18041(b)-(c).

The ACA encourages States to establish exchanges through a variety of incentives, chiefly the premium-assistance subsidy for State residents purchasing individual health insurance through State-established exchanges. The subsidy takes the form of a refundable tax credit paid directly by the Federal Treasury to the taxpayer's insurer as a premium offset. *See* 26 U.S.C. § 36B; 42 U.S.C. § 18082(c). The subsidy is available to households with incomes between 100 percent and 400 percent of the federal poverty line. *See* ACA § 1401(a); 26 U.S.C. § 36B(c)(1)(A).

The ACA provides that a tax credit "shall be allowed" in a particular "amount." 26 U.S.C. § 36B(a). That amount is based on the monthly premiums for a "qualified health plan[] offered in the individual market within a State which cover[s] the taxpayer . . . and which were enrolled in through an Exchange *established by the State under [§] 1311* of the Patient Protection and Affordable Care Act," 26 U.S.C. § 36B(b)(2)(A) (emphasis added). The statute calculates the subsidy by looking to "coverage months," defined as months in which the taxpayer "is covered by a qualified health plan described in subsection (b)(2)(A) that was enrolled in through an Exchange *established by the State under section 1311* of the Patient Protection and Affordable Care Act[.]" 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added).

The availability of the subsidy effectively triggers the assessable payments under the Employer Mandate. Specifically, the ACA provides that any employer with 50 or more full-time employees will be subject to an "assessable payment" if it does not offer its full-time employees an opportunity to enroll in affordable, employer-sponsored coverage. 26 U.S.C. § 4980H(a). But the payment is triggered only if at least one full-time 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).

On May 23, 2012, the IRS promulgated a final regulation ("IRS Rule") which states that these subsidies would be available to anyone "enrolled in one or more qualified health plans through an Exchange[.]" 77 Fed. Reg. 30,377, 30,387 (2012). The IRS Rule defines "Exchange" as "a State Exchange, regional Exchange, subsidiary Exchange, and Federally-facilitated Exchange." *Id.* at 30,378. This effectively eliminates the statutory restriction of subsidies to exchanges "established by the *State* under [Section] 1311 of the [ACA.]" 26 U.S.C. § 36B(b)(2)(A) (emphasis added).

On October 8, 2013, the State of Indiana and fifteen public school corporations brought suit challenging the validity of the IRS Rule. The Plaintiffs added an additional twenty-four school corporations as plaintiffs and named the Department of Labor and the Secretary of Labor as additional defendants on December 9, 2013 in an Amended Complaint. The State and the thirty-nine public school corporations seek to have the IRS Rule invalidated and ask the Court to enjoin its application.

ARGUMENT

I. The IRS Rule Is Invalid Because It Conflicts with the Plain Text of the ACA

A. The ACA creates two types of exchanges—State and Federal—and only State exchanges trigger the Employer Mandate

There is no ambiguity in the ACA. The relevant provisions are clear and are not open to interpretation. 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 credit amounts." *See* School Pls.' Summ.

J. Br. at Part I.B.[1] If the taxpayer's State is served by the Federal exchange, no premium assistance subsidies are available to that taxpayer.

When Congress directly addresses an issue, this Court "must give effect to the unambiguously expressed intent of Congress." *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Only if the statute is "silent or ambiguous" on a matter does a court move to *Chevron* Step Two. *Id.* at 843. Even then deference is not automatic, *see id.* at 844, "for the simple reason that some questions of law do not depend on agency expertise for their resolution." *Zivkovic v. Holder*, 724 F.3d 894, 897 (7th Cir. 2013). But here this Court should resolve the matter in *Chevron* Step One. Congress chose deliberate and unambiguous terms in Section 1401, and did not delegate to the IRS the power to ignore those terms. A court in the District of Columbia recently addressed this issue in *Halbig v. Sebelius*, No. 13-cv-623, 2014 WL 129023, at *14 (D.D.C. Jan. 15, 2014) (quoting cases), but erred by engaging in speculative inquiries contrary to the plain reading of text that provides a straightforward answer to the question.

The Supreme Court has on numerous occasions emphatically instructed that "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). This Court need not look elsewhere for congressional intent. *See Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1047 (7th Cir. 2013). Section 1401 is not silent: it says "State" and it says "1311." Nor are those terms ambiguous, as the plain meaning of "State" means one of the fifty States or the District of Columbia, and "1311" specifies a

[1] The State incorporates the School Plaintiffs' motion, memorandum and evidence by reference.

precise section of the ACA which distinguishes it from Section 1321.[2] Congress did not delegate to the IRS the decision of which exchanges would facilitate subsidies, or leave a gap in the statute for the IRS to fill. Quite the contrary, this Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Id.* at 1052-53 (citation and quotation marks omitted). The text is unambiguous here. Subsidies do not flow to through all exchanges, but rather only through those established by a State pursuant to Section 1311.

B. Canons of interpretation confirm Section 1401 subsidies flow only through State exchanges

1. This Court is not to give *Chevron* deference to an agency interpretation unless the text is *still* ambiguous after applying canons of construction. *Chevron*, 467 U.S. at 843 n.9. The Federal Government's argument ignores the canon against surplusage: a federal court has a "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation omitted).

Congress specified in Section 1401 that subsidies apply for persons who enroll through an exchange "*established by the State* under *1311*[.]" 26 U.S.C. § 36B(b)(2)(A) (emphasis added). Then Congress did so *again*. *See* 26 U.S.C. § 36B(c)(2)(A)(i). Giving effect to those words means that "by the State" deliberately excludes the Federal Government (or "Secretary"), and "1311" deliberately excludes "1321." Indeed, Congress could have said "State" or "1311" alone. Including *both* qualifiers emphasizes the exclusivity of the provision.

---

[2] Congress explicitly defined what was to be considered a "State" under the ACA: "[i]n 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). This is important because the District of Columbia is not a State, but Congress determined that it should be treated as one for purposes of the ACA. Unlike the District of Columbia, however, Congress did not explicitly claim—or even suggest—that the Federal Government could similarly be treated as a State.

