IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. E. Scott Pruitt, In his official capacity as Attorney General of Oklahoma	)	
Plaintiffs,	)	Case No. CIV- 11-030-RAW
v.	)	
KATHLEEN SEBELIUS, *et al,*.	)	
Defendants.	)	

MOTION OF AMERICAN CIVIL RIGHTS UNION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The American Civil Rights Union (ACRU) moves for leave to file the accompanying *amicus curiae* brief in support of Plaintiff's motion for summary judgment.

I. INTEREST OF MOVANTS

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and was the originator of the concept of returning responsibility for welfare programs back to the states through block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to maintain enforcement of the Rule of Law in America, and the Constitution's Separation of Powers. We are concerned to enforce the principle that even the President of the United States must obey the law, and to preempt any gathering threat of high level Administration lawlessness.

The President has now made more than two dozen unilateral changes in the provisions of his own Affordable Care Act, as enacted by Congress and originally signed into law by him. He has done the same in regard to other laws and policies. When does this transform our government into rule by decree rather than democratic rule by the people, in accordance with the Rule of Law?

Moreover, as discussed further below, the General Counsel of the ACRU, Peter Ferrara, offers long established expertise on health policy issues, starting with his service in the White House Office of Policy Development under President Reagan, where he worked on health policy, among other issues.

II. AN *AMICUS CURIAE* BRIEF IS DESIRABLE AND THE MATTERS ASSERTED ARE RELEVANT TO THE DISPOSITION OF THE CASE.

The ACRU has long experience and developed expertise in addressing issues of constitutional law, having filed numerous *Amicus Curiae* briefs addressing such issues nationwide. *See, e.g., McDonald v. City of Chicago,* 130 S. Ct. 3020 (2010); *Citizens United v. Federal Election Commission,* 130 S. Ct. 876 (2010); *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.,* 130 S. Ct. 3138 (2010); *Ricci v. DeStefano,* 129 S. Ct. 2658 (2009); *District of Columbia v. Heller,* 128 S. Ct. 2783 (2008); *Boy Scouts of America v. Dale,* 530 U.S. 640, 120 S. Ct. 2446 (2000).

In addition to the expertise of our Policy Board, ACRU's General Counsel Peter Ferrara drafted the proposed *amicus curiae* brief for this case. A graduate of Harvard Law School and Harvard College, Mr. Ferrara served in the White House Office of Policy Development under President Reagan, where his responsibilities included health policy. He also served as Associate Deputy Attorney General of the United States under President George H. W. Bush, and as an Associate Professor of Law at the George Mason University School of Law. He has also practiced with law firms in New York and Washington. Mr. Ferrara also already has established expertise in the voluminous Patient Protection and Affordable Care Act, having already published a book length study and several articles on the Act.

For these reasons, the ACRU *amicus curiae* brief will help the court with unique, legally relevant, analysis, information and perspective. The ACRU has no institutional economic or financial interest in the outcome of this lawsuit. The ACRU consequently believes it can assist the Court in addition by providing a perspective that is distinct from that of any party.

III. CORPORATE AND FINANCIAL DISCLOSURE STATEMENT

The ACRU states that it is a non-profit, non-stock corporation organized under Section 501(c)(3) of the Internal Revenue Code. The ACRU further states that it issues no stock, and that it has no parents, trusts, subsidiaries, or affiliates that have issued shares of stock or debt securities to the public. Moreover, no publicly held corporation has an interest in the outcome of this litigation due to the ACRU's participation.

WHEREFORE, the ACRU respectfully requests that its motion for leave to file an *amicus curiae* brief in this matter be granted. A proposed order is attached.

Dated: June 4, 2014

Respectfully Submitted,

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Certificate of Service

I hereby certify that on June _____, 2014, I filed the foregoing hard copy **MOTION OF AMERICAN CIVIL RIGHTS UNION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT and Proposed Order** with the Clerk of Court. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the docketed ECF registrants:

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No. CIV-11-030-RAW

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. E. Scott Pruitt,
in his official capacity as
Attorney General of Oklahoma,

Plaintiff,
-vs-
KATHLEEN SEBELIUS, et al.,

Defendant.

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

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June 4, 2014

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to maintain enforcement of the Rule of Law in America, and the Constitution's Separation of Powers, and to counter Administration lawlessness.

