IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*, *Plaintiffs*, *v.* KATHLEEN SEBELIUS, *et al.*, *Defendants.*	Civ. No. 13-623 (PLF) **REPLY MEMORANDUM OF LAW**

REPLY MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND/OR SUMMARY JUDGMENT

Michael A. Carvin (D.C. Bar No. 366784)
Jacob M. Roth (D.C. Bar No. 995090)
Jonathan Berry (D.C. Bar No. 1016352)
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
Phone: (202) 879-3939
Fax: (202) 626-1700

Attorneys for Plaintiffs

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INTRODUCTION

At long last, the Government has filed a brief defending the IRS Rule on the merits. (Dkt. No. 38, "PI Opp.") And, in view of that defense, it is not surprising that the Government has tried for months to avoid airing it publicly. The Government's sole textual argument for interpreting "established by the State" to mean "established by the federal government" is this: Because the ACA directs states to establish Exchanges, and directs the federal government to establish "such" Exchanges if states fail to do so, then the federally established Exchanges are, paradoxically, "established by the State." Because that claim is so clearly contrary to the English language, the Government devotes most of its brief to suggesting that absurd consequences would result if the Court refuses to rewrite the ACA's text. But many of these are not absurd at all (or even surprising); and the rest are not consequences of Plaintiffs' position.

In the end, the Government resorts to simplistic accounts of legislative purpose and history, ignoring that Congress reasonably expected all states to establish Exchanges in light of the numerous "carrots" and "sticks" that the Act creates to that end. The Government's atextual policy argument is that it was irrational for Congress to treat states that undertook the costly, complex, controversial job of creating and operating unprecedented Exchanges better than those who foisted this arduous task on the federal government; rather, the only purportedly reasonable course was to provide the same subsidies in either case, eliminating the incentive for states to assume this massive responsibility. But, of course, it was eminently reasonable for Congress to treat cooperating states better than uncooperative ones; to believe that incentives were needed to induce cooperation; and to conclude that, as with Medicaid, billions of dollars of subsidies to a state's voters would be an irresistible incentive for its elected officials. Of course, because the Government discarded those incentives when it rewrote the Act's language in the IRS Rule, we will not know whether Congress' assumptions were valid unless that Rule is enjoined.

The bottom line is that there is no legitimate method of statutory construction that would interpret the phrase "established by *the State*" to instead mean the opposite: "established by *the federal government*." The ACA expressly contemplates both state-established and federally established Exchanges; where the statute uses specific and unambiguous language to refer to one type or the other—and it is hard to imagine language less ambiguous than "established by the State"—the courts must give effect to that language, not disregard it (much less disregard it *throughout the Act*, which seems to be the Government's position). That would be so even if there were legislative history contradicting the statutory text (there is not) and even if there were no rational reason to distinguish between state and federal Exchanges (there surely is). The IRS Rule thus exceeds the agency's powers and should be enjoined.

In addition to the merits, the Government objects again to the standing of Plaintiff David Klemencic. But the recently released premium rates for the federal Exchange in West Virginia definitively confirm that the IRS Rule disqualifies Klemencic from an otherwise-applicable exemption from the individual mandate penalty, requiring him to pay *out-of-pocket* for a portion of the premiums for bronze coverage. Because Klemencic does not want to bear those costs, and instead wants to forgo all health coverage for 2014, he is plainly injured by the IRS Rule.

Finally, the Government argues that the IRS Rule should not be preliminarily enjoined even if Plaintiffs are likely to succeed, because Klemencic's injury is allegedly reparable (if he is willing to risk incurring a penalty) and notwithstanding that the Treasury is poised to spend billions of dollars, millions of Americans are poised to make personal coverage decisions, and thousands of employers are poised to drop employee coverage—all based on the IRS Rule's false premise. While that is wrong, it is also beside the point: With the merits and jurisdictional issues now fully briefed, this Court can and should simply issue a *final* judgment.

RECENT FACTUAL DEVELOPMENTS

A. Premium Information for the Federally Facilitated Exchanges Now Confirms That Plaintiff Klemencic Would Be Required To Purchase and Pay Out-of-Pocket for Comprehensive Coverage, Which He Does Not Want To Do.

On September 25, 2013, the Government finally released the actual insurance premiums for health coverage available on the federally established Exchanges. (*See* Dkt. No. 38-2, ¶ 2.) As the Government's declarant states, the cheapest bronze coverage available to Plaintiff David Klemencic on West Virginia's federally established Exchange would cost $371.28 per month, and (under the IRS Rule) he would be entitled to a projected subsidy of $353.32 per month. (*Id.* ¶¶ 4-5.) Thus, under the IRS Rule, Klemencic would be required to pay approximately $18 per month for comprehensive health coverage that he does not want, or else incur a penalty for violating the individual mandate. Absent the IRS Rule, however, he would be entitled to a certificate of exemption from the individual mandate, because $371.28 per month (unlike $18 per month) exceeds 8% of his household income, which is the statutory cutoff for an exemption. *See* 45 C.F.R. § 155.605(g)(2); 26 U.S.C. § 5000A(b), (e)(1). (On October 1, 2013, the Exchanges officially opened, albeit with reported technical difficulties.)

When Klemencic submitted his initial declaration in August, premiums had not yet been announced, and so he could not determine with certainty at that time whether he wanted to forgo all coverage or instead buy cheaper catastrophic coverage. (*See* Exh. A, Supp. Decl. of David Klemencic, ¶ 2.) In light of the newly released figures, Klemencic has determined that he would prefer to forgo all health coverage for 2014, rather than buy even catastrophic coverage (which would cost almost $340 per month). (*See id.* ¶ 3; *see also* Dkt. No. 38-1, ¶ 4.) However, as explained, the IRS Rule forecloses that option, thus injuring him.

B. News Accounts Continue To Confirm That the IRS Rule Is Poised To Affect the Coverage Options of Millions of American Employees.