In no brief in any case has the Federal Government offered a textual argument to the contrary; it typically reverts to more abstract and vague structural arguments that cannot trump the explicit statutory text. Had the statute used "including" or "such as" in this section, that would have been an indication that other exchanges might be encompassed. *See Richardson v. Nat'l City Bank of Evansville*, 141 F.3d 1228, 1232 (7th Cir. 1998). But instead Congress explicated its intent that the subsidies go only to those purchasing on a Section 1311 State exchange.

2. Indiana's reading is further supported by reading these terms *in pari materia* throughout the ACA. For example, the same part of the same subtitle of the Act authorizes the "Secretary of Health and Human Services, *and* the Exchanges established under section 1311" to collect names and Social Security numbers. ACA § 1414(a)(2); 42 U.S.C. § 405(c)(2)(C)(x) (emphasis added). This conjunction distinguishes Federal and State exchanges. To harmonize Sections 1401 and 1414, "*established by the State* under 1311" must mean what it says. "These words cannot be meaningless, else they would not have been used." *United States v. Butler*, 297 U.S. 1, 65 (1936).

3. Another interpretive rule requires that tax credits, deductions, and exemptions "must be expressed in clear and unambiguous terms[.]" *Yazoo & Miss. Valley R.R. v. Thomas*, 132 U.S. 174, 183 (1889); *see also Universal Oil Prods. Co. v. Campbell*, 181 F.2d 451, 457 (7th Cir. 1950). Voters must be able to hold representatives accountable, especially on matters of taxes. Courts must therefore adhere closely to precise text implementing Congress' tax policy decisions; answers to policy questions "are not to be implied[.]" *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988). This Court should therefore not defer to the IRS's interpretation of this tax provision.

C. Congress intended to induce all States to establish exchanges

Plaintiffs' reliance on the plain text of section 1401 makes sense in light of Congress's general strategy regarding the exchanges. In other words, Congress's general approach to induce State partnerships explains why subsidies are linked to State exchanges.

Just as Congress desired that all States would expand Medicaid, it likewise desired all States to set up an exchange. The anti-commandeering doctrine foreclosed compelling States to do either. *See New York v. United States*, 505 U.S. 144, 161-62 (1992). So Congress structured both as choices and used financial incentives to ensure that all fifty States and the District of Columbia would join the ACA by setting up exchanges and expanding Medicaid. If subsidies applied to Federal exchanges, not only would there be no incentive for States to establish exchanges, but there would be incentives *not* to create one: *i.e.*, assuming significant costs, undertaking an arduous task of staffing, administering, and bearing much of the blame if outcomes were unpopular.

Congress has previously employed this same tactic of incentivizing States through offering tax incentives that voters can receive only if the State adopts policies that advance federal policies. *See, e.g.*, 26 U.S.C. § 35(e)(2) (conditioning whether an individual's health plan is qualified to receive favorable treatment on whether the State complies with federal standards). Therefore, it is entirely fitting that Congress would structure similar incentives with respect to the exchanges.

D. A general congressional intent to increase insurance coverage does not authorize the IRS to re-write congressionally-enacted text

The D.C. District Court refused to give force to the plain text of the statute because in its view doing so would create "anomalies within the statute that Congress could not have intended." *Halbig*, 2014 WL 129023, at *14. The principal supposed "anomaly" would be that, notwithstanding Congress's general intent to expand health insurance coverage, *see* 42 U.S.C. § 18091(2)(D), giving force to the plain text of Section 1401 would yield fewer people receiving subsidies, and fewer people purchasing insurance. The Eastern District of Virginia also upheld the IRS Rule based on "statutory context" instead of the plain language of the statute. *King v. Sebelius*, No. 3:13-cv-630-JRS, 2014 WL 637365, at *11 (E.D. Va. Feb. 18, 2014). Similar to the *Halbig* decision, the *King* court concluded that the Federal Government's interpretation of Section 36B must be correct "because it furthers Congress's intent to provide affordable health insurance for all" and because the plain language of Section 36B leads to "numerous statutory anomalies[.]" *Id.*

First, while such results might be suboptimal, they would hardly be "anomalous." Congress did not pursue universal health insurance at all costs. Rather, the ACA, like most legislation, represents a balance of competing policies and trade-offs. *See, e.g.*, *Rosado v. Wyman*, 397 U.S. 397, 412 (1970) ("The background of [the statute] reveals little except that we have before us a child born of the silent union of legislative compromise."). This complex statute has myriad provisions, which overall and working in concert seek to provide near-universal health insurance coverage. Any undesirable outcomes are not "anomalies," but a testament to the reality that legislation represents compromise. Here, Congress created a system of tax incentives to induce States to do its bidding. When such inducements fail, that is not "anomalous," it is the result of divided and limited government at work.

Second, just because 450 sections of an Act are intended to work together to increase insurance coverage, this does not mean that each section must always directly achieve that purpose. Some provisions actually reduce the number of people with health insurance. For example, the ACA requires a "medical loss ratio" under which employers must pay out at least 80 percent of money taken in through premiums back out in benefits to the insured, meaning that insurance administration and overhead must consume no more than 20 percent of revenues received as premiums. 42 U.S.C. § 300gg-18(b)(1). As a result, many employers—such as companies with entry-level workers—responded that they could not satisfy this requirement, and may have to discontinue offering coverage altogether. *See, e.g.*, Janet Adamy, *McDonald's May Drop Health Plan*, Wall St. J., Sept. 30, 2010, *available at* http://online.wsj.com/news/articles/SB1000142405274 870343160457552241310106307O. The Federal Government then purported to issue a temporary waiver. Drew Armstrong, *McDonald's, 29 Other Firms Get Health Care Coverage Waivers*, USA Today, Oct. 7, 2010, *available at* http://usatoday30.usatoday.com/money/industries/health/2010-10-07-healthlaw07_ST_N .htm. Although the ACA is supposed to decrease the number of uninsured Americans, this example shows that various provisions can actually have the opposite effect. It does not mean that there is some alternate meaning a court can assign to the provision to change that effect, especially when a court must disregard the plain meaning of the provision's words to modify its effect.

