NOTE

What's in a Contribution?: How the IRS's Misinterpretation of the ACA Precludes Millions of Families from Accessing Affordable Health Coverage

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This Note is about the "family glitch" in the Affordable Care Act (ACA), focusing on the regulatory interpretation of the statutory affordability requirements. Under the ACA, individuals are not eligible for premium tax credits to purchase health insurance coverage if they receive an offer of affordable health insurance coverage from an employer. However, the Internal Revenue Service (IRS) determined that an offer of employer-sponsored insurance that includes dependent coverage should preclude dependents from receiving premium tax credits if the employee's self-only coverage is affordable. This makes entire families ineligible to buy subsidized insurance on the ACA Marketplace if any individual in the family is eligible for affordable self-only coverage, even if the premiums for family coverage are prohibitively expensive. This Note demonstrates that regardless of whether one interprets the statute using a textualist approach, a legislative intent approach, or an objective purpose approach, the statute requires that affordability be determined by the employee's full contribution for family coverage rather than self-only coverage. In other words, the IRS's interpretation is without support under the three dominant theories of modern statutory interpretation. This Note then assesses varying methods of fixing the family glitch and how they may be affected by what the future has in store for the ACA.

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INTRODUCTION

You ask me for a contribution
Well, you know
We're doing what we can
–The Beatles[1]

One of the signature provisions of the Affordable Care Act (ACA) provides subsidies through premium tax credits to individuals and families to buy private health insurance on the Marketplace set up by the law.[2] The main focus of the subsidies was to make coverage accessible to people who did not have access to health insurance through their employers.[3] People with access to affordable employer-sponsored coverage are not eligible for ACA subsidies.[4] Employer-

1. THE BEATLES, *Revolution 1*, *on* THE BEATLES (Apple Records 1968).
2. *See* I.R.C. § 36B(b).
3. *See id.* § 36B(c)(2)(C).
4. *See* Katie Keith, *Fixing the ACA's Family Glitch*, HEALTH AFFS. (May 20, 2021), https://www.healthaffairs.org/do/10.1377/hblog20210520.564880/full/ [https://perma.cc/HW8G-JMYM].

sponsored coverage is considered affordable under the law if your contribution for insurance premiums costs less than 9.5% of your income.[5] For example, if your income is $1,000 per month, your premiums would be considered affordable if you have to pay less than $95 per month.

For individuals purchasing insurance, the affordability calculation is based on the cost of self-only coverage as a percentage of income.[6] But, under Internal Revenue Service (IRS) rules, the affordability calculation for *family* coverage is also determined by the affordability of the individual employee's *self-only* coverage, not what the actual contribution would be for a family plan.[7] This is known as the "family glitch." This means that entire families become ineligible to buy subsidized insurance on the ACA Marketplace if someone in the family is eligible for affordable self-only coverage, even if the premium for family coverage is thousands of dollars per month.

The IRS regulations on eligibility for premium tax credits misconstrue the ACA's statutory language in such a way that precludes millions of families from accessing affordable coverage.[8] Individuals are not eligible for premium tax credits to purchase health insurance coverage on the ACA's Marketplace if they receive an offer of affordable health insurance coverage from an employer meeting the minimum essential coverage requirements.[9] Lawmakers included this provision in the statute as a "firewall" to alleviate concerns that consumers may flee the employer-sponsored market to purchase government-subsidized coverage on the Marketplace.[10] The family glitch is a byproduct of the IRS's interpretation of the affordability standards, establishing that an offer of employer-sponsored insurance that includes coverage for dependents makes those dependents ineligible to receive premium tax credits if the portion of the premiums for self-only coverage for the employee is affordable—irrespective of the cost of family coverage.

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5. I.R.C. § 36B(c)(2)(C)(i). This number is indexed to the rate of premium growth in the prior year. *See id.* § 36B(c)(2)(C)(iv); *see also id.* § 36B(b)(3)(A)(ii) (specifying the general method of calculating adjustment). In 2022, the applicable percentage is 9.61%. *See* Rev. Proc. 2021-36, 2021-35 I.R.B. 358.

6. Health Insurance Premium Tax Credit, 78 Fed. Reg. 7264, 7265 (Feb. 1, 2013) (codified at 26 C.F.R. § 1.36B-2 (2022)).

7. *Id.*

8. *See* LINDA J. BLUMBERG, JOHN HOLAHAN, MICHAEL KARPMAN & CAROLINE ELMENDORF, URB. INST., CHARACTERISTICS OF THE REMAINING UNINSURED: AN UPDATE 9 (2018), https://www.urban.org/sites/default/files/publication/98764/2001914-characteristics-of-the-remaining-uninsured-an-update_2.pdf [https://perma.cc/JHH5-AAS4]; MATTHEW BUETTGENS & JESSICA BANTHIN, URB. INST., CHANGING THE "FAMILY GLITCH" WOULD MAKE HEALTH COVERAGE MORE AFFORDABLE FOR MANY FAMILIES 5 (2021), https://www.urban.org/sites/default/files/publication/104223/changing-the-family-glitch-would-make-health-coverage-more-affordable-for-many-families_1.pdf [https://perma.cc/EYW2-F4DD]; Cynthia Cox, Krutika Amin, Gary Claxton & Daniel McDermott, *The ACA Family Glitch and Affordability of Employer Coverage*, KAISER FAM. FOUND. (Apr. 7, 2021), https://www.kff.org/health-reform/issue-brief/the-aca-family-glitch-and-affordability-of-employer-coverage/ [https://perma.cc/JQ39-U5DL]; Matthew Buettgens, Lisa Dubay & Genevieve M. Kenney, *Marketplace Subsidies: Changing the 'Family Glitch' Reduces Family Health Spending but Increases Government Costs*, 35 HEALTH AFFS. 1167, 1170 (2016); Keith, *supra* note 4.

9. I.R.C. § 36B(c)(2)(C)(i).

10. Julian Pecquet, *Healthcare Law Could Leave Families with High Insurance Costs*, HILL (July 21, 2011, 4:43 PM), https://perma.cc/UJ6H-HKJE.

Whether, as a mode of statutory interpretation, one prefers plain meaning, congressional intent, or general purpose, the result is the same: the statute requires that affordability be determined by the employee's full contribution for family coverage rather than self-only coverage. This reinterpretation may be particularly relevant to ongoing efforts to expand access to affordable health insurance coverage amid indications from the Biden Administration that it would like to reevaluate previous regulatory actions that limit access to affordable coverage.[11]

This Note proceeds in the following manner. Part I introduces the family glitch, including how it originated, the impact it has had, and the judicial precedent that may bear on proper interpretation of the statute. Part II describes different canons of statutory interpretation and explains why each canon refutes the IRS's interpretation of the statute. Part III suggests different ways the family glitch could be fixed. Part IV discusses the future of the ACA.