When Plaintiffs moved for a preliminary injunction, they warned that thousands of employers were poised to eliminate or narrow group coverage programs for their employees on the potentially false premise that those employees and their families would be eligible for subsidies even on federally established Exchanges. Since that time, news accounts have amply confirmed this phenomenon, exemplifying the urgent need for legal clarity on the IRS Rule. *See, e.g.*, Scott Thurm, *Firms Drop, Rather Than Upgrade, Cheapest Health Plans*, WALL ST. J., at B1 (Sept. 26, 2013) (reporting on several companies justifying dropping coverage for tens of thousands of employees because many "would pay less to buy insurance through the exchanges" due to "subsidies"); *Home Depot To Tap Health Insurance Exchanges for Part-Timers*, REUTERS (Sept. 20, 2013), http://www.businessinsurance.com/article/20130920/NEWS03/130929988 (indicating that "roughly 20,000 part-time workers" would be affected by Home Depot's decision to drop health coverage for part-time employees and "shift them over to public exchanges"); Dave Jamieson, *Trader Joe's To Drop Health Coverage for Part-Time Workers Under Obamacare: Memo*, HUFFINGTON POST (Sept. 11, 2013), http://www.huffingtonpost.com/2013/09/11/trader-joes-obamacare_n_3902341.html (same, for Trader Joe's).

ARGUMENT

I. AS PREMIUM DATA FINALLY AND DEFINITIVELY CONFIRM, THERE IS NO JURISDICTIONAL OBSTACLE TO THIS ROUTINE APA CHALLENGE.

The Government's threshold objection to a preliminary injunction is that this Court lacks jurisdiction over Plaintiffs' Administrative Procedure Act ("APA") challenge. But the recent release of actual insurance premiums for the federally established Exchange in West Virginia definitively confirms that Plaintiff Klemencic suffers Article III injury from the IRS Rule. And the remainder of the Government's jurisdictional arguments are baseless.

1. The Government first argued that Klemencic lacked standing because insurance premium figures were "speculative" and so it was not possible to know for certain whether he would be eligible for an exemption from the individual mandate penalty, even absent the IRS Rule. (*See* Dkt. No. 23-1, at 16.) When Klemencic submitted evidence refuting that suggestion, the Government shifted ground, contending that the IRS Rule would disqualify Klemencic from the exemption but that he would nonetheless be better off, because bronze coverage would be "free" in light of the subsidies. (*See* Dkt. No. 29, at 4.) But now that actual premiums have been released, the Government *concedes* that Klemencic would bear out-of-pocket costs for coverage that, as a result of the IRS Rule, he must purchase. (*See* PI Opp. at 5.) To be precise, he would have to pay at least $18 per month (and bear the risk that the subsidies might turn out to be lower than projected). (Dkt. No. 38-1, ¶ 5.) Klemencic does not want to bear that cost, or that risk. He wants to forgo health coverage for 2014. (*See* Exh. A, Supp. Decl. of David Klemencic, ¶ 3.)

The Government argues that, for Klemencic, bronze coverage (with a subsidy) is better than unsubsidized *catastrophic coverage*. (*See* PI Opp. at 4-5.) But, in light of the recently released premium figures, Klemencic has determined that he wants to forgo *all* coverage for 2014, including catastrophic. (*See* Exh. A, Supp. Decl. of David Klemencic, ¶ 3.)[1]

In short, there is no longer any genuine dispute that (i) absent the IRS Rule, Klemencic would be eligible to receive a certificate of exemption from the individual mandate penalty under 45 C.F.R. § 155.605(g)(2); but (ii) due to the IRS Rule, Klemencic must either purchase bronze coverage at a cost to him of at least $18 per month, which he does not want to do, or else incur a penalty. That is plainly and definitively Article III injury.

[1] Because premiums had not yet been released, Klemencic could not determine with certainty at the time of his initial declaration whether he would prefer to buy catastrophic coverage or forgo all coverage for 2014. (*See* Exh. A, Supp. Decl. of David Klemencic, ¶ 2.) He therefore attested only that he did not want to purchase comprehensive coverage. (*See* Dkt. No. 24-1, ¶ 8.)

2. The Government also briefly repeats four other jurisdictional arguments that it pressed in its motion to dismiss. (*See* PI Opp. at 6.) But all are manifestly meritless, as detailed at length in Plaintiffs' opposition to that motion. (*See* Dkt. No. 24.)

First, as the *regulated person* under the individual mandate and the *subject* of the disputed subsidy, Klemencic "obviously" has prudential standing, *PDK Labs., Inc. v. USDEA*, 362 F.3d 786, 791-92 (D.C. Cir. 2004); any contrary argument is "absurd," *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 600 (D.C. Cir. 2007). *Accord Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987) (clarifying that prudential standing test only applies if "plaintiff is not itself the subject of the contested regulatory action"). *Second*, given that there is now *no factual dispute* about how the final IRS Rule applies to Klemencic, his purely legal challenge to that rule is classically ripe. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 151 (1967); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005). *Third*, no statute, case, or other authority requires Klemencic to violate the individual mandate, incur a penalty, and then sue for a tax refund, simply in order to determine whether an agency regulation is valid; to the contrary, federal courts have recognized at least since *Ex parte Young*, 209 U.S. 123 (1908), that it is unfair to withhold judicial review until a party is bold enough to risk incurring a penalty by violating the challenged provision. *See id.* at 148; *see also Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (finding alternative remedy inadequate where party forced to accrue "potential liability" in interim). Nor would the tax-refund remedy offer any relief if Klemencic rationally chooses to buy the mandated coverage rather than risk being forced to pay the penalty if he loses his challenge. *Fourth*, and finally, Klemencic need not "exhaust" by applying for a certificate of exemption that everyone agrees he is ineligible for under current law. *See Ass'n of Flight Attendants v. Chao*, 493 F.3d 155, 159 (D.C. Cir. 2007).

