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### TAXATION WITHOUT REPRESENTATION: THE ILLEGAL IRS RULE TO EXPAND TAX CREDITS UNDER THE PPACA

*Jonathan H. Adler &  
Michael F. Cannon*

# TAXATION WITHOUT REPRESENTATION: THE ILLEGAL IRS RULE TO EXPAND TAX CREDITS UNDER THE PPACA\*

*Jonathan H. Adler<sup>†</sup> & Michael F. Cannon<sup>††</sup>*

## ABSTRACT

The Patient Protection and Affordable Care Act (PPACA) provides tax credits and subsidies for the purchase of qualifying health insurance plans on state-run insurance exchanges. Contrary to expectations, many states are refusing or otherwise failing to create such exchanges. An Internal Revenue Service (IRS) rule purports to extend these tax credits and subsidies to the purchase of health insurance in federal exchanges created in states without exchanges of their own. This rule lacks statutory authority. The text, structure, and history of the Act show that tax credits and subsidies are not available in federally run exchanges. The IRS rule is contrary to congressional intent and cannot be justified on other legal grounds. Because tax credit eligibility can trigger penalties on employers and individuals, affected parties are likely to have standing to challenge the IRS rule in court.

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## INTRODUCTION

On March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act (PPACA or “the Act”) into law.<sup>1</sup> The PPACA creates a complex scheme of new government regulations, mandates, subsidies, and agencies in an effort to achieve near-universal health insurance coverage. Immediately after passage, a majority of state attorneys general and numerous business and public interest groups filed suit challenging various portions of the new law—most notably the so-called “individual mandate” and Medicaid expansion. This litigation wound its way to the US Supreme Court, which produced a divided ruling upholding the constitutionality of the mandate but limiting the Medicaid expansion.<sup>2</sup> Yet this decision did not end the controversy surrounding the PPACA.<sup>3</sup> Additional litigation has already ensued and is likely to continue in the years to come.<sup>4</sup>

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1. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified in scattered sections of the U.S. Code).
  2. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (upholding the constitutionality of the individual mandate as a tax but invalidating conditioning of federal Medicaid funds on state acceptance of Medicaid expansion).
  3. News reports suggesting Chief Justice John Roberts may have switched his vote after oral argument have only fueled the controversy. See Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 1, 2012, 1:29 PM), [http://www.cbsnews.com/8301-3460\\_162-57464549/roberts-switched-views-to-uphold-health-care-law/](http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/).
  4. See Rob Field, *Legal Challenges to Obamacare Live On*, THE FIELD CLINIC (Dec. 7, 2012, 12:31 PM), <http://www.philly.com/philly/>

The PPACA’s congressional sponsors created incentives for states to implement much of the law and reasonably expected that states would do so.<sup>5</sup> States help implement many complex federal programs like Medicaid and the Clean Air Act. Among other things, the PPACA encourages states to create new agencies called health insurance “Exchanges” to execute many of the law’s key features. If a state fails to create an Exchange that meets federal standards, the Act authorizes the federal government to create a “fallback” Exchange for that state. As an inducement to state officials, the Act authorizes tax credits and subsidies for certain households that purchase health insurance through an Exchange, but restricts those entitlements to Exchanges created by states. Apparently this was not inducement enough.

Contrary to initial expectations, a large number of states will not create Exchanges before the PPACA’s key provisions take effect in 2014. As Health and Human Services (HHS) Secretary Kathleen Sebelius commented in February 2012, the federal government could be

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blogs/fieldclinic/legal-challenges-to-obamacare-live-on.html; Jonathan H. Adler, *The ObamaCare Cases Keep Coming*, NATIONAL REVIEW ONLINE (Oct. 15, 2012, 4:00 AM), <http://www.nationalreview.com/articles/330400/obamacare-cases-keep-coming-jonathan-h-adler>; Jack M. Balkin, *The Right Strikes Back: A New Legal Challenge for Obamacare*, THE ATLANTIC ONLINE (Sept. 17, 2012, 12:49 PM), <http://www.theatlantic.com/national/archive/2012/09/the-right-strikes-back-a-new-legal-challenge-for-obamacare/262443/>; Jennifer Haberkorn, *More Legal Challenges to ACA on Way*, POLITICO (July 3, 2012, 5:49 PM), <http://www.politico.com/news/stories/0712/78104.html>; Michael Doyle, *It Ain’t Over—More Legal Challenges to Health Care Law Coming*, MCCLATCHY WASHINGTON BUREAU (June 29, 2012, 5:37 PM), <http://www.mcclatchydc.com/2012/06/29/v-print/154456/it-aint-over-more-legal-challenges.html>; *Foes Plan Next Wave of Healthcare Lawsuits*, MSNBC (June 18, 2012), [http://leanforward.msnbc.msn.com/\\_news/2012/06/18/12284836-foes-plan-next-wave-of-healthcare-lawsuits](http://leanforward.msnbc.msn.com/_news/2012/06/18/12284836-foes-plan-next-wave-of-healthcare-lawsuits).

5. See *Departments of Labor, Health & Human Services, Education, & Related Agencies Appropriations for 2011: Hearing Before a Subcomm. on Appropriations, House of Representatives*, 111th Cong. 171 (Apr. 21, 2010) (statement of Kathleen Sebelius, Sec’y, Dep’t of Health & Hum. Servs.) [hereinafter *Statement of K. Sebelius*], available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg58233/pdf/CHRG-111hhrg58233.pdf> (“We have already had lots of positive discussions, and States are very eager to do this. And I think it will very much be a State-based program.”); KAISER FAMILY FOUND., HEALTH CARE REFORM NEWSMAKER SERIES: SEN. MAX BAUCUS, KAISER FAMILY FOUNDATION, FAMILIES USA AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS 23 (2009) (“States will still be able to make a lot of decisions, perhaps, but there will be significant measures left to states, but still in a way where Americans will know, that in whatever state they live, that they’re going to get quality, they’re getting affordable, and access to affordable, quality healthcare.”).

responsible for running Exchanges in fifteen to thirty states.<sup>6</sup> Yet dozens of states are either dragging their heels or flatly refusing to cooperate with implementation.<sup>7</sup> As of February 15, 2013, only seventeen states and the District of Columbia have signaled intent to create a PPACA-compliant Exchange, leaving the federal government responsible for creating them in thirty-four states.<sup>8</sup>

This apparent miscalculation creates a number of problems for implementation of the PPACA. The tax credits and subsidies for the

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6. See J. Lester Feder, *Sebelius: Exchange Funding Request Was Anticipated*, POLITICO PRO (Feb. 14, 2012), <https://www.politicopro.com/go/?id=9220> (“We don’t know if we’re going to be running an exchange for 15 states, or 30 states.”).
  7. See J. Lester Feder & Jason Millman, *Exchanges Hit Roadblocks in Red States*, POLITICO (Apr. 18, 2012, 11:33 PM), <http://www.politico.com/news/stories/0412/75331.html>; see also Elise Viebeck, *Fifteen Governors Reject or Leaning Against Expanded Medicaid Program*, THE HILL (July 3, 2012, 5:00 AM), <http://thehill.com/blogs/healthwatch/health-reform-implementation/236033-fifteen-governors-reject-or-leaning-against-expanded-medicaid-program>.
  8. Tom Howell Jr., *After Obamacare Health Exchange Deadline Passes, 26 States Opt in with Feds*, WASHINGTON TIMES (Feb. 16, 2013), <http://www.washingtontimes.com/news/2013/feb/16/after-obamacare-health-exchange-deadline-passes-26/?page=all>; see also *State Decisions for Creating Health Insurance Exchanges in 2014*, KAISER STATE HEALTH FACTS, <http://www.statehealthfacts.org/comparemaptable.jsp?ind=962&cat=17> (last updated Feb. 15, 2013) (reporting that eighteen states, including Utah, have opted to create an exchange.). The thirty-three states that have opted not to establish an Exchange are: Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin, and Wyoming. This group also includes seven states—Arkansas, Delaware, Illinois, Iowa, Michigan, North Carolina, and West Virginia—that have opted for a “partnership” Exchange, which HHS categorizes as a Section 1321 Exchange. See Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers; Final Rule and Interim Final Rule, 45 Fed. Reg. 18,310, 18,325 (Mar. 27, 2012), <http://www.gpo.gov/fdsys/pkg/FR-2012-03-27/pdf/2012-6125.pdf> (“A Partnership Exchange would be a variation of a Federally-facilitated Exchange. Section 1321(c) of the Affordable Care Act establishes that if a State does not have an approved Exchange, then HHS must establish an Exchange in that State; the statute does not authorize divided authority or responsibility. This means that HHS would have ultimate responsibility for and authority over the Partnership Exchange.”). Yet Utah has informed HHS that it will not create an Exchange for the individual health insurance market. See Lisa Riley Roche, *Gov. Herbert Now Wants Feds to Run Individual Health Insurance Exchange in Utah*, DESERET NEWS (Feb. 5, 2013, 3:15 PM), <http://www.deseretnews.com/article/865572340/Gov-Herbert-calls-for-feds-to-run-individual-health-insurance-exchange-in-Utah.html>.

purchase of qualifying health insurance plans in state-run Exchanges serve as more than just an inducement to states. These entitlements also operate as the trigger for enforcement of the Act's "employer mandate." As a consequence, that mandate is effectively unenforceable in states that decline to create an Exchange. The tax credits further play a role in the enforcement of the Act's "individual mandate," such that a state's decision not to create an Exchange would exempt a substantial portion of its residents from that mandate.<sup>9</sup> Because such a large number of states have declined to create Exchanges of their own, it may be difficult to implement the law as supporters had hoped.

A final Internal Revenue Service (IRS) rule issued on May 18, 2012, attempts to fix this problem by extending eligibility for tax credits and cost-sharing subsidies to those who purchase qualifying insurance plans in *federally* run Exchanges.<sup>10</sup> The PPACA, however, precludes the IRS from issuing tax credits in federal Exchanges. The plain text of the Act only authorizes premium-assistance tax credits and cost-sharing subsidies for those who purchase plans on state-run Exchanges, and the IRS rule's attempt to offer them to other individuals cannot be legally justified on other grounds. In other words, the IRS is attempting to create two entitlements not authorized by Congress and, in the process, to tax employers and individuals whom Congress did not authorize the agency to tax.

It may be somewhat surprising that the PPACA contains such a gaping hole in its regulatory scheme. We were both surprised to discover this feature of the law and initially characterized it as a "glitch."<sup>11</sup> Yet our further research demonstrates that this feature was intentional and purposeful and that the IRS's rule has no basis in law. This supposed fix is actually an effort to rewrite the law and to provide for something Congress never enacted—indeed, something that the PPACA's authors chose not to include in the law.

This Article explains the importance of the law's limitation on the availability of tax credits for health insurance for implementation of the PPACA and details the case for and against the IRS rule. Part II

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9. We are indebted to Richard Urich for alerting us to the relationship between state-established Exchanges and the individual mandate's affordability exemption.
  10. Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,377 (May 23, 2012).
  11. See, e.g., Jonathan H. Adler & Michael F. Cannon, *Another ObamaCare Glitch*, WALL ST. J. (Nov. 16, 2011), <http://online.wsj.com/article/SB10001424052970203687504577006322431330662.html>. The authors were first made aware of this aspect of the PPACA by a presentation by attorney Thomas Christina at the American Enterprise Institute in December 2010. See Tom Christina, *What to Look for Beyond the Individual Mandate (And How to Look for It)*, AM. ENTER. INST. (Dec. 6, 2010), <http://www.aei.org/files/2010/12/06/Christina20101206.pdf>.

provides a brief overview of the PPACA's legislative history and explains the regulatory structure that the Act creates to govern private health insurance markets—paying particular attention to the instability the law introduces into those markets, the role of tax credits and subsidies in mitigating that instability, and the central role of health insurance “Exchanges.” Part III describes the IRS rule and the agency's justification for it. Part IV shows how the IRS rule is contrary to the text, structure, purpose, and history of the PPACA. Part V identifies and evaluates other potential legal rationales for the IRS rule and finds them wanting. Part VI explains that while an IRS rulemaking expanding the eligibility of tax credits or subsidies beyond that authorized by Congress would normally escape judicial review, the interactions of the tax credit provisions with the law's employer and individual mandates provides a basis for Article III standing to challenge the IRS rule. States may have standing to sue as well.<sup>12</sup> In other words, this question is likely to be resolved in federal court.

## I. THE PPACA

What we now call the PPACA is the product of three different bills, two of which originated in the Senate and a third that made limited amendments to the final Senate bill at the behest of the House of Representatives. In 2009, two Senate committees reported major health care legislation. On September 17, the Health, Education, Labor, and Pensions (HELP) Committee approved the “Affordable Health Choices Act” (S. 1679).<sup>13</sup> On October 19, the Senate Committee on Finance approved the “America's Healthy Future Act of 2009” (S. 1796).<sup>14</sup> The two Senate bills shared many features. Before either bill reached the Senate floor, Senate Majority Leader Harry Reid (D-NV) assembled the chairmen of those committees and congressional and White House staff

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12. At the time of this writing, one state (Oklahoma) has filed suit against the IRS rule. See Wayne Greene, *AG Pruitt Revises Health-care Suit, Aims to Block Affordable Care Act Taxes, Subsidies*, TULSA WORLD (Sept. 20, 2012, 8:22 AM), [http://www.tulsaworld.com/news/article.aspx?subjectid=711&articleid=20120920\\_16\\_A11\\_CUTLIN601704](http://www.tulsaworld.com/news/article.aspx?subjectid=711&articleid=20120920_16_A11_CUTLIN601704).
  13. *Bill Summary & Status, 111th Congress, S. 1697*, THOMAS, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN01679:@@L&summ2=m&> (last visited Jan. 25, 2013); *Affordable Health Choices Act*, S. 1679, 111th Cong. (2009).
  14. *Bill Summary & Status, 111th Congress, S. 1796*, THOMAS, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN01796:@@@L&summ2=m&> (last visited Jan. 25, 2013); *America's Healthy Future Act of 2009*, S. 1796, 111th Cong. (2009).



in his office in the US Capitol, where they merged the two committee-reported bills into the Patient Protection and Affordable Care Act.<sup>15</sup>

Although Senate Democrats held a sixty-seat majority—the minimum necessary to break a Republican filibuster—Senator Reid had difficulty collecting yea votes from every member of his caucus.<sup>16</sup> Once he had corralled all sixty votes, Senate Democrats broke the Republican filibuster. The new Patient Protection and Affordable Care Act cleared the US Senate before sunrise on December 24, 2009, without a vote to spare.<sup>17</sup>

Congressional Democrats had intended to have a conference committee merge the PPACA with the “Affordable Health Care for America Act” (H.R. 3962) that had passed the House of Representatives in November.<sup>18</sup> Had this occurred, the PPACA might look quite different than it does today. But in January 2010, Republican Scott Brown won a special election to fill the seat vacated by the death of Sen. Edward Kennedy (D-MA). Brown’s victory shifted the political terrain. It gave Senate Republicans the forty-first vote necessary to filibuster a conference report on the House and Senate bills.

As a result, House and Senate Democrats abandoned a conference committee in favor of a novel strategy. House Democrats agreed to pass the PPACA exactly as it had passed in the Senate, but only upon receiving assurances that after the House amended the PPACA through the “budget reconciliation” process, the Senate would immediately approve those amendments. Because Senate rules protect reconciliation bills from a filibuster, the PPACA’s supporters needed only fifty-one votes to pass the House’s “reconciliation” amendments. The downside of this strategy was that the rules governing budget reconciliation limited the amendments House Democrats could make.<sup>19</sup> Supporters opted for an

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15. David M. Herszenhorn & Robert Pear, *White House Team Joins Talks on Health Care Bill*, N.Y. TIMES, Oct. 15, 2009, at A24 (quoting Senate Majority Leader Harry Reid: “This is legislating at its best.”).
  16. See Brian Montopoli, *Tallying the Health Care Bill’s Giveaways*, CBS NEWS (Dec. 21, 2009, 3:56 PM), [http://www.cbsnews.com/8301-503544\\_162-6006838-503544.html](http://www.cbsnews.com/8301-503544_162-6006838-503544.html).
  17. See *Vote Summary: On Passage of the Bill (H.R. 3590 as Amended)*, U.S. SENATE, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00396](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396) (last visited Jan. 25, 2013).
  18. *Bill Summary & Status, 111th Congress, H.R. 3962, CRS Summary*, THOMAS, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03962:@@D&summ2=1&> (last visited Jan. 25, 2012); *Affordable Health Care for America Act, H.R. 3962, 111th Cong.* (2009).
  19. See John Carney, *How Does Reconciliation Work in Congress?*, BUS. INSIDER (Jan. 17, 2010) [http://articles.businessinsider.com/2010-01-17/news/29990286\\_1\\_41st-vote-filibuster-vote-republican-filibuster](http://articles.businessinsider.com/2010-01-17/news/29990286_1_41st-vote-filibuster-vote-republican-filibuster); Alan Greenblatt, *Senate Faces Slog Over Health Bill Amendments*, NPR (Mar.

imperfect bill—that is, a bill that did not accomplish all they may have set out to do, but for which they had the votes—over no bill at all.

The Act signed into law by President Obama and the law that the IRS rule purports to implement—the PPACA—is thus a hybrid of the two Senate-committee-reported bills, as amended by the Health Care and Education Reconciliation Act of 2010 (HCERA).<sup>20</sup> This history, and the need to resort to the reconciliation process to pass the final law, helps explain why the final legislation looks as it does and why the Act does not conform with the hopes or expectations of some of its supporters.<sup>21</sup>

## II. THE PPACA'S REGULATORY STRUCTURE

The PPACA attempts to achieve near-universal health insurance coverage through an interdependent system of government price controls, mandates, and subsidies. To understand the significance of the IRS rule, it is important to understand the role of health insurance Exchanges and how they were intended to complement the other controls enacted by the PPACA.

### A. A Three-Legged Stool

Among the central features of the PPACA are new regulatory controls limiting medical underwriting by health insurance companies.<sup>22</sup> Specifically, the Act requires carriers to charge individuals of a given age the same premium, regardless of their health status.<sup>23</sup> This type of

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21, 2010), <http://www.npr.org/templates/story/story.php?storyId=124993274>.

20. Congress has further amended PPACA through subsequent legislation. Those amendments do not affect the matter at hand.
21. For example, in January 2010, eleven House Democrats raised objections to relying upon the Senate's state-based health insurance Exchanges as opposed to a single federal Exchange because of the potential for "obstruction." See *U.S. Rep. Doggett: Settling for Second-Rate Health Care Doesn't Serve Texans*, MY HARLINGEN NEWS (Jan. 11, 2010), <http://www.myharlingennews.com/?p=6426>. Despite these concerns, all eleven voted in favor of the PPACA.
22. Mark A. Hall, *The Factual Bases for Constitutional Challenges to the Constitutionality of Federal Health Insurance Reform*, 38 N. KY. L. REV. 457, 464 (2011) (noting that "prohibiting medical underwriting" is among the PPACA's "core provisions.>").
23. The Act prohibits carriers from adjusting premiums for any reason other than age (allowable variation: a 3 to 1 ratio for adults only); family size (two categories: individual or family); smoking status (carriers may charge smokers up to 50 percent more than nonsmokers); or by geographic "rating areas." Carriers may not adjust premiums according to an applicant's health status or sex. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1201, 124 Stat. 119, 155 (2010).

government price control, known as “community rating,” reduces premiums for those with pre-existing conditions but increases premiums for low-risk consumers and thereby encourages healthy people to wait until they fall ill to purchase health insurance.<sup>24</sup> Such price controls can produce a vicious cycle of adverse selection: the influx of high-risk consumers and exodus of low-risk consumers cause premiums to rise, which leads additional low-risk customers to drop coverage, leading to further price increases, and so on.<sup>25</sup> In other contexts, community-rating price controls have caused comprehensive health insurance plans and even entire carriers to exit certain health insurance markets,<sup>26</sup> often to the point of market collapse.<sup>27</sup>

To combat the instability introduced by its community-rating price controls, the Act imposes an “individual mandate” that requires nearly all Americans to purchase a health insurance policy offering a minimum package of “essential” coverage.<sup>28</sup> Failure to comply may result in a

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24. The Act’s “guaranteed issue” provisions also require carriers to offer health insurance to all applicants, regardless of health status.
25. Thomas C. Buchmueller, *Consumer Demand for Health Insurance*, NBER REPORTER 10, 12 (2006) (discussing health insurance exchanges at Harvard University and the University of California system: “One factor contributing to adverse selection in the UC and Harvard cases is that, in each system, premium contributions faced by employees and premium payments to plans were ‘community rated’—that is, they did not vary with the risk characteristics of those being insured. As discussed earlier, one result is thus that the most generous plan faced an adverse selection death spiral.”).
26. *Id.* at 11.
27. Brief of Texas Public Policy Foundation & Cato Institute as Amici Curiae Supporting Petitioners, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Nos. 11-393 & 11-400) (“Before Congress took up health care reform in 2009, a handful of states had experimented with major health insurance reforms including guaranteed issue and some form of community rating compression, focused on the individual insurance market.”); S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, 112TH CONG., RANKING MEMBER REP.: HEALTH CARE REFORM LAW’S IMPACT ON CHILD-ONLY HEALTH INSURANCE POLICIES 5 (Aug. 2, 2011); RICHARD S. FOSTER, CTRS. FOR MEDICARE & MEDICAID SERVS., ESTIMATED FINANCIAL EFFECTS OF THE “PATIENT PROTECTION AND AFFORDABLE CARE ACT,” AS AMENDED 15 (2010), *available at* [https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/downloads/PPACA\\_2010-04-22.pdf](https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/downloads/PPACA_2010-04-22.pdf) (“Although Title VIII includes modest work requirements in lieu of underwriting and specifies that the program is to be ‘actuarially sound’ and based on ‘an actuarial analysis of the 75-year costs of the program that ensures solvency throughout such 75-year period,’ there is a very serious risk that the problem of adverse selection will make the CLASS program unsustainable.”).
28. *See* Hall, *supra* note 22.

penalty payable to the IRS.<sup>29</sup> In addition, the Act imposes an “employer mandate” that requires employers to offer “affordable” health benefits of “minimum value” to all full-time employees and their dependents.<sup>30</sup> Failure may result in penalties against the employer.<sup>31</sup> The combined effect of the PPACA’s price controls and individual mandate is that health-insurance premiums could increase by as much as 100 percent or more for some young and healthy households.<sup>32</sup>

Given the burden those higher premiums will impose on low-income households, the Act offers refundable “premium assistance” tax credits to households with incomes between 100 and 400 percent of the federal poverty level (FPL).<sup>33</sup> The Act further offers “cost-sharing subsidies” that enable households between 100 and 250 percent of FPL to obtain, at no additional cost to them, more than the mandatory minimum level

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29. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 244 (2010). Although styled as a penalty for failure to comply with a regulatory mandate, the Supreme Court ultimately upheld the penalty as an exercise of the federal government’s taxing power. *See Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2600.
30. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1513, 124 Stat. 119, 254 (2010) (defining an “applicable large employer” as one “who employed an average of at least 50 full-time employees on business days during the preceding calendar year.”).
31. *Id.*
32. JONATHAN GRUBER ET AL., THE IMPACT OF THE ACA ON WISCONSIN’S HEALTH INSURANCE MARKET 24-25 (2011), *available at* <http://www.dhs.wisconsin.gov/aboutdhs/docs/WI-Final-Report-July-18-2011.pdf> (“[P]rior to tax subsidies, 41% of the market will receive a premium increase that is higher than 50% . . . . 54% of the members receiving greater than a 50% premium increase are age 29 or under.”); E-mail correspondence from Dennis Smith, Wisconsin Sec’y of Health Servs., to Michael F. Cannon (Jan. 13, 2012) (on file with author) (citing supplemental findings from Gruber et al.: “Another way to look at the data is to just look at the 1% of single policies that see the highest increases after accounting for the tax subsidy. In this case these ‘top’ 1% see an average increase of 126%.”); JEREMY D. PALMER ET AL., CLIENT REPORT: ASSIST WITH THE FIRST YEAR OF PLANNING FOR DESIGN AND IMPLEMENTATION OF A FEDERALLY MANDATED AMERICAN HEALTH BENEFITS EXCHANGE 7 (Aug. 31, 2011), *available at* <http://www.ohioexchange.ohio.gov/Documents/MillimanReport.pdf> (“In the individual market, a healthy young male (with benefit coverage at the market average actuarial value pre and post-ACA) may experience a rate increase of between 90% and 130%.”).
33. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1401, 124 Stat. 119, 213-14 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1001(a)(1)(A), 124 Stat. 1029, 1032 (2010).

of coverage.<sup>34</sup> This premium assistance, however, is only available for the purchase of insurance through Exchanges.<sup>35</sup>

These features of the PPACA's regulatory scheme are interdependent. An apt metaphor is that of a three-legged stool: removing any of the three above-mentioned "legs"—the price controls, the individual mandate, or the tax credits and subsidies—could cause the structure to collapse. Remove the price controls, and premiums for high-risk households would increase dramatically; those households would have a more difficult time complying with the individual mandate. Remove either the individual mandate or the tax credits and the Act's price controls would further threaten the viability of health insurance markets by pushing low-income/low-risk households to exit the market.

