IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DAVID KING, *et al.*, Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as U.S. Secretary of Health and Human Services, *et al.*, Defendants.	)	Case No. 3:13-cv-00630-JRS

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

Rules and Regulations:

Miscellaneous:

Introduction

The Patient Protection and Affordable Care Act ("ACA" or "Act") creates new health insurance Exchanges, along with federal tax credits to help defray the cost of insurance offered on these Exchanges. Congress knew that these credits would be "key" to its goal of "ensuring people affordable health coverage." H.R. REP. NO. 111-443, vol. I, at 250 (2010) (Gov't Ex. 1, ECF 51-1 at 4). Based on a misinterpretation of one lone phrase in the statute – taken completely out of the relevant statutory and legislative context – the plaintiffs seek to deny these tax credits to millions of Americans who need the credits to purchase health insurance on the Exchanges, and who are not before the Court. The Court should reject this claim.

The plaintiffs misinterpret the Affordable Care Act by ignoring all recognized principles of statutory construction. They assert that one phrase in Section 36B, read in isolation, means that the federal tax credits that are the "key" to ensuring affordable coverage are available *only* in state-run Exchanges, and not in the federally-facilitated Exchanges (including those run in partnership with states), which will be the only Exchanges available for citizens of 34 states. However, when read in its entirety and in light of the Act as a whole – as it must be – Section 36B is best read to provide the federal tax relief that Congress deemed vital on a nationwide basis. At least, Treasury reasonably reads the statute to so provide. Contrary to the plaintiffs' theory, and as the defendant's proper textual analysis makes clear, Congress specified that the federally-facilitated Exchange would be the *same* entity as the Exchange that the state is directed to establish. In other words, the federal government stands in the shoes of the state in establishing "such Exchange." 42 U.S.C. § 18041(c)(1). Treasury's reading of the Act gives effect to this and related provisions; the plaintiffs' reading does not. Moreover, Treasury's reading avoids many other anomalies that would flow from the logic of the plaintiffs' theory –

including a result that even the plaintiffs now concede would be absurd: that no person could qualify to buy coverage at all through the federally-facilitated Exchange that the Act creates, a result that Congress clearly could not have intended.

Although the reasonableness of Treasury's interpretation is plain once Section 36B is viewed in the proper statutory context, that reading gains equally strong support from the legislative history and purpose. Put simply, the plaintiffs' theory runs contrary to the fundamental purpose of the ACA: expanding the availability of affordable health coverage, a goal that could not be achieved without the premium tax credits. There is no support, other than the post hoc account concocted by the plaintiffs and their *amici*, for the notion that Congress meant for the Act's basic goal to be achieved in some states but not others, or that Congress meant to incentivize states to establish Exchanges by threatening their citizens with the denial of affordable health coverage if they failed to do so. Had Congress intended to make such a dire threat, it would have declared so in a clear statement. No such statement exists.

Treasury's construction of Section 36B is entitled to *Chevron* deference. The plaintiffs' arguments against the application of *Chevron* deference – largely presented for the first time on reply – are wrong. Both Treasury and HHS are fully in agreement that participants in any Exchange may be eligible for federal premium tax credits, so this is not a case in which to apply the exception to the *Chevron* rule for cases where multiple agencies have offered conflicting interpretations of a statute. Moreover, Treasury's interpretation of a statute creating tax credits is entitled to the same deference as given to those of statutes imposing taxes; recent Supreme Court precedent makes it clear that *Chevron* deference applies to Treasury's interpretation of all of the provisions of the Internal Revenue Code. Accordingly, this Court should defer to Treasury's reasonable interpretation of Section 36B, and reject the plaintiffs' attempt to read one phrase in that provision in isolation so as to deny millions of Americans the tax relief Congress intended them to have under the Affordable Care Act.

Argument

I. Section 36B is Best Read, and at a Minimum Is Reasonably Read, to Provide that Participants in Federally-Facilitated Exchanges May Be Eligible for Federal Premium Tax Credits

On the merits, the plaintiffs continue to insist that the Court read one phrase in 26 U.S.C.§ 36B(b)(2)(A) in isolation, without reference to the remainder of that section, the larger structure of the Affordable Care Act, or the Act's purpose and history.[1] All established canons of statutory interpretation demand precisely the opposite approach. "In making the threshold determination under *Chevron*, a reviewing court should not confine itself to examining a particular statutory phrase in isolation. Rather, the meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (internal quotations and alterations omitted). *See also, e.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 98-99 (2007); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *Davis v. Mich. Dep't of Treasury,* 489 U.S. 803, 809 (1989). When read in context, as Section 36B must be, it is clear that Congress intended for federal premium tax credits to be available for participants in the federally-facilitated Exchanges. Because Treasury offers the best reading of the Act, or at the very least a reasonable reading of the Act, its interpretation must be sustained under *Chevron*.