II. KLEMENCIC IS CORRECT ON THE MERITS, BECAUSE THE IRS RULE IS SQUARELY FORECLOSED BY THE STATUTORY TEXT.

Plaintiffs' argument on the merits is simple and compelling: The ACA instructs states to create insurance Exchanges, but also authorizes the federal government to create fallback Exchanges in states that fail or decline to do so. *See* ACA, §§ 1311(b)(1), 1321; 42 U.S.C. §§ 18031(b)(1), 18041. The Act then sometimes refers generically to "an Exchange" or "an Exchange established under this Act," *e.g.*, ACA, §§ 1421(a), 1312(d)(3)(D)(i)(II); but elsewhere refers specifically and expressly to an Exchange "established by the State," like in the provisions at issue here, 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i). No one familiar with the English language could interpret "an Exchange established by the State" to include one established by the federal government. And every imaginable canon of construction confirms that such judicial revision of the Act's plain language is forbidden. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("differing language" in "two subsections" cannot have "same meaning"); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (clauses should not be construed to be "superfluous"); *Custis v. United States*, 511 U.S. 485, 492 (1994) (that Congress referred generically to Exchanges elsewhere in ACA proves it "knew how to do so" when it wanted). "Were we to ascribe no meaning to this choice of language, we would ignore our duty to pay close heed to both what Congress said and what Congress did not say in the relevant statute." *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 824 F.2d 108, 115 (D.C. Cir. 1987).

A. The Government's Effort To Inject Ambiguity into the Statute Fails, Because an Exchange Established by the Federal Government Is Unambiguously Not "an Exchange Established by the State."

At the threshold, the Government must establish that the relevant statutory language—"an Exchange established by the State under section 1311 of the [ACA]"—is ambiguous. Without textual ambiguity, the IRS has no deference to construe the phrase. *Bd. of Governors of*

the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 368 (1986). And without ambiguity, the Government's avoidance canon and arguments from legislative structure, history, and purpose are inapplicable. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (presumption against incorporation of state law in "absence of a plain indication to the contrary"); *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563 (2013) (statutory structure can clarify "provision that may seem ambiguous in isolation"); *Performance Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 642 F.3d 234, 238 (D.C. Cir. 2011) (legislative history irrelevant if "statute is unambiguous"); *Consol. Rail Corp. v. United States*, 896 F.2d 574, 579 (D.C. Cir. 1990) (legislative purpose irrelevant as to "unambiguous statutes").

Try as it might, however, the Government cannot inject any ambiguity into the clear-as-day statutory phrase. It presses only two arguments to this end: the first turning on the statute's direction to the federal government to establish "such Exchange" in a state that fails to create its own, and the second relying on the ACA's global definition of "Exchange." Neither can work the alchemy of turning a federally established Exchange into one "established by the State."

1. The Government's principal statutory argument rests on the ACA provision that directs the federal government to establish Exchanges for states that fail or refuse to create their own. The provision says that if a state will "not have any required Exchange operational" by a given date, the HHS Secretary "shall … establish and operate *such Exchange* within the State." ACA, § 1321(c)(1); 42 U.S.C. § 18041(c)(1) (emphasis added). The Government draws from use of the word "such" that the federally established Exchange is to be "the *same entity*" as the state-established Exchange referenced previously, and that, because the Exchange is the same regardless of who establishes it, this somehow means that a federally established Exchange *is* "an Exchange established by the State." (PI Opp. at 9.)

That is not statutory construction; it is nonsense. The phrase "such Exchange" does refer back to an antecedent, but that antecedent ("required Exchange") describes *what the Exchange is*, not *who established it*. The term "such" provides that the federal government should establish *the same Exchange* as the state was supposed to have established. The federal Exchange should operate in the same fashion, perform the same tasks, and play the same functions. The only difference is that it is *established by the federal government*, not by the state. Yet eligibility for subsidies turns precisely on that distinction—on *who* established the Exchange.

Put another way, the ACA cannot be read as directing the *federal government* to establish a *state-established* Exchange, because a "federally established state-established Exchange" is an oxymoron. To use a hypothetical, if Congress asked states to build airports, and described these airports in great detail (specifying, *e.g.*, traffic and security procedures), but added that the Secretary of Transportation should construct "such airports" if the states fail to, would anyone even *think* to refer to the latter as "state-constructed airports"? Obviously not. Had Congress in fact wanted federal Exchanges to be "deemed" state Exchanges for all purposes, it could and would have said so expressly—as it did for territorial Exchanges, stipulating that a territory that establishes an Exchange "shall be treated as a State." ACA, § 1323(a)(1).

Indeed, even HHS regulations concede that a federal Exchange is "established and operated … *by the Secretary*," not by a state. 45 C.F.R. § 155.20 (emphasis added). And the HHS Secretary has implicitly conceded the point by not trying to tap the ACA's appropriation for state-established Exchanges in order to pay for the otherwise-unfunded federal Exchanges. *See* J. Lester Feder, *HHS May Have To Get 'Creative' on Exchange*, POLITICO, Aug. 16, 2011; *see also* ACA, § 1311(a)(1) (providing unlimited funds to help "States" establish Exchanges). In short, there is simply no ambiguity as to who establishes a *state-established* Exchange.

2. The Government further argues that its construction follows from the ACA's own definition of the term "Exchange" as "an American Health Benefit Exchange established under section 1311 of the [ACA]." ACA, § 1563(b)(21). (*See* PI Opp. at 10-11.) According to the Government, this necessarily means that when § 1321 of the ACA directs the federal government to establish "such Exchange," it means an Exchange "established under section 1311," and thus that federally established Exchanges are actually established under § 1311. (*Id.*)

But this interpretation, even if correct, does nothing to support the IRS's central, atextual position that § 36B's provision of subsidies for coverage through an Exchange "established by the State" somehow authorizes subsidies for a federally established Exchange. Again, subsidies are limited to those who enroll through an Exchange that is "*established by the State* under section 1311 of the [ACA]." 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added). Even if federal Exchanges could somehow be deemed established *under § 1311* (rather than § 1321), the subsidy provisions further distinguish *among* the § 1311 Exchanges based on which entity established them—only those established *by a State* under § 1311 receive the subsidies. The definitional section invoked by the Government thus does absolutely nothing to justify its counter-textual construction of the critical, dispositive phrase—"an Exchange established by the State."

