No. 14-5018

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACQUELINE HALBIG, ET AL.,

Appellants,

v.

SYLVIA M. BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (NO. 13-623 (PLF))

OPPOSITION TO PETITION FOR REHEARING EN BANC

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GLOSSARY

ACA	Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010
HHS	U.S. Department of Health and Human Services
IRS	Internal Revenue Service

INTRODUCTION

I. There is no doubt that this case is of great national importance. Not due to the legal principles at stake—this is a straightforward statutory construction case under well-established principles—but rather due to its policy implications for ongoing implementation of the Affordable Care Act ("ACA"). Those implications, however, are precisely why rehearing would *not* be appropriate here, as Judges of this Court have recognized in many analogous cases. Continued uncertainty over the validity of the IRS Rule at issue is simply not tenable, given its enormous consequences for millions of Americans, hundreds of thousands of businesses, dozens of states, and billions of dollars in monthly federal spending. Only the *Supreme Court* can lift that doubt by giving a *definitive* answer to the challenge raised here (and in other suits). The Supreme Court has already been asked to do so, in a petition from a conflicting Fourth Circuit decision that would allow the matter to be resolved during the Court's upcoming Term. En banc review, by contrast, would cause delay without providing any certainty—regardless of how the en banc court ultimately rules. Thus, for the same reasons that this Court expedited review of this case, the en banc petition should be denied and this matter should proceed immediately, as it ultimately must in any event, to final resolution by the Supreme Court. At the very least, the petition should be held in abeyance pending Supreme Court action on the certiorari petition already before it.

II. The vast majority of the Government's petition addresses the merits, asserting that majority erred by construing "Exchange established *by the State*" as excluding an Exchange established by the *federal government*. The Government transparently mischaracterizes both the statute and the panel's opinion.

First, the fact that § 1321 of the ACA *envisions* HHS-established Exchanges in states that refuse to establish their own obviously cannot support the notion that such Exchanges are somehow *state*-established. To the contrary, precisely *because* the Act directs two distinct entities to establish Exchanges, "Exchange established by the State" cannot be read to include an HHS-established Exchange. *Second*, the panel did not analyze only "a single phrase" in the Act; rather, it spent 15 pages parsing the relevant provisions and addressing "anomalies" that the Government claimed would result from a plain-text reading. Nor did the panel merely find the alleged anomalies "non-absurd"—it concluded that one provision "creates no difficulty" at all, and that another "seem[s] sensible." And the Fourth Circuit, for its part, *agreed* on this score. *Third*, it is not true that the panel "identified no reason" why Congress would have written the text as it did. To the contrary, the panel agreed (as did the Fourth Circuit) that there was a very "plausible" reason why Congress would have conditioned subsidies on state establishment of Exchanges—*i.e.*, to induce the states to shoulder the politically, financially, and logistically difficult burden of running these Exchanges.

ARGUMENT

I. BECAUSE THE SUPREME COURT MUST ULTIMATELY RESOLVE THE VALIDITY OF THE IRS RULE, REHEARING WOULD WASTE BOTH TIME AND EFFORT.

En banc review should occur "only in the rarest of circumstances." *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1243-44 (D.C. Cir. 1987) (Edwards, J., concurring in denial of rehearing en banc). Thus, while "exceptional importance" is among the grounds permitting rehearing, not every important case warrants it. Indeed, this Court twice recently denied rehearing in cases concerning nationally important EPA regulations, both of which the Supreme Court later reviewed. *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 U.S. App. LEXIS 25997, at *28-29 (D.C. Cir. 2012) (Sentelle, C.J., joined by Rogers & Tatel, JJ., concurring in denial of rehearing en banc) (denying rehearing where divided panel *upheld* EPA greenhouse gas rules, even though "stakes here are high" and "outcome of this case [is] undoubtedly … of exceptional importance," as "legal issues presented … are straightforward"); *EME Homer City Generation, L.P. v. EPA*, No. 11-1302, 2013 U.S. App. LEXIS 1624 (D.C. Cir. Jan. 24, 2013) (denying rehearing where divided panel *invalidated* EPA pollution rule).