[1] For the reasons that the defendants have previously explained, this suit – which presents a virtually unheard-of claim seeking to challenge eligibility for tax benefits – is not justiciable. The defendants respectfully refer the Court to their prior briefing with respect to the numerous threshold barriers to this suit. *See* ECF 18 at 12-19; ECF 31 at 12-13.

A. Treasury Reasonably Reads Section 36B Together with 42 U.S.C. §§ 18031 and 18041 to Provide that Participants in Federally-Facilitated Exchanges May Be Eligible for Federal Premium Tax Credits

Section 36B(b)(2)(A) cannot be read in isolation, because it expressly refers to 42 U.S.C. § 18031, which declares that "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an 'Exchange') for the State" that meets certain statutory requirements. 42 U.S.C. § 18031(b)(1). *See also* 42 U.S.C. § 18031(d)(1) ("An Exchange shall be a governmental agency or nonprofit entity that is established by a State."). Section 18031 thus presumes that the state establishes the Exchange, but also accounts for the possibility that a state may not do so, by directing that, if a state will "not have any *required Exchange* operational by January 1, 2014, … the Secretary shall (directly or through agreement with a not-for-profit entity) establish and operate *such Exchange* within the State[.]" 42 U.S.C. § 18041(c)(1) (emphasis added). The "required Exchange" is the Exchange that Section 18031 directs the state to establish. Thus, the federally-facilitated Exchange *is* the Exchange that the state is directed to establish under Section 18031: the federal government stands in the shoes of the state in establishing "such Exchange."[2]

It follows from the foregoing that the Section 36B tax credit is available in every Exchange, whether the state itself establishes the Exchange, or whether the federal government stands in the state's shoes to do so. This reading is necessary to make sense, for example, of Section 18031(d)(1), which directs that an Exchange shall be an entity "that is established by a State." That phrase, coupled with Section 18041(c), reflects that the federally-facilitated

[2] The plaintiffs refer to 42 U.S.C. § 18043, which sets up a mechanism to establish Exchanges in the territories. ECF 40 at 3. The reason why the Act treats territories separately is clear. Territorial residents do not ordinarily pay federal income tax, 26 U.S.C. §§ 931-33, and so Congress needed some mechanism other than federal premium tax credits to put the Act into effect for the territories. Residents of all fifty states, of course, do pay federal income tax, whether or not their state has established its own Exchange.

"Exchange" is the Exchange that the state is directed to establish. That is, the Act takes the state-established Exchange as a given, and directs the federal government to act to bring the Exchange into operation if the state does not to do so, or fails to do so sufficiently.

The ACA's definitional provisions confirm this reading. The Act treats "Exchange" as a defined term; to confirm this point, it is capitalized each time it appears in the Act. The term is defined to mean "an American Health Benefit Exchange established under [42 U.S.C. § 18031]." 42 U.S.C. §§ 300gg-91(d)(21), 18111. So, when the Act instructs the Secretary to establish "such Exchange," it instructs that "the Secretary shall … establish and operate such [American Health Benefit Exchange established under 42 U.S.C. § 18031]." 42 U.S.C. § 18041(c)(1). The federally-facilitated Exchange, then, *is* the Section 18031 Exchange. The plaintiffs acknowledge this point, but they argue that an Exchange would not be established "by a state." This misses the point. By defining "Exchange" one way regardless of the identity of the operator, the Act makes clear that it creates one type of Exchange, not classes of Exchanges.

This reading is further confirmed by 26 U.S.C. § 36B(f)(3). That provision directs every Exchange, as well as persons designated by HHS to carry out the responsibilities of the federally-facilitated Exchange, to provide information to Treasury and to taxpayers regarding payments of premium tax credits. This provision *assumes* that premium tax credits are available on the federally-facilitated Exchange, and it would make no sense if there were no tax credits for that Exchange to process. The plaintiffs speculate that Congress might have intended the federally-facilitated Exchange to make meaningless reports, simply to avoid potential redundancy in drafting the statute. ECF 40 at 10. But there would be no reason for the federally-facilitated Exchange to report *any* of the information listed in Section 36B(f)(3) to Treasury under the plaintiffs' theory; Treasury does not need that information for anything other than the administration of the premium tax credit, particularly given that Treasury already will receive some similar information under a separate reporting provision, 26 U.S.C. § 6055.[3] This is why Congress directed "*[e]ach* Exchange" to provide *all* of the required information, including reporting on tax credits. 26 U.S.C. § 36B(f)(3) (emphasis added). The far more natural conclusion to draw from this language is the one drawn by Treasury: that Congress expected that federal premium tax credits would be provided in every Exchange. *See Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 878 (D.C. Cir. 2006).

