UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

REPLY IN SUPPORT OF PLAINTIFF SCHOOL CORPORATIONS' MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

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I. PRELIMINARY PROCEDURAL STATEMENT

At the outset, it is worth noting that the federal government does not contest the Schools' statement of undisputed material facts, and therefore these facts are admitted and established for purposes of summary judgment. *See* L.R. 56-1(f)(1)(A). As a result, the injury-in-fact set forth in the Schools' statement of undisputed material facts is established for purposes of summary judgment.

Conversely, the Schools object to the federal government's "Statement of Material Facts" to the extent that it is argumentative, and respectfully submit that this section should more appropriately be characterized as a legislative summary, not a statement of material facts. *See* Defs.' Mem. in Supp. of Their Cross-Mot. for Summ. J. ("Memorandum" or "Mem."), Dkt. 62, at 3-14. For example, it is not a fact that "The Act establishes federal tax credits that assist eligible individuals with household income between 100% and 400% of the federal poverty line to pay premiums for non-group insurance policies on the health care Exchanges created pursuant to the Act." Mem. at 5. This contention presumes the answer to the very issue to be decided in this case, namely, whether premium assistance tax credits are available in the federal Exchange. Because the defendants do not offer a permissible "Statement of Material Facts Not in Dispute" as required by Local Rule 56-1(a), the Schools cannot respond with a "Statement of Material Facts in Dispute" pursuant to Local Rule 56-1(f)(1)(A).

Finally, as a procedural matter, the Schools filed a "Joinder in State of Indiana's Motion for Summary Judgment" ("Joinder") on March 5, 2014. Dkt. 49. In that Joinder, the Schools noted that they joined, and incorporated by reference, the State's arguments in Sections II through V of the State's summary judgment brief (Dkt. 45), which apply with equal force to the Schools. As with the Joinder, the Schools adopt and incorporate by reference the arguments

made by the State in response to the federal government's cross motion for summary judgment and in reply in support of the State's motion for summary judgment.

II. THE SCHOOLS MAY RAISE TENTH AMENDMENT CLAIMS

The federal government briefly questions whether public school corporations may assert Tenth Amendment challenges, commenting that "plaintiffs apparently mean to argue that the school corporations would also be immune from taxation under their Tenth Amendment theory, but they do not explain why their theory would extend immunity to a state's political subdivisions." Mem. at 39, n.13. The Complaint, Amended Complaint, and various briefs submitted by all plaintiffs do indeed make clear that the Schools, like the State itself, are invoking the Tenth Amendment's protections in this case. The federal government has never before in this litigation challenged the Schools' independent standing to raise a Tenth Amendment claim, so the Schools have had no need to explain that standing. Even now, the federal government makes no serious effort to challenge the notion that political subdivisions are protected by the Tenth Amendment, so the Court should treat any such defense as waived.

Regardless, as many of the Supreme Court's leading Tenth Amendment cases demonstrate, state political subdivisions, including municipalities, may assert Tenth Amendment barriers against federal encroachment. The very case that the federal government (erroneously) contends resolves plaintiffs' Tenth Amendment claims—*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)—proves the point. There, as the caption of the case suggests, it was a municipal public transit agency, not the State of Texas, that brought a Tenth Amendment challenge to the National Labor Relations Act. *See Garcia*, 469 U.S. 528. Next, in the decision that *Garcia* overturned, *National League of Cities v. Usery*, 426 U.S. 833 (1976), the plaintiff was not *any* unit of *any* government but an association of municipalities. Yet there the Court held that this quasi-private association could directly (and successfully) litigate state

sovereignty interests under the Tenth Amendment. *See Nat'l League of Cities*, 426 U.S. at 851-52. And in *Printz v. United States*, 521 U.S. 898 (1997), the Court fully adjudicated a successful Tenth Amendment challenge brought by the Sheriff of a single County in Montana to the Brady Act and its background check requirements.

There is no meaningful distinction between these political subdivision (or local government association) plaintiffs and the plaintiff public school corporations here. While this case focuses more specifically on the Tenth Amendment sub-species of intergovernmental tax immunity, that is not the only basis for the Tenth Amendment claim, *see* Amended Complaint paragraphs 210-211, and there is no reason to suppose the Tenth Amendment protects political subdivisions from other regulations, but not with respect to taxes.

The federal government cites no precedent saying political subdivisions do not enjoy intergovernmental tax immunity because it has none. Neither the Supreme Court, nor the Seventh Circuit, nor this Court has ever held that political subdivisions of Indiana are unable to claim protections of the Tenth Amendment of any stripe (or are bound in privity to the State for purposes of invoking the Tenth Amendment). Especially here, where each School suffers unique injuries and has unique interests—and are even separately represented—it would be an unwarranted and incorrect new rule of law to say the Schools cannot claim Tenth Amendment protections.

III. THE IRS RULE IS INVALID AS A MATTER OF LAW

The defendants' statutory argument is flawed in several respects. In fact, the federal government abjectly fails to defend the IRS Rule as a permissible interpretation of the ACA under *Chevron*. The text, structure, and history of the ACA all corroborate what seems plain: To be eligible for a premium assistance tax credit, one must enroll in a qualified health plan offered in the individual market within a state through an Exchange established by the state under

section 1311 of the ACA. *See* 26 U.S.C. § 36B(a)-(c). The IRS Rule, which must adhere to a sound and valid interpretation of the ACA to have any legitimacy, goes further and says that such credits are available for such health plans enrolled in through an Exchange established by the Secretary of Health & Human Services (the "Secretary") under section 1321 of the ACA. There is no interpretative justification for this extension of the premium assistance credit (and, by necessary implication, the employer mandate penalties) to the federally-facilitated HealthCare.gov Exchange. The IRS Rule was adopted in violation of the Administrative Procedure Act and is invalid.