In any event, although it is of no moment, we note that the federal Exchanges are not established under § 1311. An Exchange established pursuant to § 1321 cannot, by definition, be established under § 1311. Section 1321 certainly indicates that the federal Exchanges should function *as described in* § 1311—but that hardly means that they are *established under* § 1311. Again, HHS regulations contradict the IRS Rule, defining a federally facilitated Exchange as one "established … under *section 1321(c)(1)* of the [ACA]." 45 C.F.R. § 155.20 (emphasis added).

* * *

Apart from the above, the Government makes no effort to reconcile the IRS Rule with the text of the ACA. And, since the above fails, the Government's other arguments—based on deference, statutory structure, legislative history, and congressional intent—are irrelevant. *See supra* at 7-8. But in fact, all of those considerations *corroborate* the statutory text, as explained below, and therefore demonstrate that the IRS Rule's construction could not be upheld under *Chevron*'s second prong even if the text itself were ambiguous (which it is not).

B. Most of the Government's Allegedly Absurd Consequences Are Not At All Absurd, and the Remainder Are Not Consequences of Plaintiffs' Position.

Since the Government's arguments concerning what the subsidy provisions actually say are patently frivolous, it next asks the Court to judicially rewrite the Act's plain language because it contends that adhering to the text would somehow produce absurd results. But there is no absurdity here; interpreting the subsidy provisions to mean what they say does not nullify or contradict any part of the Act. Moreover, the Government's additional arguments about the consequences of interpreting *other* provisions of the Act (using the same or different language) do not create absurd results, do not in any way stem from Plaintiffs' construction of the subsidy provisions, or would not be resolved by adopting the Government's contrary construction.

1. The Government alleges certain consequences if federal Exchanges cannot offer subsidies. But none of these consequences is absurd or negates any part of the Act. They reflect, at most, that Congress imposed certain uniform obligations on *all* Exchanges, those with and without subsidies, some of which would be more easily satisfied by the latter.

Reporting. The Government notes that the federal Exchanges would have to report the "aggregate amount of any advance payment" of subsidies as "zero," and would not have to report any individualized information "necessary to determine eligibility" for those subsidies. 26 U.S.C. § 36B(f)(3). (PI Opp. at 11-12.) True—but so what? Congress listed pieces of information that

all Exchanges (state and federal) must report. Some data points will be zero or inapplicable for federal Exchanges, but none is superfluous because the same list governs state Exchanges. Meanwhile, other data points (like the "level of coverage … and the period such coverage was in effect," the "premium" charged, and the "name, address and TIN of the primary insured" under the policy, 26 U.S.C. § 36B(f)(3)(A), (B), (D)) will be equally applicable to federal Exchanges, and so the federal Exchanges' reports will not be "an empty act" (PI Opp. at 12).

Indeed, if anything, the information-sharing provision actually bolsters Plaintiffs' point by referring generically to "an Exchange" (not, as elsewhere in the same statutory section, to "an Exchange established by the State") and by providing that the provision applies to any person carrying out responsibilities of a state *or* federal Exchange—thus making clear that the former does not include the latter, and that Congress knew how to distinguish between the two.

Exchange Functions. Similarly, the Government contends that, of the eleven functions that the ACA directs *all* Exchanges to perform, it would be very easy for federal Exchanges to satisfy one (and part of a second) if Plaintiffs' position is accepted. In particular, because subsidies are not available in federal Exchanges, it will be straightforward for those Exchanges to "make available by electronic means a calculator to determine the actual cost of coverage" net of "any" subsidy. 42 U.S.C. § 18031(d)(4)(G). And the federal Exchange's list of "each individual who was an employee of an employer but who was determined to be eligible for the premium tax credit" will have no names on it (though it will still be required to transfer other information to the Treasury Secretary, such as the names of individuals granted exemptions). *Id.* § 18031(d)(4)(I). Again—so what? Congress included those functions because they will be meaningful for the state-run Exchanges, to which the list of functions principally applies. And Congress subjected the federal Exchanges to the same list because all the other functions—such

as certifying health plans, creating a website and a hotline, granting exemptions, establishing a Navigator program, etc., *see id*. § 18031(d)(4)(A), (B), (C), (D), (H), (K)—are equally relevant to the federal Exchanges. Again, there is neither superfluity nor empty gestures here.

Global Application Form. The Government says that federal Exchanges are required to use an application form that facilitates application for various "health subsidy programs," including subsidies under the ACA, which would not be possible if those were unavailable. (*See* PI Opp. at 15.) But the Government misstates the law. The cited provision requires the Secretary to "provide *to each State*" such a form, not to use it for the federal Exchanges. 42 U.S.C. § 18083(b)(1)(A) (emphasis added). Moreover, the form is supposed to allow individuals to apply for "all *applicable* State health subsidy programs," *id.* § 18083(b)(1)(A)(i) (emphasis added), contemplating that not all such programs will be available in all states.[2]

Innovation Waivers. Starting in 2017, states may seek "innovation waivers" from the scheme created by the ACA, by showing that alternative state reforms would achieve the same ends. If a waiver is granted, the state receives the "aggregate amount" of the subsidies "that would have been paid … had the State not received such waiver." 42 U.S.C. § 18052(a)(3). On Plaintiffs' view, the Government reasons, this aggregate amount would be zero for states that never established Exchanges. (PI Opp. at 17-18.) But the cited provision refers to amounts that "would have been paid" in 2017 and beyond; a state that did not establish an Exchange *pre-2017* could still claim innovation funds by simply stating that it *would have* established an Exchange for future years had its waiver request been denied. And even if a state could not do so, it would