Section 36B, when read in its entirety, and in conjunction with the provisions of the ACA describing the Exchange, 42 U.S.C. §§ 18031 and 18041, makes plain that Congress envisioned the federally-facilitated Exchange to be the same entity as the Exchange that the state is directed to establish, and that Section 36B would operate in every state "to establish a nationwide scheme of taxation uniform in its application." *United States v. Irvine*, 511 U.S. 224, 238 (1994) (federal taxing statute not to be read to be "subject to state control or limitation" absent plain language so requiring). Because the intent of Congress is clear, "applying the ordinary tools of statutory construction," and, at the very least, because Treasury has reasonably resolved any statutory ambiguity, its interpretation should be upheld under *Chevron*. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

B. The Larger Structure of the Act Confirms Treasury's Interpretation

It is axiomatic that "in ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a

[3] For example, there would be no reason for Treasury to receive reports on the "level of coverage" a taxpayer is enrolled in, 26 U.S.C. § 36B(f)(3)(A), apart from the fact that Treasury administers cost-sharing reductions for plan on the Exchanges, which are available only for plans offered at the "silver" level of coverage. 42 U.S.C. §§ 18071(b), 18082(c)(3). A taxpayer is eligible for these cost-sharing reductions only if he or she is also eligible for the Section 36B tax credit. 42 U.S.C. § 18071(f)(2).

whole." *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004); *see also, e.g.*, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563 (2013); *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013). The plaintiffs ignore this precept, reading Section 36B in isolation. It is thus not surprising that the plaintiffs' theory would upset the Act's structure in a number of ways that Congress could not have intended.

1. Notably, the logic of the plaintiffs' theory would produce the absurd result that *nobody* would be eligible to buy insurance offered on the federally-facilitated Exchange – with or without a subsidy. This is so because a "qualified individual" who is eligible to buy insurance on the Exchange is defined as an individual "who resides in the *State that established the Exchange*." 42 U.S.C. § 18032(f)(1)(A)(ii) (emphasis added). There is no separate provision defining "qualified individual" for purposes of the federally-facilitated Exchange. Run to its logical conclusion, then, the plaintiffs' theory would mean that nobody would be a "qualified individual" in a state with a federally-facilitated Exchange. Obviously, Congress did not intend this result; without any eligible buyers, there would be no reason for the federally-facilitated Exchange to exist. Even the plaintiffs acknowledge the absurdity of this result. As they put it, Congress did not mean "to establish an eligibility criterion that is literally impossible to satisfy, since, if possible, one does not interpret statutes to create such a Catch-22." ECF 40 at 16, citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995).

The plaintiffs offer two theories seeking to avoid the absurdity that their interpretation would create. Neither theory is tenable. First, they argue that there is no definition of a "qualified individual" at all for federally-facilitated Exchanges, because they read Section 18032(f)'s definition of eligibility "with respect to an Exchange" to refer only to state-operated Exchanges. ECF 40 at 15. But, as shown above, the federally-facilitated Exchange is the same entity as the Exchange that the state is directed to establish, and the Act uses the term "Exchange" to refer to every Exchange, regardless of the identity of its operator. Indeed, the plaintiffs explicitly agree with this point elsewhere in their brief: "The term 'such,' and the definition of 'Exchange,' confirm that the federal government should establish *the same Exchange* as the state was supposed to have established." ECF 40 at 5 (emphasis in original); *see also id.* at 7. They may offer a different definition of "Exchange," applicable to 42 U.S.C. § 18032 alone, only by ignoring the principle that "identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007). There is no reason to think that Congress intended this result.

Second, the plaintiffs argue (for the first time on reply) that the Court should simply read the residence provision out of the text of Section 18032. Under this new theory, a "qualified individual" would simply be a person "seeking to enroll in a qualified health plan," 42 U.S.C. § 18032(f)(1)(A)(i), and there would be no need to meet the second condition that the person "resides in the State that established the Exchange," 42 U.S.C. § 18032(f)(1)(A)(ii). But the statute specifies that both clause (i) *and* clause (ii) must be met for a person to be a "qualified individual." Congress's use of the term "and" makes it "self-evident" that Congress meant to impose both conditions. *Feist Pubs. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 357 (1991). This Court, then, should decline the plaintiffs' new invitation to "tak[e] a red pen to the statute" by "cutting out" the residence clause. *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1267 (2011).

It would make far more sense to do as Treasury has done, and interpret the Act not to create an absurd result in the first place. As explained above, the Act is best read to create a presumption that a state will create an Exchange, and that, where a state fails to do so adequately, the federal government stands in the shoes of the state to perform the actions needed to ensure that the Exchange that the state is directed to establish under 42 U.S.C. § 18031 is brought into operation. The Act's definition of a "qualified individual" makes perfect sense, then, under Treasury's approach. Every person "resides in [a] State that established the Exchange" under this reading, and there is no need to resort to the plaintiffs' contortions to avoid an absurd result.