A. The Federal Government's Textual Argument Fails to Justify the IRS's Wholesale Rewrite of the ACA.

1. An "Exchange established by the State" must be established by the state.

The federal government nonsensically asserts that an Exchange established by the HHS Secretary—established by the Secretary because a state, such as Indiana, elected not to establish the Exchange itself—is really "an Exchange established by the State under [42 U.S.C. § 18031] *on behalf of* that state." Mem. at 17 (citing *Halbig*, 2014 WL 192023, at * 14 (emphasis and alteration by the court in *Halbig*)). Initially, the federal government must be called on its sleight-of-hand. It argues that it establishes an Exchange "on behalf of" a non-electing state, but the ACA uses different language; it says that the federal government establishes the Exchange "within" the non-electing state. *See* 42 U.S.C. § 18041(c). Moreover, an Exchange established by HHS within Indiana cannot be an Exchange established by the state of Indiana, because for HHS to act, Indiana must first elect not to establish an Exchange. As such, there is no Exchange "established by the state" within Indiana, only HealthCare.gov, which was established by the federal government "within" Indiana.

The federal government next over-burdens the phrase "such Exchange" in the ACA section that directs the Secretary to establish the Exchanges in non-electing states. Section 1321 of the ACA (42 U.S.C. § 18041) requires at least two primary things of the Secretary. First, the Secretary is required to issue regulations setting the standards for meeting the ACA's requirements for the establishment and operation of Exchanges, the offering of qualified health plans through "such Exchanges," and other things. 42 U.S.C. § 18041(a)(1). States that elect to "apply the requirements described in subsection (a)" of section 1321, that is, that elect to establish their own Exchanges, must adopt the federal standards established under section (a) or pass state laws or regulations as necessary to implement those standards. *Id.* at §18041(b). Second, if a state elects not to establish an Exchange or implement the Secretary's requirements, then the Secretary "shall (directly or through agreement with a not-for-profit entity) establish and operate *such Exchange* within the State" and "take such actions as are necessary to implement such other requirements." *Id.* at § 18041(c) (emphasis supplied).

The federal government contends that Congress's use of the phrase "such Exchange" "shows that it meant for the federally-facilitated Exchange to be the *same entity* as the earlier referenced Exchange, that is, the Exchange contemplated under 42 U.S.C. § 18031" (which is ACA section 1311). Mem. at 17 (emphasis original). The plaintiffs do not disagree that the Exchange established by the Secretary under section 1321 within Indiana serves the same function and purpose as the Exchange that would be "established by the State" under section 1311 if Indiana elected to do so. But it is not "established by the State under [section] 1311 of the [ACA]"; it is established by the Secretary "within" Indiana under section 1321 of the ACA. Metaphysically and existentially, the Exchange established by the Secretary simply cannot be the

same entity as the Exchange established by the State (which was never established in Indiana); instead, it is the Exchange "established" by the federal government.

The federal government places significant weight on the ACA's definitional provision. Title I of the ACA, which is the relevant title here, defines "Exchange" to mean "an American Health Benefit Exchange *established* under section 18031 [which is section 1311] of [the ACA]." 42 U.S.C. § 300gg-91(d)(21); ACA section 1562(b) (emphasis supplied); *see also* 42 U.S.C. § 18111.[1] The federal government takes this to mean that the Exchange "established" by the Secretary pursuant to section 1321 is necessarily and always the same thing as the Exchange "established" by the State in section 1311, but this is where the defendants ignore both the "established under section [1311]" language[2] and the context of each provision in which "established" is used. It is well-settled that although courts presume "the same term has the same meaning when it occurs here and there in a single statute," "most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Environ. Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (internal citations omitted).

Here, "established" fulfills separate roles in the various sections. Initially, the definitional section refers to the American Health Benefit Exchange established in section 1311. *See* 42 U.S.C. § 300gg-91(d)(21). Section 1311 establishes, that is, "sets up," what an Exchange is and does. *See* Am. Heritage Collegiate Dict. at 469 (3d ed. 1993) (definition 1.a of "establish" is "to

[1] "Unless specifically provided for otherwise, the definitions contained in section 300gg-91 of [Title I] shall apply with respect to [Title I]."

[2] In defining the premium assistance amount in 26 U.S.C. § 36(B), Congress did not refer to qualified plans purchased in the individual market through "any Exchange," "an Exchange established under this Act," or "an Exchange established by the State under section 1311 or the Secretary under section 1321," as it has in other sections of the ACA. *See e.g.*, ACA § 1421(a); 26 U.S.C. § 45R(b)(1); ACA, § 1312(d)(3)(D)(i)(II); 42 U.S.C. § 18032(d)(3)(D)(i)(II).

set up; found."). When a state or the Secretary "establishes" an Exchange, however, it "brings it about," into existence. *See id.* (definition 1.b of "establish" is "to bring about; generate."). Thus, while it is true that the Exchange "established" by the Secretary is definitionally "set up" in section 1311, it is also true that the Exchange "established" by the Secretary is "brought about" through the authority vested in the Secretary under section 1321. This plain, logical, and simple reading of the various uses of "established" fits much better with the ACA than the federal government's definitional contortionism that leads to an absurd Constitutional impossibility—the federal government simply cannot be "the State," which is the necessary conclusion of the defendants' argument.

There is one exception to the limitation on the federal government's inability to be "the State." It could be the state for ACA purposes if, but only if, Congress deemed it to be so. Alas, Congress did not, although it did so for the District of Columbia and the territories of the United States. For Washington D.C., Congress called it "the State" for purposes of the ACA: "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; *cf.* U.S. Const. art. I, § 8, cl. 17. For the territories, Congress said that any territory that elects to establish an Exchange "in accordance with part II of this subtitle and establishes such an Exchange . . . shall be treated as a State for purposes of such part." Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152 § 1323(a)(1), 124 Stat. 1029 (2010); 42 U.S.C. § 18043(a)(1).[3] There is no similar equivalency language for the federal

[3] Congress's use of the phrase "such an Exchange" when referring to the Exchange established by the territories further undermines the federal government's transcendental argument that the phrase "such Exchange" in section 1321 means that the federal government is the state for purposes of establishing an Exchange. If "such Exchange" were a proxy for "equivalency," then Congress, when passing the reconciliation bill found in HCERA, never would have gone the extra step to declare the territories as the equivalent of the states; using "such an Exchange" would have been enough.

government anywhere in the ACA, a point which the federal government avoids at all costs in its litigation over the IRS Rule. Congress, which said a lot in the ACA, never declared HHS to be the equivalent of the State, which should end the discussion.

2. 26 U.S.C. § 36B is the comprehensive home of all necessary provisions related to the tax credit.