INTRODUCTION

American liberty has long endured because checks and balances protect and enforce that liberty. James Madison, in Federalist 48 and 51, warned of the specific need for "defense" by

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one branch of government against encroachments from another; where "ambition" overflows, Separated Powers and the residual powers of the States can step into the breach.

The Rule of Law is another girder of American liberty. "Even the sovereign is subject to God and the law." *Paula Jones v. William Clinton*, 869 F. Supp. 690, 698 (1994). But what if the President tells us he has a phone and a pen, and doesn't need Congress?

The President has now made more than two dozen unilateral changes in the provisions of his own Affordable Care Act, as enacted by Congress and originally signed into law by him. Grace-Marie Turner, Galen Institute, www.galen.org. He has done the same in regard to other laws and policies. What precedent is this setting for the future course of American government? When does this transform our government into rule by decree rather than democratic rule by the people, in accordance with the Rule of Law?

These troubling national concerns come before this Court in the present case. Once again the language of the stature is discarded by the Executive Branch in a unilateral change in policy. It now falls to this Court in the Eastern District of Oklahoma to stand up for the Rule of Law, and our fundamental Constitutional framework. This Court is now called on to step into the breach and say that even the President and his Administration must obey and follow the Rule of Law, if our Republic and its freedoms are to endure.

STATEMENT OF THE CASE

The Affordable Care Act ("ACA") provides for two, separate, distinct types of health insurance Exchanges that can be established for each state, in two entirely separate sections of the law. One is a health insurance Exchange established by a state government. ACA Section 1311, 42 U.S.C. Section 18031. That Section provides, "Each State shall, not later than January

1, 2014, establish an American Health Benefit Exchange…for the state that facilitates the purchase of qualified health plans." ACA Section 1311(b)(1), 42 U.S.C. Section 18031(b)(1).

The other type is a federal health insurance Exchange established by the Secretary of the U.S. Department of Health and Human Services. ACA Section 1321, 42 U.S.C. Section 18041. That Section provides, "If a State does not establish an Exchange…the Secretary shall (directly or through an agreement with a not-for-profit entity) establish and operate such Exchange within the State[.]" ACA Section 1321(c), 42 U.S.C. Section 18041(c).

The legislative history shows that the final ACA legislation as passed intended for the states to establish and operate the Exchanges in each state. E.g. Carrie Budoff Brown, *Nelson: National Exchange a Dealbreaker*, POLITICO, Jan. 25m 2010 http://www.politico.com/livepulse/0110/Nelson_National_exchange_a_dealbreaker.html. But as is well recognized, under the Constitution, the states are each sovereign entities, and the federal government has no authority to order the states to carry out and implement federal policies and programs. *Prinz v. United States*, 521 U.S. 898, 925 (1997); Timothy S. Jost, *Health Insurance Exchanges: Legal Issues*, O'Neill Institute, Georgetown University Legal Ctr., no. 23 at 7, Apr. 27, 2009, http://scholarship.law.georgetown.edu/cgi?article=1022&context=ois_papers. The ACA state Exchanges could only be established by the independent decision of each state.

The ACA grants federal tax credits providing substantial assistance for the purchase of health insurance in one of these two types of health insurance Exchanges but not the other. 26 U.S.C. Section 36(B)(b)(2) provides for a defined federal tax credit for health insurance that a taxpayer or a spouse or a dependent of the taxpayer was "enrolled in through an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act." But that Section does not mention any tax credit at all for health insurance that the taxpayer or a spouse or

a dependent of the taxpayer enrolled in through "Exchanges established by the Secretary under Section 1321."

Moreover, the ACA defines the term "State" as "each of the 50 states, plus the District of Columbia." ACA Section 1304, 42 U.S.C. Section 18024(d); 45 C.F.R. Section 155.20. So when 26 U.S.C. Section 36(B)(b)(2) states that the federal health insurance tax credits under the ACA are available for health insurance that a taxpayer or a spouse or a dependent of the taxpayer was "enrolled in through an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act," it means established by one of the 50 states or the District of Columbia, not by the Secretary of the U.S. Department of Health and Human Services.

Restricting federal tax credits for health insurance to residents of the states where the state established a state Exchange was the main way the ACA sought to encourage states to establish such Exchanges. ACA, Section 1401, 26 USC, Section 36B; Jost, *supra*, n. 23 at 7. Congress further encouraged states to establish Exchanges by offering the states federal funding to do so, ACA, Section 1311(a), 42 U.S.C. Section 18031(a), and by providing for the federal government to establish the Exchange in a state if the state does not do it, ACA, Section 1321(c), 42 U.S.C. Section 18041(c).