Finally, as the Seventh Circuit recently said, federal statutes sometimes lead to unexpected outcomes, and "[e]ven were this an odd result . . . the court's job is not to fix it." *Patriotic Veterans*, 736 F.3d at 1047. Rather, the Court's job is to give effect to plain statutory text. "If Congress determines later that the plain language of the statute does not accurately reflect the true intent of Congress, it is for Congress to amend the statute[,]" not the courts. *Id.* (citation omitted). Further, "[t]he court's task is not to seek a motive for what Congress has plainly done, in fact, to the contrary, a court must 'avoid rendering what Congress has plainly done . . . devoid of reason and effect.'" *Id.* (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217-18 (2002)). Here, that means carrying out the text as written and invalidating the contrary IRS Rule.

E. The Federal Government is not a State and may not displace States

In other cases, the Federal Government has attempted to explain its position by contending that the reference to "such Exchange" in Section 1321 necessarily incorporates all properties of State exchanges under Section 1311 into federal-fallback exchanges under Section 1321. *See* Def.'s Mot. Summ. J. at 30-34, *Halbig v. Sebelius*, No. 13-cv-623, 2014 WL 129023 (D.D.C. Nov. 12, 2013). The court in *Halbig* accepted this theory, stating that "even where a state does not actually establish an Exchange, the federal government can create 'an Exchange established by the State under [42 U.S.C. § 18031]' *on behalf of* that state." 2014 WL 129023, at *14. This argument is incomprehensible under any reasonable understanding of federalism.

The plain text of the ACA makes it impossible for an exchange established by HHS under Section 1321 ever to be considered an exchange "established by the State under [Section] 1311[.]" In order for such a thing to be possible, the Federal Government would have to establish a State-created governmental agency or State-created non-profit entity to establish the exchange within the meaning of Section 1311. ACA § 1311(d)(1); 42 U.S.C. § 18031(d)(1).

The language of the IRS Rule itself serves to highlight the fact that the regulation flies in the face of the statutory text. The IRS Rule incorporates another regulation by reference, saying the term "Exchange" has "the same meaning as in 45 C.F.R. § 155.20." 26 C.F.R. § 1.36B-1(k). That incorporated regulation addresses a separate issue pertaining to exchanges involving Qualified Health Plans, and includes the phrase "regardless of whether the Exchange is established and operated by a State . . . *or by HHS*." 45 C.F.R. § 155.20 (emphasis added) In other words, in that separate regulation, the Federal Government was keenly aware of the distinction between State and federal exchanges, and made clear that requirements for Qualified Health Plans would apply to both. If it were serious about its theory that a Section 1321 exchange constituted an exchange "established by the State under [Section] 1311," HHS would not have added the phrase "or by HHS" in 45 C.F.R. § 155.20. Its "HHS exchange is a State exchange" theory regarding Section 1321 is semantic opportunism, not rigorous textual analysis.

The Federal Government, moreover, cannot create a State agency, enact a State statute, or take any of the other actions that would be required in order to support the fiction that an exchange established by HHS under Section 1321 is an exchange "established by the State under [Section] 1311" for purposes of Internal Revenue Code Section 36B. More generally, "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 161 (internal quotation omitted); *see also id.* at 162 ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."). Indeed, "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166; *see also Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568 (1985) ("In our federal system, the States have a major role that cannot be pre-empted by the National Government. As contemporaneous writings and the debates at the ratifying conventions make clear, the States' ratification of the Constitution was predicated on this understanding of federalism.").

The Federal Government's position here goes even further than improperly requiring the State to act. It proposes that it may act on behalf of the State—to actually set up an exchange "*established by the State* under [Section] 1311[.]" Federalism does not work by permitting the Federal Government to supplant the State in this (or any other) way. *See Garcia*, 469 U.S. at 581 ("The true 'essence' of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme."). The Federal Government may not usurp the power of State governments by taking actions that may be taken only by States. *Cf. Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004).

This is true in part because "[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people. By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." *New York*, 505 U.S. at 168. Indeed, "[p]ermitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012). *See also Printz v. United States*, 521 U.S. 898, 930 (1997) ("By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects."); *FERC v. Mississippi*, 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part) ("Congressional compulsion of state agencies, unlike pre-emption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs.").

Indiana's State government has chosen not to set up an exchange and, in turn, not to subject itself or its employers to the Employer Mandate. "If Congress had intended" subsidies to flow through *all* exchanges, "it could simply have said that." *Patriotic Veterans*, 736 F.3d at 1047. Congress decided States should make this choice, not the IRS. The Federal Government has neither the authority nor the prerogative to usurp this decision, and its attempt to do so here should be rejected.

II. The Certification and Reporting Requirements Violate the Tenth Amendment as Applied to Indiana Due to Intergovernmental Tax Immunity

Section 1514 of the ACA requires "[e]very applicable large employer . . . [to] make a return . . . contain[ing] . . . a certification as to whether the employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer sponsored plan[.]" ACA § 1514(a); 26 U.S.C. § 6056(a), (b)(2)(B). This tax reporting obligation applies to all large employers, regardless whether their employees receive tax credits or premium assistance under Section 1401 of the ACA. *See id*. Accordingly, no matter what happens with the IRS

Rule, Indiana and the Schools are subject to the dictates of Section 1514 and have challenged its constitutionality under the Tenth Amendment. *See* Am. Compl. at 64-65.

The fundamental problem with Section 1514 is that the Federal Government cannot tax a sovereign State as though it were a private corporation. "The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves[.]" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Thus, "the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-à-vis one another." *Id.* Indeed, "[t]he allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Id.*

That allocation and balance would be fundamentally upended if the power of the Federal Government to tax a State—such as the power to compel a State to submit to a tax reporting and certification system—was coextensive and coterminous with federal power over corporations. Yet ACA Section 1514 does precisely that, and therefore violates the residual sovereignty of the States under the Tenth Amendment. Indiana is entitled to judgment on Section 1514 as a matter of law.

A. Intergovernmental tax immunity doctrine does not permit the Federal Government to subject a sovereign State to direct taxation

1. In our federal system, if the Federal Government had plenary taxing power over the States, the Federal Government could control the States. Faced with this latent threat, the States would be rendered subordinate to the Federal Government. The intergovernmental tax immunity doctrine is the Tenth Amendment rule that bars

Congress from upending the federal balance of power by subjugating the States through taxation. *See Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 584 (1895) ("As the states cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the constitution to tax either the instrumentalities or the property of a state.") (abrogated in part on other grounds); *see also Indian Motorcycle Co. v. United States.*, 283 U.S. 570, 577 (1931).