I. WHAT IS THE FAMILY GLITCH?

A. HOW THE FAMILY GLITCH ORIGINATED

The ACA introduced a complex network of cross-referential provisions to establish much of its framework to provide affordable health coverage. Section 36B of the tax code states that people who receive an offer of "affordable" health insurance coverage through an employer-sponsored plan providing minimum essential coverage are not eligible for premium tax credits to purchase health insurance under the ACA.[12] An affordable plan is defined as a plan costing less than 9.5% of household income.[13] In defining affordable coverage, the statute cross-references a provision within the individual mandate portion of the statute, § 5000A(e)(1)(B), which establishes that for an individual who receives an offer of employer-sponsored coverage, affordability is determined by "the portion of the annual premium which would be paid by the individual . . . for self-only coverage."[14] The IRS reasoned in its 2011 proposed rulemaking—finalized in 2013—that an offer of employer-sponsored coverage for a family is affordable if the portion of the premium for self-only coverage is affordable, regardless of the cost of coverage for the entire family.[15] However, immediately following § 5000A(e)(1)(B), the statute has a special rule clarifying that for individuals related to employees, the determination of affordability "shall be made by reference to [the] required contribution of the employee."[16] Because § 36B's definition of affordability does not explicitly cross-reference the special rule in § 5000A, the

11. *See* Katie Keith, *Biden Executive Order to Reopen HealthCare.gov, Make Other Changes*, HEALTH AFFS. (Jan. 29, 2021), https://www.healthaffairs.org/do/10.1377/hblog20210129.998616/full/ [https://perma.cc/7XEC-M83C].

12. I.R.C. § 36B(c)(2)(C)(i).

13. *See supra* note 5.

14. I.R.C. § 5000A(e)(1)(B)(i).

15. Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,935 (Aug. 17, 2011) (codified at 26 C.F.R. § 1.36B-2 (2022)); Health Insurance Premium Tax Credit, 78 Fed. Reg. 7264, 7265 (Feb. 1, 2013) (codified at 26 C.F.R. § 1.36B-2 (2022)).

16. I.R.C. § 5000A(e)(1)(C) (footnote omitted).

IRS ignored this provision in its rulemaking, making families ineligible for premium subsidies whenever affordable self-only coverage is available.[17]

B. HOW THE FAMILY GLITCH IMPEDES ACCESS TO AFFORDABLE HEALTH INSURANCE

The result of the IRS's interpretation is that many families are worse off for having received an offer of employer-sponsored coverage than they would have been if the employer offered no coverage at all. The offer of coverage, despite being unaffordable, precludes them from eligibility for tax credits to purchase insurance on the Marketplace. Although it is difficult to determine exactly how many people are affected by the family glitch, recent estimates of the number of people ineligible for premium tax credits because of an offer of family coverage from an employer range from 4.8 million people[18] to over 5.1 million people.[19] Although much of the attention around the future of health insurance reform focuses on the millions of people who are still uninsured,[20] fixing the family glitch would not only lower the uninsured rate, it would also substantially reduce the cost of coverage for families who would be able to switch from employer-sponsored plans to Marketplace plans.[21] Furthermore, allowing for more families to purchase affordable Marketplace coverage—rather than employer-sponsored insurance—would likely increase wages, which would benefit low-income families and also provide increased tax revenue to help offset the federal budgetary cost of the tax subsidies.[22]

C. ADMINISTRATIVE LAW PRECEDENT

Before exploring the varying approaches to statutory interpretation, it is necessary to set a baseline of what the U.S. Supreme Court's precedent permits administrative agencies to do. Looming large over all determinations of administrative authority is *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[23] In short, *Chevron* holds:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the

17. *See* Health Insurance Premium Tax Credit, 78 Fed. Reg. at 7265.

18. *See* BUETTGENS & BANTHIN, *supra* note 8.

19. *See* Cox et al., *supra* note 8.

20. *See, e.g.*, Jennifer Tolbert, Kendal Orgera & Anthony Damico, *Key Facts About the Uninsured Population*, KAISER FAM. FOUND. (Nov. 6, 2020), https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/ [https://perma.cc/3GSC-6DAP].

21. *See* BUETTGENS & BANTHIN, *supra* note 8, at 8–9 (finding that families who "currently spend $2,481 per person on premiums" because of the family glitch "would spend $1,028 less per person on premiums" if the family glitch were eliminated).

22. *See* Buettgens et al., *supra* note 8, at 1172.

23. 467 U.S. 837 (1984).

> precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[24]

The Court further elaborated that the standard for resolving ambiguity in the statute is not whether the agency's view is appropriate but whether the agency's view is reasonable.[25]

However, in interpreting the ACA's health insurance reforms in *King v. Burwell*, the Court held that *Chevron* deference does not extend to questions of "deep 'economic and political significance.'"[26] The Court found that Congress would only assign such questions to an agency expressly and that it is "especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort."[27] Although *King* did not set out a standard defining what constitutes a question of "deep economic and political significance," the Court made clear that the interpretation of health insurance policy was one such question. This indicates that one cannot rely on the IRS receiving *Chevron* deference when interpreting ambiguous statutory language regarding the meaning of an employee contribution under the ACA statute.[28] Instead, the Court took it upon itself "to determine the correct reading of Section 36B."[29] It went on to lay out its approach to interpreting the statute:

> If the statutory language is plain, we must enforce it according to its terms. But oftentimes the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." Our duty, after all, is "to construe statutes, not isolated provisions."[30]

Therefore, the final say on how to interpret statutes of "economic and political significance," like the ACA, is left to the courts—even when there is ambiguous language.

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24. *Id.* at 842–43 (footnotes omitted).

25. *Id.* at 845.

26. King v. Burwell, 576 U.S. 473, 485–86 (2015) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

27. *Id.* at 486.

28. Indeed, given the current composition of the Court, it is unlikely that the current Court would give the IRS greater interpretive latitude. Although two of the six Justices who joined the majority in *King*—Kennedy and Ginsburg—are no longer on the Court, Justice Gorsuch, who joined the Court after *King* was decided, has openly questioned the constitutional legitimacy of *Chevron* and would be unlikely to join an opinion seeking to expand its applicability. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

29. *King*, 576 U.S. at 486.

30. *Id.* (citations omitted).