But most states did not accept these inducements to set up a state Exchange under the ACA. Oklahoma, is one of a total of 34 states that declined to establish state ACA Exchanges. Kaiser Family Foundation, *State Health Facts, State Decisions for Creating Health Insurance Exchanges*, (May 28, 2013), http://kff.org/health-reform/stateindicator/health-insurance-exchanges/. Two other states decided to establish state Exchanges under the ACA, but failed to get them up and running in time. Jennifer Corbett Dooren, *Two States Seek Help With Health Exchanges*, Wall St. J., May 22, 2003,

http://online.wsj.com/news/articles/SB10001424127887323336104578499444065609364. That means 36 states do not have state Exchanges under the ACA for 2014. Only 14 do.

Perhaps because of these disappointing results, with two thirds of the states failing to participate under the ACA, on August 17, 2011, Defendant Internal Revenue Service (IRS) proposed a regulation defining eligibility for the federal health insurance tax credits under the ACA as follows:

> "a taxpayer is eligible for the credit for a taxable year if...the taxpayer or a member of the taxpayer's family (1) is enrolled in one or more qualified health plans through an Exchange established under Section 1311 ***or 1321*** of the Affordable Care Act...."

Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,934 (Aug. 17, 2011) [emphasis added].

In response to this proposed regulation, swarms of commenters, legal scholars, and dozens of members of Congress filed comments objecting that the proposed regulation departed from the text of the ACA in granting eligibility to taxpayers who had enrolled in health insurance plans on state Exchanges established under Section 1311, ***or*** health insurance plans on federal Exchanges established under Section 1321. The ACA, as discussed above, provides for eligibility only for health insurance plans on state Exchanges established under Section 1311. The proposed regulation, by adding the six letters ***or 1321***, had vastly expanded the availability of the federal tax credits from the 14 states with state Exchanges, as provided in the legislation as enacted by Congress and the President, to all 50 states and the District of Columbia. Adler and Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, Health Matrix: Journal of Law and Medicine, Volume 23, Issue 1, Spring 2013.

Nevertheless, on May 23, 2012, the IRS finalized the regulation as proposed, without change, explaining only,

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

Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012).

On September 19, 2012, the State of Oklahoma filed its amended Complaint seeking a declaration that this final, adopted, IRS regulation is invalid and contrary to law because it authorizes expansion of the ACA health insurance tax credits beyond what is authorized in the text of the ACA itself. The Complaint seeks further relief in an injunction prohibiting enforcement of the regulation.

Defendants moved to dismiss the Amended Complaint on the grounds that Oklahoma lacked standing, its claims were not ripe, and the Anti-Injunction Act deprived the Court of jurisdiction. The Court denied the motion as to Counts II, III, and V, and granted it as to Counts I and IV. Count II alleges that the challenged regulation is *ultra vires*, Count III alleges that it violates the Administrative Procedures Act, and Count V alleges that it amounts to unconstitutional commandeering. The parties have now cross moved for Summary Judgment on the remaining issues.

SUMMARY OF ARGUMENT

Oklahoma has standing to challenge the IRS regulation because the regulation directly injures the state. Indeed, precedents provide that plaintiffs are typically assumed to have standing to challenge an allegedly invalidly grounded rule when they are directly regulated by the rule.

But in the present case, the challenged rule triggers in the state the employer mandate, and the penalties for non-compliance, which otherwise would not apply in the state, under the plain terms of the ACA. Since the state of Oklahoma is one of the largest employers in the state, the employer mandate, and its costs and penalties, directly harm the state government of Oklahoma.

On the merits, the challenged IRS regulation is invalid because it contradicts the plain, unambiguous language of the ACA. It is inconceivable that the plain meaning of the statutory language "Section 1311" can mean "Section 1311 or 1321," as provided in the challenged regulation. There can be no ambiguity in the term "Section 1311" that can be read as "Section 1311 or 1321."

Moreover, the IRS is not even entitled to deference under *Chevron*, in regard to the regulation at issue here. That in part is because the regulation interprets sections of the ACA involving the Exchanges (such as Sections 1311 and 1321) that are within the domain of HHS to interpret and administer, not the IRS.