In particular, where cases are "important" only by virtue of their national implications, or where Supreme Court review is otherwise required or likely, rehearing is not only a waste of resources but could actually harm the public

interest by delaying final resolution. Judges of this Court—and other Circuits—have long cited that dynamic to deny en banc review of many "important" cases:

- *Bismullah v. Gates*, 514 F.3d 1291, 1299 (D.C. Cir. 2008) (Garland, J., concurring in denial of rehearing en banc) ("Were we to grant en banc review in *Bismullah*, we would plainly delay our decision and hence the Supreme Court's disposition of *Boumediene*. As delaying the latter is contrary to the interests of all of the parties, as well as to the public interest, I concur in the denial of rehearing en banc without reaching the merits.").

- *Nat'l Inst. of Military Justice v. DOD*, No. 06-5242, 2008 U.S. App. LEXIS 16732, at *5 (D.C. Cir. Apr. 30, 2008) (Tatel, J., concurring in denial of rehearing en banc) ("Only the Supreme Court can clarify the outer limits of the 'intra-agency' prong of Exemption 5.").

- *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1071 (D.C. Cir. 1995) (Tatel, J., concurring in denial of rehearing en banc) ("This case presents antitrust and labor issues of national significance. The issues have been fully engaged and developed by the majority and dissenting opinions. Supreme Court review is essential to the resolution of these issues.").

- *Kimberlin v. Quinlan*, 17 F.3d 1525, 1526 (D.C. Cir. 1994) (Williams, J., concurring in denial of rehearing en banc) ("[I]t seems to me on balance preferable to continue with [Circuit precedent] until the Supreme Court resolves the issue"); *see also id.* (Silberman, J., concurring the denial of rehearing en banc) (agreeing that "the Supreme Court is better positioned than we to resolve" the issue).

- *Ayuda, Inc. v. Thornburgh*, No. 88-5226, 1989 U.S. App. LEXIS 16504, at *6 (D.C. Cir. Oct. 4, 1989) (Buckley, J., concurring in denial of rehearing en banc) (describing the "only likely result of our rehearing the case" en banc as "to … den[y] [appellees] the opportunity for prompt review by the Supreme Court").

- *Dep't of Treasury, IRS v. Fed. Labor Relations Auth.*, 862 F.2d 880, 884 (D.C. Cir. 1989) (Ginsburg, J., joined by Williams & Sentelle, JJ., concurring in denial of rehearing *en banc*) (in light of contrary decisions by the Fourth and Ninth Circuits, it is "likely that the Supreme Court will

want to resolve this question," and so "I do not conceive it to be a sensible allocation of our time to rehear this case *en banc*").

- *Alliance for Open Soc'y Int'l, Inc. v. United States*, No. 08-4917, 2012 U.S. App. LEXIS 3193, at *6 (2d Cir. Feb. 2, 2012) (Pooler, J., concurring in denial of rehearing en banc) ("Even if we were willing and able to tackle these questions, our resolution simply could not substitute for the Supreme Court's attention.").

- *Mitts v. Bagley*, No. 05-4420, 2010 U.S. App. LEXIS 25036, at *15 (6th Cir. Dec. 3, 2010) (Sutton, J., concurring in denial of rehearing en banc) ("Sometimes there is nothing wrong with letting the United States Supreme Court decide whether a decision is correct and, if not, whether it is worthy of correction.").

- Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1025 (1991) ("If the conflict is important, the Supreme Court is likely to resolve it, and its decision is not likely to be affected by anything that the en banc court could add to the debate already reflected in the conflicting opinions of the circuits.").

This is the *quintessential* case in which the urgent need for Supreme Court review weighs strongly against en banc consideration. The significance of the IRS Rule makes prompt and definitive resolution a national imperative, and only the Supreme Court can provide it. By contrast, en banc rehearing would waste a great deal of resources and cause significant delay, contrary to the public interest.