2. The plaintiffs' theory also would create an unanticipated obligation for states in the operation of their Medicaid programs. As the plaintiffs acknowledge, ECF 40 at 14, it follows from their theory that a state with a federally-facilitated Exchange would never be relieved of the Act's temporary maintenance-of-effort requirement for that state's Medicaid program. 42 U.S.C. § 1396a(gg)(1). It is not plausible that Congress intended this result; if it had, it would have provided "clear notice" to the states. *See Arlington Central Sch. Dist. v. Murphy*, 548 U.S. 291, 296 (2006). There is no reason to interpret the Act to impose this obligation, particularly given that the plaintiffs contend that doing so would raise a serious constitutional question, which the court must avoid if possible. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 382 (2005).

3. The plaintiffs' theory would also undermine the ACA's process for state innovation waivers. As the defendants have noted, beginning in 2017, a state that has enacted legislation to provide its own deficit-neutral system of comprehensive, affordable health coverage may seek to opt out of some of the Act's provisions. 42 U.S.C. § 18052. In particular, if a waiver were approved, the state could opt out of the application of premium tax credits under Section 36B; federal funds in the amount of the forgone tax credits would be distributed directly to the state to administer its alternative plan. 42 U.S.C. § 18052(a)(3), (b)(1). Congress thus specified the terms of the deal that it offered to the states – the state could gain approval for Section 36B (and related provisions) not to apply within its borders, but only after the state enacted its own comprehensive health reform legislation meeting specified criteria. This offer would be

pointless under the plaintiffs' reading. The plaintiffs argue that Section 18052 would not be fully superfluous under their theory. ECF 40 at 13. But the issue is not whether the plaintiffs could salvage some way for Section 18052 to have some limited effect; perhaps the waiver provision could survive in some minimal form. But such an outcome would be a far cry from the system that Congress intended, which is one that ensures that comprehensive, affordable health coverage is available in every state, either under the system specified by the ACA or under an alternative, equally comprehensive system enacted by the state.

4. The plaintiffs ask the Court not to concern itself with the damage that their theory would wreak on the structure of the ACA, because HHS could issue regulations to try to repair that damage. ECF 40 at 14. This cavalier argument does not speak to how *Congress* intended the Act to operate. In any event, it is not apparent how the plaintiffs believe that regulations could restore the operation of (for example) the Act's provisions concerning CHIP benefits. The Act instructs states to ensure that low-income children (who are not Medicaid-eligible) have access to plans in an Exchange, if there is a funding shortfall in the state's CHIP program. 42 U.S.C. § 1397ee(d)(3)(B). The Act also directs HHS, "[w]ith respect to each State," to certify whether plans offered through an "Exchange established by the State under [42 U.S.C. § 18031]" provide benefits for children that are comparable to those offered in the state's CHIP plan. 42 U.S.C. § 1397ee(d)(3)(C). It is not apparent how the plaintiffs would contend that HHS could fulfill this obligation for "each State" under their theory. In contrast, if the federal government stands in the shoes of the state to operate the Exchange where the state does not do so, then Section 1397ee does not impose an obligation on HHS that is impossible to fulfill.

C. Treasury's Interpretation Comports with Congress's Clear Purpose in Enacting the Affordable Care Act

The plaintiffs' acontextual interpretation of Section 36B would undermine Congress's basic goals in passing that legislation. Their theory runs contrary to the principle that the Act must be interpreted in light of its "object and policy." *Maracich v. Spears*, 133 S. Ct. at 2203; *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44 (1989) (court must "look to the purpose of the statute" in order to guard against "the danger that the federal program would be impaired if state law were to control"). Congress's goal in enacting Section 36B is obvious; it recognized that the Section 36B tax credits "are *key* to ensuring people affordable health coverage." H.R. REP. NO. 111-443, vol. I, at 250 (Gov't Ex. 1, ECF 51-1 at 4) (emphasis added). The defendants have explained – and the plaintiffs have not disputed – that, without Section 36B tax credits, millions of Americans living in states with federally-facilitated Exchanges would find it impossible to buy affordable insurance; the cost of premiums would rise significantly for millions more Americans; and the ACA's insurance reforms, including the ban on discrimination by insurers on the basis of pre-existing conditions, would be undermined. ECF 31 at 28-30. Congress clearly did not intend such a result and, as explained above, the proper interpretation of the text of the Act does not by any means require such a result.