II. HOW SHOULD THE ACA'S DEPENDENT COVERAGE PROVISIONS BE INTERPRETED?

Although there are several common methods of statutory interpretation, none of them lead to the conclusion at which the IRS arrived. Analyzing the ACA through textualism, legislative intent analysis, and objective purpose analysis invariably demonstrates that when family coverage is offered, the affordability of that family coverage should be the benchmark for determining eligibility for premium tax credits.

A. THE TEXTUALIST APPROACH

Textualism is a theory of statutory interpretation increasing in popularity in recent decades, primarily—though not exclusively—among conservative jurists such as Justice Antonin Scalia.[31] Modern textualist analysis focuses strictly on the meaning of the statutory text itself based on how an ordinary, English-speaking member of the public would understand the text when it was signed into law.[32] A textualist may consult contemporaneous dictionaries or other provisions of the statute; however, neither the legislative intent nor the general purpose may be considered, even if this information would have been available to an ordinary member of the public.[33]

The critical code section for analysis of the family glitch is 26 U.S.C. § 5000A's requirement to maintain minimum essential coverage—including its exemptions for people who cannot afford coverage.[34] For an individual who is eligible to purchase an employer-sponsored plan, the statute says affordability is determined by "the portion of the annual premium which would be paid by the individual . . . for self-only coverage."[35] This provision is immediately followed by a special rule for individuals related to employees: for individuals who are "eligible for minimum essential coverage through an employer by reason of a relationship to an employee," the affordability determination "shall be made by reference to [the] required contribution of the employee."[36]

However, § 36B(c)(2)(C), which establishes the firewall preventing people who have access to employer-sponsored coverage from receiving subsidies for Marketplace coverage, only cross-references the general rule of § 5000A(e)(1)(B) in establishing the affordability requirements for such coverage.[37] When the IRS published its notice of proposed rulemaking, it determined that an offer of employer-sponsored coverage for a family is affordable for the purposes of eligibility for premium tax credits under § 36B if the portion of the premium for self-

31. *See* Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 239 (2018).

32. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 235–36 (2d ed. 2006).

33. *See id.* at 236.

34. I.R.C. § 5000A(e)(1).

35. *Id.* § 5000A(e)(1)(B)(i).

36. *Id.* § 5000A(e)(1)(C) (footnote omitted).

37. *Id.* § 36B(c)(2)(C)(i)(II).

only coverage is affordable, "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."[38] This interpretation only takes the general rule of § 5000A (e)(1)(B) into account and ignores the special rule for dependents contained in § 5000A(e)(1)(C). As a result, the affordability test adopted by the IRS in regulations is exactly the same for both employees and dependents.

The general rule made explicit that the affordability determination for self-only coverage is based on the contribution for self-only coverage.[39] If the special rule on dependent coverage also determines affordability based solely on the contribution for the employee's self-only coverage, the statute would use parallel language to reflect that determination. Instead, the special rule uses less precise language about the "required contribution of the employee."[40] Commenters on the proposed interpretation urged the IRS, when interpreting the plain meaning of the statute, to affirm that this differing language means just what it sounds like it means: the affordability of coverage for dependents should be based on the premium contribution to insure those dependents.[41] Courts generally follow the rule that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."[42] When the IRS released the proposed regulation to solicit public comments, many commenters acknowledged that this is what they read the statute to say.[43] A range of groups came to this same conclusion about the plain meaning—groups spanning the ideological spectrum on healthcare, from labor unions to health policy analysts to health insurance companies.[44]

For instance, the National Health Law Program questioned the IRS's plain language reading of the statute, because if the special rules for individuals related to employees were meant to follow the same affordability standard based on self-only coverage, the statute could have used the phrasing as it did for individual employees purchasing coverage.[45] Moreover, the National Health Law Program suggested that the statute could have even omitted the special rules for individuals related to employees altogether if they were meant to follow the same

38. Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,935 (Aug. 17, 2011) (codified at 26 C.F.R. § 1.36B-2 (2022)).

39. I.R.C. § 5000A(e)(1)(B)(i).

40. *Id.* § 5000A(e)(1)(C).

41. *See* Nat'l Health L. Program, Comment Letter on Proposed Regulations on Health Insurance Premium Tax Credit (Oct. 31, 2011), https://downloads.regulations.gov/IRS-2011-0024-0084/attachment_1.pdf [https://perma.cc/CJ36-UN9C]; AFL-CIO, Comment Letter on Proposed Regulations on Health Insurance Premium Tax Credit (Oct. 31, 2011), https://downloads.regulations.gov/IRS-2011-0024-0138/attachment_1.pdf [https://perma.cc/TG6J-V8W2].

42. Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004) (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06, at 194 (rev. 6th ed. 2000)).

43. *See* Nat'l Health L. Program, *supra* note 41; AFL-CIO, *supra* note 41; Cigna, Comment Letter on Proposed Regulations on Health Insurance Premium Tax Credit (Oct. 28, 2011), https://downloads.regulations.gov/IRS-2011-0024-0182/attachment_1.pdf [https://perma.cc/4F2U-R82V].

44. *See supra* note 43.

45. Nat'l Health L. Program, *supra* note 41.

affordability standard, because the general rule in § 5000A(e)(1)(B)(i) does not differentiate between employees and their dependents.[46] There is nothing special about the special rules for individuals related to employees if they just reiterate the same affordability standard of the general rule for everyone.

But the IRS does not explicitly reject this interpretation of § 5000A(e)(1)(C). Instead, it ignores this provision altogether.[47] The IRS contends that § 5000A(e)(1)(C) was only included in the statute for determining the affordability of coverage for the purposes of the individual mandate penalty.[48] Although the language in § 36B(c)(2)(C)(i) defines affordable employer-sponsored coverage based on the general rule of § 5000A(e)(1)(B), it is illogical to ignore the clarification of this provision contained in the special rule for dependents in § 5000A(e)(1)(C). Although interpreting the meaning using a provision not specifically cross-referenced may seem counter to textualist analysis, this logical reading of the statute is required by textualism. As noted by Justice Scalia:

> Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be . . . . A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.[49]

A strict constructionist may support the IRS's hyper-literal interpretation, but that is not within the bounds of textualism. The statute in § 5000A establishes the special rule in § 5000A(e)(1)(C) as a clarification of the general rule in § 5000A(e)(1)(B).[50] By cross-referencing § 5000A(e)(1)(B), there should be no question that § 36B(c)(2)(C)(i) seeks to reference § 5000A(e)(1)(B) as clarified by § 5000A(e)(1)(C).