*B. Exchanges, Tax Credits & the Employer Mandate*

Health insurance Exchanges play an essential role in the PPACA's regulatory scheme. As the Department of Health and Human Services (HHS) explains, "Exchanges are integral to the Affordable Care Act's goals of prohibiting discrimination against people with pre-existing conditions and insuring all Americans."<sup>36</sup> Specifically, Exchanges are government agencies that oversee the buying and selling of health insurance within a state; monitor carriers' compliance with the Act's health-insurance price controls; implement measures to mitigate the perverse incentives created by the Act's price controls;<sup>37</sup> report to the IRS on whether individuals and employers are complying with the

34. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1402, 124 Stat. 119, 221-22 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1001(b)(2)(C), 124 Stat. 1029, 1032 (2010).

35. See *infra* notes 62-65 and accompanying text.

36. CTR. FOR CONSUMER INFORMATION & INS. OVERSIGHT, CTRS. FOR MEDICARE & MEDICAID SERVS., GENERAL GUIDANCE ON FEDERALLY-FACILITATED EXCHANGES 3 (2012).

37. Timothy Jost, *Implementing Health Reform: A Final Rule on Health Insurance Exchanges*, HEALTH AFFAIRS BLOG (Mar. 13, 2012), <http://healthaffairs.org/blog/2012/03/13/implementing-health-reform-a-final-rule-on-health-insurance-exchanges> (explaining that state-run Exchanges "must ensure that [qualified health plan] service areas cover at least a county except under exceptional circumstances to discourage redlining. The final rule QHP standards require QHPs to meet network adequacy standards. Specifically, plans must maintain 'a network that is sufficient in number and types of providers, including providers that specialize in mental health and substance abuse services, to assure that all services will be accessible without unreasonable delay' and include essential community providers. QHPs . . . cannot employ marketing practices or benefit designs that will discourage enrollment of individuals with significant health needs.").

individual and employer mandates;<sup>38</sup> and distribute hundreds of billions of dollars in government subsidies to private health insurance companies.<sup>39</sup>

Like the individual and employer mandates, Exchanges help to limit how much of the cost of the Act's insurance expansion appears in the federal budget. By requiring households to give money directly to insurance companies, the individual mandate keeps those transactions off of the government's books.<sup>40</sup> Likewise, the employer mandate requires employers to purchase coverage for their workers, thereby removing those transactions from the federal budget and even household budgets.<sup>41</sup> In this way, the PPACA achieves its redistributionist goals off-budget.

Similarly, Exchanges reduce the Act's impact on the federal budget by limiting eligibility for tax credits and subsidies. Allowing all households within the relevant income ranges to claim these entitlements would dramatically increase the federal deficit and significantly disrupt existing employer-sponsored insurance arrangements. The PPACA's authors therefore offered these entitlements only to certain households that purchase a qualified health plan through an Exchange. In addition to household-income criteria, individuals are eligible for tax credits only

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38. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311, 124 Stat. 119, 177 (2010).
39. *See Executive Business Meeting to Consider an Original Bill Providing for Health Care Reform: Hearing Before the S. Comm. on Finance*, 111th Cong. 146 (2009) (statement of Thomas Barthold, Chief of Staff, Joint Comm. on Taxation) (“[I]n terms of the direct payment, the mark would direct the payments go directly to the insurance provider.”); *see also id.* (testimony of Douglas W. Elmendorf, Director, Congressional Budget Office).
40. *See* Michael F. Cannon, *The \$1.5 Trillion Fraud*, NATIONAL REVIEW ONLINE (Nov. 6, 2009, 4:00 AM), <http://www.nationalreview.com/articles/228551/1-5-trillion-fraud/michael-f-cannon> (“President Clinton’s ill-fated health plan had an individual mandate, too. Back in 1994, the CBO decided that since ‘the mandatory premiums . . . would constitute an exercise of sovereign power,’ the agency would treat all premiums as federal revenues, including them in the federal budget. That revealed to the public the full cost of Clinton’s health plan. Clinton’s secretary of health and human services, Donna Shalala, called the CBO’s decision ‘devastating.’ Journalist Ezra Klein writes that it ‘helped kill the bill.’”); *see also* Michael F. Cannon, *Bland CBO Memo, or Smoking Gun?*, CATO AT LIBERTY (Dec. 16, 2009, 7:49 AM), <http://www.cato-at-liberty.org/bland-cbo-memo-or-smoking-gun> (explaining how the PPACA’s authors carefully avoided having the CBO include the mandatory premiums in federal budgets).
41. The money employers use to purchase employee health benefits comes out of employees’ cash compensation rather than profits. *See* Jonathan Gruber, *Health Insurance and the Labor Market*, in *THE HANDBOOK OF HEALTH ECONOMICS* 645, 651 (Joseph Newhouse & Anthony Culyer eds., 2000).

if they are not Medicaid-eligible and do not receive an offer of “minimum value” and “affordable” self-only health coverage from an employer.<sup>42</sup>

Offering tax credits and subsidies within Exchanges, however, creates an incentive for employers to drop their health benefits so that their workers can gain access to those entitlements. If employers did so in large numbers, the PPACA’s budgetary footprint would grow.<sup>43</sup> The employer mandate attempts to prevent such employer “dumping.” It penalizes employers with more than fifty workers if they fail to offer “minimum value” and “affordable” health benefits to all employees. By compelling employers to offer health benefits and thereby restricting access to the Exchanges, the employer mandate reduces the federal budgetary impact of the Act’s insurance expansion and reduces disruption to existing insurance arrangements.<sup>44</sup>

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42. The PPACA defines “minimum value” as coverage with an actuarial value of at least 60 percent, and defines “affordable” as when the explicit (i.e., employee-paid) portion of the premium for self-only coverage is less than 9.5 percent of household income. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1401, 124 Stat. 119, 216-17 (2010). According to the IRS:

Consistent with these statutory provisions, the proposed regulations provide that an employer-sponsored plan also is affordable for a related individual for purposes of section 36B if the employee’s required contribution for self-only coverage under the plan does not exceed 9.5 percent of the applicable taxpayer’s household income for the taxable year, even if the employee’s required contribution for the family coverage does exceed 9.5 percent of the applicable taxpayer’s household income for the year.

Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,935 (Aug. 17, 2011).

43. This would also further undermine the claim made by the PPACA’s proponents that it would not cause people to lose their existing health insurance. *See, e.g., Barack Obama Promises You Can Keep Your Health Insurance, But There’s No Guarantee*, POLITIFACT (Aug. 11, 2009), <http://www.politifact.com/truth-o-meter/statements/2009/aug/11/barack-obama/barack-obama-promises-you-can-keep-your-health-ins> (quoting President Barack Obama: “If you like your health care plan, you can keep your health care plan.”).
44. Some analysts predict worker exodus and employer dumping will occur despite the PPACA’s attempts to prevent it. DOUGLAS HOLTZ-EAKIN & CAMERON SMITH, AM. ACTION FORUM, LABOR MARKETS & HEALTH CARE REFORM: NEW RESULTS 2 (2010); *see also* CONG. BUDGET OFFICE, UPDATED ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT 3 (2012); CONG. BUDGET OFFICE, CBO AND JCT’S ESTIMATES OF THE EFFECTS OF THE AFFORDABLE CARE ACT ON THE NUMBER OF PEOPLE OBTAINING EMPLOYMENT-BASED HEALTH INSURANCE 1 (2012). *But see* LINDA BLUMBERG ET AL., WHY EMPLOYERS WILL CONTINUE TO PROVIDE HEALTH INSURANCE: THE IMPACT OF THE AFFORDABLE CARE ACT 1 (2011).

Exchanges, in turn, play an essential role in enforcing the employer mandate. Before the IRS may levy a penalty against an employer, (1) the employer must fail to offer “minimum value” or “affordable” coverage to all full-time employees and their dependents, and (2) one of the employer’s full-time employees must enroll in a qualified health plan through an Exchange “to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee.”<sup>45</sup> If an employer fails to offer “minimum value” coverage, the Act fines the employer \$2,000 for every full-time employee (after exempting the first thirty employees). If an employer offers coverage that is “minimum value” but not “affordable,” the Act fines the employer either \$3,000 for each employee who receives or is eligible for a tax credit through an Exchange or the penalty for not offering “minimum value” coverage, whichever is less.<sup>46</sup> Employer groups have expressed concern about both the size and the unpredictability of these penalties.<sup>47</sup>

### *C. Tax Credits & the Individual Mandate*

Exchanges also play a key role in the enforcement of the individual mandate. Subject to certain exemptions, the PPACA requires all US residents to obtain a minimum level of health insurance coverage or pay a tax penalty.<sup>48</sup> When fully phased-in by 2016, penalties will be the greater of a flat fee of \$695 (for single individuals) to \$2,085 (families of four or more) or 2.5 percent of income in excess of the income-tax filing threshold, up to a limit of the nationwide average premium of all “bronze” level health plans available to the taxpayer’s age and household size.<sup>49</sup> One estimate posits that by 2016, the maximum penalty will reach

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45. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1513, 124 Stat. 119, 253 (2010).

46. *Id.* § 1513, amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1003, 124 Stat. 1029, 1033 (2010).

47. *February Outlook: Business and Health Reform*, CoBANK, <http://www.cobank.com/Newsroom-Financials/CoBank-News-Feed/February-Outlook.aspx> (last visited Jan. 22, 2013) (quoting Robert Graboyes, Senior Fellow for Health and Economics at the National Federation of Independent Business Research Foundation: “What makes it very difficult for businesses is that the penalties involve so much that is outside of their control or even outside of their view. Let’s say you’re married with two children and you and your wife together earn \$100,000. Now your wife’s income drops a bit, and you’re below \$89,000. Your employer and your wife’s employer will both be slammed with a fine. I have jokingly referred to this as the ‘employee’s spouse’s uncle tax,’ because it is literally true that an employer could be fined because one of its employees has a spouse who has an elderly uncle who moves into their spare bedroom, thereby increasing family size.”).

48. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242-50 (2010) (adding § 5000A to the IRC).

49. *Id.*



\$7,779 for a single fifty-five year old and \$18,085 for a family of four with a fifty-five year-old head of household.<sup>50</sup>

The Act exempts taxpayers from that penalty if coverage is deemed not “affordable,” defined as when the “required contribution” to the cost of health insurance exceeds roughly 8 percent of household income.<sup>51</sup> In the case of a household that does not have an offer of “minimum value” and “affordable” coverage from an employer, the “required contribution” is the difference between the premium for the lowest-cost plan available to the household through an Exchange, and any premium-assistance tax credit for which the household is eligible.<sup>52</sup>

Importantly, the mere fact that a taxpayer is *eligible* for premium-assistance tax credits will deprive many taxpayers of this “affordability” exemption. Mere eligibility for a tax credit will bring the individual’s “required contribution” below 8 percent of household income, thereby subjecting him to penalties.

#### *D. Tax Credits & State-Run Exchanges*

The PPACA’s authors envisioned that each state would have its own Exchange, operated by state officials. As President Obama explained shortly after signing the PPACA, “by 2014, each state will set up what we’re calling a health insurance exchange.”<sup>53</sup> The PPACA does not force states to create Exchanges, however. Although the Act declares that each state “shall” create an Exchange and lays out rules for state-run Exchanges,<sup>54</sup> it does not and could not mandate that states establish one.<sup>55</sup> A direct command that state governments assist in the implementation of a federal regulatory scheme would be unconstitutional

50. PAUL R. HOUCHEMS, MEASURING THE STRENGTH OF THE INDIVIDUAL MANDATE 10-11 (2012), <http://publications.milliman.com/publications/health-published/pdfs/measuring-strength-individual-mandate.pdf>.

51. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242-50 (2010) (adding § 5000A(e)(1)(A) to the IRC).

52. *Id.* (adding § 5000A(e)(1)(B)(ii) to the IRC).

53. Remarks on Health Insurance Reform in Portland, Maine, 2010 DAILY COMP. PRES. DOC. 220 (Apr. 1, 2010); *see also* Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2673 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (“The ACA requires each State to establish a health insurance ‘exchange.’”).

54. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311, 124 Stat. 119, 173 (2010).

55. *See* Jonathan H. Adler, *Cooperation, Commandeering, or Crowding Out?: Federal Intervention and State Choices in Health Care Policy*, 20 KAN. J.L. & PUB. POL’Y 199, 213 (2011); *see also* Michael F. Cannon, *Will States Lose Medicaid Funds if They Fail to Create an ObamaCare ‘Exchange’?*, CATO AT LIBERTY (Feb. 6, 2012, 2:04 PM), <http://www.cato.org/blog/will-states-lose-medicaid-funds-they-fail-create-obamacare-exchange>.

commandeering.<sup>56</sup> If Congress believes state cooperation is necessary to facilitate the implementation of a federal program, it must create incentives for state action. The Supreme Court has explained there are “a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests.”<sup>57</sup> Among other things, the federal government may offer states financial assistance or threaten to implement the program directly if the state refuses to participate.<sup>58</sup> The use of such incentives to induce state cooperation is often referred to as “cooperative federalism”<sup>59</sup> and is quite common. In the PPACA, Congress used such “cooperative” measures to encourage state creation of Exchanges.

Though the Act provides that states “shall” create their own exchanges, it actually gives states a choice. Section 1311 declares, “Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an ‘Exchange’)” and lays out rules for state-run Exchanges.<sup>60</sup> If a state fails to create an Exchange under Section 1311, the Act directs the federal Department of Health and Human Services to create an Exchange for that state.<sup>61</sup> Specifically, Section 1321 requires the HHS Secretary to “establish and operate” an Exchange within any state that either fails to create an Exchange or fails to implement the PPACA’s health insurance regulations to the Secretary’s satisfaction. Section 1321 thus requires a federal “fallback” for states that do not create Exchanges of their own.

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56. See *Printz v. United States*, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the states to implement, by legislation or executive action, federal regulatory programs.”); *New York v. United States*, 505 U.S. 144, 162 (1992) (“[T]he Constitution has never been understood to confer upon Congress the ability to require States to govern according to Congress’s instructions.”).

57. *New York*, 505 U.S. at 167.

58. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. at 2602 (“Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when ‘pressure turns into compulsion,’ the legislation runs contrary to our system of federalism.” (citation omitted)).

59. *New York*, 505 U.S. at 167. (“[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. This arrangement . . . has been termed ‘a program of cooperative federalism . . . .’” (citation omitted)).

60. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311, 124 Stat. 119, 173 (2010). Among the “requirements” for purposes of Section 1311, an Exchange must be “a governmental agency or nonprofit entity that is established by a State.” *Id.* § 1311(d)(1).

61. Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1204, 124 Stat. 1029, 1321 (2010).

As noted above, the PPACA provides tax credits for the purchase of qualifying health insurance plans on such Exchanges. Specifically, Section 1401 adds a new Section 36B to the Internal Revenue Code that authorizes refundable “premium assistance tax credits” for the purchase of qualifying health insurance plans in Exchanges established by states under Section 1311.<sup>62</sup> These are “refundable” tax credits, meaning that in many cases the credit does not just reduce tax liability but also results in government outlays to private insurance companies.<sup>63</sup> Section 1402 also authorizes “cost-sharing” subsidies for the purchase of health insurance plans on Exchanges. Congress designed these subsidies to help lower-income households obtain more comprehensive coverage.<sup>64</sup> Section 1402 makes these direct outlays available only where tax credits are available—i.e., through state-run Exchanges.<sup>65</sup>

### III. THE IRS RULE

On August 17, 2011, the IRS proposed a regulation to implement Section 36B that would offer premium assistance tax credits through *federal* Exchanges. As proposed by the IRS, the rule provided 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 . . . .<sup>66</sup>

If the tax credits authorized by Section 1401 are to be available without regard to whether an insurance plan is purchased through a state-run (Section 1311) or federal Exchange (Section 1321), the same will be true for cost-sharing subsidies, which Section 1402 makes available wherever tax credits are available. Because the receipt of tax credits or cost-sharing subsidies by workers triggers tax penalties against employers, another result of the rule is that it taxes employers who otherwise would

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62. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1401, 124 Stat. 119, 172 (2010).

63. Nonrefundable credits only reduce a taxpayer’s tax liability. For example, if a taxpayer has a \$5,000 tax liability and is eligible for a \$6,000 non-refundable credit, the credit will wipe out her tax liability, but she will receive only \$5,000 of benefit rather than the full \$6,000. If the credit is refundable, however, she receives the full \$6,000 benefit: the credit wipes out her \$5,000 tax liability and the IRS issues her a \$1,000 payment.

64. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1402, 124 Stat. 119, 220-21 (2010).

65. *Id.*

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

be exempt from PPACA’s employer mandate—i.e., employers in states that decline to create an Exchange. Because the availability of tax credits will reduce the “required contributions” of many taxpayers from above 8 percent of household income to below that threshold, the rule also taxes many individuals who would otherwise be exempt from the individual mandate and denies even more individuals access to low-cost “catastrophic plans”—individuals in states that decline to create an Exchange.

The proposed rule did not identify any specific statutory authority for the extension of tax credits and cost-sharing subsidies, or the imposition of the individual and employer mandates on exempt persons, through federal Exchanges. And indeed, the plain text of the PPACA does not authorize these actions in federal Exchanges. The rule thus amends the tax code by offering tax credits and subsidies not authorized by the statute and by taxing individuals and employers whom the statute does not authorize the IRS to tax. The IRS’s decision to offer tax credits in federal Exchanges, and its rationale for that decision, are departures from the agency’s strict adherence to the plain meaning of the statute concerning far less consequential matters.<sup>67</sup>

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67. As explained in the Federal Register,

Commentators requested that the final regulations treat a taxpayer whose household income exceeds 400 percent of the FPL for the taxpayer’s family size as an applicable taxpayer if, at enrollment, the Exchange estimates that the taxpayer’s household income will be between 100 and 400 percent of the FPL for the taxpayer’s family size and approves advance credit payments. Other commentators advocated allowing taxpayers with household income above 400 percent of the FPL for their family size to be treated as eligible for a premium tax credit for the months before a change in circumstances affecting household income occurs or for the months for which the taxpayer receives advance payments. *The final regulations do not adopt these comments because they are contrary to the language of section 36B limiting the premium tax credit to taxpayers with household income for the taxable year at or below 400 percent of the FPL for the taxpayer’s family size.*

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Commentators requested that the final regulations allow an individual who may be claimed as a dependent by another taxpayer to qualify as an applicable taxpayer for a taxable year if, for the taxable year, another taxpayer does not claim the individual as a dependent. *The final regulations do not adopt this comment because it is inconsistent with section 36B(c)(1)(D), which provides that a premium tax credit is not allowed to any individual for whom a deduction under section 151 is “allowable to another taxpayer” for the taxable year.*

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Commentators requested that the final regulations define eligibility for government-sponsored programs as actual enrollment for

Ironically, tax reduction is only a minor part of the tax-credit rule's impact. By far, the rule's largest effect is to increase federal spending. Because the tax credits are "refundable" (i.e., individuals with no tax liability receive the benefit of a cash payout from the IRS) and the cost-sharing subsidies are federal payments that also flow directly to private health insurance companies, the rule also appropriates federal dollars without statutory authority. Those expenditures completely swamp any tax reduction. Official projections show 78 percent of the budgetary impact of the tax credits and cost-sharing subsidies is new spending, with tax reduction accounting for just 22 percent.<sup>68</sup> Net of revenue from the employer-mandate penalties that those tax credits will trigger, new

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individuals suffering from end stage renal disease who become eligible for Medicare as a result of their diagnosis. Other commentators requested this treatment for any individual suffering from an acute illness who becomes eligible for a government-sponsored program . . . . *Section 36B(c)(2)(B) establishes a clear structure under which eligibility for government-sponsored minimum essential coverage in a given month precludes including an individual in a taxpayer's coverage family for purposes of computing the premium assistance amount for that month.* In keeping with the statutory scheme, the final regulations do not adopt these comments.

. . . .

Commentators suggested that the final regulations adopt a safe harbor for individuals and families who can demonstrate that they accurately reported any changes in income or family size to the Exchange and that their advance payments were properly computed based on the information available at the time the payments were made. Commentators suggested that taxpayers who experience changes in circumstances during the year, including taxpayers whose household income for the taxable year exceeds 400 percent of the FPL, should be allowed to prorate the repayment limitations based on the portion of the year the taxpayer receives advance payments. Other commentators asked that taxpayers who would experience a hardship as a result of repaying excess advance payments be exempt from the repayment requirement or that the IRS should disregard changes that cause income to slightly exceed 400 percent of the FPL. Commentators also suggested that taxpayers be allowed to compute their premium tax credit using the largest family size of the household during the year rather than the family size reported on the tax return. *The statute sets forth clear rules for reconciling advance credit payments, which are not consistent with the suggestions made by the commentators. Accordingly, the final regulations do not adopt these comments.*

Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,377-79, 30,384 (May 23, 2012) (emphases added).

68. Letter from Douglas W. Elmendorf, Dir., Congressional Budget Office, to John Boehner, Speaker of the House (July 24, 2012), *available at* <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43471-hr6079.pdf>.

spending accounts for roughly 90 percent of the rule's budgetary impact, and tax reduction just 10 percent.<sup>69</sup> Roughly speaking, for every two dollars of tax reduction, the rule triggers one dollar in immediate tax increases and eight dollars of deficit spending. Since every dollar of deficit spending must eventually be financed through taxes, taxpayers will bear the burden of those eight dollars of deficit spending as well.