The Supreme Court most recently refined the boundaries of intergovernmental tax immunity in *South Carolina v. Baker*, 485 U.S. 505 (1988), where it held that removing the federal income tax exemption for individuals on interest earned from State or local bonds did not violate the intergovernmental tax immunity doctrine. *Id.* at 527. Although the intergovernmental tax immunity doctrine has narrowed since *Pollock*, the Court in *Baker* reaffirmed its continuing vitality even as it rejected immunity against federal taxation of interest on State bonds. The Court observed that "under current intergovernmental tax immunity doctrine the States can never tax the United States directly[,]" and "[t]he rule with respect to state tax immunity is essentially the same," with some exceptions not relevant here. *Id.* at 523 (citations omitted). The Seventh Circuit also has confirmed that Congress does not have direct taxing power over States qua States. *See Travis v. Reno*, 163 F.3d 1000, 1002-03 (7th Cir. 1998).

B. Indiana and its subdivisions are immune from ACA Section 1514's mandatory system of direct federal taxation

1. ACA Section 1514 does not merely require Indiana to report on its citizens who work for the State; it also requires Indiana and the Schools to report on themselves, submitting themselves as taxed entities and subject to tax penalties if they do not self-

report fully and to the IRS's satisfaction. It is unlike the provision in *Baker*, or previous cases where the Supreme Court allowed the tax. As the Court approvingly quoted in *Baker*, "[w]here, *as here*, the economic but not the legal incidence of the tax falls upon the Federal Government, such a tax generally does not violate the constitutional immunity if it does not discriminate against holders of federal property or those with whom the Federal Government deals." *Baker*, 485 U.S. at 526 (internal quotation omitted). Accordingly, in *Baker*, the statute was upheld *because* it "clearly imposes no *direct* tax on the States." *Id.* (emphasis added).

By contrast, ACA Section 1514 imposes a direct tax on Indiana and its subdivisions. First, Indiana and the Schools must certify their compliance with this federal taxing system. 26 U.S.C. § 6056(b)(2)(B). This certification must include the length of the waiting period for coverage, 26 U.S.C. § 6056(b)(2)(C)(i), the monthly availability of the plans, 26 U.S.C. § 6056(b)(2)(C)(ii), "the monthly premium for the lowest cost option in each of the enrollment categories[,]" 26 U.S.C. § 6056(b)(2)(C)(iii), employer's share of the costs, 26 U.S.C. § 6056(b)(2)(C)(iv), the number of full-time employees for each month, 26 U.S.C. § 6056(b)(2)(D), the name, address, and taxpayer identification number for each of those employees, 26 U.S.C. § 6056(b)(2)(E), and any "such other information as the Secretary may require," 26 U.S.C. § 6056(b)(2)(F). Additionally, the public official making this submission to the Federal Government shall also provide to every employee his own name, phone number, and contact information, and recite to each employee all the information submitted to the IRS. 26 U.S.C. § 6056(c)(1). And the Section authorizes the Federal Government to make this submission part of an annual corporate tax return, 26 U.S.C. § 6056(d)—thus treating States the same as it treats private corporations—and specifically declares that the sovereign States are subject to the Federal Government under this tax system, 26 U.S.C. § 6056(e).

Complying with these requirements for 27,000 State employees, and each of the Schools' employees, is onerous and burdensome. It amounts to detailed federal micromanagement of a State's sovereign affairs through—of all things—a system of direct federal taxation. The Federal Government would never subject itself to the indignity of answering to a State in such a fashion, nor would the Supremacy Clause allow it. The States are not truly coequal sovereigns with the Federal Government unless they are treated the same. Yet ACA Section 1514 imposes a *tax penalty* upon Indiana and the Schools if the Plaintiffs fail to comply with this federal taxing regime of certification and reporting. *See* ACA § 1514(b); 26 U.S.C. § 6724.

2. Section 1514 is about far more than disclosure; it co-opts the States to participate in the ACA both as taxing agents and as compliance monitors. This Section requires Indiana to (1) gather information that it did not plan to gather; (2) certify to the Federal Government that the State is acting in compliance with a federal taxing regime; (3) compile minutiae to assist the Federal Government in monitoring whether State employees are also acting in compliance with a federal program; and (4) dutifully report information back to the IRS. It requires the State to gather and sort through information on its sovereign functions and employees, certify that it is obeying the Federal Government in the posture of a corporate employer answerable to the IRS, and act as the IRS's agent to assist in enforcing parts of the ACA.

3. In any event, the Federal Government cannot exercise direct taxing authority over the sovereign States. Otherwise it could cripple the States through direct

taxation. For example, the Federal Government is authorized to tax all "incomes," not merely profits. U.S. Const. amend. XVI. Imagine that instead of taxing business profits, the Federal Government enacted a tax statute giving every employer a $1 billion exemption, then imposed a tax on 10% for all revenue above that, instead of taxing profits. The State of Indiana took in $14.1 billion for Fiscal Year 2012. *See* Indiana State Budget Agency, *End-of-Month Revenue Report* (June 30, 2012), *available at* http://www.in.gov/sba/files/revreport_june2012.pdf. That would subject Indiana to a tax of $1.31 billion per year, payable to the U.S. Treasury. This would exclude the vast majority of businesses in Indiana while imposing a massive levy on the State. This tax would admittedly be nondiscriminatory, which is most often what courts look for under this doctrine. *See Baker*, 485 U.S. at 523-24. Nevertheless, such a tax would hobble the States, and therefore would be unconstitutional. *See Travis*, 163 F.3d at 1003.

Many provisions of federal law recognize that the Tenth Amendment immunizes the States from direct federal taxation. For example, State and local government employees are exempt from the Federal Unemployment Tax Act. *See* IRS, Publication 15: (Circular E) Employer's Tax Guide 37 (2014), *available at* http://www.irs.gov/pub/irs-pdf/p15.pdf. As another example, vehicle fuel purchases by States and their subdivisions are exempt from federal excise tax. *See* IRS, Federal Tax Exemptions for Government Entities, http://www.irs.gov/Government-Entities/Federal,-State-&-Local-Governments/Fuel-Tax-Exemptions-for-Government-Entities. Such laws reflect the respect one level of the federal system has consistently had for the other—a respect demanded by the Constitution.