Similarly, the AFL-CIO, National Association of Children's Hospitals, Center on Budget and Policy Priorities, and many other groups were confounded by the IRS's interpretation.[51] Even more telling, Cigna, a large health insurance provider, noted that "the affordability measure is based upon 9.5% of income and self-only coverage; whereas the affordability measure for individual

46. *See id*. at 2–3.

47. *See* 26 C.F.R. § 1.36B-2(c)(3)(v) (2022).

48. *See* Health Insurance Premium Tax Credit, 78 Fed. Reg. 7264, 7265 (Feb. 1, 2013) (codified at 26 C.F.R. § 1.36B-2 (2022)); *see also* Keith, *supra* note 4 (noting that "the IRS reached a *different* conclusion regarding these special rules when it came to the individual mandate").

49. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 23 (Amy Gutmann, ed., 1997).

50. I.R.C. § 5000A(e)(1)(C).

51. *See* AFL-CIO, *supra* note 41; Nat'l Assoc. of Child.'s Hosps., Comment Letter on Proposed Regulations on Health Insurance Premium Tax Credit (Oct. 31, 2011), https://downloads.regulations.gov/IRS-2011-0024-0104/attachment_1.pdf [https://perma.cc/DG5H-QN2N]; Ctr. on Budget and Pol'y Priorities, Comment Letter on Proposed Regulations on Health Insurance Premium Tax Credit (Nov. 9, 2011), https://downloads.regulations.gov/IRS-2011-0024-0191/attachment_1.pdf [https://perma.cc/2NB5-HBU6].

responsibility is based upon the contribution for family coverage. We request clarification as to whether this apparent inconsistency is intended."[52] Although the previously mentioned organizations are outwardly supportive of more consumer-friendly affordability requirements on health insurance plans, an insurer like Cigna has less reason to question the IRS's interpretation. Thus, the IRS's interpretation of the statute is in such stark conflict with its words that stakeholders with widely divergent interests all needed clarification to confirm that the IRS was actually taking the confusing position it said it was taking.

The human resources consulting firm Aon Hewitt did submit a comment in favor of the position the IRS took in the initial public comment period.[53] However, misinterpretations in Aon Hewitt's reading of the statute go beyond the IRS's misreading. In justifying the determination of affordability for family coverage based on the contribution for self-only coverage, Aon Hewitt notes the impossibility of assessing household income for the purposes of determining whether employer coverage satisfies the affordability requirement.[54] But even under the IRS's interpretation, an employer still needs to make that assessment because household income still must be determined for the purposes of determining the affordability of self-only coverage.[55]

The IRS briefly acknowledged the commenters when it published its initial part of the final regulations in 2012 but elected to leave a final decision on determining affordability for related individuals for a later stage in the rulemaking.[56] After the IRS made this statement opening the door to a potential reinterpretation of the affordability standards, the U.S. Chamber of Commerce submitted a comment supporting the IRS's initial interpretation but provided no justification for this interpretation beyond an ephemeral belief that Congress intended for the contribution for self-only coverage to be the universal standard.[57]

Likewise, Aetna, another large health insurance company, submitted a public comment in 2012 expressing concern over the possibility of the IRS reinterpreting the affordability standard for dependents because it would "seem counter to

52. Cigna, *supra* note 43.

53. Aon Hewitt describes itself in the comment letter as "the global leader in human resource consulting and outsourcing solutions. The company partners with organizations to solve their most complex benefits, talent, and related financial challenges, and improve business performance." Aon Hewitt, Comment Letter on Proposed Regulations on Health Insurance Premium Tax Credit (Oct. 27, 2011), https://downloads.regulations.gov/IRS-2011-0024-0018/attachment_1.pdf [https://perma.cc/H5RX-HTNA].

54. *Id.*

55. I.R.C. § 36B(c)(2)(C)(i).

56. Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,380 (May 23, 2012) (codified at 26 C.F.R. § 1.36B-2 (2022)).

57. U.S. Chamber of Com., Comment Letter on Proposed Regulations on Health Insurance Premium Tax Credit (Aug. 21, 2012), https://downloads.regulations.gov/IRS-2011-0024-0233/attachment_1.pdf [https://perma.cc/7ZP9-NEQC]. Though the Chamber of Commerce submitted a detailed comment in the initial public comment period in 2011, its initial comment made no mention of the affordability requirements. *See* U.S. Chamber of Com., Comment Letter on Proposed Regulations on Health Insurance Premium Tax Credit (Oct. 31, 2011), https://downloads.regulations.gov/IRS-2011-0024-0139/attachment_1.pdf [https://perma.cc/SAV2-5V9H].

the statute," but did not elaborate on how the statute supported the initial interpretation.[58] Aetna's concerns appeared to be based more on policy considerations than the text of the statute: the company was worried that a reinterpretation could cause instability in the employer-sponsored insurance market through adverse selection, leading to higher premiums for employer-sponsored plans from more consumers going to the Marketplace and increased costs to taxpayers due to the increased spending on tax subsidies.[59] Aetna's overarching concerns may be unfounded. Adverse selection would only cause an increase in premiums for employer-sponsored plans if an overwhelming number of healthier people switch to Marketplace plans, leading to a sicker and more expensive population in the employer-sponsored market. However, research has shown that fixing the family glitch would not lead to enough consumers switching away from employer coverage to cause a significant change in spending in the employer-sponsored market.[60]

Ultimately, the IRS announced in a 2013 update to the regulation that they would not change their original interpretation.[61] However, their cursory justification ignores the crux of commenters' concerns. The IRS explains:

> These final regulations adopt the proposed rule without change. The language of section 36B, through a cross-reference to section 5000A(e)(1)(B), specifies that the affordability test for related individuals is based on the cost of self-only coverage. By contrast, section 5000A, which establishes the shared responsibility payment applicable to individuals for failure to maintain minimum essential coverage, addresses affordability for employees in section 5000A(e)(1)(B) and, separately, for related individuals in section 5000A(e)(1)(C).[62]

Here, the IRS altogether refuses to address the applicability of the special rules for individuals related to employees found in § 5000A(e)(1)(C) to the determination of coverage affordability for the purposes of eligibility for premium tax credits under § 36B. Although § 36B's provision defining affordability for the purposes of premium tax credits cross-references directly to § 5000A(e)(1)(B) for the required contribution of an individual eligible to purchase employer-sponsored coverage,[63] it is a logical leap to determine that the special rule found in

58. Aetna, Comment Letter on Proposed Regulations on Health Insurance Premium Tax Credit (Aug. 21, 2012), https://downloads.regulations.gov/IRS-2011-0024-0224/attachment_1.pdf [https://perma.cc/7UQ8-ZMF4].