[2] In perhaps its silliest argument, the Government contends that a State's decision to not establish an Exchange could not affect the availability of subsidies because the Act does not require a subsidy applicant to list his "state of residence" among the "eligibility factors" when applying to an Exchange for subsidies. (PI Opp. at 15-16.) But Congress was providing directions for people applying for subsidies *where they were available—i.e.*, in state-established Exchanges. Under the Act as written, there are no subsidies in federal Exchanges, so nobody will be filling out subsidy applications there, and no federal Exchange would ever be confused as to whether a particular applicant is eligible for a subsidy.

hardly be strange if Congress did not want to reward states for innovation until *after* they tried the scheme that Congress contemplated (*i.e.*, state Exchanges). Withholding innovation-waiver funds until states first establish Exchanges creates a powerful incentive for states to do so—particularly for states that (because they seek waivers) may otherwise be hostile to the idea.

Nor is it true that Plaintiffs' reading of the subsidy provisions would render superfluous the Secretary's discretion to grant innovation waivers. (*Cf.* PI Opp. at 18.) Such waivers allow states to opt out of the individual mandate and the many ACA provisions regulating health plans, *see* 42 U.S.C. § 18052(a)(2), which they would not otherwise be able to do.

2. Moving further afield, the Government also identifies consequences that would result under *other* provisions in the ACA, if the phrase "Exchange established by the State" is consistently read to exclude federal Exchanges. The Government's argument appears to be that "established by the State" ought to be ignored *throughout* the Act. But none of these consequences are even peculiar, much less so absurd as to warrant ignoring clear statutory text.

Medicaid Maintenance-of-Effort Rule. The ACA precludes states from tightening their Medicaid "eligibility standards" until "the date on which the Secretary determines that an Exchange established by the State under section 1311 of [the ACA] is fully operational." 42 U.S.C. § 1396a(gg)(1). A state thus cannot restrict Medicaid eligibility unless it first establishes its own Exchange. This makes perfect sense because, again, Congress wanted to induce states to run Exchanges, and the Medicaid "maintenance of effort" proviso creates a "stick" if they fail to do so. By contrast, the Government's counter-textual approach would eliminate this additional inducement toward state-established Exchanges. (Prospectively, Plaintiffs note that this "stick" may have been effectively invalidated by the Supreme Court's decision concerning Medicaid in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2607 (2012).)

Regulations on State Exchanges. The Government points to a few regulations that would apply within state-established Exchanges but apparently not to federal Exchanges. *See* 42 U.S.C. §§ 1320b-23(a)(2), 1396w-3(b)(1)(E), 1397ee(d)(3)(C). (*See* PI Opp. at 18 n.7.) But the reason for all of these alleged "anomalies" is quite obvious: The HHS Secretary does not need specific statutory authority to regulate every detail of the operation of Exchanges *that she is already in charge of*. The Secretary has broad authority to take "such actions as are necessary to implement" the federal Exchanges. 42 U.S.C. § 18041(c)(1). So she can (and presumably will) do everything that the Act requires the state-run Exchanges to do.

3. Finally, in its furthest stretch, the Government points to allegedly absurd consequences that stem from other provisions of the ACA that *do not even use the same language* as the subsidy provisions (*viz.*, "established by the State"). These provisions thus have nothing to do with Plaintiffs' position in this case or with the subsidy provisions at issue. They neither flow in any way from Plaintiffs' argument here, nor would be resolved by adopting the Government's construction of the disputed language in the subsidy provisions. They are simply irrelevant. And, in any case, the Government misreads them.

Enrollment Through Federal Exchanges. The Government argues that because the ACA defines a "qualified individual" eligible for enrollment through an Exchange as one (i) who is seeking to enroll in a plan through a particular Exchange and (ii) who "resides in the State that established the Exchange," 42 U.S.C. § 18032(f)(1)(A), nobody is eligible to enroll in a federal Exchange. (*See* PI Opp. at 13-14.) There are numerous flaws in this argument.

At the threshold, it has nothing to do with the dispute in this case, which concerns the phrase "Exchange established by the State" in the subsidy provisions. The above provision, in contrast, is simply a state residency requirement for eligibility. Nor would adopting the

Government's construction of the subsidy provisions somehow fix this issue; if the class of individuals who "resid[e] in the State that established the Exchange" is a null set as to federal Exchanges, that is a problem *regardless* of how one construes the subsidy provisions. Put another way, the Government's position is that a federal Exchange "constitute[s] the referenced state-operated Exchange" for purposes of the subsidy provisions (PI Opp. at 9); even if that were true, however, it would not mean that the state actually established the federal Exchange. To the contrary, the State's *failure* to "establish an … Exchange" is what *triggers* the Secretary's ability to do so. 42 U.S.C. § 18031(b)(1). Accordingly, even on the Government's view, nobody in (say) West Virginia "resides in the State that established" the federal Exchange there.

In any event, the Government's interpretation of this different provision is wrong. Under this eligibility provision, one must be a "qualified individual" "with *respect to an Exchange*," 42 U.S.C. § 18032(f)(1)(A) (emphasis added), and thus "with respect to an Exchange established under § 1311," *see* ACA, § 1563(b)(21), to be eligible to enroll. Since § 1311 Exchanges are (unlike § 1321 Exchanges) established by states, this eligibility requirement only applies to state-established Exchanges; it does not apply to, or limit eligibility for, enrollment through the federal Exchanges. Indeed, the conclusion that this eligibility provision applies only to a state Exchange "established under § 1311," rather than a federal § 1321 Exchange, is further reinforced by the fact that, absent such a limitation, the Act would be establishing an eligibility criterion that is literally impossible to satisfy—and, if possible, one does not interpret statutes to create such a Catch-22. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995).

But, again, how one chooses to read this eligibility provision is completely beside the point, given that Plaintiffs' argument concerns the scope of the phrase "an Exchange established by the State," which neither appears in the eligibility provision nor creates a Catch-22.