However, the plaintiffs persist in a post hoc argument divorced from legislative reality, claiming that Congress did so intend, because it wanted to incentivize states to create their own Exchanges. ECF 40 at 25. Not only is there no record of any such intent, this argument makes no sense. Congress did not create the Exchanges as ends in themselves; it created them as part of a comprehensive scheme to expand the availability of affordable health coverage. *See* S. REP. NO. 111-89, at 9 (Gov't EX. 8, ECF 31-1 at 123); H.R. REP. NO. 111-443, vol. II, at 989 (Gov't EX. 1, ECF 31-1 at 20). Congress would not have sacrificed the Affordable Care Act's central objective – providing affordable coverage nationwide, including through the use of premium tax credits – simply to give states the incentive to create their own Exchanges.

If Congress had wanted to create such a powerful incentive, again, it would have given the states "clear notice" that it was doing so. *See Arlington Central Sch. Dist.*, 548 U.S. at 296. Congress knows how to provide clear notice when it imposes conditions on the states. The Medicaid program, for example, expressly warns states of the consequences of a failure to comply with federal conditions. *See* 42 U.S.C. §§ 1396b(a), 1396c (explicitly conditioning funding on HHS approval of state plan); *see also* 42 U.S.C. § 1397aa(b) (state eligibility for CHIP funds explicitly conditioned on HHS approval of state plan). Congress provided no warning that state residents' eligibility for Section 36B tax credits would purportedly turn on which entity operated the Exchange. Nor did the states receive any such warning.[4]

D. The Legislative History Confirms Treasury's Interpretation

1. The legislative history further confirms that Congress intended for federal premium tax credits to be available in every state, regardless of which entity operated the Exchange. The Congressional Budget Office (CBO) and the Joint Committee on Taxation (JCT) prepared estimates of the budgetary effects of the ACA, predicated on the belief that tax credits would be available nationwide. If anybody believed that CBO and the JCT had erred, the issue would have arisen during Congress's deliberations. It did not. As CBO's director describes, "the possibility that those subsidies would only be available in states that created their own exchanges did not arise during the discussions CBO staff had with a wide range of Congressional staff when the legislation was being considered." Gov't Ex. 17, ECF 51-1 at 210.

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[4] The Commonwealth of Virginia is a case in point. Contrary to the theory now advanced by Virginia's Attorney General (ECF 38-1), Virginia's Governor did not express any understanding that his decision to forgo a state-operated Exchange would have any consequences for his state's residents. He recited instead that "*the law makes clear*" that "the choice of a state-based, federal, or hybrid/partnership exchange are all equally valid in complying with the law." Letter from Governor McDonnell to Secretary Sebelius, at 1 (Dec. 14, 2012) (emphasis added), available at http://www.governor.virginia.gov/utility/docs/ HealthcareExchangeLetter.pdf.

The plaintiffs speculate, without any support, that Congress must have assumed that every state would operate its own Exchange. ECF 40 at 20. But it was well known at the time that some states would not do so. A number of state officials vocally declared that they wanted to "lay groundwork for fights about elements of the health care package that are expected to be left up to the state," such as proposals to "allow individual states to 'opt in' or 'opt out' of regional health insurance markets[.]" David D. Kirkpatrick, *Health Lobby Takes Fight to the States*, New York Times A1 (Dec. 28, 2009) (Gov't Ex. 21, ECF 31-1 at 215). As one state senator put it, "We would be essentially telegraphing our intentions. … If there was an opt-in, we are essentially stating now that we are not going to opt in." *Id*.[5] The plaintiffs' theory depends on the premise that Congress willfully chose to ignore these "telegraph[s]."

2. The JCT's report further confirms Congress's intent. The JCT recited in its summary of the ACA's tax provisions that the Section 36B premium tax credit "subsidizes the purchase of certain health insurance plans through an exchange," without specifying that the entity that operates the exchange would be relevant in any way. Gov't Ex. 25 at 12, ECF 31-1 at 230. The plaintiffs respond only by noting that the JCT, elsewhere in its report, sometimes refers to "state exchanges." ECF 40 at 24. But this is beside the point. The JCT's mission is to describe the operation of the tax legislation that it assisted in drafting with precision. If the Committee believed that the identity of the entity running the Exchange had any bearing on eligibility for Section 36B tax credits, it would have noted that condition. It did not, and that is powerful evidence that no such condition exists.

[5] The plaintiffs dispute the relevance of this article, asserting that it refers only to federal legislation. ECF 31 at 21. This is not so. The description of Congressional proposals to "'opt out' of regional health insurance markets" perfectly describes H.R. 3590 as it existed at the time (and as later became law); the bill gave states the choice to opt in or opt out of the operation of the health insurance marketplace, that is, the Exchange. As the article recites, multiple states were prepared to "opt out" of any measures that the Act left to the states' discretion.