59. *Id.*

60. *See* BUETTGENS & BANTHIN, *supra* note 8, at 11. Furthermore, although more consumers purchasing Marketplace plans would certainly lead to an increased budgetary cost, this may be somewhat offset by tax revenue raised through employers increasing wages as a result of their decreased spending on health insurance. *See* Buettgens et al., *supra* note 8, at 1172.

61. Health Insurance Premium Tax Credit, 78 Fed. Reg. 7264, 7265 (Feb. 1, 2013) (codified at 26 C.F.R. § 1.36B-2 (2022)).

62. *Id.*

63. I.R.C. § 36B(c)(2)(C)(i)(II).

§ 5000A(e)(1)(C) is meant to be ignored entirely for the purposes of eligibility for tax credits. In subsequent regulatory updates, the IRS has left its interpretation unchanged.[64]

The IRS's tacit implication that for Congress to get the rational meaning across, it would have needed to say in § 36B that § 5000A(e)(1)(B) should be followed *as modified by § 5000A(e)(1)(C)* is absurd. Section 5000A(e)(1)(B) cannot be divorced from the rest of the statute, and every modification of every code section cannot be cited in every cross-reference to the overall provision. That is not what textualism requires and it is not a rational interpretation of the statute.

B. THE LEGISLATIVE INTENT APPROACH

Analysis of legislative intent as a theory of statutory interpretation is based on a more disparate array of theories. Legislative intent theory can be divided between Congress's specific intent—its stated intention on how to address a particular problem—and an imaginative reconstruction—what Congress would have decided on an issue that it did not consider, if it had considered it.[65] The analysis, then, must always start by asking: did Congress consider this issue? If so, what was its stated intent on how to resolve the issue? If not, what does its stated intent on similar issues indicate about the conclusion they would have come to on this issue, had they considered it?

An early Senate Finance Committee report detailing the provisions of the bill that would eventually become the ACA included this passage: "Unaffordable is defined as coverage with a premium required to be paid by the employee that is ten percent or more of the employee's income, based on the type of coverage applicable (e.g., individual or family coverage)."[66] This passage unambiguously demonstrates that the drafters intended the affordability standard for employer-sponsored coverage for the purposes of getting around the firewall to receive premium tax credits on the Marketplace should be determined by the actual premium contribution of the employee, whether it be for self-only coverage or family coverage. But ending the analysis here is not fair to the IRS's interpretation. After all, this report was from October 2009, and the final statutory language did not pass the Senate until two months later in December.[67]

However, there is no evidence that Congress's intent changed—and plenty of evidence that Congress intended the final statute to be read the same way. The IRS argues that the statute defines affordability for the purposes of the individual mandate penalty based on separate standards for employees and for related individuals, but the affordability standard for premium tax credits should be based exclusively on the cost of self-only coverage.[68] Because much of the ACA is a

64. *See* 26 C.F.R. § 1.36B–2(c)(3)(v) (2022).

65. *See* ESKRIDGE ET AL., *supra* note 32, at 222.

66. S. REP. NO. 111-89, at 39 (2009).

67. Norm Ornstein, *The Real Story of Obamacare's Birth*, ATLANTIC (July 6, 2015), https://www.theatlantic.com/politics/archive/2015/07/the-real-story-of-obamacares-birth/397742/.

68. Health Insurance Premium Tax Credit, 78 Fed. Reg. 7264, 7265 (Feb. 1, 2013) (codified at 26 C.F.R. § 1.36B-2 (2022)).

product of compromise—either as an attempt to court Republicans or as a means to maintain the support of conservative Democrats—such a nuanced treatment of affordability would seemingly have some legislative history to explain such an unintuitive result, but no such history is apparent.

The Joint Committee on Taxation (JCT), a nonpartisan committee led by the Chair of the Senate Finance Committee and the House Ways & Means Committee, released its explanation of the revenue provisions of the ACA's budget reconciliation amendments on March 21, 2010, two days before the ACA was signed into law and nine days before reconciliation amendments were signed into law.[69] In that report, the JCT used the same language from the initial Senate Finance Committee report, explicitly defining the premium contribution as either the cost of individual or family coverage where appropriate, with the only change being that the 10% affordability requirement had been adjusted to 9.5%.[70] In May 2010, months after the passage of the ACA, the JCT released a technical update to the March report updating the original language to replace the initial definition of "the type of coverage applicable (e.g., individual or family coverage)" with the phrase "self-only coverage."[71] Journalists suggested that this after-the-fact correction was put forward to minimize the budget impact of the ACA in the final Congressional Budget Office (CBO) score.[72] However, neither the JCT nor the CBO has the authority to make substantive law. An attempt to create budgetary savings through an ex post facto interpretation of a statute that has already been signed into law does not change the meaning of the law itself.

Despite the after-the-fact change in budgetary approach, there is no indication of a last-minute change in the statute to justify it. After the IRS-proposed rule in August 2011 determined that affordability for the purposes of premium tax credits should be interpreted only based on the contribution for self-only coverage, even for the determination of family coverage, Congress took notice. Representative Sander Levin, ranking member of the House Ways & Means Committee, and Representative Henry Waxman, ranking member of the Energy & Commerce Committee, both of whom chaired their respective committees at the time the ACA was signed into law, wrote a letter to the Department of the Treasury in December 2011 clarifying that it is "unlikely that Congress intended affordability to be determined one way" for the individual mandate and another

69. JOINT COMM. ON TAX'N, JCX-18-10, TECHNICAL EXPLANATION OF THE REVENUE PROVISIONS OF THE "RECONCILIATION ACT OF 2010," AS AMENDED, IN COMBINATION WITH THE "PATIENT PROTECTION AND AFFORDABLE CARE ACT" 1 (2010); *Patient Protection and Affordable Care Act*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/patient-protection-and-affordable-care-act/ [https://perma.cc/786S-9V57] (last visited Feb. 17, 2022).

70. JOINT COMM. ON TAX'N, *supra* note 69, at 15.

71. JOINT COMM. ON TAX'N, JCX-27-10, ERRATA FOR JCX-18-10, at 1 (2010).

72. *See* Pecquet, *supra* note 10; Avik Roy, *Obamacare Bombshell: 4 Million People Who Thought They Were Gaining Coverage, Won't*, FORBES (Aug. 10, 2011, 4:45 PM), https://www.forbes.com/sites/theapothecary/2011/08/10/obamacare-bombshell-did-the-government-underestimate-the-costs-of-ppacas-exchanges-by-hundreds-of-billions/?sh=5d9c66d923b1 [https://perma.cc/3ET6-NWSC].

way for premium subsidies.[73] They added that the "notion that Congress wrote the law in a manner that would exclude many families from access to more affordable coverage … is simply incongruent."[74] If the congressional leaders who passed the law did not intend such an unintuitive interpretation, it is difficult to justify an assertion that the overall intent of Congress was to adopt such an unintuitive interpretation.