The defendants next complain that "the statutory formula for calculating the tax credit seems an odd place to insert a condition that the states establish their own Exchanges if they wish to secure tax credits for their citizens." Mem. at 18-19 (citing *Halbig*, 2014 WL 129023 *17 n.12 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("[Congress] does not, one might say, hide elephants in mouseholes."). The federal government's reliance on *Whitman* is questionable, because that case dramatically undermines its position here. There, the Supreme Court rejected the petitioners' challenge to EPA's promulgation of national ambient air quality standards ("NAAQS") under the Clean Air Act, which the industry groups challenged because they believed that the EPA was required to consider implementation costs in setting NAAQS. After identifying several provisions in the Clean Air Act that expressly directed EPA to consider costs associated with certain actions or requirements, *Whitman*, 531 U.S. at 466-67, the Supreme Court phrased the question of implementation costs and NAAQS this way: "Accordingly, to prevail in their present challenge, respondents must show a textual commitment of authority to the EPA to consider costs in setting NAAQS under § 109(b)(1) [and] because § 109(b)(1) and the NAAQS for which it provides are the engine that drives nearly all of the Title I of the CAA . . . that textual commitment must be a clear one." *Whitman*, 531 U.S. at 468. It was in search of this "textual commitment" that the Court declared, "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id.* at 469. Thus, one presumes that if the language of

a statute like the ACA is clear, and its textual commitment to the "Exchange established by the State under [section] 1311 of the [ACA]" is prominently on display, no one is searching mouseholes for anything.

Congress did not "hide" the provisions related to eligibility for and the amount of the tax credits in obscure provisions in the ACA. A review of section 1401 of the ACA (26 U.S.C. § 36B) shows that the statutory formula for calculating the tax credit, derided by the federal government as an "odd" place to authorize the credit, Mem. at 18, is in the same section as the provision authorizing the credit—and reveals that all pertinent information is self-contained in one place. Subsection (a) of section 1401 says that in the case of an "applicable taxpayer," that is, the *people* who are potentially eligible, there shall be allowed a tax credit equal to the premium assistance credit amount of the taxpayer. 26 U.S.C. § 36B(a). This begs the question of the amount of the credit, which is determined by the subsections that follow, and those subsections identify the *purchases* that are potentially eligible for the tax credits. 26 U.S.C. § 36B(b)-(c).

Eligible purchases are limited to ones that meet all of the following conditions: (1) there must be "coverage months" for which premiums are due; (2) the purchase must be of a qualified health plan; (3) that plan must be offered in the individual market; (4) the plan must have been enrolled in through an Exchange established by the State; and (5) the Exchange must be established (*i.e.*, brought about into existence) under section 1311 of the ACA. 26 U.S.C. § 36B(b)(2)(A). A "coverage month" is any month in which, as of the first of the month, the taxpayer is covered by a qualified health plan that meets the requirements of section 36B(b)(2)(A) that "was enrolled in through an Exchange established by the State under section 1311 of the [ACA]." 26 U.S.C. § 36B(c)(2)(A). There is nothing vague about, or ancillary to, the

ACA's textual commitment here: the tax credit hinges on qualified health plans purchased in the individual market and enrolled in through an Exchange established by the State under section 1311 of the ACA. There are no mouseholes here.

Further, there is nothing unusual or remarkable about the structure of this section of the ACA; indeed, Congress has used this structure before. Under the Trade Adjustment Assistance Reform Act ("TAA"), Congress authorized a tax credit of 72.5 percent of the amount paid for qualifying health coverage for eligible coverage months. 26 U.S.C. § 35(a). Then, in later sections, Congress defined "eligible coverage months" to be limited to, among other things, those in which a taxpayer was "an eligible individual." 26 U.S.C. § 35(b)(1)(A)(i). An eligible individual is then defined in yet another subsection as "an eligible TAA recipient," which then (of course) has its own definition that is subject to "special rules." 26 U.S.C. § 35(c)(1)-(2). And then, "qualified health insurance" has its own definition, which further limits the availability of what is otherwise a broadly worded tax credit. *See* 26 U.S.C. § 35(e)(1). Strikingly, and a point that cannot be lost on this case, Congress further conditioned the term "qualified health insurance," and therefore the availability of the tax credit, on whether "the State involved has elected to have such coverage treated as qualified health insurance under this section and such coverage meets [four additional] requirements." 26 U.S.C. § 35(e)(2)(A). That is, the ACA is not the first time Congress has conditioned health insurance-based tax credits for taxpayers on their states taking certain actions or adopting certain healthcare reforms. *See also* 26 U.S.C. § 223(a), (c)(2) and I.R.S. Notice 2004-43, 2004-27 I.R.B. 10 (Congress allowed tax deduction for amounts paid into a health savings account ("HSA"), which also required a high-deductible plan, which required some states to change their insurance laws to allow for high deductible plans so their citizens could qualify for the HSA deduction).

3. The reporting requirement of 26 U.S.C. § 36B(f) is one of the strongest indications in the entire statute that the plaintiffs are right.

The federal government also asks too much of the reporting requirements in 26 U.S.C. § 36B(f)(3), which was added by HCERA a week after the ACA was signed. That subsection requires "*[e]ach Exchange* (*or* any person carrying out 1 or more responsibilities of *the Exchange under section 1311*(f)(3) *or 1321*(c) of the [ACA])" to provide certain information to the Secretary of the Treasury "with respect to *any health plan* provided through the Exchange." 26 U.S.C. § 36B(f)(3) (emphasis supplied). The categories of information include the level of coverage, the total unadjusted premium, the aggregate amount of premium tax credits or cost-sharing reductions, personal identifying information of the insured, and "[i]nformation necessary to determine whether a taxpayer has received excess advance payments." *Id.* at § 36B(f)(3)(A)-(F). The federal government says the fact that this reporting requirement extends to "*every* Exchange" and includes information on the amount of payments received by the taxpayer "indicates that Congress assumed that premium tax credits would be available on any Exchange, regardless of whether it is operated" by a state under section 1311 or by HHS under section 1321. Mem. at 20 (citing *Halbig*, 2014 WL 129023, at * 15 (emphasis original by court in *Halbig*)).

The federal government is wrong about this for at least two reasons. First, Congress added this provision when it amended the ACA with HCERA, and in doing so, did not refer only to "each Exchange;" it went further and clarified that the reporting requirements applied to *both* section 1311 and 1321 Exchanges. If, as the defendants argue, state-established and federally-facilitated Exchanges were actually both "established by the State" and therefore were one and the same, there would have been no need to distinguish between them under this provision. Congress would have left it at "each Exchange." By explicitly including both state-established

and federally-facilitated Exchanges in this requirement, however, Congress demonstrated that it knew that which is plain: a federally-established Exchange is not the same thing as a state-established Exchange.