3. In addition, in passing H.R. 3962, its version of health reform legislation, the House provided for tax credits to be available in every Exchange, whether state- or federally-run. If any House member believed that the Senate's bill had departed from this approach, he or she would have noted this distinction. No such objection was raised. It is not plausible that the House would have tinkered with the amounts of the Section 36B tax credits in enacting the reconciliation bill, HCERA, while ignoring the supposed fact that tax credits would be denied entirely in some states. Although the plaintiffs speculate that the House was silent because it could not have addressed the issue in reconciliation, ECF 40 at 19, this is plainly wrong. The availability of tax credits is a budgetary matter, and could have been addressed in reconciliation, in the same manner that HCERA increased the amounts of the tax credits. *See* 2 U.S.C. § 644.[6]

4. The plaintiffs refer to, but misdescribe, the bill considered by the Senate Health, Education, Labor, and Pensions (HELP) Committee. ECF 40 at 22. That bill proposed to establish a system in which the residents of every state would be eligible for subsidies upon the effective date for the bill's health insurance reforms. S. 1679, 111th Cong., § 142 (2009) (proposing to add Public Health Service Act, § 3104(d)). Those subsidies would have been made available earlier, in both states with their own Exchanges or states with federally-run Exchanges, if the states chose to accelerate the effective date of those reforms. *Id.*, § 3104(b), (c). The bill expressly proposed to condition subsidy eligibility, however, upon the state's agreement to apply the bill's insurance reforms to state and local employers. *Id.*, § 3104(d)(1)(D). The HELP Committee's structure is not reflected in the ACA; the Senate

[6] HCERA had both deficit-increasing effects (primarily in the form of increasing Section 36B tax credits) and deficit-decreasing effects. CBO projected that HCERA, on balance, would substantially reduce the deficit. Letter from Director Elmendorf to Speaker Nancy Pelosi at 3 (Mar. 20, 2010). There was no barrier, then, to Congress's use of HCERA to clarify where tax credits were available, if anybody had thought that such clarification was needed.

chose to follow the Finance Committee's framework instead. The HELP Committee's bill confirms, however, that Congress knows how to describe conditions on subsidy eligibility *explicitly* when it wishes to do so – in other words, that Congress knows how to give the states clear warning of the consequences of their decision whether to run their own Exchange or not.

5. The plaintiffs argue that earlier legislation, the Trade Adjustment Assistance Act (TAAA), provides relevant legislative history. They also misdescribe that statute, however. Congress did not "condition[] the tax credit" that it provided on state action. ECF 40 at 9. Instead, Congress provided a tax credit for certain workers displaced by foreign competition, which could be used to offset the costs of several different kinds of qualifying health insurance. Some forms of qualifying insurance are available nationwide, and the TAAA permits states to designate *additional* kinds of insurance that would meet certain minimum standards. 26 U.S.C. § 35(e). The TAAA, then, provides no support for the plaintiffs' claim that Congress intended, in that statute or in the ACA, to make its tax credits available in some states but not others.

The most relevant feature of the TAAA, instead, is its sunset date – January 1, 2014. Pub. L. No. 112-40, § 241(a), 125 Stat. 401, 418 (Oct. 21, 2011). Congress, obviously, understood that the statute would no longer be needed once the ACA came into effect in 2014. It is doubtful that Congress would have terminated this program for health insurance tax credits, which it had made available on a nationwide basis for displaced workers, if it had thought that workers in states with federally-facilitated Exchanges would be left with no tax relief at all.[7]

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[7] In their brief, Messrs. Adler and Cannon offer a similarly creative interpretation of the Act's history. (ECF 39-1.) They misstate many of their sources; two examples should suffice. Senator Baucus, in his White Paper, did not advocate for premium subsidies to be available only in some states. Instead, he called for those subsidies to be available "to make health coverage available for all Americans." Sen. Max Baucus, *Call to Action: Health Reform 2009* at 20 (Nov. 12, 2008). And the group of health-care scholars did not decry the Senate-passed bill's supposed withdrawal of tax credits in some states. Instead, they explained that the

II. The Treasury Regulation Is Entitled to *Chevron* Deference

Despite their earlier claims that all "merits arguments have been fully briefed," ECF 21 at 30, the plaintiffs now attempt to present several new arguments to contend that *Chevron* deference should not apply. The plaintiffs have waived these new arguments, because issues may not be raised for the first time in a reply brief. *See Cavallo v. Star Enterprises*, 100 F.3d 1150, 1152 n.2 (4th Cir. 1996). In any event, none of their arguments has merit.