The actual cost of the rule cannot be known with certainty, as it depends on how many and which states ultimately decline to create an Exchange or to implement the law's Medicaid expansion. But its cost is certainly larger than a routine IRS rule.<sup>70</sup> Given that the thirty-four states that have opted not to establish an Exchange account for two-thirds of the US population,<sup>71</sup> CBO projections through 2023 suggest the IRS rule is thus likely to result in more than \$600 billion of unauthorized spending, \$178 billion of unauthorized tax reduction, more than \$100 billion in unauthorized taxes, and to increase federal deficits by some \$700 billion.<sup>72</sup>

After the rule was proposed, commentators and several members of Congress raised concerns about the IRS' apparent lack of statutory

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69. *Id.*

70. Curiously, the IRS concluded that the rule would not have a significant economic effect. *See* Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,385 (May 23, 2012) ("It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required."). Yet by authorizing tax credits in as many as thirty-four states without state-run Exchanges, the rule clearly exceeds the statutory threshold for significant rules. The rule would seem to qualify as a "significant regulatory action" under Executive Order 12,866 and a "major rule" under the Congressional Review Act. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993) (defining a "significant regulatory action" as a regulation expected to have an annual effect on the economy of \$100 million or more); 5 U.S.C. § 804(2) (2006) (defining a major rule as a rule with an anticipated annual cost or economic effect of \$100 million or more).

71. Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, N.Y. TIMES, Aug. 5, 2012, at A17.

72. CBO estimates show just 22 percent of the budgetary impact of the credits/subsidies is tax reduction, while 78 percent is new spending. Letter from Douglas W. Elmendorf, Dir., Congressional Budget Office, to John Boehner, Speaker of the House 6 (July 24, 2012), *available at* <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43471-hr6079.pdf>; and author's calculations. Thus, new spending accounts for \$948 billion of the \$1.2 trillion budgetary impact of the credits/subsidies, while tax reduction accounts for just \$268 billion. U.S. CONGRESSIONAL BUDGET OFFICE, CBO'S FEBRUARY 2013 ESTIMATE OF THE EFFECTS OF THE AFFORDABLE CARE ACT ON HEALTH INSURANCE COVERAGE 2 (2013); and author's calculations.

authority.<sup>73</sup> In response, IRS officials and representatives of both the Treasury and HHS Departments insisted such authority was in the Act yet cited no specific provisions in support.<sup>74</sup> A Treasury Department spokeswoman said the Department is “confident that providing tax credits to all eligible Americans, no matter where they live and whether their state runs the exchange, is consistent with the intent of the law and our ability to interpret and implement it.”<sup>75</sup>

On November 3, 2011, two dozen members of the House of Representatives wrote IRS Commissioner Douglas H. Shulman a letter arguing that the proposed rule “contradicts the explicit statutory language describing individuals’ eligibility for receipt of these tax credits.”<sup>76</sup> On November 29, Shulman responded:

The statute includes *language that indicates* that individuals are eligible for tax credits whether they are enrolled through a State-based Exchange or a Federally-facilitated Exchange. Additionally, neither the Congressional Budget Office score nor the Joint

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73. Letter from Rep. David Phil Roe, U.S. House of Representatives, to Douglas Shulman, Comm’r, Internal Revenue Service (Nov. 4, 2011), *available at* [http://roe.house.gov/UploadedFiles/Letter\\_to\\_IRS\\_Commissioner\\_regarding\\_tax\\_credits\\_under\\_PPACA\\_-\\_11.03.11.pdf](http://roe.house.gov/UploadedFiles/Letter_to_IRS_Commissioner_regarding_tax_credits_under_PPACA_-_11.03.11.pdf); Letter from Sen. Orrin G. Hatch, U.S. Senate, to Timothy Geithner, Sec’y, Dep’t of the Treasury and Douglas Shulman, Comm’r, Internal Revenue Serv. (Dec. 1, 2011), *available at* <http://finance.senate.gov/newsroom/ranking/download/?id=d8c3f533-132c-4cec-be10-8008402c21d8>; *see also* Adler & Cannon, *supra* note 11.
74. *See, e.g.*, Letter from Douglas H. Shulman, Comm’r, Internal Revenue Serv., to Rep. David Phil Roe, U.S. House of Representatives (Nov. 29, 2011), *available at* [http://roe.house.gov/UploadedFiles/IRS\\_Response\\_to\\_letter\\_on\\_PPACA\\_Exchange.pdf](http://roe.house.gov/UploadedFiles/IRS_Response_to_letter_on_PPACA_Exchange.pdf); CTRS. FOR MEDICARE & MEDICAID SERVS., STATE EXCHANGE IMPLEMENTATION QUESTIONS AND ANSWERS 8 (2011) [hereinafter STATE EXCHANGE IMPLEMENTATION].
75. Sara Hansard, *Private Exchanges Could Impact Success of State Exchanges*, BNA HEALTH INSURANCE REPORT, Oct. 26, 2011.
76. Letter from Rep. David Phil Roe, U.S. House of Representatives, to Douglas Shulman, Comm’r, Internal Revenue Serv. (Nov. 4, 2011), *available at* [http://roe.house.gov/UploadedFiles/Letter\\_to\\_IRS\\_Commissioner\\_regarding\\_tax\\_credits\\_under\\_PPACA\\_-\\_11.03.11.pdf](http://roe.house.gov/UploadedFiles/Letter_to_IRS_Commissioner_regarding_tax_credits_under_PPACA_-_11.03.11.pdf). On December 1, Senate Finance Committee ranking member Orrin Hatch (R-UT) likewise pressed this issue in a letter to Commissioner Shulman and Treasury Secretary Timothy Geithner. Sam Baker, *Hatch: IRS Can’t Offer Tax Credits in Federal Insurance Exchange*, THE HILL (Dec. 1, 2011, 2:40 PM), <http://thehill.com/blogs/healthwatch/health-reform-implementation/196585-hatch-irs-cant-offer-tax-credits-in-federal-insurance-exchange>; Letter from Sen. Orrin G. Hatch, U.S. Senate, to Timothy Geithner, Sec’y, Dep’t of the Treasury and Douglas Shulman, Comm’r, Internal Revenue Serv. (Dec. 1, 2011), *available at* <http://finance.senate.gov/newsroom/ranking/download/?id=d8c3f533-132c-4cec-be10-8008402c21d8>.

Committee on Taxation technical explanation of the Affordable Care Act discusses excluding those enrolled through a Federally-facilitated exchange.<sup>77</sup>

On November 29, the Department of Health and Human Services offered a similar defense:

The proposed regulations . . . are clear on this point and *supported by the statute*. Individuals enrolled in coverage through either a State-based Exchange or a Federally-facilitated Exchange may be eligible for tax credits . . . Additionally, neither the Congressional Budget Office score nor the Joint Committee on Taxation technical explanation discussed limiting the credit to those enrolled through a State-based exchange.<sup>78</sup>

Despite the public concerns about the proposed regulations, the IRS stayed the course. Late in the afternoon on Friday, May 18, 2012,<sup>79</sup> the IRS issued a final rule adopting its proposal without significant change.<sup>80</sup> The agency claimed its decision was supported by legislative intent, if not the actual language of the Act:

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

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77. Letter from Douglas H. Shulman, Comm'r, Internal Revenue Serv., to Rep. David Phil Roe, U.S. House of Representatives (Nov. 29, 2011), *available at* [http://roe.house.gov/UploadedFiles/IRS\\_Response\\_to\\_letter\\_on\\_PPACA\\_Exchange.pdf](http://roe.house.gov/UploadedFiles/IRS_Response_to_letter_on_PPACA_Exchange.pdf) (emphasis added).

78. STATE EXCHANGE IMPLEMENTATION, *supra* note 74.

79. The timing of the release of the final rule by the IRS, however, could be recognition that the final rule would not be warmly received. *See The Art of the Friday News-Dump*, NATIONAL JOURNAL, <http://www.nationaljournal.com/the-art-of-the-friday-news-dump-20110722> (last updated Nov. 9, 2012, 3:44 PM) (“When newsmakers release a tidbit on a Friday afternoon, chances are, it’s not something that puts them in the best light. Stories dumped on Fridays, as the strategy suggests, peter out during the weekend—or at least give the subjects more time to craft their responses.”).

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



it is *consistent with* the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.<sup>81</sup>

On October 12, 2012, the Treasury Department offered this explanation of the rule in response to a request from the chairman of the House Committee on Oversight and Government Reform:

We interpreted the statutory language in context and consistent with the purpose and structure of the statute as a whole, pursuant to longstanding and well-established principles of statutory construction. For example, ACA section 1311 refers to an exchange being “established by a State.” Congress provided in section 1321, however that where a state was not proceeding with an exchange, HHS would establish and operate “such Exchange within the State,” making a federally-facilitated exchange the equivalent of a state exchange in all functional respects. Moreover, throughout the ACA, Congress refers to the exchanges as “exchanges,” “exchanges established by a state,” and “exchanges established under the ACA.” There is no discernible pattern that suggests Congress intended the particular language in section 36B(b)(2)(A) to limit the availability of the tax credit.

In addition, the information reporting requirements of section 36B(f)(3) apply to exchanges under both ACA sections 1311 and 1321. This requirement relates to the administration of the premium tax credit. The placement of this provision in section 36B and the information required to be reported—including information related to eligibility for the credit and receipt of advance payments—strongly suggests [sic] that all taxpayers who enroll in qualified health plans, either through the federally-facilitated exchange or a state exchange, should qualify for the premium tax credit. Our interpretation is consistent with the explanation of the ACA released by the non-partisan Congressional Joint Committee on Taxation and with the assumptions made by the Congressional Budget Office in estimating the effects of the ACA.<sup>82</sup>

An October 25, 2012, letter from the Treasury Department to the chairman reiterated these points and added:

On September 19, 2012, the Oklahoma Attorney General amended an existing civil lawsuit in the Eastern District of Oklahoma to

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81. *Id.* (emphases added).

82. See Letter from Mark J. Mazur, Assistant Sec’y for Tax Policy, U.S. Treasury Dep’t, to Rep. Darrell Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives (Oct. 12, 2012) (on file with authors) (emphasis on “such” in original; all other emphases added).

include claims challenging Treasury regulations promulgated under section 36B. We disagree strongly with these claims, and we intend to defend the lawsuit vigorously. Ultimately, however, it will be up to the courts to determine the proper interpretation of section 36B . . . .<sup>83</sup>

These statements are notable for what they do not include. Neither agency has identified any statutory language expressly authorizing the IRS to issue tax credits through federal Exchanges or authorizing the IRS to do so via regulation. For more than a year since the IRS's interpretation was first questioned, these agencies failed to cite any statutory language in support of the rule. Instead, the IRS claimed various unidentified provisions of the law "support" its interpretation, that its rule is "consistent with" the Act, and that the "relevant" legislative history does not contradict its interpretation. In October 2012, Treasury officials ultimately cited a provision of the statute that they claim supports that interpretation, yet did not claim that interpretation is compelled by the text of the PPACA.

#### IV. TEXT, LEGISLATIVE HISTORY, AND CONGRESSIONAL INTENT

Notwithstanding the Treasury Department's recently articulated legal theory, the IRS rule lacks statutory authority. The text of the PPACA does not authorize the IRS to offer tax credits through federal Exchanges. The plain text of the Act precludes it. Section 1401's language restricting tax credits to states that establish an Exchange under Section 1311 is clear and unambiguous. Nor can the rule be justified on other grounds. The IRS's position is not supported by the structure of the statute, its legislative history, or other indicia of congressional intent.<sup>84</sup> The remainder of the statute, along with the Act's

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83. See Letter from Alastair M. Fitzpayne, Assistant Sec'y for Legislative Affairs, U.S. Treasury Dep't, to Rep. Darrell Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives (Oct. 25, 2012) (on file with authors).

84. Although this Article often refers to congressional "intent," a body composed of 535 individuals cannot be said to have a single "intent." This is a convenient "shorthand" for how to characterize what is actually the result of negotiation, compromise, and deal-making among many lawmakers, each of whom may have his or her own specific intent with regard to the legislation. See Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 14 n.25 (2008) ("Characterizing the legislature, or the enacting coalition, as a unitary actor that 'knows' the effect of policies on outcomes and chooses the policy that would advance 'its' interest is a shorthand way of describing this more complex collective choice process."). Thus, to say that a bill provision was intentional is to say that it is a result of this process, and was drafted as

legislative history, shows that this restriction was intentional and purposeful and that the plain meaning of Section 1401 reflects Congress' intent. The PPACA's authors strongly preferred state-run Exchanges over federal Exchanges, the statute repeatedly uses financial incentives to encourage states and others to comply with the Act's regulatory scheme, and the idea of conditioning tax credits on states creating Exchanges was part of this debate from the beginning. Both of the PPACA's antecedent bills thus contained the feature of withholding subsidies from residents of uncooperative states. The PPACA's authors knew how to provide for Exchanges established by different levels of government to operate similarly and did so when that was their intent. Similarly, they knew how to authorize tax credits in Exchanges established by levels of government other than the states, which they also did when that was their intent. During congressional consideration, the PPACA's lead author affirmed that the law conditions tax credits on states establishing Exchanges. In addition, the legislative history strongly suggests that House Democrats were aware of this feature before they approved the PPACA. While PPACA supporters in the House and Senate closely scrutinized and repeatedly amended Section 1401 through the HCERA, they left intact the relevant provisions. Finally, even if the foregoing evidence demonstrating that Section 1401 accurately reflects congressional intent did not exist, PPACA supporters' approval of *this* text reveals that their intent was indeed to enact a bill that restricts tax credits to state-run Exchanges. At no point have defenders of the rule identified anything in the legislative history that contradicts the plain meaning of Section 1401.

Professor Timothy Jost has argued the provisions restricting tax credits to state-run Exchanges "clearly say what Congress clearly did not mean."<sup>85</sup> On the contrary, the PPACA's authors clearly meant what the statute clearly says.

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intended by some of those involved in writing and amending the bill, and not to claim that every member of Congress who supported a bill desired each provision of the bill. This is particularly so given the unfortunate tendency of some legislators to not even read the legislation upon which they express opinions and cast votes. *See generally* Hanah Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 135, 136-38 (2011).

85. Timothy Stoltzfus Jost, *Yes, the Federal Exchange Can Offer Premium Tax Credits*, HEALTH REFORM WATCH (Sept. 11, 2011), <http://www.healthreformwatch.com/2011/09/11/yes-the-federal-exchange-can-offer-premium-tax-credits>. *Cf.* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Professor Jost is an authoritative figure on the PPACA and its implementation. *See* Erika Eichelberger, *Conservatives Insist Obamacare Is on Its Death Bed*, MOTHER JONES (Jan. 24, 2013, 3:06 AM), <http://www.motherjones.com/politics/2013/01/obamacare-exchanges-conservative-cato-freedomworks> ("Timothy Jost[] [is] a health care law

A. *Plain Text*

The starting point for statutory interpretation is the statute's text.<sup>86</sup> As noted above, the PPACA authorizes two methods for establishing an Exchange within a state. Section 1311 provides that "Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an 'Exchange')" and provides rules for state-run Exchanges.<sup>87</sup> For purposes of Section 1311, the Act specifically requires that an Exchange must be "a governmental agency or nonprofit entity that is established by a State."<sup>88</sup> Section 1304(d) clarifies, "In this title, the term 'State' means each of the 50 States and the District of Columbia."<sup>89</sup>

Section 1321 requires the federal government to create an Exchange in states that elect not to create their own. Specifically, if a state either fails to create an Exchange or fails to implement the PPACA's health insurance regulations to the Secretary's satisfaction, Section 1321 requires the HHS Secretary to "establish and operate such Exchange." Section 1321 thus requires a federal "fallback" for states that do not create Exchanges of their own. State-run Exchanges created under Section 1311 and federal fallback exchanges created under Section 1321 are distinct.

Section 1401 authorizes premium-assistance tax credits and makes them available only through state-run Exchanges. This section specifies

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scholar at the Washington and Lee University School of Law who regularly meets with HHS officials on implementation of the legislation . . .").

86. See, e.g., *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979) ("The starting point in any case involving the meaning of a statute, is the language of the statute itself."); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the act is framed . . ."); see also *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) ("[T]he best evidence of Congress's intent is the statutory text."); UNIF. STATUTE & RULE CONSTR. ACT § 19 (1995) ("The text of a statute or rule is the primary, essential source of its meaning."); Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 97, 111 (H.C. Syrett ed., 1965) ("[W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself.").
87. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311, 124 Stat. 119, 173 (2010).
88. § 1311(d).
89. § 1304(d). But note that Section 1323 provides: "A territory that elects . . . to establish an Exchange in accordance with part II of this subtitle and establishes such an Exchange in accordance with such part shall be treated as a State for purposes of such part[.]" Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1204, 124 Stat. 1029, 1055-56 (2010).

that taxpayers may receive a tax credit only during a qualifying “coverage month,” which occurs only when “the taxpayer is covered by a qualified health plan . . . that was enrolled in through an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act.”<sup>90</sup> By its express terms, this provision only applies to Exchanges “established by a state” and “established . . . under Section 1311.” Section 1401 further emphasizes that tax credits are available only through Section 1311 Exchanges when it details the two methods for calculating the amount of the credit. The first method bases the amount on the premiums of a qualified health plan that the taxpayer “enrolled in through an Exchange established by the State under [Section] 1311 of the Patient Protection and Affordable Care Act.”<sup>91</sup> The second method bases the amount on the premium of the “second lowest cost silver plan . . . which is offered through the same Exchange through which the qualified health plans taken into account under [the first method] were offered.”<sup>92</sup> Both methods therefore require that taxpayers obtain coverage through a state-run Exchange. The second method also relies on the concept of an “adjusted monthly premium,” which only applies to “individual[s] covered under a qualified health plan taken into account under paragraph (2)(A)”<sup>93</sup>—i.e., “through an Exchange established by the State under [Section] 1311.”<sup>94</sup>

These clauses carefully restrict tax credits to state-created Exchanges. They either employ or refer to not one but two limiting phrases: “by the State” and “under Section 1311.” Either phrase by itself would have been sufficient to limit availability of tax credits to state-run Exchanges as (1) states can only establish Exchanges under Section 1311 and (2) that section provides no authority for any other entity to establish Exchanges.<sup>95</sup> The repeated use of both phrases makes the meaning and effect of the language abundantly clear.<sup>96</sup>

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90. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1401, 124 Stat. 216 (2010).

91. *Id.* (emphasis added).

92. *Id.* (emphasis added).

93. *Id.*

94. *Id.* (emphasis added).

95. Section 1311 does authorize “regional” or other interstate Exchanges that “may operate in more than one State if each State in which such Exchange operates permits such operation.” Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311(f), 124 Stat. 119, 179 (2010). Since interstate Exchanges satisfy both the “established by the state” and “under section 1311” requirements, Section 1401 authorizes tax credits through these Exchanges as well.

96. Even if one were to conclude that federal Exchanges established under Section 1321 could be considered Section 1311 exchanges, they would still not be Exchanges “established by a state.” See *infra* Part V.D.

Indeed, Section 1401 either employs or refers to this restrictive language a total of seven times.<sup>97</sup> Even though the appearance of those phrases in the definition of “coverage month” is sufficient to restrict tax credits to state-run Exchanges, *every* reference to Exchanges in Section 1401’s tax-credit eligibility rules is to an Exchange “established by the State under section 1311.” The Act contains no parallel language authorizing tax credits in Exchanges established by the federal government under Section 1321. Nor does it contain language authorizing the IRS to issue tax credits through the “functional equivalent” of a Section 1311 Exchange.

Courts are to “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”<sup>98</sup> To treat federal fallback Exchanges as equivalent to state Exchanges established under Section 1311 is to ignore the PPACA’s repeated reference to Exchanges “established by the State” and render this latter language into mere surplusage.<sup>99</sup> Further, as Professor James Blumstein notes, under the familiar canon of *expressio unius est exclusio alterius*, “the ACA’s granting of subsidies for income-qualified enrollees under state exchanges established under Section 1311 is to be construed not to grant comparable subsidies for income-qualified enrollees under federal exchanges established under Section 1321.”<sup>100</sup>

The painstaking repetition of the phrase “established by the State” makes the plain meaning of the statute abundantly clear. As the Congressional Research Service has written,

a strictly textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS’s authority to

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97. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1401, 124 Stat. 216 (2010).
98. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *see also Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) (“Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.” (citing *Russello v. United States*, 464 U.S. 16, 23 (1983))).
99. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“We are . . . ‘reluctan[t] to treat statutory terms as surplusage’ in any setting” (citation omitted)); *Jones v. United States*, 529 U.S. 848, 857 (2000) (“Judges should hesitate . . . to treat statutory terms in any setting as surplusage” (citation and internal quotation omitted)). This principle is well established and has been articulated repeatedly since the Marshall Court. *See, e.g., Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122, 202 (1819).
100. *Implementation of Health Insurance Exchanges and Related Provisions: Before the Comm. on Ways and Means, Subcomm. on Health, House of Representatives*, 112th Cong. (Sept. 5, 2012) (testimony of James F. Blumstein), available at [http://waysandmeans.house.gov/uploadedfiles/house\\_ways\\_and\\_means\\_testimony92112.pdf](http://waysandmeans.house.gov/uploadedfiles/house_ways_and_means_testimony92112.pdf).

issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a state-established exchange. Therefore, an IRS interpretation that extended tax credits to those enrolled in federally facilitated exchanges would be contrary to clear congressional intent, receive no *Chevron* deference, and likely be deemed invalid.<sup>101</sup>

Section 1402 authorizes cost-sharing subsidies for “an individual who enrolls in a qualified health plan . . . offered through *an* Exchange.”<sup>102</sup> This language would appear more inclusive. But Section 1402 also stipulates that “[n]o cost-sharing reduction shall be allowed under this section with respect to coverage for any month *unless the month is a coverage month* with respect to which a [premium assistance tax] credit is allowed to the insured . . . .”<sup>103</sup> In other words, Section 1402 explicitly and exclusively ties cost-sharing subsidies to premium-assistance tax credits, which Section 1401 explicitly and exclusively ties to state-run Exchanges created under Section 1311.

There is a discernible pattern here. Congress tightly crafted the eligibility rules for premium-assistance tax credits and cost-sharing subsidies so that they would be conditioned on each state’s implementation of an Exchange. The statute provides no authority for the IRS to offer either entitlement through federal Exchanges created under Section 1321. Because cost-sharing subsidies are available only where premium-assistance tax credits are available, the discussion below will focus primarily on tax credits.

The remainder of the statute shows this choice was intentional. Section 1421 authorizes tax credits for certain small businesses that offer to make “a nonelective contribution on behalf of each employee who enrolls in a qualified health plan offered to employees by the employer through *an exchange*.”<sup>104</sup> Just as the eligibility rules for premium-

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101. Memorandum from Jennifer Staman & Todd Garvey, Cong. Research Serv., Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act 8 (July 23, 2012), *available at* [http://www.statereform.org/sites/default/files/premium\\_credits\\_and\\_federally\\_created\\_exchanges\\_copy.pdf](http://www.statereform.org/sites/default/files/premium_credits_and_federally_created_exchanges_copy.pdf). But note the CRS qualified that conclusion: “However, given the . . . alternative interpretive arguments that may suggest a more inclusive construction—including legislative history, legislative purpose, and context—a more searching analysis of Congress’s intent in enacting the provision may lead to a less clear result.” *Id.* We discuss those alternative arguments below.

102. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1402, 124 Stat. 119, 221 (2010) (emphasis added).

103. *Id.* (emphasis added).

104. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1421, 124 Stat. 119, 237-42 (2010) (emphasis added). We are indebted to Adriane Crouse, Assistant Director, Division of Research, Missouri Senate, and Missouri Sen. Robert Schaaf for bringing the small-business tax credit language to our attention. Letter from Adriane Crouse, Assistant Director,

assistance tax credits consistently refer to Exchanges “established by a State under section 1311,” Section 1421 also uses consistent language when referring to Exchanges in the rules governing small-business tax credits. The word “exchange” appears four times in Section 1421. Each reference is to “an exchange,” a phrase that encompasses both state-created Exchanges (Section 1311) and federal Exchanges (Section 1321). The contrast between Sections 1401 and 1421 reinforces the plain meaning of the language limiting premium-assistance tax credits to Exchanges “established by the State under section 1311.” As surely as the PPACA makes small-business tax credits available through both state-established and federal Exchanges, it offers premium-assistance tax credits solely through the former.

*B. Preference for State-Run Exchanges*

The language, structure, legislative history, and congressional debate over the PPACA demonstrate that its authors preferred state-run Exchanges to federal Exchanges. From the outset, the Act directs states to establish Exchanges, and many of the PPACA’s supporters presumed that all states would create Exchanges of their own.

The text of the PPACA suggests that Congress sought universal state cooperation. Section 1311(b) provides that “each state *shall* . . . establish an American Health Benefit Exchange” by 2014.<sup>105</sup> The Act further details various requirements state-run Exchanges must meet. This was not accidental. The Senate Finance Committee, where the relevant PPACA language originated, wrestled with the question of whether states or the federal government should take the lead in creating Exchanges. A November 2008 “white paper” issued by Chairman Max Baucus (D-MT) endorsed a single, federal Exchange: “The Baucus plan would ensure that every individual can access affordable coverage by creating a nationwide insurance pool called the Health Insurance Exchange.”<sup>106</sup> The committee subsequently heard testimony from a broad coalition endorsing state-run rather than federal Exchanges.<sup>107</sup> When Sen. Baucus introduced his “Chairman’s

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Division of Research, to Senator Robert Schaaf, Missouri Senate (Nov. 13, 2012) (on file with authors).

105. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311(b), 124 Stat. 119, 173 (2010) (emphasis added).

106. MAX BAUCUS, CALL TO ACTION: HEALTH REFORM 2009 iv (Nov. 12, 2008).

107. Those testifying before the Committee included Stuart M. Butler, Director of the Center for Policy Innovation at The Heritage Foundation:

There is broad support for the concept of a health insurance exchange to improve the functioning of a competitive market for plans . . . . But should an exchange be at the national level, or at the state level, and should there be overlapping exchanges? A national exchange may seem attractive but it is accompanied by



Mark” in September 2009, it directed states to establish Exchanges and provided for a federal fallback Exchange.<sup>108</sup> Advocates of state-

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many problems . . . . The solution would be for the federal government to do two things. First, set out broad objectives for exchanges, and allow states to propose designs for state or regional exchanges to be certified by the federal government.

*Roundtable Discussion on Expanding Health Care Coverage: Before the S. Comm on Finance, 111th Cong. 2 (May 5, 2009) (testimony of Stuart M. Butler, Vice President, Heritage Foundation), available at <http://www.finance.senate.gov/imo/media/doc/Stuart%20Butler.pdf>.*

Len M. Nichols, Director of the Health Policy Program at The New America Foundation:

Do note, however, these new exchanges could be organized at the state or even substate levels. It is not necessary (or wise) to have one national exchange/marketplace . . . . Insurance market rules governing the new marketplaces should be uniform across the country, but the exchanges themselves could be organized on a national, state, or sub-state level. It is important to remember that all health markets (like politics) are local. Competing against Kaiser in San Francisco or Group Health in Seattle is different than competing against Blue Cross of Arkansas in Little Rock. Exchange managers and oversight boards can and should bring local expertise and flexibility to the overall federal superstructure.”

*Roundtable Discussion on Expanding Health Care Coverage: Before the S. Comm on Finance, 111th Cong. 4 (May 5, 2009) (testimony of Len M. Nichols, Director, New America Foundation Health Policy Program), available at <http://www.finance.senate.gov/imo/media/doc/Len%20Nichols.pdf>.*

Scott Serota, President and CEO of the Blue Cross and Blue Shield Association:

[C]reating a federal ‘connector’ would be complex, costly and time-consuming. Creation of a federal connector could also undermine state regulation and authority, creating conflicting federal-state rules that would result in regulatory confusion and adverse selection. A state-based approach would accomplish the goals of a federal connector while ensuring current consumer protections afforded by state oversight and assuring faster implementation at lower costs by avoiding the creation of a new federal bureaucracy. To encourage states to establish State Insurance Markets, federal funding should be provided to offset the cost of development.

*Roundtable on Health Care Coverage: Before the S. Comm. on Finance, 111th Cong. 6 (May 5, 2009) (testimony of Scott Serota, President and CEO, Blue Cross and Blue Shield Association), available at <http://www.finance.senate.gov/imo/media/doc/Scott%20Serota.pdf>.*

108. S. COMM. ON FINANCE, 111TH CONG., AMERICA’S HEALTHY FUTURE ACT OF 2009 11 (Chairman’s Mark 2009) (“States must establish an exchange that complies with the requirements set forth in the Federal law. If a state does not establish an exchange within 24 months of enactment,

established Exchanges prevailed in the Finance Committee and later in both chambers of Congress. It is unlikely that the PPACA would have passed the Senate without this provision.<sup>109</sup>

The congressional debate over the PPACA and its antecedents correspondingly emphasized state-run Exchanges over federal Exchanges. We surveyed eight Senate committee hearings and markups,<sup>110</sup> the Finance Committee Chairman’s Mark of the America’s Healthy Future Act of 2009,<sup>111</sup> and the House and Senate floor debates over the PPACA.<sup>112</sup> In those venues, Democratic members of Congress and their staffs made 117 references to “state Exchanges” or state-established Exchanges, three references to federal Exchanges, and 359 non-specific references to Exchanges. Republican members of Congress, all of whom opposed the PPACA, mentioned state or state-established Exchanges forty-one times and federal Exchanges seven times in these venues. The emphasis on state-run Exchanges reflects the PPACA’s emphasis. When Republicans spoke of federal Exchanges, it was typically to raise the specter of a federal takeover of health care—a specter that PPACA supporters downplayed by emphasizing that Exchanges would be created

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the Secretary of HHS shall contract with a non-governmental entity to establish a state exchange that complies with the Federal legislation.”).

109. See Carrie Budoff Brown, *Nelson: National Exchange a Dealbreaker*, POLITICO (Jan. 25, 2010, 7:59 PM), [http://www.politico.com/livepulse/0110/Nelson\\_National\\_exchange\\_a\\_dealbreaker.html](http://www.politico.com/livepulse/0110/Nelson_National_exchange_a_dealbreaker.html); Patrick O’Connor & Carrie Budoff Brown, *Nancy Pelosi’s Uphill Health Bill Battle*, POLITICO (Jan. 9, 2010, 9:58 AM), <http://www.politico.com/news/stories/0110/31294.html>.
110. *Healthcare Reform: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 111th Cong. 8-10 (2009); *What Women Want: Equal Benefits for Equal Premiums: Full Comm. Hearing Before the S. Comm. on Health, Education, Labor & Pensions*, 111th Cong. (2009); *Affordable Health Choices Act: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*; 111th Cong. (2009); *Open Executive Session to Consider an Original Bill Providing for Health Care Reform: Hearing Before the S. Comm. on Finance*, 111th Cong. (2009); *The President’s Fiscal Year 2010 Health Care Proposals: Hearing Before the S. Comm. on Finance*, 111th Cong. (2009); *Covering the Uninsured: Making Health Insurance Markets Work: Hearing Before the S. Comm. on Finance*, 110th Cong. (2008); *High Health Care Costs: A State Perspective: Before the S. Comm. on Finance*, 110th Cong. (2008); *Health Care Reform: An Economic Perspective: Hearing Before the S. Comm. on Finance*, 110th Cong. (2008).
111. S. COMM. ON FINANCE, 111TH CONG., AMERICA’S HEALTHY FUTURE ACT OF 2009 (Chairman’s Mark 2009).
112. We searched the *Congressional Record* during the periods that each chamber was considering the PPACA—the Senate Record between June 1, 2009 and March 30, 2010, and the House Record between January 19, 2010 and March 22, 2010.

and run by the states.<sup>113</sup> Further reflecting the Act's preference for state-run Exchanges, the Joint Committee on Taxation's technical explanation of the revenue provisions in the PPACA and HCERA made fifteen references to state Exchanges, zero references to federal Exchanges, and fifty-one non-specific Exchange references.<sup>114</sup>

### C. *Financial Incentives*

Further evidence of this preference is that the PPACA's authors created large financial incentives to encourage states to establish Exchanges. The Act authorizes the Secretary of Health and Human Services to provide unlimited funding for states to cover the start-up costs of establishing Exchanges.<sup>115</sup> As of January 2013, the Secretary had issued a total of \$3.526 billion in Exchange grants to states.<sup>116</sup> The Secretary has announced these "start-up" grants will be available through 2019.<sup>117</sup> In contrast, the PPACA's authors failed to authorize any funding for HHS to create federal Exchanges.<sup>118</sup> Unlimited start-up grants and a lack of funding for federal Exchanges appear not only in

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113. *See, e.g.*, SENATE DEMOCRATIC POLICY COMM., FACT CHECK: RESPONDING TO OPPONENTS OF HEALTH INSURANCE REFORM (Sept. 21, 2009), available at <http://dpc.senate.gov/reform/reform-factcheck-092109.pdf> ("There is no government takeover or control of health care in any senate health insurance reform legislation . . . All the health insurance exchanges, which will create choice and competition for Americans' business in health care, are run by states.").
114. JOINT COMM. ON TAXATION, TECHNICAL EXPLANATION OF THE REVENUE PROVISIONS OF THE "RECONCILIATION ACT OF 2010," AS AMENDED, IN COMBINATION WITH THE "PATIENT PROTECTION AND ACCORDABLE CARE ACT" (2010).
115. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311, 124 Stat. 119, 177-78 (2010); *see* Memorandum from the Cong. Research Serv., Federal Grants For Planning and Establishment of Health Insurance Exchanges Under Section 1311(a) of the Patient Protection and Affordable Care Act (Feb. 7, 2011).
116. *Total Health Insurance Exchange Grants*, 2013, THE HENRY J. KAISER FAMILY FOUNDATION: KAISER STATE HEALTH FACTS, <http://www.statehealthfacts.org/comparabletable.jsp?ind=964&cat=17> (noting \$3,533,977,252 has been awarded as of March 1, 2013).
117. *See* Michael F. Cannon, *HHS Offers to Pay Six Years of Operating Costs for Some States' ObamaCare Exchanges*, CATO AT LIBERTY (July 3, 2012, 4:13 PM), <http://www.cato-at-liberty.org/lhs-offers-to-pay-six-years-of-operating-costs-for-some-states-obamacare-exchanges/>.
118. *See* Michael F. Cannon, *President's Budget Shows Feds Can't Create ObamaCare 'Exchanges'*, CATO AT LIBERTY (Feb. 13, 2012, 5:08 PM), <http://www.cato-at-liberty.org/presidents-budget-shows-feds-cant-create-obamacare-exchanges/>; J. Lester Feder, *Sebelius: Exchange Funding Request was Anticipated*, POLITICO PRO (Feb. 14, 2012), <https://www.politico.com/go/?id=9220> (subscription only).

the PPACA but also in both antecedent bills reported by the Finance and HELP committees.<sup>119</sup>

Making credits and subsidies available solely through state-run Exchanges is consistent with the PPACA's modus operandi of using financial incentives to elicit a desired behavior. Under the Act, individuals who fail to obtain health insurance must pay a penalty. Large employers that fail to offer required health benefits likewise must pay a penalty.

Many statutes seek to encourage state cooperation by threatening to cut off funding to recalcitrant states.<sup>120</sup> The PPACA contains this feature in other provisions such as the Medicaid expansion.<sup>121</sup> Under the Act as passed, states that failed to expand their Medicaid programs to those below 138 percent of the federal poverty level would have lost all federal Medicaid grants, which account for 12 percent of state revenues.<sup>122</sup> The Act imposes a "maintenance of effort" requirement on states' Medicaid programs that only lifts upon certification of an Exchange "established by the State under section 1311."

States that opt to establish an Exchange may receive unlimited start-up funds from HHS if, "as determined by the Secretary," the state makes adequate progress toward establishing an Exchange, implements other parts of the Act, and "meet[s] such other benchmarks as the Secretary may establish."<sup>123</sup> This feature—conditioning the continued availability of start-up funds on state cooperation—appears in the HELP committee bill as well.<sup>124</sup> It is hardly a departure for the Act to condition

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119. America's Healthy Future Act of 2009, S. 1796, 111th Cong. § 2237(c) (2009); *see* Affordable Health Choices Act, S. 1679, 111th Cong. § 3101(a) (2009).

120. *See generally* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 858-65 (1998).

121. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2581-82 (2012) (describing the Medicaid expansion).

122. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2001, 124 Stat. 119, 271-75 (2010). Even after the Supreme Court's ruling in *NFIB v. Sebelius* invalidating this requirement, the Act conditions new federal Medicaid grants on states expanding their Medicaid programs. CINDY MANN ET AL., MEDICAID AND STATE BUDGETS: LOOKING AT THE FACTS 1 (2008), <http://ccf.georgetown.edu/wp-content/uploads/2012/03/Medicaid-state-budgets-2007.pdf> ("It is often reported that states spend, on average, almost 22 percent of their state budgets on Medicaid, but this figure can be misleading because it considers federal as well as state funds. On average, federal funds account for 56.2 percent of all Medicaid spending.").

123. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311(d)(1), 124 Stat. 119, 176 (2010).

124. The Finance Committee bill contained language almost identical to the PPACA. The HELP Committee bill explicitly withheld credits from

the availability of tax credits and cost-sharing subsidies on state cooperation.

The language in Sections 1401 and 1402 restricting credits and subsidies to state-created Exchanges is more than just consistent with the rest of the Act. It is integral to Section 1311's directive that states "shall" create an Exchange. Because it likely creates a larger financial incentive than the Medicaid "maintenance of effort" requirement, it is the primary sanction imposed on states that do not establish Exchanges.<sup>125</sup> It thus animates Section 1311's "shall." To ignore it as the IRS has would sap that directive of most of its force.

As noted above, the federal government cannot actually force states to create Exchanges, as this would constitute unconstitutional commandeering.<sup>126</sup> The federal government can, however, utilize a combination of positive and negative incentives to induce state cooperation—in this case, subsidies for creating Exchanges and the threat of a federally run Exchange if a state does not create its own.

Such incentives are common. Various federal programs, including Medicaid, condition the receipt of federal funding on state acceptance of the federal government's conditions.<sup>127</sup> In this context, limiting the availability of tax credits to insurance purchased in state-run Exchanges can be seen as just one more inducement for state cooperation: the PPACA threatens states with the loss of tax credits for state residents if they do not create an Exchange.<sup>128</sup>

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residents of states that refused or were slow to create their own health insurance Gateways. S. 1679, § 3104(d)(2).

125. The PPACA's "maintenance of effort" provision requires states to maintain aspects of their Medicaid programs as they were in 2010, which can be a costly proposition, and only lifts this requirement once "the Secretary determines that an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act is fully operational." See 42 U.S.C. §§ 1396a(a)(74), (a)(gg). There are real questions about whether the maintenance-of-effort provisions are enforceable under *NFIB v. Sebelius*, in which the Supreme Court held that Congress may not impose retroactive conditions on federal Medicaid funds or condition those funds on state participation in a new program. See, e.g., Ralph Lindeman, *PPACA Opponents Eyeing New Challenge To Law's Maintenance-of-Effort Requirement*, BNA HEALTH L. REP. (Oct. 26, 2012), available at <http://lawprofessors.typepad.com/files/moe-challenge---bna-article-1.pdf>.
126. See *infra* notes 55-59 and accompanying text.
127. Additional examples include the No Child Left Behind Act, the Safe Drinking Water Act, and the Clean Air Act.
128. The PPACA is not the first law to offer to reduce the tax burden on private parties in order to encourage state cooperation with federal policy. In *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), the Supreme Court upheld federal legislation "predicating tax abatement on a State's adoption of a particular type of unemployment policy." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603 (2012); see also *New York v. United States*,

This idea of using conditional tax credits to avoid the commandeering problem was also part of the health care reform debate well before PPACA supporters first introduced any legislation. In early 2009, Professor Jost wrote:

Congress cannot require the states to participate in a federal insurance exchange program by simple fiat. This limitation, however, would not necessarily block Congress from establishing insurance exchanges. Congress could invite state participation in a federal program, and provide a federal fallback program to administer exchanges in states that refused to establish complying exchanges. Alternatively it could exercise its Constitutional authority to spend money for the public welfare (the “spending power”), either *by offering tax subsidies for insurance only in states that complied with federal requirements* (as it has done with respect to tax subsidies for health savings accounts) or by offering explicit payments to states that establish exchanges conforming to federal requirements.<sup>129</sup>

#### *D. Antecedent Bills*

Both the Finance bill and the HELP bill withheld subsidies from taxpayers whose state governments failed to establish an Exchange or otherwise failed to implement the bills’ requirements.

The PPACA’s closest antecedent was the Finance Committee-reported “America’s Healthy Future Act of 2009” (S. 1796).<sup>130</sup> The relevant language in the PPACA is nearly identical to that of the Finance bill. Indeed, the four ways Section 1401 confines tax credits to state-run Exchanges appear almost verbatim in the Finance bill.<sup>131</sup>

505 U.S. 144 (1992) (upholding law that authorized surcharges on importation of low-level radioactive waste from noncompliant states).

129. Timothy S. Jost, *Health Insurance Exchanges: Legal Issues*, O’Neill Institute, Georgetown University Legal Center, no. 23, April 27, 2009, available at [http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1022&context=ois\\_papers](http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1022&context=ois_papers) (emphasis added). The earliest known version of this paper was posted online on January 1, 2009, by the Robert Wood Johnson Foundation, available at <http://www.rwjf.org/en/research-publications/find-rwjf-research/2009/01/health-insurance-exchanges.html>.
130. *Bill Summary & Status, 111th Congress, S. 1796*, THOMAS, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN01796:@@L&summ2=m&> (last visited Jan. 25, 2013); *America’s Healthy Future Act of 2009, S. 1796, 111th Cong. (2009)*.
131. Like the PPACA, the Finance bill would have created a new Section 36B in the Internal Revenue Code that offers two methods for determining the amount of a taxpayer’s premium assistance tax credit. Under the first method, found in Section 36B(b)(2)(A)(i), the bill bases the credit amount on the premiums for health plans “which were enrolled in through an Exchange established by the State under subpart B of title XXII of the

The HELP bill even more explicitly withheld credits in states that failed to implement its requirements, and it employed that strategy to encourage state cooperation even if the federal government created the Exchange. If a state sought to establish its own “Gateway” (i.e., Exchange) then the HELP bill provided that “any resident of that State who is an eligible individual shall be eligible for credits”—but only after the Secretary determined that the state had (1) created a qualified Gateway, (2) enacted legislation imposing various health insurance regulations on the state’s individual and small-group markets, and (3) enacted legislation subjecting its state and local governments to the bill’s employer mandate. If a state failed to meet these criteria, its residents would be ineligible for credits.<sup>132</sup> When an “establishing state” fell out of compliance, the HELP bill went so far as to revoke credits that state residents had already been receiving.<sup>133</sup>

If a state formally requested that HHS establish a Gateway for the state (such states were called “participating states”), the HELP bill authorized the federal government to do so and authorized credits within the federal Gateway. But the bill again withheld those credits if the state failed to satisfy (2) or (3).

If state officials opted neither to be an “establishing state” nor a “participating state,” then the HELP bill again authorized the federal government to create a Gateway for the state, authorized credits within that federal Gateway, imposed the bill’s health insurance regulations on the state, and deemed the state to be a “participating state.” However, the bill still withheld credits unless state officials complied with (3) as well.<sup>134</sup>

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*Social Security Act*,” a clear and exclusive reference to state-run Exchanges. America’s Healthy Future Act of 2009, S. 1796, 111th Cong. (2009) (emphasis added). But note there is no “subpart B” of the proposed title XXII. The parts in that title take capital letters while the subparts take numbers. Because *Part B* of the proposed title XXII directs states to create Exchanges, however, this appears to be an immaterial scrivener’s error. The second method uses the “adjusted monthly premium” for “the second lowest cost silver plan in the individual market which . . . is offered through *the same exchange* . . . .” S. 1796 § 1205(a) (emphasis added). The definition of “adjusted monthly premium” again refers to “qualified health benefits plan taken into account *under paragraph (2)(A)(i)* . . . .” *Id.* (emphasis added). Finally, the bill also ties “coverage months” to state-run Exchanges by defining them as months in which a taxpayer “is covered by a qualified health benefits plan described *in subsection (b)(2)(A)(i)*.” *Id.* (emphasis added).

132. See Affordable Health Choices Act, S. 1679, 111th Cong. § 3104(d) (2009).

133. § 3104(b)(2) (“If the Secretary determines that a State has failed to maintain compliance with such requirements, the Secretary may revoke the determination,” thereby revoking eligibility for credits).

134. § 3104(d).

This history demonstrates that restricting tax credits to state-run Exchanges was a deliberate policy choice. The authors of these provisions sought to limit the availability of credits to state-run Exchanges. The PPACA, the Finance bill, and the HELP bill all explicitly withheld credits from individuals as a means of encouraging state officials to implement the law. None of the three bills allowed residents of a state to receive credits absent cooperation by state officials. Some PPACA supporters may have preferred to provide tax credits for the purchase of health insurance in federally run Exchanges, but other proponents felt otherwise. It is the latter group that prevailed.

*E. Authorial Intent*

Statements by one of the PPACA's primary authors, Senate Finance Committee Chairman Max Baucus, provide additional evidence that the language of Section 1401 conditioning tax credits on a state establishing an Exchange was no accident.

During Finance Committee deliberations over the Baucus bill, which became the PPACA without pertinent alteration, Sen. John Ensign (R-NV) asked Baucus, "How do we [in this committee] have jurisdiction over changing state laws on coverage," such as through the bill's requirements that states establish Exchanges and adopt the bill's insurance regulations, when such matters are "only in the jurisdiction of the HELP Committee and not in the jurisdiction of this committee?" Baucus responded that the bill conditions the availability of tax credits on states complying with those directives.<sup>135</sup> Specifically, Senator Baucus explained that the requirements Ensign mentioned are among the "conditions to participate in the Exchange," and that "an Exchange . . . essentially is tax credits," which "are in the jurisdiction of this committee."<sup>136</sup> In other words, the reason the Finance Committee could

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135. Indeed, Section 1321 requires the Secretary to establish an Exchange within a state if a state fails to create one itself, or if the state fails to adopt the Act's insurance regulations. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1321(c), 124 Stat. 119, 186 (2010). The Act therefore conditions tax credits on states adopting those regulations as well.

136. In this colloquy, excerpted and lightly edited here, Sen. Baucus backs into an admission that his bill conditions tax credits on state officials creating an Exchange:

Senator Ensign: [Is] the underlying premise in this bill that . . . we are making states change their laws, their coverage laws? Aren't we doing that? And so why would not most of the coverage rules in this bill, underlying bill, be . . . only in the jurisdiction of the HELP Committee and not in the jurisdiction of this committee? . . . On certain minimum plans, exchanges. All those coverage things are state laws . . . How do we have jurisdiction over changing state laws on coverage? . . .



impose requirements on state-run Exchanges was because tax credits were conditional on state compliance.