Second, and most significantly, the federal government misstates the statute when it says, "By invoking both Section [1311] and Section [1321], this advance payment provision is expressly directed at *every* Exchange, regardless of whether the Exchange is state- or federally-run." Mem. at 20 (citing *Halbig*, 2014 WL 129023, at * 15 (emphasis original by court in *Halbig*)). The "advance payment provision" is not directed at the Exchanges; instead, the advance payment provision, by its own terms, applies only to policies that are connected to "coverage months," which, as established above, occur only when a qualified, individual-market plan is purchased and enrolled in through an Exchange established by the State under section 1311. *See* 26 U.S.C. § 36B(c)(2), and 42 U.S.C. § 18082. What is "directed at every Exchange" is the obligation to report information not just with respect to policies with "coverage months," but "*with respect to any health plan provided through the Exchange*." 26 U.S.C. 36B(f)(3) (emphasis supplied).

The federal government pretends this qualifier does not exist; it never mentions it. *See* Mem. at 19-21. This provision, however, completely undermines the defendants' contention that limiting "Exchange established by the State" to Exchanges actually established by the states requires the Exchanges to engage in an "empty gesture" because, under the plaintiffs' position, there would never be anything to report about excess payments or tax credits in federally-established Exchanges. *See* Mem. at 20-21. The federal government is exaggerating, because the reporting requirements apply "with respect to any health plan provided through the Exchange" and those requirements apply even if the taxpayer is not eligible for advance payments or tax

credits, whether because the taxpayer makes too much money to qualify or because the state in question, like Indiana, elected not to establish its own Exchange. Even if no tax credit is available, Congress still required the reporting on things like the amount of coverage purchased and the premium charged even though it knew that there would be times when nothing would be reported on the amount of the tax credit and excess payments. The defendants never explain this internally contradictory, and fatal, flaw within their position.

Once again, the federal government relies on a case that undercuts its position, this time *Fund for Animals, Inc. v. Kempthorne*, which it quotes as follows, "That plaintiffs interpret [section 36B(f)(3)] to be an empty gesture is yet another indication that their submission is erroneous." Mem. at 20 (citing *Fund for Animals*, 472 F.3d 872, 878 (D.C. Cir. 2006)). In that case, a group affiliated with the Humane Society of the United States and three individuals challenged the Department of Interior's treatment of the non-indigenous mute swan under the Migratory Bird Treaty Reform Act. The D.C. Circuit concluded that the statute expressly excluded the mute swan from its protections, a point which the plaintiffs conceded. *Fund for Animals*, 472 F.3d at 876-78. The court recognized that "Plaintiffs' interpretation of the sense of Congress provision would render the Reform Act meaningless, as plaintiffs candidly acknowledge." *Id.* at 877. In rejecting the plaintiffs' counter-textual argument, the court recognized its obligation to give effect to all of the provisions of a statute and held, "That plaintiffs interpret the Reform Act to be an empty gesture is yet another indication that their submission is erroneous." *Id.* at 878.

This is a far cry from the challenge to the IRS Rule in this case. The Schools are not asking the Court to interpret the ACA as an empty gesture. Instead, the plaintiffs are advocating for the straight-forward, unadorned interpretation and application of the phrase "Exchange

established by the State" and all that is related to it. This includes the reporting requirement of Section 36B(f) and its express reference to both federally-established Exchanges and state-established Exchanges, as well as its express application to "any health plan provided through the Exchange." The federal government's interpretation, which reads this last provision and the reference to both Exchanges out of the statute so that it can limit the reporting requirement only to tax credits and excess payments, is the empty gesture that rings hollow.

4. The federal government's "absurdity" arguments are themselves absurd.

The defendants next contend that by giving effect to the ACA's straight-forward language, "nobody could meet the standard for eligibility to buy insurance offered on the federally-facilitated Exchange." Mem. at 22. This stretches things too far. Essentially, the federal government argues that only "qualified individuals" may purchase insurance through an Exchange and that a "qualified individual" is defined as someone "who resides in the State that established the Exchange." *Id.* (citing ACA § 1312(f)(1)(A)(ii); 42 U.S.C. § 18032(f)(1)(A)(ii)). In other words, if the plaintiffs' reading of the ACA is correct, no one residing in Indiana, or any other state that uses the federal Exchange, could buy coverage because there is no Exchange established by the State. Mem. at 22-23.

There are at least two deficiencies with this argument. First, if there is an absurdity occasioned by this language in section 1312 defining a qualified individual, which is not the Schools' position, it exists with respect to the eligibility requirements for section 1312, not for determining who is eligible for a premium assistance tax credit under section 1401. To the extent this provision imposes a residency requirement on a person seeking to purchase insurance through an Exchange, this provision also assumes that a state-established Exchange exists. The federal government's universal solution is to treat the federally-established Exchange as if it

were "established by the State on behalf of the State" and declare the residency condition satisfied. However appropriate that may be for this section (and it is not, as explained below), the federal government offers no compelling reason why this interpretive gloss should be transported to other sections of the ACA like section 1401 where the text is otherwise clear. That is, if the federal government's proposed fix were appropriate here, it still does not extend to the premium assistance tax credit because the thing that requires the fix, namely, the assumption that a state-established Exchange exists, is not an issue with the tax credit provision. Instead of assuming that a state-established Exchange exists, section 1401 explicitly links the availability of the tax credits to the existence of a state-established Exchange; that is, to receive a tax credit, the state-established Exchange *must* exist.