The challenged IRS regulation was also adopted in violation of the Administrative Procedure Act (APA). Responding to the accurate criticisms of commenters on its proposed regulation, the conclusory, cursory, and even transparently false statements issued by the IRS regarding the textual support for the availability of the federal ACA tax credits for health insurance on federal Exchanges, the legislative history of the ACA, and the language, purpose and structure of the ACA, did not meet the standards of *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971).

ARGUMENT

I. OKLAHOMA HAS STANDING TO CHALLENGE THE IRS REGULATION BECAUSE THE REGULATION DIRECTLY INJURES THE STATE.

Under applicable precedent, Oklahoma has standing to challenge the IRS regulation if it can show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, not merely speculative, that the injury will be redressed by a favorable decision. *Tri-County Hospice, Inc. v. Sebelius*, 788 F. Supp.2d 1274, 1276 (E.D. Okla. 2010); *New England Health Care Employees Pension v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008).

The Defendants have conceded that Oklahoma has satisfied prongs (2) and (3). They dispute only whether Oklahoma has suffered an injury in fact. Oklahoma has indeed suffered such an injury.

Tri-County Hospice is definitive on that point. This Court decided there that a hospice provider was injured by a HHS regulation that calculated the Medicaid reimbursement rates for the provider in a manner conflicting with the underlying statute. Even without the hospice establishing that it would actually be underpaid under the regulation, this Court concluded that "plaintiffs are typically assumed to have constitutional standing when, as here, they are directly regulated by a rule." *Id.* at 1277; *ACCORD: Am. Petroleum Inst. v. Johnson*, 541 F.Supp.2d 165, 176 (D.D.C. 2008). This Court found that the hospice had been injured by "the fact that HHS is operating an invalid regulation, leading to accounting and payment inaccuracies," even without proving any "monetary injury." *Tri-County Hospice*; *ACCORD: Los Angeles Haven Hospice, Inc. v. Leavitt*, 2009 WL 5868513 (C.D. Cal. 2009).

Tri-County Hospice indisputably establishes that plaintiff Oklahoma has standing to bring a challenge to a rule directly regulating it to establish that the IRS is operating an invalid

regulation in violation of law. And even more than in *Tri-County Hospice*, Oklahoma can show that it is directly suffering monetary damages as a result.

The most specific problem for Oklahoma caused by the challenged IRS regulation is that it triggers the penalties in the state for non-compliance with the employer mandate. Those penalties apply only if employees of employers subject to the employer mandate are eligible for the federal tax credits under the ACA. ACA Sections 1501 (a) and (b); 26 U.S.C. Sections 4980H(a) and (b).

Under the plain terms of the ACA, the ACA federal tax credits for health insurance do not apply in the state, because there is no state Exchange. ACA, Section 1401; 26 U.S.C. Section 36(B)(b)(2). It is only the challenged IRS regulation which makes the ACA federal tax credits applicable in Oklahoma. Therefore, only the challenged IRS regulation makes the penalties for the employer mandate applicable in the state.

The state of Oklahoma is itself an employer subject to the employer mandate in the state. If the federal tax credits are applicable in Oklahoma, then the state as an employer is subject to the costs and penalties of the employer mandate. The state must then either incur the costs of providing the mandated ACA health insurance to all full time employees of the state, or pay the penalties for failing to do so. Since it is only the challenged IRS regulation that makes the federal tax credits applicable in Oklahoma, it is the challenged IRS regulation that imposes these costs on the state. The challenged IRS regulation, therefore, imposes direct monetary costs on the state of Oklahoma, conferring standing on the state of Oklahoma to challenge the regulation.

Moreover, the applicability of the employer mandate in the state, and the penalties for failing to comply with it, also trigger responsibilities under the ACA for the state of Oklahoma to compile and submit to the federal government detailed reports regarding each full time employee

of the state, and the health insurance provided to those employees. ACA, Section 1514; 26 U.S.C. Section 6056. Those Sections also require the state employer to issue reports to each full time employee regarding the required reports to the federal government and what is reported regarding the employee in those reports. Moreover, the state is subject to monetary penalties for failing to make the required reports and for errors in those reports. 26 U.S.C. Sections 6721, 6722, and 6724(d). The costs and burdens of compiling and submitting those reports, and for any penalties, are again incurred by the state of Oklahoma only because of the challenged regulation, again granting standing to the state to challenge the regulation. *See, e.g., Planned Parenthood of se. Pennsylvania v. Casey*, 505 U.S. 833, 900 (1992).