Conditioning the tax credits on state compliance provided the jurisdictional hook the Committee needed to direct states to create Exchanges and otherwise alter their health insurance laws. If the Finance Committee bill had authorized tax credits in both state-run and federal Exchanges, then the Committee would not have had jurisdiction to impose regulatory requirements on state-run Exchanges. The operation of state Exchanges would have been outside the Committee's bailiwick and arguably immune from federal oversight altogether.<sup>137</sup> The fact that Section 1401 provided the Finance Committee this jurisdictional hook further demonstrates that the PPACA's authors intentionally restricted tax credits to state-run Exchanges.

It is irrelevant that the need for that jurisdictional hook evaporated when the Finance bill cleared committee or that other members of Congress may have preferred a different outcome. The text that the Finance Committee approved is the text that the House and Senate passed and that the president signed. Nor is it plausible to argue the IRS rule is justified because congressional intent subsequently changed; the language did not.<sup>138</sup>

In our extensive search of the PPACA's legislative history, this comment by Sen. Baucus is the *only* instance we found of a member of Congress discussing whether tax credits would be available in federal Exchanges. Like all other relevant aspects of the legislative history, it

The Chairman: There are conditions to participate in the Exchange.

Senator Ensign: That's right.

The Chairman: For setting up an Exchange.

Senator Ensign: These would be conditions to participate—

The Chairman: And states—an Exchange is, essentially is tax credits. Taxes are the jurisdiction of this committee.

*Executive Committee Meeting to Consider Health Care Reform: Before the S. Comm. on Finance*, 111th Cong. 326 (2009), available at <http://www.finance.senate.gov/hearings/hearing/download/?id=c6a0c668-37d9-4955-861c-50959b0a8392>; see also *Executive Committee Meeting to Consider an Original Bill Providing for Health Care Reform: Before the S. Comm. on Finance*, C-SPAN (starting at 2:53:21) (Sept. 23, 2009), <http://www.c-spanvideo.org/program/289085-4>.

137. As noted above, the federal government cannot commandeering state governments to implement federal policy. By the same token, the federal government cannot direct state governments *qua* state governments. Absent the creation of federal incentives, the only inducement for state cooperation would be the threatened creation of a federal Exchange.

138. As noted below, several revisions were made to Section 1401 through the Health Care and Education Reconciliation Act, yet the language relevant here was not changed. See *infra* notes 142-52 and accompanying text.

flatly contradicts the IRS's position. In contrast, the IRS and its defenders have identified nothing from the legislative history that supports the IRS rule. Senator Baucus's own words show both that the plain meaning of Section 1401 accurately reflects congressional intent and that the IRS rule undermines congressional intent by discouraging states from creating Exchanges.

*F. Non-Equivalence*

Further evidence that the plain meaning of Section 1401 reflects congressional intent is that PPACA supporters knew how to craft language ensuring that Exchanges created by different levels of government would operate identically, yet opted not to create such equivalence with respect to the availability of tax credits in state-run versus federal Exchanges.

Contrary to the Treasury Department's claim that the Act makes "a federally-facilitated exchange the equivalent of a state exchange in all functional respects," the Act does not provide that an Exchange established by the federal government under Section 1321 is a Section 1311 Exchange, shall be considered a Section 1311 Exchange, or is functionally equivalent to a Section 1311 Exchange. Instead, Title I of the Act imposes various requirements on state-created Exchanges which Section 1321 incorporates and imposes on federal Exchanges by reference. First, Section 1321(a) mentions "the requirements under this title . . . with respect to the establishment and operation of Exchanges . . . and such other requirements as the Secretary determines appropriate."<sup>139</sup> Section 1321(c) then provides that if a state either fails to create an Exchange or to implement the Act's health insurance regulations to the Secretary's satisfaction, "the Secretary shall . . . establish and operate such Exchange within the State and . . . take such actions as are necessary to implement such other requirements." Section 1321 does not deem Exchanges established by the federal government to have been established under Section 1311. It takes the requirements imposed on state-created Exchanges and incorporates them into Section 1321. Section 1311 and Section 1321 remain distinct.

Nor does Section 1321 create full equivalence between Exchanges established by the federal government and those established by states. Section 1321 instead imposes on federal Exchanges the same requirements that Title I imposes on state-created Exchanges. Those requirements include the eligibility restrictions (contained in Section 1401) that Title I imposes on premium-assistance tax credits. In no way does Section 1321 alter or conflict with those restrictions.

Moreover, the language of Section 1321 is a far cry from the explicit Exchange-equivalence language found in the health care bills Congress

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139. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1321(a)(1), 124 Stat. 119, 172 (2010).

rejected and elsewhere in the PPACA. The House-passed “Affordable Health Care for America Act” (H.R. 3962), for example, created a single federal Exchange for all states and allowed states to opt out by creating their own Exchanges. To ensure that certain aspects of state-run and federal Exchanges would operate in an identical manner, H.R. 3962 contained the following language: “any references in this subtitle to the Health Insurance Exchange or to the Commissioner in the area in which the State-based Health Insurance Exchange operates shall be deemed a reference to the State-based Health Insurance Exchange and the head of such Exchange, respectively.”<sup>140</sup>

The HELP bill likewise contained explicit equivalence language: “A Gateway shall be a governmental agency or nonprofit entity that is established by a State, in the case of an establishing State . . . ; or the Secretary, in the case of a participating State[.]”<sup>141</sup> Even with this language, as discussed above, the HELP bill allowed for state and federal Gateways to function differently based on a state’s level of cooperation, as it explicitly withheld subsidies in non-compliant states.

The PPACA contains full-equivalence language, but not with regard to federal Exchanges. The Act provides that Exchanges established by US territories shall be fully equivalent to state-run Exchanges. Section 1323, as added by HCERA, provides that “[a] territory that elects . . . to establish an Exchange in accordance with part II of this subtitle”—Part II includes Section 1311, but not Section 1321—“and establishes such an Exchange in accordance with such part shall be treated as a State for purposes of such part[.]”<sup>142</sup> Section 1323 also explicitly authorizes and appropriates funds for “premium and cost-sharing assistance to residents of the territory obtaining health insurance coverage through the Exchange[.]”<sup>143</sup> This language shows PPACA supporters knew how to create full equivalence between Section 1311 Exchanges and other Exchanges, particularly with regard to tax credits and cost-sharing subsidies, when that was their intent. Congress created full functional equivalence for Exchanges established by federal territories but not for exchanges established by the federal government.<sup>144</sup>

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140. Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 308(e) (2009).

141. Affordable Health Choices Act, S. 1697, 111th Cong. § 3101(b) (2009).

142. Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1204, 124 Stat. 1029, 1055 (2010).

143. § 1204(b).

144. As a general rule, if Congress adopts particular language in one part of a statute, but omits it in another, it is presumed Congress acted “intentionally and purposely in the disparate inclusion or exclusion.” *See* *Russello v. United States*, 464 U.S. 16, 23 (1983) (citing *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

The HCERA also added information-reporting requirements to the Act.<sup>145</sup> These provisions explicitly require both Section 1311 Exchanges and Section 1321 Exchanges to report an array of information pertaining to the purchase of health insurance plans, including the level of coverage purchased, identifying information about the purchaser, the premium paid, and the amount of any advance payments of tax credits and cost-sharing subsidies.

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145. Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1004, 124 Stat. 1029, 1035 (2010); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1401, 124 Stat. 119, 219 (2010) (adding § 36B(f) to the IRC). Congress has amended this subsection through subsequent legislation. *See* Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, Pub. L. No. 112-9, § 4, 125 Stat. 36, 36-37 (2011). I.R.C § 36B(f), as added to the PPACA by HCERA:

(3) INFORMATION REQUIREMENT. Each Exchange (or any person carrying out 1 or more responsibilities of an Exchange under section 1311(f)(3) or 1321(c) of the Patient Protection and Affordable Care Act) shall provide the following information to the Secretary and to the taxpayer with respect to any health plan provided through the Exchange:

(A) The level of coverage described in section 1302(d) of the Patient Protection and Affordable Care Act and the period such coverage was in effect.

(B) The total premium for the coverage without regard to the credit under this section or cost-sharing reductions under section 1402 of such Act.

(C) The aggregate amount of any advance payment of such credit or reductions under section 1412 of such Act.

(D) The name, address, and TIN of the primary insured and the name and TIN of each other individual obtaining coverage under the policy.

(E) Any information provided to the Exchange, including any change of circumstances, necessary to determine eligibility for, and the amount of, such credit.

(F) Information necessary to determine whether a taxpayer has received excess advance payments.

(g) REGULATIONS. The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section, including regulations which provide for—

(1) the coordination of the credit allowed under this section with the program for advance payment of the credit under section 1412 of the Patient Protection and Affordable Care Act, and

(2) the application of subsection (f) where the filing status of the taxpayer for a taxable year is different from such status used for determining the advance payment of the credit.

Supporters of the IRS rule maintain these reporting requirements show that Congress sought to make federal and state-run Exchanges equivalent with respect to tax credits.<sup>146</sup> The Treasury Department writes, “The placement of this provision in section 36B and the information required to be reported . . . strongly suggests [sic] that all taxpayers who enroll in qualified health plans, either through the federally-facilitated exchange or a state exchange, should qualify for the premium tax credit.”<sup>147</sup> Professor Jost writes, “In this later-adopted legislation amending the earlier-adopted ACA, Congress demonstrated its understanding that federal exchanges would administer premium tax credits.”<sup>148</sup> Alternatively, supporters of the IRS’ position maintain this reporting requirement introduces sufficient ambiguity to permit the IRS to resolve the claimed ambiguity by offering tax credits in federal Exchanges.<sup>149</sup>

To the contrary, these reporting requirements do not suggest, let alone require, that state-created and federal Exchanges are functionally equivalent with respect to tax credits. These requirements support, rather than undermine, the plain meaning of Section 1401. They likewise advance the Act’s goal of encouraging states to create Exchanges. Nothing about these requirements suggests that Congress erred in limiting tax credits and subsidies to the purchase of health insurance in state-run exchanges.

This reporting requirement expressly refers to both state-run Exchanges (Section 1311) and federal Exchanges (Section 1321). This shows that Congress knew to mention both Sections where that was their intent—something Congress did not do when authorizing tax credits.<sup>150</sup> To the extent this paragraph creates equivalence between state-run and federal Exchanges, that equivalence extends only so far as the paragraph’s information-reporting requirement.<sup>151</sup>

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146. See Jost, *supra* note 85.

147. Letter from Mark J. Mazur, Assistant Sec’y for Tax Policy, U.S. Treasury Dep’t, to Rep. Darrell Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives (Oct. 12, 2012).

148. Timothy S. Jost, *Yes, the Federal Exchange Can Offer Premium Tax Credits*, HEALTH REFORM WATCH (Sept. 11, 2011), <http://www.healthreformwatch.com/2011/09/11/yes-the-federal-exchange-can-offer-premium-tax-credits/>.

149. The claim that the IRS’ interpretation of the Act on this question should receive *Chevron* deference is discussed *infra* Part V.C.

150. See *Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012).

151. Some defenders of the IRS rule argue Section 1321 contains equivalence language because, after reference to exchanges created under Section 1311,

The reporting requirement is clear and straightforward. The paragraph refers to “the credit under this section” a total of four times. Since this paragraph resides in Section 36B, which authorizes tax credits solely in Exchanges “established by the state under section 1311,” it plainly requires federal Exchanges to report zero advance payments.

There are valid reasons why Congress would require federal Exchanges to report that and other information about their enrollees. First, imposing these reporting requirements on both types of Exchanges serves to ensure a degree of uniformity in the information provided to the federal government. That not every requirement would seem equally applicable to both state and federal Exchanges is not anomalous. It is easier for Congress to draft and enact a single set of reporting requirements than to enact two separate provisions. Second, applying these reporting requirements to federal Exchanges enables those Exchanges and the Treasury Secretary to notify individual taxpayers of the tax credits for which they would *become* eligible and to publicize to state officials the number of taxpayers who would benefit if the state were to establish its own Exchange. The reporting requirement thus advances the PPACA’s goal of encouraging states to establish Exchanges. Finally, it was necessary for Congress to state explicitly that these requirements would apply to both state-created and federal Exchanges. Since Section 1401 precludes tax credits in federal Exchanges, administrators of federal Exchanges might otherwise think that Congress did not want them to compile and report that information.

The text of the reporting requirements even allows that tax credits would not be available through federal Exchanges. The paragraph provides that state and federal Exchanges must provide information about “any” tax credits an individual receives. “Any,” as used here, is conditional. That an Exchange is obligated to report “any” advance payments made means that *if* such payments are made they must be reported. It does not suggest, let alone require, that such payments will be made in all entities covered by the provision any more than this language suggests that all individuals who purchase insurance within Exchanges must be eligible for premium assistance.

The fact that the HCERA’s authors made no changes to Section 1401’s language restricting tax credits to state-run Exchanges corroborates that the plain meaning of Section 1401 accurately reflects congressional intent that state-created and federal Exchanges would not be equivalent in this respect and demonstrates that the reporting requirements are not evidence of any contrary intent. The HCERA’s authors scoured Section 1401, amending it seven times (and Section 1402 five times) but left the language restricting tax credits to state-run

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it directs the federal government to create “such exchanges” where states do not. This claim is addressed *infra* Part V.D.

Exchanges undisturbed.<sup>152</sup> It would be difficult to argue that the HCERA's authors noticed that state and territorial Exchanges were not equivalent in this respect, but somehow failed to notice the same asymmetry between state and federal Exchanges.

The plain meaning of these reporting requirements is thus consistent with the rest of Section 1401 and the overarching goals of the law, as is the directive that the Secretary "shall prescribe such regulations as may be necessary to carry out the provisions of this section." The PPACA draws absolutely no equivalence between state-run and federal Exchanges when it comes to offering tax credits. Indeed, the only time it mentions state and federal Exchanges together is when it enables the Secretary to inform people of that fact.

Another chapter of the PPACA's legislative history provides further evidence that members of Congress did not consider state and federal Exchanges under that law to be equivalent. As congressional leaders and Obama administration officials attempted to merge the House- and Senate-passed bills in late 2009 and early 2010, eleven US representatives—all Texas Democrats—authored a letter to President Obama, House Speaker Nancy Pelosi (D-CA), and House Majority Leader Steny Hoyer (D-MD) expressing their strong opposition to the Senate bill's approach to Exchanges.<sup>153</sup>

The letter did not explicitly address whether the bill restricted tax credits to states that established Exchanges. Yet the authors clearly saw a difference between state-created and federal Exchanges under the Senate bill. If states failed to create Exchanges, they warned, residents of those states would not "receive[] any benefit" and "millions of people will be left no better off than before Congress acted."<sup>154</sup>

The authors of that letter believed that under the PPACA, recalcitrant states could block the law's benefits.<sup>155</sup> It seems implausible that these members would say taxpayers in states with federal Exchanges would see zero benefit if they believed that state and federal Exchanges were equivalent and billions of dollars of tax credits and subsidies would flow into those states whether or not states cooperated.

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152. See Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1401, 124 Stat. 1029, 1030-32, 1034-35 (2010).

153. *U.S. Rep. Doggett: Settling for Second-Rate Health Care Doesn't Serve Texans*, MY HARLINGEN NEWS (Jan. 11, 2010), <http://www.myharlingennews.com/?p=6426>.

154. *Id.* (emphasis added).

155. A contemporaneous report on the letter framed the issue the same way: "[The Texas Democrats] worry that because leaders in their state oppose the health bill, they won't bother to create an exchange, leaving uninsured state residents with no way to benefit from the new law." Julie Rovner, *House, Senate View Health Exchanges Differently*, NPR (Jan. 12, 2010, 4:00 AM), <http://www.npr.org/templates/story/story.php?storyId=122476051> (emphasis added).

Nonetheless, all eleven cosigners subsequently voted for the PPACA without any modifications to the language restricting tax credits to state-created Exchanges.<sup>156</sup>

### *G. Revealed Intent*

Even if—contrary to the clear language of the statute and its legislative history—supporters of the PPACA somehow shared a tacit understanding that tax credits would be available in federal Exchanges, their actions reveal that their intent was to enact a law without tax credits in federal Exchanges. Following Scott Brown’s election, congressional Democrats faced two options. The first was to merge the House- and Senate-passed bills in a manner that made enough changes to secure the support of one Senate Republican, thus enabling proponents to invoke cloture on a conference report. This option was problematic. Not only was there no guarantee that Democrats could peel away one senator from the GOP bloc, but doing so could have moved the conference report far enough to the center that House Democrats likely would have rejected it. The second option was to have the House pass the PPACA, thus sending the bill directly to the president’s desk, and have the House and Senate make limited amendments to the PPACA through the reconciliation process. Congressional Democrats chose the latter strategy. This was in no small part because while a “regular order” strategy would have moved the PPACA to the center to appease one or another GOP senator, the “reconciliation” strategy would move it to the left to appease House Democrats.

The PPACA’s supporters thus made a quite deliberate choice to pass a bill with which none of them were completely satisfied and to use the reconciliation process to make only limited amendments because a more satisfactory conference report would have failed. They made a decision that, whatever the PPACA’s remaining shortcomings, passing it with limited amendments was the best they could do under the circumstances.<sup>157</sup> An “imperfect” bill was better than no bill. It may well

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156. *Final Vote Results for Roll Call 165*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES (Mar. 21, 2010), <http://clerk.house.gov/evs/2010/roll165.xml>.

157. In a letter to Nancy Pelosi encouraging the House to adopt the Senate bill, Henry J. Aaron and colleagues wrote:

Both houses of Congress have adopted legislation that would provide health coverage to tens of millions of Americans, begin to control health care costs that seriously threaten our economy, and improve the quality of health care for every American. These bills are imperfect. Yet they represent a huge step forward in creating a more humane, effective, and sustainable health care system for every American. We have come further than we have ever come before. Only two steps remain. The House must adopt the Senate bill, and the President must sign it . . . Some differences between the bills, such as the scope of the tax on high-cost plans and the



be the case that, as Professor Jost writes, “the Senate Bill was not supposed to be the final law.”<sup>158</sup> Yet it became their only option. If what they passed was a bill without tax credits in federal Exchanges, then that is *exactly* what they intended. If they had sought to pass a bill authorizing tax credits in federal Exchanges, there would have been no law. If tax credits in federal Exchanges could not have passed Congress, it cannot be the law.

#### H. *An Error of Miscalculation*

The statute and the lack of any support for the IRS rule in the legislative record put defenders of the IRS rule in the awkward position of arguing that it was so obviously Congress’ intent to offer tax credits in federal Exchanges that despite a year of debate over the PPACA, it never occurred to anyone to express that intent out loud. A better explanation is that the PPACA’s authors miscalculated when they assumed states would establish Exchanges. As *The New York Times* reported, “When Congress passed legislation to expand coverage two years ago, Mr. Obama and lawmakers assumed that every state would set up its own exchange,” and that “running them [would] be a herculean task that federal officials never expected to perform.”<sup>159</sup> Prior to enactment, HHS Secretary Kathleen Sebelius proclaimed states were “very eager” to create Exchanges and predicted most would quickly do so.<sup>160</sup> The end result would “very much be a State-based program.”<sup>161</sup>

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allocation of premium subsidies, should be repaired through the reconciliation process . . . . The Senate bill accomplishes most of what both houses of Congress set out to do; it would largely realize the goals many Americans across the political spectrum espouse in achieving near universal coverage and real delivery reform.

Letter from Henry J. Aaron, Senior Fellow, The Brookings Institution, et al. to Nancy Pelosi, Speaker of the House, et al. (Jan. 22, 2010), *available at* [http://graphics8.nytimes.com/images/2010/01/22/health/adopt\\_senate\\_bill\\_final.2.pdf](http://graphics8.nytimes.com/images/2010/01/22/health/adopt_senate_bill_final.2.pdf).

158. Timothy Jost, *Tax Credits in Federally Facilitated Exchanges Are Consistent with the Affordable Care Act’s Language and History*, HEALTH AFFAIRS BLOG (July 18, 2012), <http://www.healthaffairs.org/blog/2012/07/18/tax-credits-in-federally-facilitated-exchanges-are-consistent-with-the-affordable-care-acts-language-and-history>.
159. Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, N.Y. TIMES, Aug. 5, 2012, at A17; *see also* Elise Viebeck, *Obama Faces Huge Challenge in Setting Up Health Insurance Exchanges*, THE HILL (Nov. 25, 2012, 2:45 PM), <http://www.thehill.com/blogs/healthwatch/health-reform-implementation/269137-obama-faces-huge-challenge-in-setting-up-health-exchanges> (“It’s a situation no one anticipated when the Affordable Care Act was written. The law assumed states would create and operate their own exchanges . . . .”).

160. Statement of K. Sebelius, *supra* note 5.

161. *Id.*

Shortly after signing the law, President Obama predicted, “by 2014, each state will set up what we’re calling a health insurance exchange.”<sup>162</sup> If the PPACA’s failure to authorize tax credits in federal Exchanges represents an error at all, it is that miscalculation.

Such a miscalculation would be consistent with the widespread view among supporters that the public would grow to support the law over time<sup>163</sup> or the view that the challenge brought against the law by state attorneys general was so meritless that federal courts should sanction the challengers.<sup>164</sup> Having created an enormous incentive for states to establish Exchanges, it likely never occurred to some of the Act’s authors that states would refuse.<sup>165</sup> This interpretation also explains why

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162. Remarks on Health Insurance Reform in Portland, Maine, 2010 DAILY COMP. PRES. DOC. 220 (Apr. 1, 2010).

163. *See, e.g.*, Naftali Bendavid, *Reid: Voters Like Health Law If They Understand It*, WALL ST. J. (Aug. 4, 2010, 4:09 PM), <http://blogs.wsj.com/washwire/2010/08/04/reid-voters-like-health-law-if-they-understand-it> (quoting Senate Majority Leader Harry Reid (D): “It’s very obvious that people have a lack of understanding of our health care reform bill . . . [t]he more people learn about this bill, the more they like it . . . [t]he trend is turning all over America today . . . [o]nce you explain what’s in the bill, the American people of course like it.”); *see also* Susie Madrak, *Gov. Ed Rendell: The More People Learn About the Health Care Bill, the More They Like it*, CROOKS & LIARS (Mar. 28, 2010), <http://crooksandliars.com/susie-madrak/gov-ed-rendell-more-people-learn-about> (quoting former Pennsylvania Gov. Ed Rendell (D): “As more and more people get to understand what’s in this bill, people are going to like it.”).

164. *See* Timothy Stoltzfus Jost, *Sanction the 18 State AGs*, NAT’L L.J. (Apr. 12, 2010), <http://www.law.com/jsp/nlj/legaltimes/PubArticleFriendlyLT.jsp?id=1202447759851&slreturn=1> (“As we all know, Rule 11 of the Federal Rules of Civil Procedure requires an attorney filing a pleading in federal court to certify that ‘the claims, defenses, and other legal contentions are warranted by existing law’ and ‘the factual contentions have evidentiary support.’ The court can sanction an attorney who violates this rule, including an obligation to pay the costs and reasonable attorney fees of the opposing party . . . . This complaint not only represents shockingly shoddy lawyering but should be recognized by the courts for what it is in fact is: A pleading whose key claims are without support in the law and the facts. The attorneys who brought this case—solely for political purposes—should have to bear personally the cost of defending this litigation that they are imposing on federal taxpayers.”).