Second, to the extent this statutory eligibility requirement assumes that a State-established Exchange exists, the Secretary is empowered to establish the necessary eligibility requirements for the federally-established Exchanges. Specifically, in section 1321, Congress directed the Secretary to "establish and operate such Exchanges within the [non-electing] State and the Secretary shall take such actions as are necessary to implement such other requirements." 42 U.S.C. § 18041(c). That is, the Secretary may establish the necessary eligibility requirements for the federally-established Exchanges, and the Secretary did just that. In promulgating the implementing regulations, the Secretary had this to say about the residency standard: "the service area of the Exchange of the individual is the service areas of the Exchange in which he or she is living." 45 C.F.R. § 155.305(a)(3). The preamble to the proposed version of this rule makes this explicit: "When discussing the residency standard for the Exchange [from section 1312(f)], we use the term 'service area of the Exchange' to account for regional or subsidiary Exchanges . . . as well as for situations in which a Federally-facilitated Exchange is operating in a State. We

clarify that this residency standard is designed to apply to all Exchanges." 76 Fed. Reg. 51201, 51206 (August 17, 2011). As such, the federal government's residency argument is a rabbit-hole to be ignored.

5. Requiring an "Exchange established by the State" for tax credit purposes does not create "anomalies" under the ACA.

As "'further proof' that Congress intended the ACA's references to state-operated Exchanges to include the Exchanges that HHS operates on a state's behalf," the defendants cite to certain "anomalies" they contend arise from the plaintiffs' reading of the plain text of the ACA. Mem. at 25.

One example the defendants cite is the Medicaid maintenance-of-effort requirement in 42 U.S.C. § 1396(gg)(1) [ACA section 2001(b)(2)]. Under this provision, until a state establishes an Exchange, the state cannot impose any "eligibility standards, methodologies, or procedures" under their Medicaid plan that are more restrictive than the standards that the state had in place as of the date the ACA was enacted. Mem. at 25. The federal government argues that "[i]t is not plausible that Congress intended this result." *Id.* at 26. It is not clear, and the defendants do not explain, why this is implausible. If, as the plaintiffs note in their main briefs, the political bargain struck by Congress required Congress to rely on the states to establish and run the Exchanges, it needed the right balance of incentives and consequences to induce the states to act. This is one of them; any state that desires to tighten its Medicaid "eligibility standards, methodologies, or procedures" can do so after it establishes its own Exchange. There is nothing anomalous about this.

The federal government also contends that the ACA "instructs states to ensure that children (who are not Medicaid-eligible) have access to plans in an 'Exchange established by the State under [Section 18031],' if there is a funding shortfall in the state's CHIP program." Mem.

at 27 (citing 42 U.S.C. § 1397ee(d)(3)(B)) (alterations original). The defendants also note that HHS is required to ensure that state-established Exchanges offer benefits to children that are at least comparable to the protections provided under the state CHIP plan. *Id*. (citing 42 U.S.C. § 1397ee(d)(3)(C)). There is nothing anomalous about this, and there is no deleterious effect to children or the CHIP program, if one only follows the plain-meaning of the words employed by Congress to their logical end: If a state established the Exchange, it must coordinate the benefits available on the Exchange with the CHIP program; in addition, the Secretary will review the benefits available on the federal Exchanges to ensure that the children are not left behind. Presumably, Congress was more specific in setting the rules for the states because they are separate sovereigns and need to know what it is they are agreeing to undertake, whereas the Secretary of HHS has overall responsibility for implementing and coordinating these various programs and does not need to be told what to do.

Another purported example of an anomaly is 26 U.S.C. § 125(f)(3). Mem. at 28 n.7. Under 26 U.S.C. § 125(a), taxpayers may, subject to certain limitations, exclude certain amounts spent on cafeteria plans from their gross income. Subsection (f)(3) provides that this exclusion does not apply to any qualified health plan (as defined by the ACA) "offered through an Exchange established under section 1311 of such Act." 26 U.S.C. § 125(f)(3). The federal government contends that the plaintiffs' interpretation of the "Exchange established by the State" language in the tax credit exclusion means that this provision is limited only to state-established Exchanges, but taxpayers on the federal Exchange can exclude this income. Mem. at 28 n.7. The federal government is wrong. Section 125(f)(3) is referring to the Exchange "established," that is, set up or laid out in section 1311 regardless of whether the state or the Secretary ultimately "establishes," that is, brings about the Exchange into existence. In other words, the cafeteria plan

section is concerned with defining the Exchange, whereas the tax credit provision is concerned with identifying which sovereign is responsible for operating the Exchange. Rather than an anomaly, this again reflects the legislative bargain struck by Congress.

Finally, the federal government contends that 42 U.S.C. § 18052, which allows states to obtain a waiver from some of the requirements of the ACA, "would be an empty formality if . . . a state already had the power to prevent the application of central features of the ACA within its borders, simply by declining to establish its own Exchange." Mem. at 28. The waiver provisions of 42 U.S.C. § 18052, however, are anything but an empty formality. Instead, this section entitled "waiver for State innovation" provides yet another incentive for the states to establish their own Exchanges or an alternative plan that provides similar coverage and cost-sharing protections as Exchanges. *See* 42 U.S.C. § 18052(a)(1). In particular, 42 U.S.C. § 18052(a)(3) provides a waiver and a block grant to states in the amount that would have been paid on behalf of participants in the Exchanges" in the form of tax credits or cost sharing reductions had the state not obtained the waiver. States that decline to establish their own Exchanges and who do not establish a qualified alternative plan are not eligible for the block grants. This provision makes perfect sense under the plaintiffs' theory, and is by no means an "anomaly" within the ACA.

B. The Federal Government's "Purpose" Argument Exalts Generalized Notions of "Purpose" Over the Means Congress Adopted to Achieve that Purpose.

The federal government objects that the plaintiffs' commitment to the plain meaning of "established by the State," which the plaintiffs contend is the very legislative compromise that enabled the United States Senate, as constituted in 2009, to pass the ACA, "undermine[s] Congress's basic goals in passing that legislation." Mem. at 29. As the federal government puts it, "In expounding a statute, we must not be guided by a single sentence or member of a

sentence, but look to the provisions of the whole law, and to its object and policy." *Id.* (citing *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013)).

Once again, the federal government's sound-bite approach to case citations undermines its position. The statute under consideration in *Maracich* was the Driver's Privacy Protection Act ("DPPA"), which protects from disclosure, subject to 14 enumerated exceptions, certain personal information people are required to provide bureaus of motor vehicles to obtain a driver's license. At issue was whether the exception for use "in connection with" judicial and administrative proceedings was broad enough to allow plaintiffs' lawyers to obtain protected personal information as a basis for mass mailing solicitations related to actual or potential litigation against car dealers in South Carolina. *Maracich*, 133 S. Ct. at 2195-96. The Court analyzed this exception by first noting that "[i]f considered in isolation, without reference to the structure and purpose of the DPPA," the "in connection with" litigation exception was "susceptible to a broad interpretation." *Id.* at 2199-2200. The Court determined that such a broad construction "stop[ped] nowhere," and thereby would allow the exception to swallow the protection. *Id.* at 2200. Concluding its analysis of the scope of the exception based on the statutory text, the Court held:

> While the (b)(4) exception allows this sensitive information to be used for investigation in anticipation of litigation and in the litigation itself, there is no indication Congress wanted to provide attorneys with a special concession to obtain medical information and Social Security numbers for the purpose of soliciting new business.