Furthermore, although it is hypothetically possible that the committee leaders could have approved the law based on different assumptions about the law's meaning than ordinary rank-and-file members, there is evidence that many members of Congress outside of committee leadership positions also reject the IRS's interpretation. The Family Coverage Act was introduced in June 2014 to fix the family glitch.[75] Although it proposed to do so by amending § 36B of the statute, it also included a "Sense of Congress" provision stating that the Department of Health and Human Services and the Department of the Treasury already "have the administrative authority necessary to apply the affordability provision in section 36B of the Internal Revenue Code of 1986 in such a manner as to expand access to affordable health insurance coverage for working families without further legislation."[76] Seventeen of the Senate bill's cosponsors and fifteen of the House bill's cosponsors voted in favor of the ACA when Congress initially passed it.[77] Because dozens of rank-and-file members have signed on to legislation affirmatively stating that § 36B *already gives* authority to the relevant agencies to interpret the statute to allow for consumers to get around the premium tax credit firewall based on the affordability of the contribution for family coverage, they have demonstrated an unambiguous intent regarding what they thought the consequences would be of the statute they were enacting.

With the legislative history, the statements of committee leaders, and the actions of a broad array of voting members all demonstrating a consensus that the affordability of the premium contribution for family coverage should be the standard for determining eligibility for premium tax credits for the people receiving an offer of such coverage, there is scant justification to call into question the legislative intent of the ACA on this issue.

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73. Julie Appleby, *Advocates Fear Tax-Credit Rule Will Exclude Some from Health-Care Benefit*, WASH. POST (Apr. 15, 2012), https://www.washingtonpost.com/politics/advocates-fear-tax-credit-rule-will-exclude-some-from-health-care-benefit/2012/04/15/gIQAJuW6JT_story.html.

74. *Id.*

75. Family Coverage Act, S. 2434, 113th Cong. § 3 (2014); Family Coverage Act, H.R. 4865, 113th Cong. § 3 (2014).

76. S. 2434 § 2; H.R. 4865 § 2.

77. *See* S. 2434 (listing the bill's cosponsors); H.R. 4865 (same); *Roll Call Vote 111th Congress – 1st Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396 [https://perma.cc/583S-3D4Q] (last visited Feb. 18, 2022) (reflecting Senators who voted for and against the bill); *Roll Call 165 | Bill Number: H.R. 3590*, U.S. HOUSE OF REPRESENTATIVES, https://clerk.house.gov/Votes/2010165 [https://perma.cc/C337-5AXC] (last visited Feb. 18, 2022) (reflecting Rcepresentatives who voted for and against the final version of the bill).

C. THE PURPOSIVIST APPROACH

Purposivism is a theory based not on Congress's specific or reconstructed intent but on its general intent or purpose in enacting the statute.[78] Although purposivism may seem like a nontraditional theory that could even risk allowing interpretation to diverge too far from the text, purposivism was "a conceptual hallmark of the New Deal" and was "reflected in Anglo-American jurisprudence going back to the sixteenth century."[79] Unlike the previously-discussed theories of interpretation, "[p]urposivism sets the originalist inquiry at a higher level of generality. It asks, 'What was the statute's goal?' rather than 'What did the drafters specifically intend?'"[80] This method of analysis is particularly helpful in interpreting statutes where the overall purpose of the law is clear, but some uncertainty exists within the text of specific provisions of the statute, particularly when facing unforeseen circumstances.[81]

Although the ACA may be controversial in many ways, there is not much controversy over what the general goal of the statute is: to increase access to affordable health insurance.[82] After the IRS released its proposed rule interpreting the ACA's standards for qualifying for premium tax credits, the Government Accountability Office (GAO) released a report finding that "under the proposed standard, an offer of affordable employer-sponsored health insurance to one family member could impede other family members' access to affordable insurance —an outcome which would not further the broader goals of [the ACA]."[83] Not only did the GAO express concern that the IRS's interpretation could make coverage unaffordable for some families, it also recommended that the IRS "consider the impact of the proposed standard . . . on children and other family members who are eligible to enroll, and whether it would be consistent with the goals of [the ACA] to adopt an alternative approach that would consider the cost of insuring eligible family members . . . ."[84] The GAO is a nonpartisan institution tasked with providing Congress and federal agencies with information to help save taxpayer dollars.[85] Its recommendation that the IRS reconsider the proposed rule in favor of adopting an interpretation that allows for broader access to the ACA's premium tax credit for families goes against its traditional role of trying to find additional cost savings. Prioritizing the coverage goals in such a way that was

78. *See* ESKRIDGE ET AL., *supra* note 32, at 228.

79. *Id*. at 229.

80. *Id*.

81. *See id*.

82. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-648, CHILDREN'S HEALTH INSURANCE: OPPORTUNITIES EXIST FOR IMPROVED ACCESS TO AFFORDABLE INSURANCE 1 (2012); *see also* Joseph R. Antos & James C. Capretta, *The ACA: Trillions? Yes. A Revolution? No.*, HEALTH AFFS. (Apr. 10, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200406.93812/full/ [https://perma.cc/HX5G-5R7L] (finding the "primary focus of the ACA was to increase the number of Americans with health insurance coverage" despite concluding that the ACA fell short in that effort).

83. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 82, at 27.

84. *Id*.

85. *About*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/about/ [https://perma.cc/C223-2JAA] (last visited Feb. 18, 2022).

estimated at the time to cost as much as an additional $48 billion in federal subsidies demonstrates how vital the purpose of the ACA is to the interpretation of its provisions, even for agencies that are not normally swayed by such arguments.[86]

Although generally acknowledged as a textualist decision, *King v. Burwell* demonstrates that purposivism is critical to interpreting the ACA. The Court held:

> Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.[87]

The question in *King* centered around whether the federal government had the authority to provide health insurance subsidies through the federal Marketplace.[88] Although the *King* Court admitted that the petitioners had a strong argument regarding the plain meaning of § 36B, the Court stated that "the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase."[89]

The same logic can be applied to the family glitch. The IRS argues that the affordability requirement for individuals related to employees in § 5000A(e)(1)(C) is not relevant to the determination of eligibility for premium tax credits in § 36B, because § 36B only directly cross-references § 5000A(e)(1)(B).[90] However, it is unlikely that Congress would have restricted subsidies from so many low-income families without directly stating its intention to depart from its overall plan to maximize access to affordable coverage.