Several provisions in the Affordable Care Act were premised at least in part upon intolerable violations of Tenth Amendment guarantees to the States. *See, e.g.*, *NFIB*, 132 S. Ct. at 2603-04 (invaliding the Act's mandatory Medicaid expansion). ACA Section 1514 is another transgression of this constitutional command. Once again, the ACA presents a situation that "is far from the typical case," *id.* at 2603, one that "crosse[s] the line" onto the residual sovereignty of the States, *New York*, 505 U.S. at 175. The tax certification and tax reporting provisions of Section 1514, and the attendant tax penalties for noncompliance with this taxing regime, *see* 26 U.S.C. § 6724, cannot be imposed upon sovereign States. Section 1514 of the ACA is therefore invalid as applied to Indiana and its subdivisions.

III. The Employer Mandate as Applied to Indiana Violates the Tenth Amendment

The Employer Mandate found in ACA Section 1513 is another provision of the Affordable Care Act that violates the Tenth Amendment as applied to the States and their political subdivisions, and therefore is invalid as applied to Indiana and the Schools.[3]

A. The Employer Mandate is a tax that violates the intergovernmental tax immunity doctrine

The Employer Mandate requires all employers with fifty or more employees to offer healthcare coverage that meets certain requirements or be subject to a tax penalty. ACA § 1513; 26 U.S.C. § 4980H. This mandate applies to sovereign States in precisely

[3] The State of Indiana was a plaintiff when ACA Section 1513 was challenged in *NFIB*, where the district court ruled that Supreme Court precedent sustained the Employer Mandate as a Commerce Clause regulation. *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1153-54 (N.D. Fla. 2010). The Supreme Court now suggests the Employer Mandate is a direct tax, rather than a commercial regulation. Nonetheless, the Federal Government argues that Indiana is precluded from challenging Section 1513 as a tax. *See* Defs.' Mem. Supp. Mot. to Dismiss at 28-32. Indiana has rebutted this argument in its Response, but in any event, as set forth in the Schools' Response to the Motion to Dismiss at pages 15-24, the thirty-nine school systems are protected by the Tenth Amendment but are not bound by the judgment in *Florida*.

the same manner as private corporations. Although at first glance ACA Section 1513 appears to be predicated on the Commerce Clause, the Supreme Court in *NFIB* held that statutory provisions that appear to be Commerce Clause regulations can instead be authorized by the Tax Clause. The requirement (1) must be "paid into the Treasury by taxpayers when they file their tax returns[,]" (2) "is found in the Internal Revenue Code and [(3)] enforced by the IRS," which (4) "must assess and collect it in the same manner as taxes," and (5) "produces at least some revenue for the Government." *NFIB*, 132 S. Ct. at 2594 (internal citations, brackets and quotation marks omitted). Where these factors are met, a requirement can still be a tax even if its "most natural interpretation" is as a Commerce Clause provision. *Id.*

ACA Section 1513 meets all these requirements. Employers against whom the tax payments are assessed pay it into the Treasury via their corporate tax return. *See* 26 U.S.C. §§ 4980H(d)(1), 6671(a). The Employer Mandate is codified in the Internal Revenue Code and is enforced by the IRS. It is assessed and collected in the same manner as a tax, and is estimated to raise $140 billion over ten years.[4]

There is also a structural reason to conclude Section 1513 is a tax. In Title I of the Act, Subtitle F is titled Shared Responsibility for Health Care. 124 Stat. 121. Part I is Individual Responsibility, and Part II is Employer Responsibilities. *Id.* The key section in Part I is the Individual Mandate in Section 1501, and the key section in Part II is the Employer Mandate in Section 1513. They are functional counterparts, designed to work in concert under the same governing principles. The Supreme Court upheld the shared

[4] *See* Cong. Budget Off., *Table 2: CBO's May 2013 Estimate of the Budgetary Effects of the Insurance Coverage Provisions Contained in the Affordable Care Act* (2013), *available at* http://latham.house.gov/uploadedfiles/cbo-uninsured-never-below-30-mil-under-obamacare.pdf.

responsibility payment of the Individual Mandate as a tax. *NFIB*, 132 S. Ct. at 2600. So too regarding the Employer Mandate, "the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty." *Id.* at 2595.

The only federal court to have considered the question subsequent to *NFIB* accordingly held that Section 1513 is in fact a tax that can be constitutionally imposed upon private employers. *See Halbig*, 2014 WL 129023, at *10. Yet for all the reasons discussed in Part II, such a direct tax violates the intergovernmental tax immunity doctrine as applied to Indiana and the Schools. As applied, it violates the Tenth Amendment, so Indiana and the Schools are entitled to judgment as a matter of law.[5]

B. Alternatively, the Employer Mandate is invalid as a Commerce Clause regulation of Indiana and its subdivisions as a sovereign State

This Court should hold ACA Section 1513 is an unconstitutional tax. *See supra* Part III.A. However, if this Court examines the Employer Mandate as authorized by the Commerce Clause, it is still unconstitutional as applied to Indiana and the Schools.

1. This Court can invalidate ACA Section 1513 *as applied* because subsequent Supreme Court decisions have overtaken *Garcia*

Although the Federal Government asserts that *Garcia* is still good law, Defs.' Mem. Supp. Mot. to Dismiss ("MTD Br.") at 31, *Garcia* has been overtaken by later cases. Its central premise has been explicitly jettisoned by the Supreme Court, and it no longer accurately states the law.[6]

[5] If this Court holds that the IRS Rule is invalid as a violation of the APA, Indiana continues to be under the burden of ACA Section 1513 itself, and therefore continues to have standing to litigate the matter.

[6] The law would be clearer if the Supreme Court expressly overruled *Garcia*. The issue is mentioned here to preserve it on appeal.

For most of this Nation's history, the Federal Government adhered to the longstanding conception of intergovernmental immunity, and so did not attempt to impose federal employment laws upon the sovereign States. Yet in 1961, then again in 1966, Congress extended provisions of the Fair Labor Standards Act, to State employees. The Supreme Court upheld this extension in *Maryland v. Wirtz*, 392 U.S. 183, 198-99 (1968), *overruled by Nat'l League of Cities v. Usery*, 426 U.S. 833, 855 (1976). This decision was accompanied by a vigorous dissent, where Justice Douglas expressed his concern that with this new power "the National Government could devour the essentials of state sovereignty[.]" *Id.* at 205 (Douglas, J., dissenting).