Id. at 2203.

With this textual work finished, the Court then noted that this limit "also respects the statutory design of the DPPA." *Id.* The Court noted that only one of the twelve enumerated DPPA exceptions allowed users to acquire information for mass solicitations, and that exception

expressly required an opt-in consent by the license holders. *Id.* In comparing the absence of a consent provision in the litigation-based exception to this consent-required solicitation exception, the Court quoted from another case the sentence quoted by the federal government here: "[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Id.* (citing *United States Nat'l Bank of Ore. v. Independent Ins. Agents of Am. Inc.*, 508 U.S. 439, 455 (1993)); *compare* Mem. at 29. Based on this principle, the Court instructed, "The 'in connection with language' . . . therefore must be construed within the context of the DPPA as a whole, including its other exceptions." *Maracich*, 133 S. Ct. at 2203.

Unmoored from these broader cautions in *Maracich* and other cases, the federal government asserts, in essence, that because the ACA's "provisions are designed to achieve 'near universal coverage' for all Americans," Mem. at 29, "it is not tenable to suggest that Congress meant to withhold tax credits from individuals in states with federally-facilitated Exchanges." *Id.* at 30. The Supreme Court has already addressed arguments like this one:

> But no legislation pursues its purposes at all costs. 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. Where, as here, "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . '[there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.'"

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (citations omitted; emphasis original). The federal government's "policy" or "purpose" arguments, which run counter to the Congressional intent actually expressed in the text of the ACA, must therefore be rejected.

C. The Relevant Legislative History Reveals that Congress Intended to Limit the Tax Credits to State-Established Exchanges.

The defendants also argue that the legislative history of the ACA confirms that premium tax credits are available on federally-run Exchanges. It does no such thing. Tellingly, the federal government's lead legislative intent argument points to a cost analysis of the Congressional Budget Office ("CBO"). Mem. at 33-34. But "the CBO is not Congress." *Sharp v. United States*, 580 F.3d 1234, 1239 (Fed. Cir. 2009). While the CBO and the Joint Committee on Taxation ("JCT"), whose work is also cited by the federal government, may have assumed in 2009 that tax credits would be available in every state, this assumption says nothing about whether Congress meant what it said when it tied the tax credits to Exchanges "established by the State" under section 1311 of the ACA. Further, although the defendants do not account for this, it just may be that the CBO and the JCT simply misread the statute and assumed tax credits were available in all states, notwithstanding statutory language to the contrary. At a minimum, if "established by the State" means what it says, the CBO and the JCT both ignored that language in making their assumptions.

The federal government also argues that the House "passed a bill that explicitly provided for federal tax credits on a federally-run Exchange." Mem. at 35 (citing H.R. 3962, 111th Cong., §§ 301, 308 (2009)). It then posits that "[i]f the Senate-passed bill had changed this scheme to provide for tax credits in some states but not others, one would have expected House members to have noticed this change." Mem. at 35. Whatever one may have expected in a functioning, bipartisan political environment, the state of Congress leading up to the passage of the ACA makes this statement absurd.

The Schools' main summary judgment brief addresses the passage of the ACA—and the limitations on what Congress could achieve at that time. Only three salient points need to be

addressed at this time. First, Senator Ben Nelson, a former governor and state insurance commissioner, openly opposed any national takeover of the health insurance industry, which historically has been a state-regulated enterprise, and his critical vote was conditioned upon provisions in the ACA that shifted the focus to state-established exchanges. *See* Carrie Budoff Brown, *Nelson: National Exchange a Dealbreaker*, POLITICO, Jan. 25, 2010 *at* http://www.politico.com/livepulse/0110/Nelson_National_exchange_a_dealbreaker.html (last visited on April 24, 2014) (Sen. Nelson: "The national exchange is unnecessary and I wouldn't support something that would start us down the road of federal regulation of insurance and a single-payer plan."). Second, both the Senate Finance Committee bill and the bill from the Senate Committee on Health, Education, Labor & Pensions ("HELP") conditioned premium subsidies to individuals on actions taken by their states. *See* America's Healthy Future Act of 2009, S. 1796, 111 Congress. 180-83 (2009) (Sen. Baucus) (Finance bill proposed to amend the Internal Revenue Code to create a "small employer health insurance credit," but would have denied that credit "for any month of coverage before the first month the State establishing the exchange has in effect the insurance rating reforms described" elsewhere in the bill);[4] Affordable Health Choices Act, S. 1679, 111th Cong. 103-07 (2009) (Sen. Harkin) (HELP bill gave states the option of electing to create a "gateway" [Exchange], adopting certain reforms, and agreeing to make State or local governments subject to certain provisions of bill, among other things; but eligibility for tax credits depended on whether states adopted those reforms, and no credits were available to "the residents of such [non-electing] State" until that state made the election). Third,

[4] The Senate Finance Committee bill also included the provision that added Section 36B to the Internal Revenue Code. In the bill, a "premium assistance amount" was still determined based on coverage months in which a taxpayer purchased "qualified health benefits plans offered in the individual market within a State . . . which were enrolled in through an exchange established by the State." S. 1796, 111th Cong. 146-47.

after the Senate passed the ACA, which included elements of the Finance and HELP bills plus more, the bill went to the House, but Republican Scott Brown was elected Senator from Massachusetts. This meant the House had to pass the Senate version of the bill or a revised healthcare bill from the House would die a filibustered death in the Senate. *See* Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule To Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119, 125-26 (2013). To the extent the legislative history matters, which is questionable given the plain language in the statute, this is the history that is relevant.

In short, there is no reasoned, interpretative basis to conclude under the first step in the *Chevron* standard that the ACA is ambiguous. Instead, Congress spoke plainly and limited the premium assistance credits, and therefore the employer mandate penalties, to qualified health plans purchased in the individual market and enrolled in through Exchanges established by the state (and Washington D.C.). The IRS Rule has no statutory support and must be invalidated as a matter of law.