165. Tom Howell Jr., *After Obamacare Health Exchange Deadline Passes, 26 States Opt In with Feds*, WASHINGTON TIMES (Feb. 16, 2013), <http://www.washingtontimes.com/news/2013/feb/16/after-obamacare-health-exchange-deadline-passes-26/?page=all> (“The Obama administration says it will be ready to run exchanges in more than half of the states . . . . ‘It’s not what the drafters of the bill had hoped would happen,’ Timothy S. Jost, a professor at Washington and Lee University School of Law who specializes in health care, said of the outcome on Friday.”).

the PPACA authorizes no funding for HHS to create federal Exchanges.<sup>166</sup> Its authors did not anticipate that such funds would be necessary.<sup>167</sup>

## V. ASSESSING OTHER POTENTIAL LEGAL RATIONALES FOR THE IRS RULE

As demonstrated above, the text, purpose, structure, and history of the PPACA do not support the IRS rule. That does not end the arguments in favor of the rule, however. Insofar as the language of the PPACA would seem to bar the IRS rule, commentators have suggested several additional rationales in defense of the administrative extension of tax credits and subsidies to federal exchanges. First, some suggest that the language of Section 1401 was a “scrivener’s error” that the IRS and any reviewing court would be justified in disregarding. Second, some suggest the plain text of Section 1401 should be disregarded because it would produce “absurd results” that undermine the purpose and intent of the PPACA. Third, some argue that, insofar as the text of Section 36B is ambiguous or unclear, particularly when read in light of subsequent amendments, the IRS should receive deference for its interpretation under the *Chevron* doctrine. Fourth, some argue that statutes should be read in light of evaluations by Congressional agencies such as the Congressional Budget Office, and that such an approach would support the IRS rule. Each of these arguments has a superficial plausibility. None withstands scrutiny.

### A. *Scrivener’s Error*

One possible argument in defense of the IRS rule is that the text of the PPACA contains a simple mistake that the IRS can and should disregard. Specifically, the claim is that Section 1401’s failure to mention federal Exchanges created pursuant to the authority in Section 1321 was an error made in the drafting or transcribing of the legislation and does not reflect legislative intent. Professor Timothy Jost, for instance, has argued that the textual limitation of tax credits and subsidies to state-run (i.e., Section 1311) Exchanges is a “drafting error” that “is obvious

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166. J. Lester Feder, *HHS May Have to Get ‘Creative’ on Exchange*, POLITICO (Aug. 16, 2011, 6:54 PM), <http://www.politico.com/news/stories/0811/61513.html#ixzz1zaMIZBtO>.

167. To paraphrase another famous miscalculation, the PPACA’s authors believed that when they reached state capitols, they would be greeted as liberators. See *Anti-war Ad Says Bush, Cheney, Rumsfeld & Rice “Lied” About Iraq*, FACTCHECK (Sept. 25, 2005), [http://www.factcheck.org/iraq/print\\_anti-war\\_ad\\_says\\_bush\\_cheney\\_rumsfeld.html](http://www.factcheck.org/iraq/print_anti-war_ad_says_bush_cheney_rumsfeld.html) (quoting Vice President Dick Cheney on the eve of the US-led invasion of Iraq: “We will be greeted as liberators.”).

to anyone who understands” the PPACA.<sup>168</sup> If the “error” is, in fact, “obvious,” then it may be the sort of error that a federal agency (and reviewing courts) should disregard as a “scrivener’s error.”<sup>169</sup>

A “scrivener’s error” is supposed to be just that—a purely clerical error that could be attributed to a failed transcription or something of that sort.<sup>170</sup> Common examples are errors in punctuation that, when read literally, alter the meaning of a statutory provision and mistaken cross-references to subsections in a statute—say, mistaking “(i)” for “(ii)” or “Section 36B(B)(I)(b)” for “Section 36(B)(I)(b).” These are the sorts of mistakes a legislator could easily miss when reviewing 2,000 pages of statutory text or that could even be introduced into a statute when it is amended or transcribed—hence the name “scrivener’s error.”

To establish that a statutory provision is a scrivener’s error typically requires showing that it is *implausible*, not merely unlikely, that a statutory provision was drafted as its authors intended. As the Supreme Court explained in *U.S. National Bank of Oregon v. Independent Insurance Agents of America*, this will only be shown in the “unusual” case in which there is “overwhelming evidence from the structure, language, and subject matter of the law” that Congress could not have

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168. Jost, *supra* note 85; see Robert Pear, *Brawling Over Health Care Moves to Rules on Exchanges*, N.Y. TIMES, July 8, 2012, at A14 (“Some supporters of the law say Congress may have made a mistake in drafting this section.”). Professor Jost has since abandoned this argument. See Timothy Jost, *Tax Credits in Federally Facilitated Exchanges Are Consistent with the Affordable Care Act’s Language and History*, HEALTH AFFAIRS BLOG (July 18, 2012), <http://www.healthaffairs.org/blog/2012/07/18/tax-credits-in-federally-facilitated-exchanges-are-consistent-with-the-affordable-care-acts-language-and-history> (“I agree with Cannon and Adler that the courts are unlikely to find the ‘established by the state’ language a ‘scrivener’s error.’”).

169. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 234 (2012) (“No one would contend that the mistake cannot be corrected if it is of the sort sometimes described as a ‘scrivener’s error.’” (citing Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 289 (1989) (“If the directive contains a typographical error, correcting the error can hardly be considered disobedience.”))).

170. See, e.g., *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 462 (1993) (stating that a “scrivener’s error”—in this case, mistaken punctuation that changed the statute’s meaning—was characterized as “a mistake made by someone unfamiliar with the law’s object and design”). According to Justice Antonin Scalia, a scrivener’s error may be found “where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 20 (1997); see also Andrew S. Gold, *Absurd Results, Scrivener’s Errors and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 56 n.167 (2006).

consciously adopted the language in the statute.<sup>171</sup> Similarly, in *Appalachian Power Co. v. EPA*, the D.C. Circuit explained that:

We will not . . . invoke this rule to ratify an interpretation that abrogates the enacted statutory text absent an extraordinarily convincing justification [because] . . . the court's role is not to 'correct' the text so that it better serves the statute's purposes, for it is the function of the political branches not only to define the goals but also to choose the means for reaching them . . . . Therefore, for the [agency] to avoid a literal interpretation . . . it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.<sup>172</sup>

Further, the showing must be exceedingly strong for a reviewing court to disregard the statute's text because the legislature is always free to correct its own mistakes. As Justice Kennedy noted for a unanimous court in *Lamie v. United States Trustee*, "If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent."<sup>173</sup> Where a "scrivener's error" is found, an implementing agency or reviewing court is justified in disregarding the literal text of the statute insofar as this is necessary to correct the mistake, but no further. The discovery of a scrivener's error is not a justification for writing a statute anew.<sup>174</sup>

Given the PPACA's unusual (and somewhat hurried) legislative history, one could anticipate that there are scrivener's errors of one sort or another in the Act. As Justice Stevens observed, "a busy Congress is fully capable of enacting a scrivener's error into law,"<sup>175</sup> and the

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171. 508 U.S. at 462.

172. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001) (internal quotation omitted); *see also* *United States v. X-Citement Video*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) (noting the "sine qua non" of the doctrine "is that the meaning genuinely intended but inadequately expressed must be absolutely clear; otherwise we might be rewriting the statute rather than correcting a technical mistake.").

173. *Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004); *see also* *United States v. Granderson*, 511 U.S. 39, 68 (1994) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.").

174. *Appalachian Power Co.*, 249 F.3d at 1043-44 ("Lest it 'obtain a license to rewrite the statute,' . . . we do not give an agency alleging a scrivener's error the benefit of *Chevron* step two deference, by which the court credits any reasonable construction of an ambiguous statute. Rather, the agency 'may deviate no further from the statute than is needed to protect congressional intent.'" (citations omitted)).

175. *Koons Buick, Pontiac, GMC, Inc. v. Nigh*, 543 U.S. 50, 65 (2004) (Stevens, J., concurring).

Congress that passed the PPACA was extraordinarily busy. Sure enough, some such errors can be found in the Act. For example, there is a textbook scrivener's error in the very clause where PPACA restricts tax credits to state-run Exchanges. Section 1401 amended the Internal Revenue Code to make taxpayers eligible for premium-assistance tax credits if they enroll in a qualified health plan "through an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act."<sup>176</sup> Obviously, the authors inadvertently omitted the word "Section" before "1311." The Act contains dozens of references to "Section 1311," including a reference elsewhere in Section 1401 that uses identical language but includes the word "Section."<sup>177</sup> The omission of "Section" is a clear scrivener's error. It is an error of transcription, and the language is open to no other interpretation.

Another textbook scrivener's error exists in the section of the PPACA that creates the Independent Payment Advisory Board.<sup>178</sup> Subsection (f)(1) details the requirements for a type of joint resolution mentioned in "subsection (e)(3)(B)."<sup>179</sup> Yet subsection (e)(3)(B) makes no mention of joint resolutions. The authors clearly meant to refer to subsection (e)(3)(A). It is there that the Act first mentions the joint resolution in question. Subsection (e)(3)(A) even contains a cross-reference: it states that the joint resolution is "described in subsection (f)(1)."<sup>180</sup> The use of "(B)" instead of "(A)" is a clear scrivener's error.

In contrast to these provisions, the failure to authorize tax credits for insurance purchased through federal Exchanges is not a "scrivener's error." As noted above, there is a plausible rationale for the way the statute is written and ample evidence that the language of the statute provides for what at least some of its authors intended. Either alone would be sufficient to defeat a scrivener's error claim. The alleged error here is also more significant than the sort typically recognized as a scrivener's error. Section 1401 specifically mentions the type of Exchanges through which tax credits will be available (those "established by the State") and the relevant Section (1311). It makes no mention of federally run Exchanges or Section 1321. A legislator reviewing the relevant language could not claim that they did not realize the statutory cross-reference excluded federal Exchanges because the clear text of the statute does as well.

There is also no evidence we have been able to identify to suggest that the failure to mention Section 1321 in Section 1401's eligibility rules

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176. Patient Protection and Affordable Care Act, Pub. L. No. 11-148, § 1401(a), 124 Stat. 119, 213 (2010).

177. § 1401(a).

178. § 3403(f)(1); 42 U.S.C. § 1395kkk(a) (2010).

179. 42 U.S.C. § 1395kkk(f)(1) (2010).

180. 42 U.S.C. § 1395kkk(e)(3)(A)(ii) (2010).

for premium-assistance tax credits could have been an error of transcription or something of that sort. We have been unable to identify text in any previous iteration of the law—something equivalent to the IRS rule’s “or 1321”—which a legislative staffer or someone else might have mistranscribed or inadvertently dropped in order to produce the result the IRS rule seeks. In every material respect, the final versions of the PPACA’s relevant provisions are identical to previous drafts of the Finance Committee bill. Those eligibility rules make numerous references to Exchanges. If the unavailability of tax credits through Section 1321 Exchanges had been a scrivener’s error, one might expect at least one of those references to leave the door open to the possibility of tax credits through federal Exchanges. Yet as noted above, those eligibility rules consistently and exclusively refer to Section 1311 Exchanges. However many such errors there may be in the Act, the failure to authorize tax credits for the purchase of health insurance in federally run Exchanges is not among them.

Further, in order to establish the existence of a scrivener’s error that could be corrected by agency regulation, the IRS would have to do more than show that Congress “clearly did not mean”<sup>181</sup> to create a presumably undesirable scenario in which the PPACA’s “community rating” price controls and individual mandate would take effect but the tax credits would not. The IRS would have to meet the more difficult test of showing that Congress *could not* have intended to produce such a result. Supporters of the rule would have to show, as Professor Jost claims, “[t]here is no coherent policy reason why Congress would have refused premium tax credits to the citizens of states that ended up with a federal exchange.”<sup>182</sup>

The IRS cannot meet this test. The record clearly shows that PPACA supporters had a coherent policy reason for withholding tax credits from uncooperative states. They considered it a viable means of encouraging states to implement the law.<sup>183</sup> Not only is it plausible that Congress wanted to restrict tax credits to state-run Exchanges, that restriction is an essential part of the Act because it is the primary means of enforcing the directive that states “shall” create Exchanges. The HCERA’s explicit authorization of tax credits and subsidies through territorial Exchanges, the HELP bill’s explicit authorization of credits through federal Gateways, and the rest of the legislative history further show that the PPACA’s authors made a deliberate policy choice. The record further shows that PPACA supporters contemplated and even created scenarios like what would exist in federal Exchanges, where community-rating price controls would operate without tax credits or

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181. See Jost, *supra* note 85.

182. *Id.*

183. The use of tax credits for this purpose was also suggested by academics supportive of the PPACA. See Jost, *supra* note 129.

subsidies to mitigate the resulting instability.<sup>184</sup> Such a policy may not be wise or fair. It may even undermine the goal of expanding health insurance coverage to the uninsured. But it is a sufficiently plausible account of congressional intent to defeat a claim of a scrivener's error.<sup>185</sup>

The feature of the statute that the IRS rule seeks to “correct” fails both parts of the scrivener's-error test. Failing to include an entire clause or paragraph that would have authorized two new entitlements is not an error of transcription. It is not equivalent to omitting the word “section” when referring to Section 1311 nor to mistyping “(B)” where only “(A)” makes sense. There is a perfectly reasonable explanation for why the PPACA would mean what it says: the PPACA's authors sought to offer tax credits and subsidies as an incentive to encourage states to create Exchanges. For purposes of the scrivener's-error test, it is sufficient to show that this interpretation is plausible. The PPACA's legislative history, as recounted above, shows this explanation is not only plausible but actually the best explanation available.

### B. *Absurd Results*

A related argument for discarding the plain meaning of the statutory text is that a literal application of the text will produce such an absurd result that Congress could not have intended it.<sup>186</sup> As the Supreme Court explained in *United States v. Ron Pair Enterprises*, if “the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters’ . . . , the intention of the drafters, rather than the strict language, controls.”<sup>187</sup> In such cases, an implementing agency or reviewing court would be justified in construing a statute in such a way as would prevent the absurd result. Again, however, this argument requires more than demonstrating that a literal application of

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184. *See infra* Part V.B.

185. *See, e.g.*, *Lamie v. United States Trustee*, 540 U.S. 526, 526 (2003) (noting potential reasons Congress may have desired the result the alleged error created).

186. *See, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68–69 (1994) (rejecting the “most natural grammatical reading” of a statute to avoid “absurd” results). The most famous, or perhaps infamous, application of this rule is *Holy Trinity Church v. United States*, 143 U.S. 457, 459–60 (1892) (“It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers . . . . If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity.”). Since *Holy Trinity*, courts have become decidedly less willing to find that the plain language of a statute produces “absurd results” justifying an agency departure from the statutory text. *See generally* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2002-03); *see also* Gold, *supra* note 170, at 59.

187. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).



the statutory text would be undesirable or objectionable to some portion of those who supported or advocated the law's passage. It requires that the result would be truly "absurd" or unimaginable.<sup>188</sup>

To avail itself of the "absurd results" doctrine, the IRS could argue that denying tax credits to otherwise qualifying individuals who reside in states that fail to create their own Exchanges would produce such absurd consequences that it is inconceivable that the Act would mean what it says. The only potential absurd results argument is that denying tax credits in federal exchanges would compromise the PPACA's stated goal of increasing access to affordable health insurance, particularly if a large number of states were to refuse to create their own Exchanges.

One consequence of the PPACA imposing the community-rating requirement on health insurance sold in federal Exchanges without the presumably stabilizing influence of tax credits would be to destabilize insurance markets, as health insurance premiums would rise, causing many healthy purchasers to exit the market. Yet the mere existence of unwanted effects from a statutory reform is insufficient to show that a statute will produce truly "absurd" results, let alone demonstrate that the language is different than that intended by Congress. In this case, the allegedly "absurd" result is a consequence of how states respond to the PPACA and not of the text itself.

No legislation pursues a single goal without regard for costs or competing priorities.<sup>189</sup> However much legislators seek to pursue a particular goal, they may still conclude a statute "should reach so far and no farther."<sup>190</sup> Trade-offs are omnipresent, and there is rarely a statute that does not contain some provision that tampers with or moderates the statute's overall goal. Further, and perhaps more importantly, a law reflects a deal or compromise made among multiple legislative blocs and rarely embodies all of one bloc's preferences.<sup>191</sup> This is particularly true when, as here, legislation passes without a vote to spare. Thus there is no reason to privilege one group's preferences or

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188. See, e.g., *Garcia v. United States*, 469 U.S. 70, 75 (1984) (noting "[o]nly the most extraordinary showing of contrary intentions" can justify ignoring statutory text); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820) ("The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest.").

189. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 541 (1983) ("No matter how good the end in view, achievement of the end will have some cost, and at some point the cost will begin to exceed the benefits.").

190. *Id.*

191. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 876 (1975); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL. J. ECON. & MGMT. SCI. 3, 3 (1971).

stated intent over the plain meaning of the statute that it approved. And, as already suggested, there is an entirely plausible explanation for the statutory structure that Congress adopted: conditioning the availability of tax credits on state creation of an Exchange was a method of encouraging state cooperation.<sup>192</sup>

Even though restricting tax credits to state-run Exchanges could frustrate the law's goal of expanding health insurance coverage, this would not be a sufficiently "absurd" result to justify disregarding the plain text of the Act. The plain meaning of Section 1401 is not absurd for the same reason it is not implausible that Congress could have meant what it said: the lack of tax credits in federal Exchanges is just one manifestation of PPACA supporters' willingness to induce adverse selection in insurance markets in pursuit of other goals. Indeed, the Exchange provisions are but one example of Congress doing exactly that through the PPACA.

In at least two other instances, Congress displayed an even higher tolerance for iatrogenic instability than what it created in federal Exchanges. One example is the Act's imposition of community-rating price controls on health insurance for children. The Act imposed these price controls with neither a mandate nor subsidies to encourage low-risk individuals to remain in the market. This provision took effect on September 23, 2010—six months after the PPACA's enactment and more than three years before families with children would become subject to the individual mandate or be eligible for tax credits or subsidies. As a result, thirty-nine states reported that at least one carrier left the child-only market, and in seventeen of those states, the market completely collapsed. In some cases, the PPACA caused the market to collapse before the price controls even took effect.<sup>193</sup>

A second example is the Community Living Assistance Services and Supports (CLASS) Act, a government-run long-term care insurance program authorized by the PPACA. By law, premiums in that program could not vary according to an applicant's risk. Congress neither imposed a mandate requiring low-risk individuals to participate in this program nor created tax credits or subsidies to encourage low-risk individuals to participate. Prior to enactment, independent observers warned that the community-rating price controls would induce adverse selection and make the program highly unstable,<sup>194</sup> a reality the Obama

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192. This structure also served to provide the Senate Finance Committee with jurisdiction over the bill. *See supra* Part IV.E.

193. U.S. SENATE COMM. ON HEALTH, EDUCATION, LABOR AND PENSIONS, RANKING MEMBER REPORT: HEALTH CARE REFORM LAW'S IMPACT ON CHILD-ONLY HEALTH INSURANCE POLICIES (2011).

194. RICHARD S. FOSTER, CTR. FOR MEDICARE & MEDICAID SERVS., ESTIMATED FINANCIAL EFFECTS OF THE "AMERICA'S AFFORDABLE HEALTH CHOICES ACT OF 2009" (H.R. 3962), AS PASSED BY THE HOUSE ON NOVEMBER 7, 2009 11 (2009); *see also* AMERICAN ACADEMY OF

administration ultimately acknowledged in 2011.<sup>195</sup> Congress enacted it anyway.<sup>196</sup>

This feature also appeared in both of the PPACA's antecedents.<sup>197</sup> For example, the situation the PPACA creates in states that fail to create Exchanges is exactly what the HELP bill would have created in states that failed to implement that bill's employer mandate. Many members of Congress supported both bills.

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ACTUARIES, CRITICAL ISSUES IN HEALTH REFORM: COMMUNITY LIVING ASSISTANCE SERVICE AND SUPPORTS ACT (CLASS) (2009); RICHARD S. FOSTER, CTR. FOR MEDICARE & MEDICAID SERVS., ESTIMATED FINANCIAL EFFECTS OF THE "PATIENT PROTECTION AND AFFORDABLE CARE ACT," AS AMENDED 15 (2010); DEP'T OF HEALTH AND HUMAN SERVICES, OFFICE OF THE CLASS ACTUARY, ACTUARIAL REPORT ON THE DEVELOPMENT OF CLASS BENEFIT PLANS 35 (2011) ("It is not a coincidence that many experts have maintained that adverse selection is the major obstacle for the CLASS program. Any workable design must address it in order to receive certification as an actuarially sound plan.").

195. Sam Baker, *HHS Decision Erases Nearly \$100B of Projected Savings from Reform Law*, THE HILL (Oct. 14, 2011, 4:44 PM), <http://thehill.com/blogs/healthwatch/health-reform-implementation/187727-hhs-decision-erases-nearly-100b-of-projected-savings-from-reform-law> ("The Obama administration's decision Friday to scrap a controversial insurance program wiped out nearly \$100 billion of the projected savings from the healthcare reform law. Officials at the Health and Human Services Department announced they will no longer try to implement the CLASS program, which was designed to provide insurance for long-term care. By suspending the CLASS Act, HHS also erases about 40 percent of the savings the healthcare reform was supposed to generate for the government."). One might argue that the CLASS Act is not an apt example of PPACA supporters' tolerance for adverse selection because the law requires it to be self-sustaining and HHS suspended implementation due to the Department's inability to develop a sustainable model for the program. But if the IRS were to claim Congress would not have enacted community-rating price controls without also subsidizing low-risk consumers, the CLASS Act is an example of Congress doing just that. Moreover, the non-partisan Congressional Research Service has written that federal courts have ordered HHS to implement the CLASS Act even if it is not sustainable. See Avik Roy, *Congressional Research Service: Courts Could Force HHS to Implement CLASS Act, Despite Its Insolvency*, FORBES (Feb. 1, 2012, 9:00 AM), <http://www.forbes.com/sites/aroy/2012/02/01/congressional-research-service-courts-could-force-hhs-to-implement-class-act-despite-its-insolvency/>.
196. Albeit temporarily, Congress and President Obama repealed the CLASS Act in January 2013. See Sarah Kliff, *The Fiscal Cliff Cuts \$1.9 Billion from Obamacare. Here's How.*, WASH. POST (Jan. 2, 2013, 10:50 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/02/the-fiscal-cliff-cuts-1-9-billion-from-obamacare-heres-how/> ("The CLASS Act is officially repealed.").
197. Affordable Health Choices Act, S. 1697, 111th Cong. §§ 101, 190-91 (2009); America's Healthy Future Act of 2009, S. 1796, 111th Cong. § 1001 (2009).

These examples show that the lack of tax credits in federal Exchanges is consistent with the high tolerance for adverse selection evident elsewhere in the Act and reinforces that this is not the sort of “absurd” result that would justify ignoring clear statutory text. Congress clearly contemplated allowing community-rating price controls to operate in the absence of credits or subsidies that might mitigate the resulting instability. The PPACA actually does more to mitigate adverse selection in federal Exchanges than in either the child-only market or the CLASS Act: Congress imposed an individual mandate that would take effect at the same time federal Exchanges would begin operations. Thus, there is nothing about the lack of tax credits in federal Exchanges to suggest a departure from congressional intent, absurd or otherwise.