Congress advanced its incursion upon the States in 1974, expanding the definition of "employer" in FLSA to include "a public agency." Pub. L. No. 93-259, 88 Stat. 55 (1974) (codified at 29 U.S.C. § 203(d)). When the Court reviewed this expansion in *National League of Cities*, it overruled *Wirtz*, and invalidated the FLSA's regulation of "public agenc[ies]." *National League of Cities*, 426 U.S. at 840, 51-52, 55. In so doing, the Court held that "the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce." *Id.* at 854. The Court held that the Federal Government cannot override the functioning of a sovereign State or its subdivisions with regard to its "traditional governmental functions." *Id.* at 849-52.

In *Garcia*, with a 5-4 decision the Court reversed course again, upholding Congress' application of FLSA wage and hour provisions to public employees. *Garcia*, 469 U.S. at 557. The Court held that the Tenth Amendment merely declared a principle to be considered by political actors, not a foundation for court judgments: "State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552.

Even then, however, *Garcia* included the caveat that "we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position." *Id.* at 556. The Court thus left open the possibility that courts could recognize and judicially enforce some limits where federal power interferes with the States, cabining its holding by saying the matters before it "do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Id.* (citation omitted).

As discussed in Part II, the Supreme Court quickly acknowledged its error in declaring that the Tenth Amendment was not a matter for judicial enforcement. *See Gregory v. Ashcroft*, 501 U.S. 452, 457-64 (1991). "[T]he States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461. The Court recognized the indispensable role that the Tenth Amendment plays in maintaining the "healthy balance of power between the States and the Federal Government[.]" *Id.* at 458.

Two years later, the Court demonstrated its abandonment of *Garcia*'s central premise, invalidating the take-title provision of a federal radioactive-waste statute in *New York*, 505 U.S. at 174-77. The Court unequivocally rejected the idea that the Tenth Amendment was not a matter for judicial determination, holding that the invalid provision violated the Tenth Amendment's guarantee that the Federal Government cannot commandeer state legislatures to pass specific legislation. *Id.* at 161. In doing so, the Court directly cited precedents from the *National League of Cities* line of cases, *see id.* at 160-62, reviving aspects of that doctrine. Specifically, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162 (citation omitted).

The Supreme Court elaborated upon the Tenth Amendment's protection of States' autonomy in *Printz*. As in this case, the Federal Government claimed broad powers to require state-level implementation of a federal statute (there, background check provisions of the Brady Act). *See Printz*, 521 U.S. at 902-05. "Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty[.]'" *Id.* at 918-19 (quoting The Federalist No. 39 (J. Madison)). The Court reaffirmed that the Constitution does not allow Congress to regulate States. *Id.* at 920 (quoting *New York*, 505 U.S. at 166). Accordingly, the Tenth Amendment anti-commandeering principle that exempted State legislatures in *New York* likewise applied to State and local executive officers. *Id.* at 933. The Court specifically rejected the Federal Government's argument that "Congress [may] command state or local officials to assist in the implementation of federal law[.]" *Id.* at 927. To the contrary, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Id.* at 928.

As applied to Indiana and its subdivisions, the Employer Mandate suffers from the same fundamental defect as the Individual Mandate. A majority of the Supreme Court held that the Individual Mandate would be unconstitutional if predicated upon the Commerce Clause. *NFIB*, 132 S. Ct. at 2586-91 (opinion of Roberts, C.J.); *id.* at 2644-50 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.). But while the Individual Mandate can be salvaged by construing it as authorized by the Tax Clause, *id.* at 2600 (majority opinion), for the reasons discussed in Part II, that option is not available regarding the Employer Mandate vis-à-vis the States.

New York, *Printz*, and *NFIB* cannot be reconciled with *Garcia*. This is all the more true now, as *NFIB* reaffirmed and restated the anti-commandeering principle as the rule that federal courts are "to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes." *NFIB*, 132 S. Ct. at 2602. ACA Section 1513 requires State and local personnel to function in accordance with the Act, and thereby supposedly advance the ACA's stated federal purposes of achieving near-universal coverage while reducing costs. ACA § 1501(a)(2)(D). *Garcia* is no longer good law, and cannot justify the Federal Government's intrusion on the sovereignty of the States in ACA Section 1513.

2. Alternatively, *Garcia* only applies to Title 29 labor law

Even if this Court finds Part III.B.1 persuasive, this Court may not consider itself at liberty to conclude that *Garcia* has been wholly overtaken by subsequent precedent absent an explicit Supreme Court opinion declaring that *Garcia* is overruled. Should this Court so conclude, it should still hold that *Garcia* applies only to the Fair Labor Standards Act and other provisions of Title 29. Since ACA Section 1513 is not codified in Title 29, this Court should hold that it is unconstitutional as applied to Plaintiffs.

The *Garcia* line of cases involves federal labor law, namely Fair Labor Standards Act provisions, codified in Title 29. *See Wirtz*, 392 U.S. at 185-93 (reviewing 29 U.S.C. §§ 203(d), (r)-(s), 206(b), 207(a)(2)); *National League of Cities*, 426 U.S. at 837-38 (reviewing 29 U.S.C. § 203(d), (s)(5), (x)); *Garcia*, 469 U.S. at 534-35 (reviewing 29 U.S.C. § 217 and 29 C.F.R. § 775.3(b)(3)). By contrast, none of the affected statutes in Supreme Court cases wherein the Court invalidated statutes on Tenth Amendment grounds subsequent to *Garcia* implicated FLSA or were codified in Title 29. *See New York*, 505 U.S. at 153-54 (invalidating nuclear waste take-title obligations, 42 U.S.C. § 2021e(d)(2)(C)); *Printz*, 521 U.S. at 903-04 (rejecting Brady Act requirements codified at 18 U.S.C. §§ 922(s)(2), (s)(6)(B)(i), (s)(6)(C)); *NFIB*, 132 S. Ct. at 2604 (rejecting Medicaid expansion conditions codified at 42 U.S.C. § 1396(c)).