Abortion Coverage. Finally, the Government contends that Plaintiffs' theory would preclude states from banning coverage for abortions in federal Exchanges. (*See* PI Opp. at 16.) That is neither true nor relevant. The ACA grants broad authority for states to "prohibit abortion coverage in qualified health plans offered through *an Exchange*," 42 U.S.C. § 18023(a)(1) (emphasis added); it does not limit this power to plans offered "through an Exchange established by the State," the way the ACA's subsidy provisions are expressly limited. The cited provision can thus easily be read as allowing states to prohibit abortion coverage in *any* Exchange.

Only if the statutory definition of "Exchange" is incorporated into the abortion provision and understood as limited to state-established Exchanges would states be powerless with respect to federal Exchanges. But, as explained above, *see supra* Part II.A.2, Plaintiffs are agnostic on whether that definition of "Exchange" includes federal Exchanges. Whatever the scope of the statutory definition, the subsidy provisions further distinguish between *state*-established versus *federally* established Exchanges—and that is the crux of Plaintiffs' argument.

In any event, it would hardly be peculiar for Congress to give states power over coverage offered on Exchanges that *they themselves* establish and operate, but withhold that power as to coverage offered on Exchanges that *the federal government* establishes, operates, and controls.

* * *

By burying the Court with the operational details of so many irrelevant aspects of the ACA, the Government is seeking to distract attention from the very simple question that controls this case: Is an Exchange established by the federal government "established by the State"? The answer is no, as even HHS regulations expressly admit. And that answer does not, contrary to the Government, create anomalies in the operation of the Act's other provisions—anomalies that would not allow the Court to ignore the plain statutory text in any event.

C. No Legislative History Contradicts the Unambiguous Statutory Text, and the Limited Legislative Discussion of Federal Exchanges Reflects the Consensus That States Would Submit to the ACA's Pressure To Establish Their Own.

The Government argues that the legislative history supports the IRS Rule. But it does not identify *any* legislative history that directly discusses, much less answers, the relevant question—*i.e.*, whether subsidies are available on federal Exchanges. In fact, Congress barely discussed the federal Exchanges *at all* during the legislative debates, apparently because the overwhelming consensus view was that states would submit to the Act's pressures and establish their own Exchanges. (Indeed, Congress did not even appropriate funds for federal Exchanges.) What little history does exist shows that conditioning subsidies on state participation in Exchanges was proposed early on, adopted by the Senate Finance Committee, and forced onto the House of Representatives when ACA supporters lost their filibuster-proof majority in the Senate.

Thus, while it is always "inappropriate" to use legislative history to rewrite a statute that is "unambiguous," *Performance Coal*, 642 F.3d at 238, the Government's resort to legislative history is particularly worthless here, given that there is "no basis for the court to conclude that [Congress] voted for a regulatory scheme other than that provided by the words in the statute," *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1092 (D.C. Cir. 1996). As the D.C. Circuit explained, "[t]he haste and confusion attendant upon the passage of [a] massive bill do not license the court to rewrite it" but rather "are all the more reason for us to hew to the statutory text." *Id.*

1. Although the Government boldly claims that the legislative history "confirms" the IRS Rule, its real argument is that there is no legislative history *contradicting* the IRS Rule—or, in other words, that no legislative history *confirms* that the ACA's text means what it says. To the extent that the Government cites any actual, affirmative statements by legislators (PI Opp. at 21-22), they are banal descriptions of the ACA's presumptive scheme—*i.e.*, that it would "provide tax credits to significantly reduce the cost" of insurance, 155 Cong. Rec. S13,375 (Dec.

17, 2009) (Sen. Johnson), or provide "refundable tax credits to ensure that coverage is affordable," 155 Cong. Rec. S12,358 (Dec. 4, 2009) (Sen. Bingaman). These statements are true as far as they go, but do not even purport to address the fallback federally established Exchanges or delve into the details of who would be eligible for subsidies under what circumstances.[3]

2. The Government's legislative-history argument is thus that surely someone would have said something (other, of course, than expressly in the statute) if Congress had *really* meant to deprive federal Exchanges of subsidies. (*See* PI Opp. at 19-20, 23.) But Congress barely discussed the fallback federal Exchanges *at all*. And there is good reason for that.

As the Government admits, the House initially passed a bill under which the federal government would presumptively operate *all* of the Exchanges. (*See* PI Opp. at 19.) The Senate preferred state-run Exchanges and, as a tool to incentivize participation by states, enacted a bill that conditioned subsidies on such. The House had little choice but to "silently acced[e]" to that plan (PI Opp. at 20) after the election of Senator Scott Brown deprived ACA-supporters of a filibuster-proof Senate majority. *See* Michael Cooper, *G.O.P. Senate Victory Stuns Democrats*, N.Y. TIMES, Jan. 19, 2010, at A1. To be sure, limited changes to the Senate bill were approved in the reconciliation bill (*see* PI Opp. at 20), but not major structural changes like switching from state-based Exchanges back to the House's preferred national exchange.[4]

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[3] Amusingly, the Government also cites Senator Landrieu's statement deeming "very accurate" a poll question describing the draft ACA as creating a "National Insurance Exchange" offering subsidies. 155 Cong. Rec. S13,733 (Dec. 22, 2009). Obviously, that is not accurate at all; the Senate had rejected a national Exchange in favor of state-based Exchanges months earlier. (*See* Dkt. No. 17, at 4.) And the Government cites a Senate Report explaining that the HHS Secretary would establish "state exchanges" in states that failed to do so. S. Rep. No. 111-89, at 19 (2009). But the report surely meant "state-*based* exchanges," not the semantically nonsensical "federally established state-*established* exchanges."