Ultimately, interpretation of the statute does not hinge on one's chosen method of statutory interpretation. As evidenced by the public's interpretation of the plain meaning, the intent of the members of Congress who passed the legislation, and the general purpose of the law, the family glitch is an error in the regulatory code, not an error in the statute.

III. WHAT CAN BE DONE TO FIX THE FAMILY GLITCH?

To the families left without affordable coverage, the knowledge that it was the IRS, not Congress, who left them out to dry provides little comfort unless something can be done to fix the problem. However, options do exist to address the

86. *See* Sarah Kliff, *Health Reform's $50 Billion Question: What's 'Affordable'?*, WASH. POST (Aug. 16, 2011), https://www.washingtonpost.com/blogs/ezra-klein/post/health-reforms-50-billion-question-whats-affordable/2011/08/02/gIQAJijEJJ_blog.html.

87. 576 U.S. 473, 498 (2015); *see also* Michael C. Mikulic, Case Comment, *The Emergence of Contextually Constrained Purposivism*, 91 NOTRE DAME L. REV. ONLINE 128, 128 (2016) (finding that *King v. Burwell* reaffirms the relevancy of purposivism).

88. *See* 576 U.S. at 479.

89. *Id.* at 497.

90. Health Insurance Premium Tax Credit, 78 Fed. Reg. 7264, 7265 (Feb. 1, 2013) (codified at 26 C.F.R. § 1.36B-2 (2022)).

family glitch through regulatory action, congressional legislative reform, or individual state action.

A. THE IRS COULD USE ITS STATUTORY AUTHORITY TO PROMULGATE A REVISED RULE

The easiest and most straightforward approach to fixing the family glitch would be for the IRS to put forward a new rule, reinterpreting the firewall provision in § 36B to allow for consumers who receive an offer of employer-sponsored family coverage to determine the affordability of that coverage based on the premium contribution for family coverage, rather than self-only coverage. The IRS could do this by changing just one word in the regulation. In its current form, the regulation says, "an eligible employer-sponsored plan is affordable for a related individual if the portion of the annual premium the employee must pay for self-only coverage does not exceed the required contribution percentage . . . ."[91] Simply replacing "self-only" with the word "family," would eliminate the family glitch without disrupting the firewall for the individual employee.

Nevertheless, this change could not be made overnight. Once an agency promulgates a rule, it needs to go back through the entire notice-and-comment rulemaking process to change it.[92] However, in the context of the family glitch, there is no reason to believe that this would be a difficult process because of both the simple nature of the change and the overwhelming number of public comments already on file in support of such a change in interpretation.[93] Although the IRS has not expressed any eagerness to budge from its current interpretation, such a regulatory fix would be the simplest method of providing access to premium tax credits for the families who are barred from receiving them by the current interpretation.[94] Furthermore, President Joe Biden signed an executive order in his first weeks in office that encourages agencies to reexamine policies that reduce the "affordability of coverage or financial assistance for coverage, including for dependents," which has been seen as a subtle effort to encourage the IRS to fix the family glitch.[95]

B. CONGRESS COULD PASS LEGISLATION TO CLARIFY THE STATUTE

Even if the IRS refuses to act, Congress could amend the statute to reject the IRS interpretation and explicitly permit families to receive premium tax credits if an offer of family coverage is unaffordable based on the premium contribution for that family coverage. In 2020, the House of Representatives passed the Patient Protection and Affordable Care Enhancement Act, to make improvements

91. 26 C.F.R. § 1.36B–2(c)(3)(v)(A)(2) (2022).

92. Section 4 of the Administrative Procedure Act provides the procedure agencies must follow when promulgating a rule through notice and comment rulemaking. *See* 5 U.S.C. § 553; *see also* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34 (1983) (noting an agency's failure to follow statutorily required rulemaking procedure under § 553).

93. *See, e.g.*, AFL-CIO, *supra* note 41, at 4.

94. For discussion of congressional and state action, see *infra* Sections III.B–C.

95. *See* Exec. Order No. 14,009, 86 Fed. Reg. 7793, 7794 (Feb. 2, 2021); *see also* Keith, *supra* note 11 (discussing the order).

to the ACA, including eliminating the family glitch.[96] Although the Senate did not take up the Affordable Care Enhancement Act, Senator Sherrod Brown did introduce a standalone bill to fix the family glitch in 2019 with twenty cosponsors.[97] President Biden would be all but certain to sign such a bill into law, given the opportunity, as the healthcare plan he released during his campaign for President proposed going a step further and eliminating the firewall altogether, so an offer of employer-sponsored insurance would have no bearing on one's eligibility for premium tax credits on the Marketplace.[98]

The legislative option, though decisive, has obvious political limitations. With Democrats holding a narrow majority in the House and a razor-thin majority in the Senate, they would still need to either corral sixty votes to overcome the Senate filibuster or use the budget reconciliation process—which has complex and restrictive rules about the types of changes that can be made—to eliminate the family glitch.[99] Democrats did use the reconciliation process to improve access to ACA coverage through expanded subsidies in the American Rescue Plan Act of 2021, but each of those changes were temporary fixes and did not address the family glitch.[100] Furthermore, moderate Democrats may be reticent to pass such a change without offsetting its budget impact, which the Urban Institute estimated would cost the federal government $2.6 billion per year.[101] Although there is little question that the appetite to fix the family glitch exists among Democrats, they will likely not have the votes to overcome Republican opposition.

C. STATES COULD ACT INDIVIDUALLY

The least comprehensive but most achievable option would be to eliminate the family glitch through state-based legislative efforts. The ACA's Section 1332 State Innovation Waivers allow states to apply for waivers to change ACA requirements and adopt a flexible approach to certain insurance rules.[102] Although 1332 waiver authority has guardrails, including a requirement that the

96. *See* Patient Protection and Affordable Care Enhancement Act, H.R. 1425, 116th Cong. § 103 (2020); *see also* Katie Keith, *House Democrats Introduce New Coverage Bill*, HEALTH AFFS. (June 24, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200624.197845/full/ [https://perma.cc/P6Z7-C6E2] (explaining the Patient Protection and Affordable Care Enhancement Act).

97. *See* Family Coverage Act, S. 1935, 116th Cong. (2019).

98. *See Health Care*, JOEBIDEN.COM, https://joebiden.com/healthcare/ [https://perma.cc/748Y-JXSJ] (last visited Feb. 18, 2022).