The Seventh Circuit, concluding that *Garcia* survived *New York* and *Printz*, applied *Garcia* beyond Title 29 when it upheld application of criminal provisions of the Driver's Privacy Protection Act, codified at 18 U.S.C. §§ 2721-25, against state officials. *Travis*, 163 F.3d at 1002-03. Properly understood, however, *Bond* and *NFIB* constitute supervening authority, such that *Travis* no longer controls. Accordingly, if *Garcia* is still law at all, it must be confined to Title 29. Since ACA Section 1513 is codified at 26 U.S.C. § 4980H, Count III is governed by the Tenth Amendment principles in *New York*, *Printz*, and *NFIB*, not *Garcia*. Thus, Section 1513 is invalid as applied to all Plaintiffs.

3. At minimum, *Garcia* does not apply to Title 26 tax law

If the Court nonetheless concludes that it is constrained to adhere to *Travis*, then at minimum *Garcia* does not apply to the Internal Revenue Code, Title 26, which is generally and almost entirely predicated upon the Tax Clause rather than the Commerce Clause. The statute in *Travis* was a Commerce Clause statute, and there is no reason to extend its reasoning to the Tax Code. This is true *a fortiori* after *NFIB*, where the Supreme Court held that even ACA provisions that would normally seem to be

Commerce Clause mandates are instead taxes if they fit certain criteria, underscoring the distinction between those two enumerated powers. *See supra* Part III.A.

Accordingly, 26 U.S.C. § 4980H is not governed by *Garcia*, but instead by the principles discussed in *Gregory* and *Bond*, and the limits on congressional power set forth in *New York*, *Printz*, and *NFIB*. Indiana and the Schools are entitled to judgment on Count III that ACA Section 1513 is invalid as applied to them as a matter of law.

IV. The Employer Responsibility Provisions of the ACA Constitute a Nonseverable Unit That Is Invalid Against States or their Subdivisions

If this Court agrees that Section 1514 is unconstitutional as applied to Indiana and the Schools, but for any reason concludes Section 1513 is valid as applied, or that consideration of the merits of that question is precluded, Section 1513 *still* must be invalidated as applied to the Plaintiffs on account of Section 1514's unconstitutionality. This is true because in determining severability, courts must focus on the relevant congressional intent. The Employer Responsibility provisions are too interconnected for Congress to have intended them to be severed from each other.

A. Severability doctrine requires inquiry into congressional intent, with a severability clause being the strongest indication of intent

Severability is a remedial inquiry that turns on congressional intent. When part of a statute is invalidated, this Court must ask two questions in sequence. First, do the remaining provisions of the Act still function in a manner consistent with Congress' intent? If so, then nonetheless, would Congress have passed the remaining sections if it had been aware *ex ante* that the challenged provision would be struck down? *NFIB*, 132 S. Ct. at 2668-69 (joint dissent). These questions are closely related; the answer to both is often the same, and the Court does not always clearly separate the two. *Id.* at 2669.

A court is *not* to ask merely whether the remaining provisions of a statute still function at all. "The more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). A court must "evaluate the importance of [the invalid provision] in the original legislative bargain," *id.*, and determine whether the remaining provisions still accomplish Congress' legislative objectives for the statute as a whole, or the part of the statute implicated in the challenge. *See NFIB*, 132 S. Ct. at 2669 (joint dissent) (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010)).

There is no presumption of severability without a severability clause. The Supreme Court has held that "the inclusion of such a clause *creates* a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines*, 480 U.S. at 686 (emphasis added). "In the absence of a severability clause, however, Congress' silence is just that—silence—and does not raise a presumption against severability." *Id.* (citations omitted). Instead, a court recurs to normal tools of statutory interpretation to determine whether other implicated provisions function in the manner Congress intended, and whether Congress would have passed the residue of the statute as one piece.

Severability is not an all-or-nothing proposition. Invalid provisions that cannot be severed entirely from a statute are either completely nonseverable or partially severable. In the former, the question is whether the invalid provision plays such a role in the entire statute that without it the entire statute must be invalidated. *See, e.g., Free Enter. Fund*, 130 S. Ct. at 3161. The Supreme Court invalidates entire statutes when it cannot confidently determine which provisions the legislature would salvage. *E.g.*, *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (plurality) (explaining the Court would not sever the invalid provisions because it could not "foresee which of many different possible ways the legislature might respond to the constitutional objections we have found").

B. The Employer Mandate cannot function as Congress intended without the tax certification and reporting system

Severability is about legislative intent: A court may not leave intact a statutory remnant that, in context, differs materially from what Congress intended. Here, the question is whether Congress would have preferred to omit Section 1513 rather than have it function without Section 1514's reporting system. *See Randall*, 548 U.S. at 262.

1. The Federal Government admits Section 1513 cannot function without Section 1514

There is no severability clause in the ACA, so there is no presumption in favor of severability. Further, even the Federal Government has admitted that the tax compliance reporting system under Section 1514 cannot be severed from the Employer Mandate of Section 1513. The blog post that purported to absolve large employers of their relevant mandatory obligations for 2014 relied on the inextricability of Sections 1513 and 1514. *See* Mark J. Mazur, U.S. Dep't of the Treasury, Treasury Notes: Continuing to Implement the ACA in a Careful, Thoughtful Manner, http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx [hereinafter Mazur]. Specifically, the post started by saying that 26 U.S.C. § 6056—the reporting requirement—would not be in effect for 2014. *Id.* Based on that suspension, the blog post went on to say that without this reporting system in operation, it would be "impractical" to assess "shared responsibility payments (under section 4980H) for 2014." *Id.* In other words, by the Federal Government's own admission, Section 1513 is "impractical" without Section 1514, *i.e.*, it cannot "function in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685.

That assessment makes sense. Without Section 1514, various agencies of the Federal Government have no way of knowing which large employers provide health care. So it is "necessary" to "nullify" the part of the "legislature's work" contained in Section 1513 as applied to Indiana. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006). Otherwise this Court would be rewriting this portion of the ACA, and Section 1513 would no longer function as intended, *see id.* at 329-30. Sections 1513 and 1514 "must stand or fall as a unit." *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 83 (1976).