1. The plaintiffs first repeat their main argument in this case: that *Chevron* deference is not owed because the snippet of statutory language that they rely upon is unambiguous, or because any ambiguity is not of the sort that an agency should resolve. ECF 40 at 28. Alternatively, they argue that the Treasury regulation is not reasonable because it contradicts the Act's unambiguous text. *Id.* at 36.[8] But, for the reasons discussed above and in prior briefing, it is the *plaintiffs'* reading of the Act that is contradicted by the Act's text, structure, purpose, and history. Treasury's interpretation, not the plaintiffs', offers a reading that reconciles the Act as a whole, and that interpretation should prevail under *Chevron* step one. At the very least, it is a reasonable interpretation, which is owed deference under *Chevron* step two.[9]

2. The plaintiffs argue, for the first time on reply, that Treasury is not owed deference,

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Senate-passed and House-passed bills were alike in "offering affordability credits to those who cannot afford health insurance." Letter from Henry J. Aaron, Brookings Institution, to Speaker Pelosi (Jan. 22, 2010), available at www.newrepublic.com/blog/the-treatment/47-health-policy-experts-including-me-say-sign-the-senate-bill.

[8] The plaintiffs mischaracterize the CRS report. ECF 40 at 28. That report concluded that the Treasury regulation would likely be upheld. Cong. Res. Serv., *Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act* at 8-10 (July 23, 2012).

[9] The plaintiffs argue that some kinds of ambiguity are left to courts, not agencies, to resolve. *City of Arlington* disclaims that distinction: "the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." 133 S. Ct. at 1871.

because it shares responsibility for administering parts of the Act with HHS, and the two agencies supposedly disagree with respect to the issues presented here. ECF 40 at 29. This argument is doubly misplaced. First, Treasury and HHS fully agree that residents of every state may be eligible for premium tax credits. There is no reason to deny *Chevron* deference to Treasury's expert judgment, simply because that judgment is also shared by HHS. Second, Congress expressly delegated rulemaking power to Treasury here, so there is no need to speculate whether Congress intended an implicit delegation or not.

As Treasury recited when it proposed the regulation at issue here, it has "work[ed] in close coordination [with HHS] to release guidance related to Exchanges, in several phases." 76 Fed. Reg. 50,931, 50,932 (Aug. 17, 2011). Through this process of close coordination, both Treasury and HHS have issued notice-and-comment regulations reciting that state-operated and federally-facilitated Exchanges are to be treated alike for all purposes relevant here. Treasury, for its part, promulgated 26 C.F.R. § 1.36B-1(k), the regulation challenged here, providing that participants in any Exchange may be eligible for Section 36B tax credits. HHS, likewise, has determined that participants in any of the Exchanges are eligible for advance payments of the premium tax credits, regardless of who runs the Exchange. *See* 45 C.F.R. § 155.20 (advance payments are provided for eligible individuals enrolled in a plan "through an Exchange"); 45 C.F.R. § 155.305(a), (f) (listing criteria for eligibility for advance payments). HHS has also determined that cost-sharing reductions under 42 U.S.C. § 18071 (which turn on tax credit eligibility) are available for participants in any Exchange. 45 C.F.R. §§ 155.20, 155.305(a), (g).

Given that the two agencies are in full agreement, *Chevron* deference plainly applies here. *See, e.g., Nat'l Ass'n of Home Builders*, 551 U.S. at 665-66 (according *Chevron* deference to regulation jointly issued by Departments of Commerce and Interior under the

Endangered Species Act); *see also Coeur Alaska, Inc. v. Se. Alaska Conservation Council,* 557 U.S. 261, 277-78 (2009) (deferring to agencies' interpretation of shared-administration statute); *Kentuckians for Commonwealth Inc. v. Riverburgh*, 317 F.3d 425, 446 (4th Cir. 2003) (deferring to "contemporaneous explanation by the two agencies charged with the responsibility of administering the Clean Water Act"). Indeed, both Treasury and HHS are co-defendants in this suit. Both agencies agree that Treasury has primary authority to interpret Section 36B, and they both stand behind their consistent interpretations, as presented in their respective rulemakings, on their arguments before this Court. Consequently, *Chevron* deference applies.

The plaintiffs attempt to avoid the required deference, citing out-of-circuit case law holding that, where agencies share authority, it "cannot be said that Congress implicitly delegated authority [to one agency] to reconcile ambiguities or to fill gaps." *Salleh v. Christopher*, 85 F.3d 689, 692 (D.C. Cir. 1996). But there is nothing "implicit" in Congress's delegation here. It *expressly* delegated authority to Treasury to resolve any ambiguities in Section 36B. *See* 26 U.S.C. § 36B(g) ("The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section."); *see also* 26 U.S.C. § 7805(a) ("the Secretary shall prescribe all needful rules and regulations for the enforcement of this title"). This is precisely the language that Congress uses when it delegates rulemaking authority. *See Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). When Congress provides such "a broad grant of rulemaking authority," there is no occasion to "have a court search provision-by-provision to determine whether that delegation covers the specific provision and particular question before the court." *City of Arlington*, 133 S. Ct. at 1874; *see also Trans Union LLC v. FTC*, 295 F.3d 42, 50 (D.C. Cir. 2002) (according deference "given the broad rulemaking authority" that the statute conferred on multiple agencies).