[4] Actually, eleven House Democrats did push for such a change, warning that "millions of people will be left no better off" if the Senate's state-based Exchange approach were adopted, but to no avail. *See* Letter from Rep. Lloyd Doggett, *et al.*, to President Barack Obama, Jan. 11, 2010, *available at* http://www.myharlingennews.com/?p=6426. It would be hard to conclude that these Members thought the Senate bill authorized subsidies in federal Exchanges.

Nobody in Congress talked about federal fallback Exchanges—much less the subsidiary question of whether they would offer subsidies—because Congress reasonably expected all of the states to accept its offer and establish their own Exchanges (just as it expected all of the states to expand their Medicaid programs in order to continue to receive federal Medicaid funds). *See* Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, N.Y. TIMES, Aug. 4, 2012, at A17 ("Mr. Obama and lawmakers assumed that every state would set up its own exchange."); Elise Viebeck, *Obama Faces Huge Challenge in Setting up Health Insurance Exchanges*, THE HILL, Nov. 25, 2012 ("It's a situation no one anticipated when the [ACA] was written. The law assumed states would create and operate their own exchanges …."). Indeed, Congress did not even *appropriate funds* for federal Exchanges, confirming that it did not think they would ever be needed. *See* Feder, *HHS May Have To Get 'Creative'*, *supra* (ACA "doesn't actually provide any funding" for federal exchanges, while it provides "essentially unlimited sums for helping states"). So even if one could infer anything from the *absence* of mention of one point in a massive bill spanning thousands of pages, it is hardly surprising that nobody talked about fallback Exchanges never intended to see the light of day.[5]

[5] The Government says it was "well known" that some states would refuse to create Exchanges. But its sources do not support that proposition. The letter from Oklahoma's Insurance Commissioner actually stated that Oklahoma "support[s] the state-based exchange concept" and was "currently in the planning stages for a similar concept," but pleaded for a "federal grant" so that the state would be able to afford "the necessary investment." 155 Cong. Rec. S12,543 (Dec. 6, 2009). (The ACA ultimately provided such grants. *See* ACA, § 1311(a)(1).) *USA TODAY*, in arguing for a national Exchange, warned that (among other problems with state-based Exchanges) states might "stall." Editorial, *Don't Trust States To Create Health Care Exchanges*, USA TODAY, Jan. 4, 2010, 2010 WLNR 148256. That leaves only a warning by a single Republican *opponent* of the Act in the House that, because "up to 37" states were considering "filing a constitutional challenge" to parts of the ACA, they also "may not set up the State-based Exchange." 156 Cong. Rec. H2207 (Mar. 22, 2010) (Rep. Burgess). Clearly, however, the congressional majority believed that speculation to be either ill-founded or mere posturing, or else it would have appropriated some funds for federal Exchanges. And if the Government was able to find only a single, speculative legislative reference to the prospect that states would not establish Exchanges, that amply proves that it was not a genuine concern at the time.

3. The ACA's history in fact confirms that conditioning subsidies on state participation in Exchanges was conscious and intentional. When the Senate began to consider a state-based Exchange model, an influential commentator proposed "offering tax subsidies for insurance only in states that complied with federal requirements." Timothy S. Jost, *Health Insurance Exchanges: Legal Issues*, O'Neill Institute, Georgetown Univ. Legal Ctr., no. 23 at 7, April 27, 2009, http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1022&context=ois_papers. The Senate Finance Committee adopted that proposal, and its chair used the conditional nature of the subsidies to justify his committee's jurisdiction over the Exchanges and related regulations of health coverage in the draft ACA bill; that is, the *Finance* Committee had jurisdiction over the latter only because the bill *conditioned* "tax credit" subsidies, which were within its bailiwick, on the states creating Exchanges and adopting related regulations. *See Exec. Comm. Mtg. to Consider Health Care Reform: Before the S. Comm. on Finance*, 111th Cong. 326 (2009); Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule To Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119, 156 (2013).

4. The Government also invokes reports by the Congressional Budget Office ("CBO") and Joint Committee on Taxation ("JCT"). In estimating the cost of premiums in the Exchanges, CBO assumed that subsidies would be generally available. (*See* PI Opp. at 21.) Of course, when it conducted that analysis in March 2010, no state had yet opted out of establishing an Exchange, so there would have been no principled basis to assume otherwise. Regardless, CBO has since admitted that it "did not perform a separate legal analysis of that issue," so its assumption cannot possibly be probative of anything (much less sufficiently probative to warrant disregarding statutory text). *See* Letter from CBO Director Douglas W. Elmendorf to Rep. Darrell Issa (Dec. 6, 2012), *available at* http://www.cbo.gov/publication/43752.

As for the JCT report, it actually refers repeatedly to "state" Exchanges in its discussion of subsidy eligibility and related provisions. *See* JCT, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Care Act"* at 12 (Mar. 21, 2010) (referring, in discussion of subsidy eligibility, to "individuals who purchase health insurance *through a State exchange*"); *id.* at 15 (if employee has coverage in group market, he is "ineligible for the premium tax credit for health insurance purchased *through a State exchange*"); *id.* at 41 (employee who is offered employer coverage is "ineligible for a premium tax credit … for health insurance purchased *through a State exchange*"); *id.* at 38 (employer mandate penalty applies if employee "purchased health insurance *through a state exchange* with respect to which a tax credit … is allowed or paid"); *id.* at 39, 40 (same, referring six times to "*State exchange*") (emphases added). By contrast, the JCT report *never* refers to federal Exchanges. If anything, this further *undermines* the IRS Rule.

D. Congress Had Good Reasons To Distinguish Between State-Established and Federally Established Exchanges and Thereby Encourage the Former.