2. Sections 1514 and 1513 cannot be severed from the other Employer Responsibility provisions

Since Section 1514 is unconstitutional as applied to a sovereign State, this Court should simply take the Federal Government at its word and hold Section 1513 is likewise invalid as applied to Indiana and the Schools. It is also clear that Sections 1511, 1512, and 1515 cannot function in a manner consistent with Congress' intent without Section 1513, and this Court has no reason to believe Congress would have enacted those provisions against the States had it known Section 1513 would not be operating against the States. That was not the "original legislative bargain." Therefore Part I.F.2 of the ACA, consisting of Sections 1511-15, is invalid as applied to Indiana and the Schools.

Congress designed these five provisions to work in concert, with Section 1513 as the functional heart. Its operational dynamics are predicated entirely on the full functionality of Section 1513. If Section 1513 does not apply to States, those sections no longer serve the purposes Congress intended.

Without Section 1513 and Section 1514, the remaining three sections in Part I.F.2 of the ACA cannot function as Congress intended, nor does this Court have any reason to conclude Congress would have enacted them as standalone provisions. As applied to Indiana, ACA Part I.F.2 is one inseparable unit that must stand or fall together.

V. This Court Should Estop the Federal Government by Permanently Enjoining Enforcement Sanctions Arising from 2014

This Court should exercise its equitable powers to grant Indiana injunctive relief regarding the Federal Government's unlawful suspension of the tax-and-certification regime and Employer Mandate penalties. Equitable remedies can take many forms. *See e.g.*, *Mitchell v. Donchin*, 286 F.3d 447, 450 (7th Cir. 2002) (equitable estoppel). Of all the forms of equitable relief, judicial estoppel seems closest to the relevant facts here. *See New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001). Although judicial estoppel usually applies to matters where a party prevailed with a position in previous litigation, then in a subsequent case takes a contradictory position, *see see id.* at 750-51, like other equitable doctrines, it is "not reducible to any general foundation of principle[.]" *Id.* at 750. Those broad principles—under whatever label—should control here.

Indiana seeks a permanent prohibitory injunction. Since the narrow scope of this injunctive relief is to declare that Indiana does not have to comply with ACA Sections 1513 and 1514 for 2014, and any adverse response from the Federal Government for Indiana's resulting actions and inactions, estoppel is a modest and narrow injunctive remedy to achieve that result. This Court is free to use its equitable discretion to style the relief as it sees fit. Regardless whether this claim is properly understood to sound in judicial estoppel or some other equitable remedy, "the granting of injunctive relief remains a discretionary equitable remedy[.]" *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1430 (7th Cir. 1986).

President Obama purports to suspend Section 1514 for 2014 and permanently waive all penalties for willful violations in 2014 of Section 1513. The President claims the power to "tweak" provisions of an Act of Congress, so long as the modification "doesn't go to the essence of the law[.]" President Barack Obama, *Remarks by the President in a Press Conference*, Aug. 9, 2013, http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference; *see also* Mazur.

When a statutory provision does not grant the Chief Executive any discretion, or delegate any authority regarding waivers, suspensions, or modifications, the President is required to faithfully administer the terms of that statute. A President's unilateral declaration of non-enforcement is not itself "law." So what is needed in this case is an actual source of law to validate the President's declaration and afford protection to those, including the State, who must govern themselves according to law.

Accordingly, this Court should follow the same approach as the D.C. Circuit in *Wheaton Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012) (per curiam). At issue there was another Rule implementing a provision of the ACA regarding "preventive care" and requiring employers to cover contraception-related matters. *Id.* at 551-52. The Federal Government had announced that the Final Rule would be superseded by a new Rule incorporating broader religious-liberty and conscience protections, and would provide a safe harbor for religious institutions such as the plaintiff universities. *Id.* at 552. The court pointed out that the new Rule was not yet in the Code of Federal Regulations and, therefore, it did nothing to mitigate the force of law of the then-current ACA Rule against the plaintiffs. *See* Ex. 1 at 35-42 [Trans. of Oral. Arg., *Wheaton Coll. v. Sebelius*, 703 F.3d 551 (2012) (Nos. 12-5273, 12-5291)]. The court asked the Federal Government's attorney why he would object to an injunction from the Court holding the Federal Government to its representation that the current rule would never be enforced against the plaintiffs. *Id.* at 42. The Federal Government listed a variety of objections similar to those offered in this case, *see id.* at 42-45, and the court rejected those objections and the Federal Government's assurances of non-enforcement, saying that "the fact of the matter is they're not binding. Nothing that you say binds the Agency, you issued a guidance document that says . . . it's a Safe Harbor. There's a whole body of law in this Circuit that says guidance documents are not binding, they're not law . . . ." *Id.* at 45.

The D.C. Circuit granted injunctive relief, stating that it would "take the government at its word and will hold it to it." *Wheaton Coll.*, 703 F.3d at 552 (citing *EPA v. Brown*, 431 U.S. 99 (1977)). The D.C. Circuit focused on the law and noted that the Federal Government's assurances of non-enforcement had *no basis* in law, and therefore saw fit to hold the Federal Government to its word and protect the plaintiffs. This court should do likewise here.

CONCLUSION

For these reasons, and for the reasons set forth by the Public School Corporations in their Memorandum in Support of Summary Judgment, the Court should enter summary judgment for the Plaintiffs on all claims.

Respectfully submitted,

GREGORY F. ZOELLER
Attorney General of Indiana

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General
Kenneth A. Klukowski
Special Deputy Attorney General

Ashley Tatman Harwel
Heather Hagan McVeigh
Deputy Attorneys General
Office of the Attorney General
Indiana Government Center South
Fifth Floor
302 West Washington Street
Indianapolis, IN 46205
(317) 232-6255

Attorneys for State of Indiana

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2014, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's Electronic filing system. Parties may access this filing through the Court's system.

Joel McElvain
joel.mcelvain@usdoj.gov

Shelese Woods
shelese.woods@usdoj.gov

Andrew M. McNeil
amcneil@boselaw.com

John Zhi Huang
jhuang@boselaw.com

Winthrop James Hamilton
jhamilton@boselaw.com

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

Office of the Indiana Attorney General
Indiana Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6255
Facsimile: (317) 232-7979
Tom.Fisher@atg.in.gov