II. THE CHALLENGED IRS REGULATION IS INVALID BECAUSE IT CONTRADICTS THE PLAIN LANGUAGE OF THE ACA, ON WHICH IT IS BASED.

As discussed above, the ACA provides for a defined federal tax credit for health insurance that a taxpayer or a spouse or a dependent of the taxpayer was "enrolled in through an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act." ACA, Section 1401, 26 USC, Section 36B. Yet, the challenged regulation interprets this statutory language to provide that,

> "a taxpayer is eligible for the credit for a taxable year if... the taxpayer or a member of the taxpayer's family (1) is enrolled in one or more qualified health plans through an Exchange established under Section 1311 ***or 1321*** of the Affordable Care Act...."

Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,934 (Aug. 17, 2011) [emphasis added]. The addition of the 6 characters "or 1321" as compared to the statutory language has the practical effect of expanding the federal tax credits beyond the ACA statutory language from 14 states to all 50 states, plus the District of Columbia.

There is no canon of construction allowing the addition of new language to a statute that so broadens its meaning as enacted by the legislature, at least since *Magna Carta*. The U.S. Supreme Court has long upheld the "plain meaning rule," which holds that if the language of a statute is clear and unambiguous, it must be applied according to its plain terms. As the Court said in *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 254 (1992),

> "In interpreting a statute a court should always turn first to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there....When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."

See also United States v. Husted, 545 F.3d 1240, 1247 (10th Cir. 2008): "It is a longstanding principle that absent ambiguity we cannot rely on legislative history to interpret a statute.")

It is inconceivable that the plain meaning of the statutory language "Section 1311" can mean "Section 1311 or 1321." As the Supreme Court teaches in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984), courts "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. But there can be no ambiguity in the term "Section 1311" that can be read as "Section 1311 or 1321."

Acceding to that would require not deference, but abdication. But the IRS is not even entitled to deference under *Chevron*, in regard to the regulation at issue here. That in part is because the regulation interprets sections of the ACA involving the Exchanges (such as Sections 1311 and 1321) that are within the domain of HHS to interpret and administer, not the IRS. *Tsosie v. Califano,* 651 F.2d 719, 722 (10th Cir. 1981)(Agency's "construction is not entitled to special deference to the extent it rests on the interpretation of another agency's statutes and regulations."); *Dep't of Treasury v. Fed. Labor Relations Auth.,* 837 F.2d 1163, 1167 (D.C. Cir. 1988) ("[W]hen an agency interprets a statute other than that which it has been entrusted to

administer, its interpretation is not entitled to deference."); *Cheney R.R. Co. v. R.R. Ret. Bd.*, 50 F.3d 1071, 1073-74 (D.C. Cir. 1995) (no deference where issue "turn[ed] on the interpretation" of laws that were "not the Board's governing statutes.").

The challenged IRS regulation was also adopted in violation of the Administrative Procedure Act (APA). Responding to the accurate criticisms of commenters on its proposed regulation, the conclusory, cursory, and even transparently false statements issued by the IRS regarding the textual support for the availability of the federal ACA tax credits for health insurance on federal Exchanges, the legislative history of the ACA, and the language, purpose and structure of the ACA, Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012), did not meet the standards of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The IRS response and consideration failed to consider all important aspects of the issues raised by the proposed regulation, offered an explanation that was inconsistent with the administrative record before it for its decision to proceed without change in the proposed regulation despite numerous, accurate criticisms in the comments, and failed to make a plausible decision that was the product of agency expertise, all in violation of *Citizens to Preserve Overton Park*.

The IRS even certified that the challenged regulation was "not a significant regulatory action," 77 Fed. Reg. at 30,385, yet expanding the availability of the credit from 14 states following the statutory language to all 50 as provided in the regulation's language will cost the federal government hundreds of billions in 2014 alone. Executive Order 12866, referenced by the IRS, defines "significant regulatory action" as having an expected cost of $100 million or more. Exec. Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). *See also* 5 U.S.C. Section 804(2) (defining a major rule as having an expected annual cost of $100 million or more). This

further indicates inadequate consideration of the effects of the regulation, in violation of APA requirements.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully urges that Plaintiff Oklahoma's Motion for Summary Judgment be granted.

Respectfully submitted,

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