The Supreme Court recently relied on 26 U.S.C. § 7805(a) to uphold Treasury's reasonable interpretation of a tax statute. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 715 (2011). The case involved parallel (and identical) provisions in the Internal Revenue Code and the Social Security Act, the former providing an exemption from FICA taxes for students, and the latter withholding Social Security benefits from the same students. The Court accorded *Chevron* deference to Treasury, even though the case involved, in part, an interpretation of the Social Security Act (which is administered by SSA, not by Treasury). Indeed, the Court noted that Treasury had reasonably considered "the purpose of the Social Security Act," and had "taken into account the SSA's concerns," in upholding the agency's interpretation under *Chevron* step two. *Mayo Found.*, 131 S. Ct. at 715.

3. The plaintiffs also contend, also for the first time on reply, that there is a "clear statement" rule that must be met before tax credits may be provided, and that *Chevron* deference cannot trump this supposed rule. ECF 57 at 30. They cite no case so holding, and no such case exists. Although tax benefits are not to be presumed, that is not a "clear statement" rule. Instead, 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." *Centex Corp. v. United States*, 395 F.3d 1283, 1295 (Fed. Cir. 2005); *see also Lewyt Corp. v. Commissioner*, 349 U.S. 237, 240 (1955); *Patten v. United States*, 116 F.3d 1029, 1036 (4th Cir. 1997). Thus, Treasury is entitled to *Chevron* deference in its construction of the Internal Revenue Code, whether it is interpreting a statute that imposes a tax, or one that confers a tax benefit. *Mayo Foundation*, again, is instructive. *Mayo*, as noted, involved Treasury's construction of a tax exemption statute, which the Court found to be ambiguous. 131 S. Ct. at 711-12. Instead of declaring a "clear statement" rule, however, the Court held that Treasury was entitled to resolve the

ambiguity under *Chevron*. *Id.* at 712. Indeed, the Court recited the presumption against tax exemptions as support for its holding that Treasury's construction was reasonable under *Chevron* step two – not to displace the *Chevron* analysis altogether. *Id.* at 715.

III. At All Events, This Court Should Not Order Equitable Relief Broader than Necessary to Address Any Injuries of the Plaintiffs Before the Court

Even if they prevail, the plaintiffs are not entitled to a nationwide injunction that would injure millions of individuals who are not before the Court. It is well established that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Kentuckians for Commonwealth*, 317 F.3d at 436; *see also Monsanto Co. v. Geerston Seed Farms*, 130 S. Ct. 2743, 2760 (2010). The plaintiffs have offered no reason why they would benefit in any way from an order that would prohibit other parties from receiving tax relief.

The plaintiffs rely on 5 U.S.C. § 706, which states that courts may "set aside" agency action found to be unlawful. But the APA simply provides that the court may "set aside" the agency's action to consider the case of the plaintiff before it. "Nothing in the language of the APA requires [the court] to exercise such far-reaching power" to issue a nationwide injunction. *Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 394 (4th Cir. 2001), *overruled in part on other grounds*, 681 F.3d 544, 550 n.2 (4th Cir. 2012). Indeed, an injunction of such breadth would run afoul of the rule of *United States v. Mendoza*, 464 U.S. 154, 160 (1984), which holds that nonmutual collateral estoppel does not run against the United States. Equity counsels in favor of maintaining the operation of a key feature of the ACA, which enables millions of Americans to receive substantial tax relief to which they are entitled.

Conclusion

The defendants respectfully ask that judgment be entered in their favor.

Dated: December 6, 2013

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

DANA J. BOENTE
Acting United States Attorney

By: /s/ Elizabeth C. Wu
JONATHAN H. HAMBRICK
VSB #37590
ELIZABETH C. WU
VSB #30057
Attorneys for Defendant
Office of the United States Attorney
600 East Main Street, Suite 1800
Richmond, Virginia 23219
(804) 819-5400 (phone)
(804) 819-7417 (fax)
Elizabeth.C.Wu@usdoj.gov

SHEILA LIEBER
Deputy Branch Director
JOEL McELVAIN
Senior Trial Counsel
(Admitted *Pro Hac Vice*)
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Room 7332
Washington, D.C. 20001
(202) 514-2988 (phone)
(202) 616-8202 (fax)
Joel.McElvain@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Jonathan Andrew Berry
jberry@jonesday.com

Jacob Moshe Roth
yroth@jonesday.com

Michael Anthony Carvin
macarvin@jonesday.com

Walter D. Kelley, Jr.
wdkelley@jonesday.com

/s/ Elizabeth C. Wu

Elizabeth C. Wu
VSB #30057
Attorney for Defendant
Office of the United States Attorney
600 East Main Street, Suite 1800
Richmond, Virginia 23219
(804) 819-5400 (phone)
(804) 819-7417 (fax)
Elizabeth.C.Wu@usdoj.gov