99. *See* Katie Keith, *What Biden's Election Would Mean for the Affordable Care Act*, HEALTH AFFS. (Nov. 5, 2020), https://www.healthaffairs.org/do/10.1377/hblog20201105.33952/full/ [https://perma.cc/8W4M-F4XW].

100. *See, e.g.*, Katie Keith, *Final Coverage Provisions in the American Rescue Plan and What Comes Next*, HEALTH AFFS. (Mar. 11, 2021), https://www.healthaffairs.org/do/10.1377/hblog20210311.725837/full/ [https://perma.cc/KGX8-V53C].

101. BUETTGENS & BANTHIN, *supra* note 8, at 12.

102. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1332, 124 Stat. 119, 203 (2010) (codified at 42 U.S.C. § 18052); *see also Tracking Section 1332 State Innovation Waivers*, KAISER FAM. FOUND. (Nov. 1, 2020), https://www.kff.org/health-reform/fact-sheet/tracking-section-1332-state-innovation-waivers/ [https://perma.cc/9PWU-8BK9] (explaining Section 1332 waivers).

changes not increase the federal deficit, budget costs can be offset by savings elsewhere in the waiver.[103]

As of the time of this writing, no states have applied for a waiver to eliminate the family glitch, but the Minnesota Health Care Financing Task Force, convened by the Minnesota governor and legislature to provide advice on how to improve health care access and quality, included the elimination of the family glitch in its 2016 recommendations of changes to make through a potential 1332 waiver.[104] However, Minnesota did not ultimately include such a change in its waiver application the following year.[105] Additionally, Colorado used its 1332 waiver to create an affordability fund to provide enhanced financial support to consumers, including those who fall into the family glitch.[106] Minnesota and Colorado, although breaking new ground, are not totally alone: several other states are undertaking similar efforts.[107] Although states can make these changes without congressional approval, many states might struggle to find a way to offset the costs of the change without weakening access to care for other groups or digging a hole into already limited state budgets that do not have the power to maintain a deficit like the federal government. This means that—at best—innovation at the state level would lead to a patchwork approach where residents of some states would be subject to the family glitch while residents of other states would not.

Despite the existence of several options to eliminate the family glitch, they each have their limitations. Although the IRS has been reluctant to adopt a new interpretation of the rule, that remains the most pragmatic method of eliminating the family glitch nationwide. Perhaps as the Biden administration continues to establish its policy priorities—and gridlock in Congress continues—the IRS can be convinced to change its approach.

IV. THE FUTURE OF THE ACA

Each of these questions would have become no more than a thought exercise if the Supreme Court had overturned the ACA in *California v. Texas*.[108] Although

103. *See* Cara M. Passaro, Note, *Using the State Innovation Waiver to Fill Obamacare's Coverage Gaps in Connecticut*, 16 CONN. PUB. INT. L.J. 299, 314–15 (2017); *Tracking Section 1332 State Innovation Waivers*, *supra* note 102.

104. *See* MANATT HEALTH, MINN. HEALTH CARE FIN. TASK FORCE, HEALTH CARE FINANCING TASK FORCE FINAL REPORT 3, 17–18 (2016), https://mn.gov/dhs/assets/final-materials-final-report_01-28-2016_tcm1053-165972.pdf [https://perma.cc/WTL8-GNLX].

105. MINN. DEP'T OF COM., MINNESOTA 1332 WAIVER APPLICATION 17 (2017), https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Minnesota-Section-1332-Waiver.pdf [https://perma.cc/2SV7-APPT].

106. *See, e.g.*, Michael Goldberg, *Colorado Legislature Passes Bill to Create Colorado Health Insurance Affordability Enterprise*, STATE REFORM (June 15, 2020), https://stateofreform.com/featured/2020/06/colorado-legislature-passes-bill-to-create-colorado-health-insurance-affordability-enterprise/ [https://perma.cc/TT8M-2BL2].

107. *See, e.g.*, Lily Bohlke, *Health-Care Affordability Bill Could Bring Insurance to Thousands of Mainers*, PUB. NEWS SERV. (May 4, 2021), https://www.publicnewsservice.org/2021-05-04/budget-policy-and-priorities/health-care-affordability-bill-could-bring-insurance-to-thousands-of-mainers/a74163-1 [https://perma.cc/5L8J-WWEL].

108. 141 S. Ct. 2104 (2021).

the Court found that the plaintiffs did not suffer a personal injury that satisfied Article III standing requirements,[109] comments during oral arguments indicated that the ACA would likely have survived even if the Court ruled that the plaintiffs did have standing—though it is plausible that the Court could have ruled that the individual mandate was unconstitutional because Congress zeroed out the penalty.[110] However, even if the individual mandate in its current form were ruled unconstitutional in a future lawsuit filed by plaintiffs who can allege a satisfactory personal injury, this would only impact § 5000A(a) which requires people to maintain health insurance coverage. It would not affect other parts of § 5000A, such as the provisions defining affordability, so long as the Court determines that the individual mandate is severable from the rest of the law, because the constitutional question presented to the Court was limited to § 5000A(a).[111] Therefore, the affordability provisions—and the regulations interpreting them—are likely to remain in place for the foreseeable future.

CONCLUSION

Despite the substantial coverage gains from the ACA, there are still many people who have fallen through the cracks. Fixing the family glitch could help millions of those people find affordable coverage.[112] Although the IRS contends that it followed the ACA in promulgating its affordability rules, this conclusion is not in line with any common method of statutory interpretation. The IRS still has the power to fix its mistake, and it should do so quickly to help families access the coverage that the statute entitles them to.

109. *Id.* at 2116.

110. *See, e.g.*, Transcript of Oral Argument at 62–63, California v. Texas, 141 S. Ct. 2104 (No. 19-840) ("I think it's hard for [Texas] to argue that Congress intended the entire Act to fall if the mandate were struck down when the same Congress that lowered the penalty to zero did not even try to repeal the rest of the Act. I think, frankly, that they wanted the Court to do that. But that's not our job."); *see also* Katie Keith, *Supreme Court Arguments: Even if Mandate Falls, Rest of Affordable Care Act Looks Likely to Be Upheld*, HEALTH AFFS. (Nov. 11, 2020), https://www.healthaffairs.org/do/10.1377/hblog20201111.916623/ [https://perma.cc/9R4Z-XHVX].

111. *See* Petition for a Writ of Certiorari, at i, California v. Texas, 141 S. Ct. 2104 (No. 19-840) (listing "Questions Presented").

112. *See* Buettgens et al., *supra* note 8.