This conclusion is bolstered by the clear statement rule, a well-established canon of interpretation that prevents agencies from granting a tax credit unless Congress unambiguously allows it. *See* Schools'Am. Br. in Supp. of Pl. School Corporations' Mot. for Summ. J., Dkt. 51, at 29-30. As applied here, the availability of section 36B tax credits in federal Exchanges "must be unambiguously proved," *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988); the IRS cannot by regulation extend the credits by resting on "doubt or ambiguity" in the ACA, *United States v. Stewart*, 311 U.S. 60, 71 (1940). As such, any ambiguity in section 36B must be construed as a matter of law against the availability of the tax credit. Consequently, "there is, for

Chevron purposes, no ambiguity in [the] statute for [the IRS] to resolve." *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001).

The federal government does not provide a meaningful response to this argument, but instead erroneously contends that the IRS Rule is entitled to *Chevron* deference because "a tax benefit, even if not supported by express statutory language, can nonetheless be recognized if it is in harmony with the statute as an organic whole." Mem. at 38. This does not make sense for at least two reasons. First, the federal government misses the point, which is that the clear statement rule precludes the availability of *Chevron* deference for the IRS, because the clear statement rule is applied so as to determine that, at *Chevron* step one, there is no ambiguity in the statute, which makes deference at *Chevron* step two irrelevant. Second, aside from the clear statement rule, Sections III(A)-III(C) above show that the IRS Rule is not entitled to deference under *Chevron* because it is not "in harmony with the [ACA] as an organic whole." Mem. at 38. The IRS Rule has no statutory support and must be invalidated as a matter of law.

D. The IRS Rule Is Invalid Under *Chevron*, Step Two Because It Is Not the Product of Reasoned Decision-Making.

Even if the Court were to consider *Chevron* deference under the second part of the *Chevron* analysis, the Court should still vacate the IRS Rule because it is neither a permissible construction of the ACA, nor the product of "reasoned decision-making."

It is well-established that *Chevron* deference at step two is "not abject or 'rubber stamp' deference; agency interpretation of even an ambiguous or silent statute the agency administers will be set aside if unreasonable." *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 613 (7th Cir. 1999) (citations omitted). As the Supreme Court has said:

> Agency deference has not come so far that we will uphold regulations whenever it is possible to conceive a basis for administrative action. To the contrary, the presumption of regularity afforded an agency in fulfilling its statutory mandate is not equivalent to the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause. Thus, the mere fact that there is some rational basis within the knowledge and experience of the [regulators], under which they might have concluded that the regulation was necessary to discharge their statutorily authorized mission, will not suffice to validate agency decisionmaking.

Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 626 (1986) (citations and quotations omitted). Similarly, the Seventh Circuit has acknowledged the reality that "agencies occasionally act unreasonably. Given the scope of the permissible inquiry under *Chevron*'s second step, we believe that courts can rein in the excesses of unreasonable administrative rulemaking." *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 983 (7th Cir.), *cert. den.*, 525 U.S. 961 (1998). This judicial check on the administrative process is exercised when administrative rules are "arbitrary or capricious in substance, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844; *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711-12 (2011); *see also Big Ridge, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 715 F.3d 631, 641 (7th Cir. 2013). In order to show the validity of an administrative rule, "the agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (quotation omitted).[5] Stated differently, "the agency must cogently explain why it has exercised its discretion in a given manner," *State Farm*, 463 U.S. at 48, in order to prove that its administrative rule was a "product of reasoned decisionmaking." *Id*. at 52.

[5] *See also Bowen*, 476 U.S. at 627 ("Our recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgment in both.")

An example of the application of this standard is found in *Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration*, 656 F.3d 580 (7th Cir. 2011). There, the Seventh Circuit vacated a regulation of the Federal Motor Carrier Safety Administration because the agency failed to engage in reasoned decision-making. In doing so, the court rejected the agency's contention that "a single conclusory sentence in the final rulemaking to the effect that the Agency 'has taken the statutory requirement into account throughout the final rule' is enough by itself to satisfy [the federal statute]." *Id*. at 588-89. The court held that the agency's explanation was "perfunctory or superficial" and failed to "explain why it has exercised its discretion in a given manner such that we can be sure that the decision was the product of reasoned decisionmaking." *Id*. at 588, quoting *State Farm*, 463 U.S. at 52. As a result, the Seventh Circuit vacated the agency's final rule. *Id*. at 588.

Here, the IRS and Treasury failed to engage in "reasoned decision-making" in promulgating the IRS Rule. Specifically, the IRS and Treasury failed to conduct an adequate or thorough review of the ACA's statutory text or to consider essential aspects of the ACA's structure and legislative history. In addition, the IRS and Treasury failed to "cogently explain why [they have] exercised [their] discretion." *Id*. This court should therefore vacate the IRS Rule.

The rulemaking process that led to the final IRS Rule is well-documented in a recent Joint Staff Report issued by the U.S. House of Representatives Committee on Oversight and Government Reform and Committee on Ways and Means. In the summer of 2012, these Committees launched separate investigations into the IRS Rule. U.S. House Joint Staff Report, *Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies* at 3 (113th Congress, February 5, 2014) ("Joint Staff Report"). The

Committees' investigations "focused on the rulemaking process" and "whether the IRS and Treasury conducted an adequate review of the statute [ACA] and legislative history prior to coming to its conclusion that [the ACA's] premium subsidies would be allowed in federal exchanges." *Id*. at 3, 35 (emphasis added). Over an 18-month period, the Committees received several briefings and held numerous hearings with key IRS and Treasury personnel involved with the development of the IRS Rule. *Id* at 3. In addition, respective staffs from both Committees reviewed documents *in camera* at Treasury. *Id*. At the end of the investigation, the Committees concluded that the IRS Rule was not "the product of reasoned decision-making":

> The Committees' investigation, which focused on the rulemaking process and not the merits of the IRS and Treasury's interpretation, has concluded that despite claims to the contrary, neither IRS nor Treasury engaged in reasoned decision-making of this important issue prior to issuing the final rule that extended [the ACA's] premium subsidies to federal exchanges. While prior to the proposed rule IRS and Treasury's failure to do so was largely due to other pressing priorities with the [IRS Rule], IRS and Treasury's failure to engage in reasoned decision-making in the period between the proposed rule and the final rule is inexcusable and significantly calls into question the merits of IRS and Treasury's interpretation.