Finally, conditioning the availability of tax credits on states creating Exchanges is no more absurd than Congress’ decision to condition Medicaid funds on states implementing the program. As written, the PPACA threatened to withhold all funding for the Medicaid expansion and pre-existing Medicaid programs from noncompliant states. Had any state refused to cooperate under these terms, enforcing the statute would compromise the PPACA’s goal of expanding coverage. Indeed, it would result in the loss of coverage for existing Medicaid beneficiaries. Yet there is no question that Congress intended to give states this choice, creating a risk that recalcitrant states could undermine achievement of the PPACA’s stated goal of expanding coverage. The same is true of the entire Medicaid program.

Even if the consequences of enforcing the plain language of Section 1401 would strike *some* as “absurd,” this does not give the IRS “license to rewrite the statute.”<sup>198</sup> Rather, where an agency concludes that literal enforcement of the statutory text would thwart congressional intent, “it may deviate no further from the statute than is needed to protect congressional intent.”<sup>199</sup> This, in turn, calls upon a reviewing court to consult other sources of legislative intent so as to ensure that the law in question is applied as intended.<sup>200</sup>

### C. Chevron Deference

Another argument in support of the IRS rule is that the IRS should receive *Chevron* deference in its interpretation of the relevant provisions.<sup>201</sup> According to Professor Jost, the IRS’ interpretation should

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198. *See* *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998).

199. *Id.*

200. *See* *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 454 (1989) (“Where the literal reading of a statutory term would ‘compel an odd result,’ we must search for other evidence of congressional intent to lend the term its proper scope.” (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989))).

201. *See, e.g.,* John D. Kraemer & Lawrence O. Gostin, *The Power to Block the Affordable Care Act: What are the Limits?*, 308 JAMA 1975, 1975 (2012)

prevail because *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>202</sup> requires that an agency's "official construction of an ambiguous statute should be accorded deference by any reviewing court."<sup>203</sup> Thus, even if Section 1401 appears to be clear and unambiguous when read in isolation, the IRS could argue that the text and structure of the law as a whole creates sufficient ambiguity about the operation of this provision to trigger *Chevron* deference.<sup>204</sup> So, for instance, Professor Jost argues the HCERA "creates an ambiguity in the law that the IRS can resolve through its rule-making power."<sup>205</sup> Here again, arguments in defense of the IRS rule falter.

*Chevron* outlined a two-step inquiry for courts to apply when evaluating agency interpretations of federal statutes. First, the reviewing court considers the statutory text to determine "whether Congress has directly spoken to the precise question at issue."<sup>206</sup> If so, the statute controls, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>207</sup> If the reviewing court concludes that the statute is "silent or ambiguous," however, and determines that interpretive authority has been delegated to the agency, the court must defer to the agency's statutory interpretation, so long as it "is based on a permissible construction of the statute."<sup>208</sup> At this second step, the agency's interpretation is given "controlling weight" unless it is "arbitrary, capricious, or manifestly contrary to the statute."<sup>209</sup>

Although there has been some suggestion that *Chevron* is not applicable to IRS or even Treasury Department regulations, the Supreme Court has recently reaffirmed that this approach applies "with

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(suggesting courts would defer to regulation authorizing tax credits in federal exchanges).

202. 467 U.S. 837 (1984).

203. Jost, *supra* note 85.

204. The Supreme Court has endorsed the idea that statutory provisions should be read in light of the entire statutory structure. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute 'as a symmetrical and coherent regulatory scheme . . .'" (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995))).

205. David Hogberg, *Companies Could Challenge ObamaCare Employer Fines*, INVESTOR'S BUS. DAILY (Sept. 16, 2011, 5:46 PM), <http://news.investors.com/article/585053/201109161746/companies-could-challenge-obamacare-employer-fines.htm>.

206. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

207. *Id.* at 842-43.

208. *Id.* at 843.

209. *Id.* at 844.

full force in the tax context.”<sup>210</sup> “Filling gaps in the Internal Revenue Code plainly requires the Treasury Department to make interpretive choices for statutory implementation,”<sup>211</sup> but the Treasury Department (and the IRS) are entitled to no extra leeway or special treatment. Further, while *Chevron* is quite permissive to agency interpretations, such deference *only* applies once a court has concluded a statute is ambiguous. The reviewing court owes the agency “no deference” on the question of whether a statute is ambiguous in the first place.<sup>212</sup>

But ambiguity alone does not trigger *Chevron* deference.<sup>213</sup> As the Supreme Court has made clear in recent years, most notably in *United States v. Mead Corp.*,<sup>214</sup> the basis for according deference to agency interpretations of ambiguous statutes is the conclusion that Congress has delegated such interpretive authority to the agency. *Chevron* applies only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>215</sup> Further, notes Professor Adrian Vermeule, “the default rule runs against delegation. Unless the reviewing court affirmatively finds that Congress intended to delegate interpretive authority to the particular agency at hand, in the particular statutory scheme at hand, *Chevron* deference is not due and the *Chevron* two-step is not to be invoked.”<sup>216</sup>

The IRS’ primary argument is that its interpretation is “consistent with” the statute and that there is no evidence in “the relevant

210. *See Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011).

211. *Id.*

212. *See Am. Bar Ass’n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) (“The first question, whether there is such an ambiguity, is for the court, and we owe the agency no deference on the existence of ambiguity.”); *see also Ry. Labor Exec. Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

213. *See Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) (“Mere ambiguity in a statute is not evidence of congressional delegation of authority.”) (citations omitted).

214. 533 U.S. 218 (2001).

215. *Id.* at 226–27; *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *Dunn v. Commodity Futures Trading Comm’n*, 519 U.S. 465, 479 n.14 (1997) (citing *Smiley v. Citibank*, 517 U.S. 735, 740–41 (1996) (explaining that deference “arises out of background presumptions of congressional intent”); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 863 (2000–01) (observing that “[t]he Court . . . has rather consistently opted for the congressional intent theory” as the legal foundation for *Chevron* deference).

216. *See Adrian Vermeule, Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 348 (2003).

legislative history” to “demonstrate that Congress intended to limit the premium tax credit to State Exchanges.”<sup>217</sup> In effect, the IRS is arguing that because the PPACA does not preclude the agency’s interpretation, that interpretation should control.

This rationale for the rule cannot satisfy *Chevron* step one. To claim that an agency action is consistent with a statute is not even an assertion, much less a showing of ambiguity. A lack of evidence (in the “relevant” legislative history) that Congress intended to forbid an agency action is likewise not enough to demonstrate a statutory ambiguity, let alone to justify *Chevron* deference. Agencies have no inherent powers, only delegated ones.<sup>218</sup> Agencies, including the IRS, “are creatures of statute . . . [that] may act only because, and only to the extent that, Congress affirmatively has delegated them the power to act.”<sup>219</sup> When Congress is silent on a question—such as whether an agency has authority to issue tax credits, authorize entitlement spending in the form of refundable credits or cost-sharing subsidies, or levy taxes on employers—one should presume that the authority does not exist.

The D.C. Circuit has expressly rejected the proposition that *Chevron* step two is satisfied “any time a statute does not expressly *negate* the existence of a claimed administrative power.”<sup>220</sup> In *American Bar Association v. Federal Trade Commission*, for example, the court forcefully rejected the FTC’s claim that it could interpret a statute to provide a source of regulatory authority because “no language in the statute” expressly provided otherwise.<sup>221</sup> Similarly, in *Railway Labor Executives’ Association v. National Mediation Board*, the D.C. Circuit rejected the proposition that an agency could “*presume* delegation of power from Congress absent an express *withholding* of such power.”<sup>222</sup> As the Court explained:

To suggest . . . that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed

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

218. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”); *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”).

219. *American Bus Ass’n v. Slater*, 231 F.3d 1, 9 (D.C. Cir. 2000) (Sentelle, J., concurring).

220. *Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994); see also *ABA v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005).

221. *ABA*, 430 F.3d at 468.

222. *Ry. Labor Executives’ Ass’n*, 29 F.3d at 659 (emphasis in original).

administrative power (*i.e.* when the statute is not written in “thou shalt not” terms), is . . . flatly unfaithful to the principles of administrative law.<sup>223</sup>

Even if the IRS were able to satisfy *Chevron* step one by convincing a court that the relevant portions of the PPACA are sufficiently ambiguous to justify an IRS interpretation, the IRS rule would still fail. Reaching step two of the *Chevron* test does not give agencies free rein. For an agency’s interpretation to prevail at step two, it must still be consistent with the relevant statutory text. Thus, even if the IRS could demonstrate that the PPACA is ambiguous, it would have to argue that its rule is consistent with what Congress actually enacted and the President signed into law. As the foregoing discussion of the statute’s text, structure, and history should make clear, this would be difficult. The IRS’s interpretation is decidedly inconsistent with the statute’s repeated and consistent use of language restricting tax credits to Exchanges “established by the state under section 1311.”

Suppose, however, the IRS was able to convince a reviewing court that the PPACA is ambiguous on whether it limits tax credits to state-based Exchanges. The IRS would also need to demonstrate that this ambiguity was evidence of an implicit delegation of authority to interpret the statute in a way that would authorize the creation of new tax credits, new entitlement spending, and new taxes on employers and individuals beyond the purview of the traditional legislative appropriations process. This is not the sort of authority one should lightly presume Congress delegated to an agency.<sup>224</sup> To paraphrase the Supreme Court, Congress does not hide such “elephants in mouseholes.”<sup>225</sup>

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223. *Id.* at 671.

224. The framers of the Constitution considered the power to tax so dangerous that they required that “[a]ll Bills for raising Revenue shall originate in the House of Representatives” because that chamber is closest to the people. U.S. CONST. art. I, § 7. Yet the IRS would maintain that Congress somehow delegated such authority to a federal agency despite the lack of express statutory language to that effect.

225. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001); see also *Recent Regulation: Statutory Interpretation—Patient Protection and Affordable Care Act—Internal Revenue Service Interprets ACA to Provide Tax Credits for Individuals Purchasing Insurance on Federally Facilitated Exchanges.—Health Insurance Premium Tax Credit*, 77 Fed. Reg. 30,377 (May 23, 2012) (to be codified at 26 C.F.R. pt. 1), 126 HARV. L. REV. 663 (2012) (“While the debate surrounding this rule has largely concentrated on whether the text and legislative history support the IRS’s interpretation, the political saliency and economic impact of the rule may provide an opportunity for a reviewing court to clarify the limits of the major questions exception to the doctrine of judicial deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*” (citation omitted)).



If an ambiguity of that sort were sufficient to trigger full *Chevron* deference to this type of agency action, ambiguities in tax-related statutes could become so substantial a fount of IRS power that it would raise difficult constitutional questions.<sup>226</sup> Article I, Section 8 of the Constitution vests all legislative power in the Congress, and Article I, Section 9 provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>227</sup> For an agency to claim unilateral authority to interpret a statute so as to draw money from the Treasury—in this case, through entitlement spending in the form of refundable tax credits and cost-sharing subsidies—is to assert authority of questionable constitutional validity. The same applies to the taxing power, which the Constitution likewise reserves solely to Congress.<sup>228</sup> It is a longstanding principle that courts are to avoid those statutory interpretations that would raise difficult constitutional questions.<sup>229</sup> This is true even where a statute is sufficiently ambiguous that it might otherwise justify *Chevron* deference.<sup>230</sup>

It would be one thing if Congress were expressly to delegate authority to the IRS to provide premium assistance under general conditions that the IRS could then clarify and define. Here, however, the IRS is claiming the authority to authorize tax credits and entitlement spending beyond the express limits imposed by Congress. Yet the IRS’ position is not that its interpretation is compelled by the PPACA, only that it is “consistent with” it. This means the decision to provide such tax credits and cost-sharing subsidies is being made not by Congress, where such power has been vested, but by the IRS. The IRS position, at heart, is that Congress has enacted an ambiguous statute and thereby delegated to the IRS the discretionary authority to decide whether or

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226. See Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1282 (2002) (“If administrators were given ‘final authority on issues of statutory construction,’ this shift in power would substantially undermine our constitutional commitment to representative government.” (citation omitted)).

227. U.S. CONST. art. I, §§ 8-9.

228. U.S. CONST. art. I, § 8; see also *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989) (noting “Congress must indicate clearly its intention to delegate” authority to impose taxes or fees).

229. See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988).

230. See *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (“Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”).

not tax credits, subsidies, and taxes are authorized in states that do not establish Exchanges. This is authority Congress would not grant lightly and is certainly not the sort of authority to be found in an alleged statutory ambiguity. Thus even if one were to conclude Section 1401 of the PPACA is ambiguous, it would still not justify deference to the IRS.

Supporters of the rule point to language in the PPACA granting the IRS authority to promulgate regulations to implement the law as authority for the IRS rule. Professor Jost, for example, argues, “Section 36B(g) gives the Secretary of the Treasury the responsibility of issuing regulations to implement section 36B. This includes the authority to reconcile ambiguities in the statute, such as the inconsistency” created by the information-reporting requirement.<sup>231</sup>

Although subsection 36B(g) of the Internal Revenue Code grants the Secretary the power to “prescribe such regulations as may be necessary to carry out the provisions of this section,”<sup>232</sup> it does not vest the Secretary with the power to issue this rule. It is not necessary to impose unauthorized taxes, issue unauthorized tax credits, dispense unauthorized subsidies to private health insurance companies, or create two unauthorized entitlements for individuals in order to implement the one entitlement Section 1401 does authorize, or to carry out its reporting requirement. Nor is it necessary to *alter* the “aggregate amount[s] of any advance payment[s] of such credit or reductions”<sup>233</sup> in order to *report* on those amounts, as 36B(f) requires, or otherwise to carry out the provisions of this Section.

#### D. “Such Exchange”

Supporters of the IRS rule claim to have found language in Section 1321 that either provides a sufficient statutory basis for the rule or introduces sufficient statutory ambiguity to trigger *Chevron* deference. As noted above, Section 1321 provides that if a state fails to create the “required Exchange” or fails to create an Exchange that complies with federal requirements, “the Secretary shall (directly or through agreement with a not-for-profit entity) establish and operate *such Exchange* within the State and the Secretary shall take such actions as are necessary to implement such other requirements.”<sup>234</sup> The Treasury Department writes that this language makes “a federally-facilitated exchange the equivalent

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231. Jost, *supra* note 85.

232. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1401, 124 Stat. 119, 219 (2010).

233. Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1004, 124 Stat. 1029, 1035 (2010) (amending I.R.C. § 36B(f)).

234. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1321(c), 124 Stat. 119, 186 (2010) (emphasis added).

of a state exchange in all functional respects.”<sup>235</sup> Professor Jost elaborates:

By “such Exchange” Congress meant the “required exchange” mandated by section 1311. Thus when several subsequent sections refer to “an Exchange established by the State under section 1311,” including the provisions of Internal Revenue Code section 36B . . . they are referring both to state exchanges and to “such exchanges” established within states by the Secretary.<sup>236</sup>

In this account, Section 1321’s reference to “such exchange” either shoehorns Section 1321 Exchanges into Section 1311 or at least creates sufficient ambiguity to allow for the interpretation offered by the IRS. Neither claim can be squared with the statute.

Professor Jost cites the definition of Exchanges the PPACA inserts into Section 2791(d) of the Public Health Service Act:<sup>237</sup>

Section 1563(b) of the ACA states: “The term ‘Exchange’ means an American Health Benefit Exchange established under section 1311 of the Patient Protection and Affordable Care Act.” Section 1311 literally requires that the states “shall” establish an American Health Benefits Exchange by January 1, 2014. Because the Constitution prohibits the federal government from literally requiring states to establish exchanges, however, section 1321(c), provides that “the [HHS] Secretary shall (directly or through agreement with a not-for-profit entity) establish and operate *such* Exchange within the State.” Under the ACA’s definition of exchange, the term ‘Exchange’ in section 1321 exchange means a section 1311 exchange.<sup>238</sup>

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235. See Letter from Mark J. Mazur, Assistant Sec’y for Tax Policy, U.S. Treasury Department, to Rep. Darrell Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives (Oct. 12, 2012) (on file with authors); see also Sam Bagenstos, *The Legally Flawed Rearguard Challenge to Obamacare*, BALKINIZATION (Nov. 27, 2012), <http://balkin.blogspot.com/2012/11/the-legally-flawed-rearguard-challenge.html>.
236. Timothy Jost, *Tax Credits in Federally Facilitated Exchanges are Consistent with the Affordable Care Act’s Language and History*, HEALTH AFFAIRS BLOG (July 18, 2012), <http://www.healthaffairs.org/blog/2012/07/18/tax-credits-in-federally-facilitated-exchanges-are-consistent-with-the-affordable-care-acts-language-and-history/>.
237. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 264 (2010) (amending 42 U.S.C. § 300gg–91(d)).
238. *Enforcing ObamaCare’s New Rules and Taxes: Before the H. Comm. on Oversight and Government Reform*, 111th Cong. 2 (Aug. 2, 2012) (testimony of Timothy S. Jost), available at <http://oversight.house.gov/wp-content/uploads/2012/08/Jost-Testimony.pdf>. Note that the PPACA contains three separate Sections 1563.

He presents this as the plain meaning of Section 1321 rather than an ambiguity-based argument because he maintains there are no conflicts between Section 1401 and any other part of the statute.<sup>239</sup>

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239. *Enforcing ObamaCare's New Rules and Taxes: Before the H. Comm. on Oversight and Government Reform*, 111th Cong. (Aug. 2, 2012) (testimony of Michael Cannon), *video available at* <http://oversight.house.gov/hearing/irs-enforcing-obamacares-new-rules-and-taxes> (unofficial transcription, beginning at 58:46):

Rep. Scott DesJarlais (R-TN): Mr. Cannon, is there anything stopping the IRS from implementing Section 36B of the Internal Revenue Code exactly as written?

Michael Cannon: 36B is large and complicated, sir. If what you mean is the provision restricting tax credits to state-run exchanges, no.

Rep. DesJarlais: Thank you. Mr. Jost. Professor Jost.

Timothy Jost: 36B, as I explained, if you read the definitions, does authorize federal Exchanges to issue a tax credit, so, no, there's no problem.

Rep. DesJarlais: There's no problem. Thank you. In one part of the law it authorizes tax credits for people who purchase a qualified health plan through an Exchange established by the state under Section 1311. And even people who defend the IRS on this issue—such as yourself—Professor Jost, say this part of the law is clear. Is there any part of the statute that prevents you from doing just that: offering tax credits only in state-run Exchanges?

Mr. Jost: Again, the definitions.

Rep. DeJarlais: Mr. Cannon. Is there any part of the statute that prevents you from doing just that, offering tax credits? No?

Mr. Cannon: No, in fact the statute requires that.

Rep. DesJarlais: Okay, Is there any part of the statute that conflicts with that, Mr. Cannon?

Mr. Cannon: No. In fact, all other elements of the law support the clear meaning of that limitation of tax credits to health insurance Exchanges established by the state under Section 1311. And “established by the state”—those words are key.

Rep. DeJarlais: What about the information-reporting requirement?

Mr. Cannon: That does not conflict. It does require Exchanges established under Section 1321, by the federal government, to report information related to eligibility for tax credits and the advance payment of tax credits to the Treasury Secretary and to individuals enrolled through those exchanges. But that does not conflict in any way with the limitation of tax credits to state-run Exchanges.

Rep. DeJarlais: Okay, so what is stopping the IRS from implementing the tax credit provision exactly as written and the Exchanges from implementing the information reporting

A plain reading of the statute cannot support this claim. First, in each of the above-mentioned examples of equivalence language—the HELP Committee bill, the House bill, the PPACA’s authorization of tax credits in territorial Exchanges, and the information-reporting requirement—Congress explicitly mentioned the two types of Exchange between which it sought to draw equivalence and explicitly delineated the scope of that equivalence. The definition of “Exchange” in Section 1563 does neither.

Second, as noted earlier, Section 1401 expressly and repeatedly restricts tax credits to Exchanges “established by the State under section 1311.” The text of Section 1321 does not support the claim that a Section 1321 Exchange *is* a Section 1311 Exchange. Section 1321 Exchanges are distinct. They are authorized by a separate section of the statute that incorporates Title I’s other Exchange requirements into that section. The fact that Congress mentioned them separately when amending the PPACA with the HCERA confirms that Congress saw them as distinct. The Act contains no language providing that Section 1311 and 1321 Exchanges shall be equivalent with regard to tax credits. Quite the contrary: Section 1321 delineates the scope of that equivalence by providing that both types of Exchange are subject to the requirements of Title I, which includes the eligibility restrictions on tax credits.

Third, even if a Section 1321 Exchange were deemed to be a Section 1311 Exchange, it would still not be an Exchange “established by a State.” Section 1401 repeatedly requires that recipients of tax credits must be enrolled in health insurance through an Exchange that is “established by a state.” Section 1311 lists among its “requirements” that, for purposes of that section, “[a]n Exchange shall be a governmental agency or nonprofit entity that is established by a State.”<sup>240</sup> However else a Section 1321 Exchange may be like a Section 1311 Exchange, it cannot be an Exchange “established by a State.”

The IRS’s claim that federal Exchanges may distribute tax credits reduces to the absurd claim that the federal government can establish an Exchange that is “established by a state.” Such a notion “violates [the] canon of statutory construction . . . that every provision of a

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requirement exactly as written? Or can they both be implemented exactly as written without conflicting with each other?

Mr. Cannon: The latter. They can both be implemented exactly as written without any conflict.

Rep. DeJarlais: Agree, Professor Jost?

Mr. Jost: I would agree because, again, federal Exchanges can issue premium tax credits and can report.

240. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311(d)(1), 124 Stat. 119, 176 (2010).

congressional enactment should be given effect”<sup>241</sup> because it would strip multiple provisions in Sections 1311 and 1401 of their plain meanings.

This “such Exchange” defense of the IRS rule also contradicts another argument the Treasury Department and Professor Jost offer in defense of the rule: that “Congress demonstrated its understanding that federal exchanges would administer premium tax credits”<sup>242</sup> when the HCERA imposed the same information-reporting requirements on Exchanges established under both Sections 1311 and 1321.<sup>243</sup> If, as Professor Jost claims, a “section 1321 exchange means a section 1311 exchange,” there would have been no need for Congress to mention both Section 1311 and Section 1321 Exchanges in the information-reporting requirements. If the two are equivalent, the reference to Section 1321 Exchanges becomes redundant and unnecessary. Jost’s “such Exchange” theory turns this reference to Section 1321 Exchanges into surplusage as well.

Professor Jost is nevertheless correct that there is no conflict between Section 1401 and Section 1321 or any other provision of the statute. Section 1321’s command that the Secretary shall establish “such Exchange”<sup>244</sup> directs the federal government to create Exchanges that are identical to Section 1311 Exchanges, except where Congress has provided otherwise.

#### *E. The “CBO Canon”*

A rather novel defense of the IRS rule is that the IRS has authority to issue it because it is consistent with the manner in which the Congressional Budget Office (CBO) scored the PPACA.<sup>245</sup> Specifically, the argument is that the CBO score, including the revenue analysis of the law by the Joint Committee on Taxation, are evidence that the law was ambiguous and can be interpreted to support the IRS regulation. As Professor Jost explains,

the Joint Committee on Taxation and Congressional Budget Office assumed that the tax credits will be available through the federal

241. *The Role of the Internal Revenue Service in Health Reform: Before the H. Comm. on Oversight and Gov’t Reform*, 111th Cong. 3 (2012) (testimony of Timothy Stoltzfus Jost), available at <http://oversight.house.gov/wp-content/uploads/2012/08/Jost-Testimony.pdf>

242. See Jost, *supra* note 85.

243. Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1004, 124 Stat. 1029, 1035 (2010).

244. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1321(c), 124 Stat. 119, 186 (2010).

245. See Abbe Gluck, *The “CBO Canon” and the Debate Over Tax Credits on Federally Operated Health Insurance Exchanges*, BALKINIZATION (July 10, 2012, 8:55 PM), <http://balkin.blogspot.com/2012/07/cbo-canon-and-debate-over-tax-credits.html>; see also Shulman, *supra* note 77.

exchange. This is how the IRS and HHS have interpreted the law . . . and is clearly what Congress intended.<sup>246</sup>

If the actions of the CBO and the Joint Committee on Taxation (JCT) are not enough in themselves to demonstrate Congressional intent, Professor Abbe Gluck argues that there should be an “interpretive presumption” that statutory ambiguities “should be construed in the way most consistent with the assumptions underlying the congressional budget score on which the initial legislation was based.”<sup>247</sup> According to Gluck, because Congress “drafts in the shadow” of CBO budget scores, the CBO score “offers better evidence of congressional ‘intent’ than other commonly consulted non-textual tools, including legislative history.”<sup>248</sup> Alternatively, if the CBO score is not evidence that the statute supports the IRS rule, the existence of a CBO score consistent with the rule could at least suggest that the statute is sufficiently ambiguous to allow for the rule.

This theory of statutory construction raises interesting questions, none of which need be addressed here. The CBO score of the PPACA’s Exchange provisions is entirely consistent with the plain text of the statute and the prevailing assumptions about how these provisions would operate in practice.<sup>249</sup> The JCT and CBO produced revenue and spending estimates that assumed tax credits would be available in all fifty states. But this is not the same as “assum[ing] that the tax credits will be available through the federal exchange,” and neither the CBO nor JCT stated such an assumption when conducting their analysis. Indeed, the CBO has acknowledged it did not conduct a legal analysis of whether the statute authorizes tax credits through federal Exchanges.<sup>250</sup>

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246. Timothy Jost, *Implementing Reform: Funding and Flexibility for States on Exchanges*, HEALTH AFFAIRS BLOG (Nov. 30, 2011), <http://www.healthaffairs.org/blog/2011/11/30/implementing-reform-funding-and-flexibility-for-states-on-exchanges>. IRS Commissioner Douglas Shulman has also made this argument. See John Gramlich, *GOP Prepares Efforts to Challenge IRS Rule on Health Insurance Subsidies*, CQ TODAY, July 9, 2012.

247. Gluck, *supra* note 245.

248. *Id.*

249. Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, N.Y. TIMES, Aug. 5, 2012, at A17 (“When Congress passed legislation to expand coverage two years ago, Mr. Obama and lawmakers assumed that every state would set up its own exchange . . .”).

250. See Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Rep. Darrell Issa, Chairman, House Committee on Oversight and Government Reform (Dec. 6, 2012), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43752-letterToChairmanIssa.pdf>; see also Letter from Rep. Darrell Issa, Chairman, House Committee on Oversight and Government Reform (Nov. 30, 2012), available at

Thus its cost projections can hardly be considered authoritative. Like many of the PPACA's supporters, it appears the CBO and JCT simply assumed that every state would create its own Exchange and incorporated that miscalculation into their projections. Further evidence for this interpretation, if more were needed, is that the CBO made no mention of the hundreds of millions of dollars it would take to establish and operate federally run Exchanges (just as Congress didn't authorize those funds).<sup>251</sup> The CBO simply assumed every state would establish its own Exchange and did not even consider the question of what would happen if they did not. There is no basis for relying upon CBO or JCT budget projections to overturn or alter the plain meaning of the PPACA's text.

## VI. STANDING TO CHALLENGE THE IRS RULE

The fact that the IRS rule exceeds the scope of the authority Congress delegated to the agency and is contrary to law does not necessarily mean there is recourse. It can be particularly difficult to challenge IRS implementation of a statute where, as here, the IRS' alleged malfeasance consists of granting tax benefits and federal subsidies to others. As Professor Jost initially argued, "there will be no judicial review of this determination. It is not possible to conceive of a person who would be injured in fact by this interpretation of the rule such that they could present a case or controversy under Article III."<sup>252</sup> In the normal case, this could be true. Given how Section 1401 interacts with the rest of the PPACA's intricate regulatory structure, however, there could be standing for millions of employers and individuals to challenge the IRS rule.<sup>253</sup>

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<http://oversight.house.gov/wp-content/uploads/2012/12/2012-11-30-DEL-to-Elmendorf-CBO-PPACA-tax-credits.pdf.pdf> [sic].

251. For example, in a letter to the ranking member of the House Appropriations Committee, the CBO detailed the administrative costs to the federal government of implementing the PPACA but made no mention of Exchange-implementation costs. Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Jerry Lewis, Ranking Member, Committee on Appropriations (May 11, 2010), *available at* [http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/114xx/doc11490/lewisltr\\_hr3590.pdf](http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/114xx/doc11490/lewisltr_hr3590.pdf).

252. Jost, *supra* note 85.

253. Professor Jost has since acknowledged this point. See Timothy Jost, *Tax Credits in Federally Facilitated Exchanges are Consistent with the Affordable Care Act's Language and History*, HEALTH AFFAIRS BLOG (July 18, 2012), <http://www.healthaffairs.org/blog/2012/07/18/tax-credits-in-federally-facilitated-exchanges-are-consistent-with-the-affordable-care-acts-language-and-history> ("The only viable challengers to the law are employers who may in the future have to pay an exaction because they fail to offer their employees insurance (or affordable or adequate insurance) and their employees consequently end up receiving tax credits in the



A plaintiff must have Article III standing to challenge the legality of a federal agency action in federal court. Specifically, under *Lujan v. Defenders of Wildlife*, the “irreducible constitutional minimum of standing” has three parts.<sup>254</sup> First, the “plaintiff must have suffered an ‘injury in fact’” that is both “actual or imminent” and “concrete and particularized.”<sup>255</sup> Second, there must be a “causal connection between the injury and the conduct complained of.”<sup>256</sup> Third, there must be a sufficient likelihood that “the injury will be ‘redressed by a favorable decision.’”<sup>257</sup> When an individual or corporation is the subject of a government action, standing is relatively easy to satisfy. A plaintiff always has standing to challenge a government action that is directed against him. So, for instance, an individual or corporation would have standing to challenge the imposition of an allegedly illegal tax assessed against them.<sup>258</sup>

The Supreme Court has repeatedly held that, with few exceptions not relevant here,<sup>259</sup> federal taxpayers lack Article III standing to challenge the allegedly illegal or even unconstitutional expenditure of federal funds. In *DaimlerChrysler Corp. v. Cuno*, for example, the Court held unanimously that taxpayers lacked Article III standing to challenge

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federal exchanges.”). He may, however, be wrong about employers being the only viable challengers. *See infra* notes 269-78 and accompanying text.

254. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also* *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 180-81 (2000); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998); *Bennett v. Spear*, 520 U.S. 154, 162 (1997); *United States v. Hays*, 515 U.S. 737, 742 (1995); *Northeastern Fla. Chapter of Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663 (1993) (restating the minimum requirements of Article III standing articulated in *Lujan*).

255. *Lujan*, 504 U.S. at 560.

256. *Id.*

257. *Id.* at 561 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 28 (1976)).

258. While standing is easy to establish in such cases, there may be other barriers to obtaining prompt judicial review. The Anti-Injunction Act, for example, provides that, as a general rule, “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.” This restriction can prevent judicial review of a tax before it is collected, but does not affect a plaintiff’s Article III standing to sue. I.R.C. § 7421(a) (1954).

259. These exceptions concern challenges legislative appropriations alleged to violate the First Amendment’s prohibition on the establishment of religion. *See, e.g.*, *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 608-09 (2007). Whether these exceptions are coherent or not is another question. *See generally* Jonathan H. Adler, *God, Gaia, the Taxpayer, and the Lorax: Standing, Justiciability, and Separation of Powers After Massachusetts and Hein*, 20 REGENT U. L. REV. 175 (2008).

a state's award of preferential tax credits to a local manufacturer.<sup>260</sup> As the Court explained in *Frothingham v. Mellon*, a taxpayer's interest in the federal treasury is indistinct, "minute and indeterminable," and "the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain."<sup>261</sup> As a consequence, a taxpayer's alleged injury from the illegal expenditure of federal funds is not "concrete and particularized," nor is it "actual or imminent."<sup>262</sup>

The logic that precludes taxpayer standing to challenge the allegedly illegal expenditure of taxpayer dollars is "equally applicable" to tax credits and other targeted tax preferences.<sup>263</sup> As Chief Justice Roberts explained for the Court in *Cuno*, a federal taxpayer would lack standing to challenge a tax credit or exemption; "[i]n either case, the alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer contributes."<sup>264</sup> As a consequence, individual taxpayers or even taxpayer organizations would lack standing to challenge the legality of the IRS' decision to offer tax credits and subsidies to those who purchase health insurance on federally run Exchanges.

These barriers would not preclude a legal challenge to the IRS rule, however. First, the issuance of a tax credit for the purchase of a qualifying health insurance plan in a federal Exchange triggers the penalty for the so-called "employer mandate."<sup>265</sup> Specifically, under Section 1513, when an employee of a company with more than fifty employees receives a tax credit for purchasing insurance on an Exchange, the employer is assessed a penalty of up to \$2,000 per worker.<sup>266</sup> If the federal government lacks the legal authority to offer tax credits through a federal Exchange, then any employer that would be penalized as a result of one of those tax credits should have standing to challenge the IRS rule. Such an employer would have to demonstrate that it is covered by the employer mandate, does not provide a qualifying level of health

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260. 547 U.S. 332, 346 (2006).

261. *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923).

262. *Cuno*, 547 U.S. at 344 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

263. *Id.* at 343-44.

264. *Id.* at 344.

265. As far as the authors are aware, the first person to make this point was Professor James Blumstein. See David Hogberg, *Companies Could Challenge ObamaCare Employer Fines*, INVESTOR'S BUS. DAILY (Sept. 16, 2011, 5:46 PM), <http://news.investors.com/article/585053/201109161746/companies-could-challenge-obamacare-employer-fines.htm>.

266. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1513, 124 Stat. 119, 253-54 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1003, 124 Stat. 1029, 1033 (2010).

insurance to its employees, and is located in a state that has opted not to create an Exchange. Insofar as the employer-mandate penalty is considered to be a tax, it could be subject to the Anti-Injunction Act, which prevents taxpayers from challenging the legality of a tax before that tax is assessed.<sup>267</sup> If so, this would only affect the timing of such a suit and would not prevent a suitable employer from establishing standing to challenge the rule. Certain religious employers would have an additional incentive to challenge the IRS rule. The PPACA mandates that all health plans provide first-dollar coverage for preventive services. HHS has defined this standard to include all forms of contraception approved by the federal Food and Drug Administration. Employers from certain religious denominations have objected to this mandate because they consider such forms of contraception to be immoral. Dozens of employers have filed suit claiming the contraceptives mandate violates their conscience rights as protected by the federal Religious Freedom Restoration Act and the First Amendment.<sup>268</sup> Such employers have an additional incentive to challenge the IRS rule. If the direct challenges to the contraceptives mandates fail, then blocking the IRS rule would enable those employers to stay true to their consciences and avoid the contraceptives mandate by dropping their employee health benefits without penalty.

Second, many individuals could be able to challenge the rule on the grounds that the issuance of unauthorized tax credits in federal Exchanges strips them of the “affordability exemption” from the individual mandate and therefore exposes them to penalties under the individual mandate and/or deprives them of the ability to purchase low-cost “catastrophic plans” that the PPACA makes available to those who qualify for the affordability exemption. As noted above, the individual mandate exempts non-compliant taxpayers from penalties if their out-of-

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267. Whether the penalty would be considered a tax for Anti-Injunction Act purposes is not clear. In *NFIB v. Sebelius*, the Court unanimously concluded that the act did not bar suit against the “individual mandate,” even though a majority of the Court upheld the mandate as a tax. *See* 132 S. Ct. 2566, 2583 (2012) (“Congress can, of course, describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the Anti-Injunction Act. For example, 26 U.S.C. § 6671(a) provides that ‘any reference in this title to “tax” imposed by this title shall be deemed also to refer to the penalties and liabilities provided by’ subchapter 68B of the Internal Revenue Code. Penalties in subchapter 68B are thus treated as taxes under Title 26, which includes the Anti-Injunction Act. The individual mandate, however, is not in subchapter 68B of the Code.”).

268. *See, e.g.*, *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Wheaton College v. Sebelius*, 2012 WL 3637162 (D.D.C. 2012); *see also* David Gibson, *Catholic Groups File Suit over HHS Birth Control Mandate*, WASH. POST (May 21, 2012), [http://articles.washingtonpost.com/2012-05-21/national/35458658\\_1\\_catholic-groups-mandate-dioceses](http://articles.washingtonpost.com/2012-05-21/national/35458658_1_catholic-groups-mandate-dioceses) (noting “dozens” of Catholic institutions had filed suit against the so-called “contraception mandate”).

pocket costs for health insurance (i.e., their “required contribution”) exceeds 8 percent of household income. Under the statute, if a state does not establish an Exchange, the “required contribution” equals the premium for the lowest-cost plan available to the taxpayer through the federal Exchange because there are no tax credits to reduce the “required contribution” below that premium.

If the IRS nevertheless issues unauthorized tax credits through a federal Exchange, then those tax credits could reduce many taxpayers’ “required contributions” from above the 8 percent threshold to below that threshold, thereby depriving them of the affordability exemption. For individuals who prefer not to purchase health insurance, the loss of the affordability exemption would expose them to penalties. In 2016, those penalties can range from \$695 for some individuals to \$2,085 for families of four. Individuals age thirty and over who desire to purchase health insurance would also suffer injury. The PPACA makes low-cost “catastrophic plans” available to individuals under age thirty. Individuals over thirty are generally barred from purchasing such low-cost plans unless they qualify for the affordability exemption from the individual mandate.<sup>269</sup> When the IRS rule strips such individuals of the affordability exemption, they will lose the right to purchase this low-cost health insurance option.

Individuals could establish standing by demonstrating that they live in a state that will not establish an Exchange by 2014, that they would qualify for the affordability exemption in the absence of tax credits, that the affordability exemption would have value to them (either because they plan not to purchase health insurance or to purchase a catastrophic plan), and that the IRS rule would deny them the exemption. To satisfy that last element, individuals would have to show, among other criteria, that they are between 100 and 400 percent of the federal poverty level, that they will not have “minimum value coverage” in 2014 (either because they are uninsured or because they purchase less coverage than the mandate requires), and that they do not receive an offer of “minimum value” and “affordable” coverage from an employer. Some twelve million currently uninsured individuals would likely meet those criteria.<sup>270</sup> Each

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269. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1302(e), 124 Stat. 119, 168 (2010).

270. *Distribution of the Nonelderly Uninsured by Federal Poverty Level (FPL), States (2010-2011)*, U.S. (2011), HENRY J. KAISER FAMILY FOUNDATION: KAISER STATE HEALTH FACTS, <http://www.statehealthfacts.org/comparable.jsp?typ=1&ind=136&cat=3&sub=40> (last visited Mar. 1, 2013). LISA DUBAY & ALLISON COOK, HOW WILL THE UNINSURED BE AFFECTED BY HEALTH REFORM? KAISER COMMISSION ON MEDICAID AND THE UNINSURED ISSUE, PAPER NO. 7971 (2009) 7, <http://www.kff.org/healthreform/upload/7971.pdf>; JEFFREY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES (2009), <http://www.pewhispanic.org/files/reports/107.pdf>; U.S. DEP'T OF HEALTH & HUMAN SERVS., SUMMARY HEALTH STATISTICS FOR U.S. ADULTS:

is a potential plaintiff, assuming their state does not establish an Exchange. The thirty-four states that had by February 15, 2013, signaled their intent not to establish an Exchange are home to some eight million currently uninsured individuals who could have standing. In addition, many insured individuals could establish standing if, for example, they purchase a high-deductible health plan that fails to satisfy the mandate because it has an actuarial value below 60 percent.<sup>271</sup> Potentially millions of additional individuals could establish standing if they desire to use the affordability exemption to purchase catastrophic plans.

The Anti-Injunction Act is unlikely to impede a challenge brought by individual taxpayers. The Supreme Court unanimously concluded in *NFIB v. Sebelius* that the individual mandate penalty, while it may be considered a tax for constitutional purposes, is not a tax for Anti-Injunction Act purposes.<sup>272</sup> Thus a challenge brought by individual taxpayers should be able to receive immediate adjudication.

States that choose not to establish an Exchange that satisfies the PPACA's requirements should also have standing to challenge the IRS rule. States have sovereign interests that are often sufficient to establish standing to challenge federal actions.<sup>273</sup> Specifically, where the federal government acts on states as states, and directly affects state interests, states may have standing to challenge such actions in federal court.<sup>274</sup> So, for instance, where a statute creates a regulatory mechanism that acts on state governments, an objecting state has standing under the

NATIONAL HEALTH INTERVIEW SURVEY, 2011, VITAL AND HEALTH STATISTICS: SERIES 10, NO. 256, table 25 (2012), [http://www.cdc.gov/nchs/data/series/sr\\_10/sr10\\_256.pdf](http://www.cdc.gov/nchs/data/series/sr_10/sr10_256.pdf); and authors' calculations.

271. Under the statute, self-funded employers in states that do not establish Exchanges would remain free to offer plans that do not satisfy the "minimum value" standard. See SETH PERRETTA & ALLISON ULLMAN, *THE ESSENTIALS: ACA TERMINOLOGY RELATED TO ESSENTIAL HEALTH BENEFITS, MINIMUM ESSENTIAL COVERAGE AND MINIMUM VALUE* (2012), [http://www.americanbenefitscouncil.org/documents/hcr\\_ehb\\_summary-cm020112.pdf](http://www.americanbenefitscouncil.org/documents/hcr_ehb_summary-cm020112.pdf).
272. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).
273. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497 (2006) (challenging EPA's refusal to regulate greenhouse gases under the Clean Air Act); *South Dakota v. Dole*, 483 U.S. 203 (1987) (challenging federal statute conditioning portion of highway funding on adoption of minimum drinking age); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (challenging Voting Rights Act Amendments of 1970); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (challenging portions of Voting Rights Act); *see generally* Stephen Vladeck, *States' Rights and State Standing*, 46 U. RICH. L. REV. 845 (2012).
274. *See Vladeck, supra* note 273, at 848 ("when a state truly is the federal stakeholder against the federal government, state standing is not just appropriate, but necessary").

Administrative Procedure Act to challenge federal regulatory actions that compromise state interests in violation of the authorizing statute.<sup>275</sup>

In *Virginia ex rel. Cuccinelli v. Sebelius*, the US Court of Appeals for the Fourth Circuit rejected Virginia's standing to challenge the individual mandate because Virginia could not assert any interests beyond seeking to protect Virginia citizens.<sup>276</sup> Here, however, states could claim that the IRS rule directly affects state interests created by the PPACA. The health care law, as written, gives states a choice of whether to create an Exchange that complies with the Act's requirements in return for start-up funds, tax credits, subsidies, and tax penalties on employers and a greater number of individual residents. The IRS rule, however, eliminates the choice by providing for tax credits, subsidies, and tax penalties without regard to whether a state creates its own Exchange. Insofar as this rule eliminates a choice that the statute reserved to the states, an objecting state should have standing to challenge the legality of the rule.<sup>277</sup>

Litigation over the IRS rule is not merely hypothetical. As this Article goes to press, a lawsuit challenging the IRS filed by the State of Oklahoma is pending in federal court.<sup>278</sup> Additional suits, either by other states, employers seeking to avoid the tax penalties, or individuals injured by the loss of the affordability exemption, may follow.

## CONCLUSION

The IRS rule's attempt to offer premium-assistance tax credits through federal Exchanges lacks validity because the IRS lacks the legal authority to create entitlements where, as here, Congress has not authorized them. Congress has granted the IRS authority to offer premium-assistance tax credits and cost-sharing subsidies only through Exchanges that are "a governmental agency or nonprofit entity that is established by a State."<sup>279</sup> The IRS lacks the authority to offer those entitlements, to enforce the employer mandate, and in many cases to enforce the individual mandate, in states that opt for either a "federally facilitated" Exchange or a "partnership" Exchange.<sup>280</sup> The IRS rule

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275. *See, e.g.*, *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008).

276. 656 F.3d 253 (4th Cir. 2011). Virginia also enacted a statute, the Virginia Health Care Freedom Act, VA CODE ANN. § 38.2-3430.1:1 (Cum. Supp. 2011), that would be preempted by the PPACA in a failed effort to claim standing.

277. *Cf.* *Wyoming ex rel. Crank*, 539 F.3d.

278. *See supra* note 12.

279. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311(d)(1), 124 Stat. 119, 176 (2010).

unlawfully usurps Congress' exclusive powers to tax, to create new legal entitlements, to issue tax credits, and to spend federal dollars.

The Act's legislative history shows the plain meaning of the statute reflects congressional intent and offers no evidence to support claims that the plain meaning of this statute deviates from that intent. The IRS rule does not correct a scrivener's error. The rule neither resolves a textual ambiguity nor resolves an ambiguity regarding congressional intent—because there is no ambiguity. There is only a frantic, last-ditch search for ambiguity by supporters who belatedly recognize the PPACA threatens health insurance markets with collapse, which in turn threatens the PPACA.<sup>281</sup>

Finally, because these unauthorized entitlements would trigger unauthorized penalties against employers and individuals, we find that those employers (including state governments) and individuals could meet the requisite tests for standing and challenge the constitutionality of this IRS rule in federal court.

Administrative agencies enjoy wide latitude to interpret and implement federal law. But they cannot rewrite laws to impose taxes, issue tax credits, spend federal revenue, incur new federal debt, or create new legal entitlements without congressional authorization. If the PPACA imposes an unsustainable regulatory scheme on markets for health insurance, the remedy must be found in the political process. It cannot be fixed by administrative fiat.

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280. Timothy Jost, *Implementing Health Reform: A Final Rule on Health Insurance Exchanges*, HEALTH AFFAIRS BLOG (Mar. 13, 2012), <http://healthaffairs.org/blog/2012/03/13/implementing-health-reform-a-final-rule-on-health-insurance-exchanges> (noting that the final rule “does clarify that partnership exchanges are in fact federal exchanges and that states must agree to operate both the individual and the SHOP exchange to qualify for state exchange status.”).

281. See Jerry Geisel, *Oklahoma Lawsuit Targets Premium Subsidy Provision of Health Care Reform Law*, BUSINESS INSURANCE (Oct. 28, 2012, 6:00 AM), <http://www.businessinsurance.com/article/20121028/NEWS03/310289979> (“If premium subsidies are not available in federally established exchanges, ‘No one would go to those exchanges. The whole structure created by the health care reform law starts to fall apart,’ said Gretchen Young, senior vice president-health policy at the ERISA Industry Committee in Washington. ‘The health care reform law would become a meaningless law,’ added Chantel Sheaks, a principal with Buck Consultants L.L.C. in Washington.”).