Finally, the Government simplistically argues that the ACA's goal was to make insurance "affordable," and blocking subsidies in federal Exchanges would hinder that objective. (*See* PI Opp. at 24-26.) Yet particularly with an Act as complex as the ACA, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam). Rewriting a law "to further what a court perceives to be Congress's general goal … is simply too susceptible to error to be tolerated within our scheme of separated powers." *Consol. Rail*, 896 F.2d at 579. Granted, Congress wanted insurance to be affordable—but it also wanted states to establish Exchanges, so that the federal government would not bear that burden. Conditioning subsidies on state participation in Exchanges was a perfectly sensible way to achieve the latter

goal without threatening the former (just as the ACA's conditions on Medicaid funds were a sensible way to ensure that states expanded their Medicaid programs). Only because the IRS Rule gave states the "quid" of subsidies without also demanding the "quo" of Exchanges did the scheme collapse. All of the Government's arguments about how it would be unthinkable for the Act to deny poor people subsidies (*see* PI Opp. at 24-26) simply confirm Congress' rationale for conditioning subsidies on a state's decision to run the Exchange, *i.e.*, it would be unthinkable for elected state officials to deny their own citizens billions in *federal* subsidies for health care.

The truly irrational course would have been for Congress to direct states to establish Exchanges but then offer *no incentives* for them to do so; or, put another way, to treat states that refused to establish Exchanges *just as well* as those that agreed to bear that burden. Yet the Government is not only arguing that Congress intended just that, but also that any other scheme would be so implausible as to warrant wholesale disregard of clear statutory text.

III. PLAINTIFFS ARE ENTITLED TO PRELIMINARY RELIEF, BUT IN ANY EVENT THE COURT SHOULD ENTER FINAL JUDGMENT AT THIS TIME.

The Government argues that Plaintiffs are not entitled to a preliminary injunction even if they are likely to succeed on the merits. That is wrong, but the Government's arguments also miss the bigger picture: With the purely legal issue now fully briefed, and no material facts in dispute, there is no reason for this Court not to enter final judgment at this time, one way or the other. That would narrow the issues before this Court, and streamline the inevitable appeal.

1. As to irreparable harm, the Government argues that being forced to purchase an unwanted product is mere "economic loss." But such a fundamental burden on personal liberty has never been characterized as merely "economic" in nature. Anyway, it is well-established that even economic harm is irreparable if it could not subsequently be recovered due to sovereign immunity. *See Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010); *Feinerman v. Bernardi*,

558 F. Supp. 2d 36, 51 (D.D.C. 2008); *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997). The Government responds that Klemencic could recover after the fact through a tax refund suit, but he certainly would not be able to recoup the costs of bronze coverage if he rationally chooses to comply with the individual mandate rather than risk incurring the penalty. Moreover, *this* suit would allow Klemencic to obtain a certified exemption and thus *guarantee* that he will not be subject to the individual mandate penalty; a tax refund action would not necessarily succeed, as that would depend on Klemencic's actual 2014 income, not his projection thereof. *Compare* 45 C.F.R. § 155.605(g)(2) (certificate of exemption turns on "projected" income), *with* 26 C.F.R. § 1.5000A-3(e) (after-the-fact exemption turns on "household income").

2. As to the public-interest and equity factors, the Government argues that granting relief now would "seriously disrupt the entire revenue collection process." (PI Opp. at 31.) That is empty rhetoric. The IRS Rule expands the availability of *subsidies*, and so enjoining it would actually *save* federal funds. Indeed, its effect on taxes is comparatively minimal and indirect, through its relationship to the exemption from the individual mandate penalty, and so will not be implicated until 2015 (when tax penalties for 2014 violations of the mandate become due).

On the other hand, as Plaintiffs explained, clarifying the validity of the IRS Rule now—before the individual mandate takes effect—is critical for millions of Americans (who are poised to make decisions about their health coverage based on a potentially false premise), and for thousands of employers (who are poised to drop coverage for their employees in the belief that the latter will be better off with subsidies on Exchanges).[6] In fact, all taxpayers share an interest in seeing the validity of the Rule adjudicated *before* billions of dollars are disbursed without

[6] The Government claims that this effect is "overblown," citing various conflicting studies about the effect of the ACA *as a whole* on employer-sponsored coverage. (Dkt. No. 38, at 31 n.15.) But the issue here is not the effect of the ACA as a whole, but rather the effect of the *IRS Rule*. As experts and news accounts confirm, this false promise is inducing employers across the country to drop coverage for employees and shift them to Exchanges. (*See* Dkt. No. 30-1, ¶¶ 6-12; *see also supra* at 4.)

congressional authorization—especially given that, as the Government now insinuates, it would not attempt to recover these funds even if the IRS Rule is later invalidated. (*See* PI Opp. at 31 n.13.) While the Government quibbles over the scope of an appropriate injunction, the basic point is that judicial review of the IRS Rule *now* is infinitely preferable, for all parties, over review after January 1, 2014, after untold decisions are made based upon it.

3. Having said all of that, there is no reason why this Court should not simply issue a *final* judgment one way or the other. The jurisdictional arguments have been fully briefed, and so this Court could issue a final judgment dismissing the Complaint if it somehow agrees with the Government's motion to dismiss. Moreover, the merits have now been fully briefed, as well, as part of the preliminary-injunction calculus. Accordingly, whether the Court agrees with Plaintiffs or with the Government as to the validity of the IRS Rule, it could issue a final judgment on that basis. After all, Plaintiffs filed a summary judgment motion some four months ago (Dkt. No. 17), which remains pending. (The Government never formally opposed that motion, but has briefed the merits in connection with the preliminary injunction motion.) Such a course would allow this Court to bypass the ultimately extraneous issues of irreparability, public interest, and equity balancing, and resolve the case for good. It would also simplify the inevitable appeal by whichever side loses, allowing the Court of Appeals to weigh in quickly and directly on the ultimate merits of Plaintiffs' challenge.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue an injunction enjoining Defendants from applying the IRS Rule.

October 4, 2013

Respectfully submitted,

/s/ Michael A. Carvin
Michael A. Carvin (D.C. Bar No. 366784)
Jacob M. Roth (D.C. Bar No. 995090)
Jonathan Berry (D.C. Bar No. 1016352)
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
Phone: (202) 879-3939
Fax: (202) 626-1700

Attorneys for Plaintiffs