Id. at 35.

1. IRS and Treasury failed to engage in "reasoned decision-making" prior to the release of the proposed IRS Rule.

The Committees reviewed documents indicating that, as early as March 2011, "IRS and Treasury officials expressed concern that there was no direct statutory authority to interpret federal exchanges as an 'Exchange established by the State.' Specifically, they were concerned there was no statutory provision that would deem a federal exchange to be an 'Exchange established by the State.'" *Id*. at 5. Despite expressing this concern, IRS and the Treasury "did not conduct a thorough or adequate review of the text and legislative history to determine whether their decision to allow premium subsidies in federal exchanges represented a reasonable interpretation of the statute." *Id*. at 4. In addition, the Joint Staff Report found that IRS and

Treasury failed to provide a cogent explanation for the proposed IRS Rule: "[I]n March 2011, the IRS Chief Counsel's office drafted the *only written explanation* by IRS or Treasury prior to the publication of the proposed rule regarding their decision to extend the ACA's premium subsidies in federal exchanges. The written explanation contained a *single paragraph with a single reason*." *Id*. at 5 (emphasis added).

Despite their concerns about the lack of statutory authority for the IRS Rule, the IRS and Treasury failed to engage in "reasoned decision-making" before release of the proposed IRS Rule. *See State Farm*, 463 U.S. at 57 (agency did not engage in "reasoned decision-making" when there is "no indication of the basis on which the [agency] exercised its expert discretion."); *Bowen*, 476 U.S. at 627 (it is the "responsibility of the agency to explain the rationale and factual basis for its decision"); *Owner-Operator*, 656 F.3d at 588 ("single conclusory sentence" is an "insufficient explanation" for final administrative rule).

2. IRS and Treasury failed to engage in "reasoned decision-making" after receiving comments and prior to publication of the final IRS Rule.

The Committees found that "[a]fter the proposed [IRS] Rule was published, Treasury received comments from numerous individuals, including Members of Congress and the general public, pointing out that the statute does not authorize premium subsidies in federal exchanges. IRS and Treasury *have not* provided any evidence that these comments were seriously considered." *Id*. at 5 (emphasis added). In fact, "no one at IRS or Treasury interviewed by the Committees was able to remember details about their discussions of these comments" and one key member of the IRS working group "did not remember ever discussing the issue of whether the statute authorized premium subsidies in federal exchanges with other members of the working group." *Id*. at 21. In addition, the Committees found that the IRS and Treasury failed to

consider a long list of other essential components of the ACA during the rulemaking process for the IRS Rule:

> (1) "*The IRS failed to examine the entire statute* . . . IRS and Treasury have been unable to provide any evidence that they reviewed each section in [the ACA] that referenced 'Exchange established by the State' before concluding that there was no discernible pattern in the way that Congress used [the term] Exchange." *Id*. at 26-27 (emphasis added).
>
> (2) "*Treasury failed to consider whether Congress structured the premium subsidies to elicit state cooperation* . . . none of the seven IRS and Treasury employees interviewed by the Committees were aware of any internal discussion within IRS or Treasury, prior to the issuance of the final rule, that making tax credits conditional on state exchanges might be an incentive put in the law for states to create their own exchanges." *Id*. at 28-29 (emphasis added).
>
> (3) "*Treasury failed to consider [the ACA's] appropriate legislative history* . . . [a key member of the IRS working group tasked with reviewing the ACA's legislative history] told the Committees that she looked at statements from House members made prior to the passage of the ACA on December 24, 2009, during her *cursory review* of the legislative history . . . By considering statements from House members about bills other than [the ACA], [the IRS official's] review of the legislative history imputed congressional intent from bills that did not and could not pass the Congress as a whole." *Id*. at 29, 31 (emphasis added).
>
> (4) "*Treasury did not consider the Senate's preference for state exchanges during the development of the IRS Rule.*" *Id*. at 31-32.
>
> (5) "*Treasury's review of the legislative history was incomplete* . . . *cursory* . . . *and inadequate* . . . [leading to its conclusion that] the legislative history was inconclusive. [However], Treasury wrote in the final IRS Rule that 'the legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges.'" *Id*. at 33-34.

As part of their review and fact-finding concerning the IRS Rule, the Committees concluded:

> Despite receiving numerous comments, including those from Members of Congress, the evidence shows that Treasury *failed to engage* in a serious or thorough review of the issue between the publication of the proposed rule and the publication of the final rule. Rather, the Treasury's *cursory review* . . . simply reiterated the Administration's previous interpretation and *did not* even take into account reasons for why a plain text reading of the statute could preclude [the ACA's] premium subsidies from being available in federal exchanges.

Id. at 23 (emphasis added).

The IRS and Treasury's failure to consider essential components of the ACA after receiving numerous critical comments about the proposed rule and before publication of the final IRS Rule is strong evidence that the IRS and Treasury failed to engage in the required "reasoned decision-making process" in promulgating the IRS Rule. This conclusion is bolstered by the February 2012 Treasury memorandum, which contained a "single paragraph [which] is the only written analysis between the publication of the proposed rule and the publication of the final rule from either IRS or Treasury regarding the decision to extend [the ACA's] subsidies to individuals in federal exchanges." *Id*. at 22. This "perfunctory and superficial" rationale for the IRS Rule fails to demonstrate a "rational connection between the facts found and the choice made . . . and fails to cogently explain why [the IRS and Treasury] have exercised their discretion in a given manner such that we can be sure that the decision was the product of reasoned decisionmaking," and therefore should be vacated. *Owner-Operator*, 656 F.3d at 588, citing *State Farm*, 463 U.S. at 52.

This case is a classic example where, "unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." *State Farm*, 463 U.S. at 48. The Court must vacate the IRS Rule at *Chevron* step two, if it decides to proceed there.

IV. CONCLUSION

The IRS Rule is contrary to law, fails both steps of the *Chevron* two-step analysis, and must be invalidated as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2014, a copy of the foregoing "Reply in Support of Plaintiff School Corporations' Motion for Summary Judgment and Response to Defendants' Cross Motion for Summary Judgment" 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.

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