A. Because of the monumental implications of the IRS Rule, there is a compelling need for final resolution, as soon as possible, of its legal validity. If the Rule is indeed invalid, as the panel majority held, the consequences for individuals, employers, insurers, states, and federal spending will be vast—and the longer the Rule is in effect, the greater the upheaval when it is ultimately vacated.

For *individuals*, the Government says that nearly five million people have been receiving subsidies through federally established Exchanges. (Pet.6.) Until the validity of the IRS Rule is definitively resolved, these Americans do not know whether they can continue to count on these subsidies or must make alternative arrangements. And, in the meanwhile, they may be incurring thousands of dollars of debt to the Treasury, since the ACA contemplates a clawback of improperly paid subsidies. *See* 26 U.S.C. § 36B(f)(2). Only expedited resolution can curtail the unfairness caused by that ongoing and considerable detrimental reliance.

For *employers*, the validity of the IRS Rule determines whether hundreds of thousands of employers are exposed to the ACA's employer mandate penalty. The ACA requires certain employers to sponsor affordable coverage for employees, but penalties are triggered only if at least one such employee obtains a subsidy through an Exchange. Thus, if no subsidies are available in the 36 states served by HHS Exchanges, employers there are effectively exempt from the employer mandate. (*See* Op.8-9.) Until there is an authoritative answer on whether the IRS Rule is valid, therefore, these businesses have no idea whether they must comply with this burdensome ACA provision. And that uncertainty harms *employees*, too, because employers worried by potential penalties may lay off workers or reduce their hours to evade the employer mandate. *E.g.*, Robert Pear, *Public Sector Capping Part-Time Hours to Skirt Health Care Law*, N.Y. TIMES, Feb. 21, 2014, at A12.

For *insurers*, the validity *vel non* of the IRS Rule is crucial to budgeting, planning, and rate-setting for future coverage. If the Rule is invalid, as the panel held, that will have a substantial effect on the makeup and revenue of the insurance pool going forward. *See* Robert Pear, *New Questions on Health Law as Courts Differ on Subsidies*, N.Y. TIMES, July 23, 2014, at A1 (describing "confusion and turmoil" in "health insurance markets" because of uncertainty over status of IRS Rule). Insurance markets therefore also require a quick and final answer.

For *states*, only final resolution will allow them to make fully informed decisions whether to establish their own Exchanges prospectively. States are far more likely to do so if such action is necessary to qualify state residents for billions of dollars in tax credits. *See, e.g.*, Louise Radnofsky, *States Try To Protect Health Exchanges from Court Ruling*, WALL ST. J., July 25, 2014 ("A leading proponent of a fully state-run exchange [in Illinois] said he believed legislators would back his position if the D.C. panel's decision is upheld."). The sooner a final resolution is reached, the sooner these states can make these consequential decisions.

Finally, only a definitive resolution will clarify whether the Treasury has the authority to spend the *billions* of tax dollars that are right now being expended every *month* under the authority of the IRS Rule. (Govt. Br. 5.) These funds will continue to be spent until vacatur of the Rule takes effect. Because "the protection of the public fisc is a matter that is of interest to every citizen," *Brock v. Pierce*

Cnty., 476 U.S. 253, 262 (1986), there is thus a great public interest in prompt resolution. Conversely, the longer the issue remains unresolved by the Supreme Court, the more money is unlawfully spent without Congress's approval—a very serious matter, *cf.* 31 U.S.C. § 1341 (criminalizing unauthorized federal spending).

Indeed, for all of these reasons, a panel of this Court (Brown, Tatel, and Pillard, JJ.) greatly expedited appellate proceedings, giving Appellants only 7 days to file an opening brief and setting oral argument for "the earliest available date." Expedited, final resolution of this matter is thus clearly in the public interest.

B. The Supreme Court is primed to provide that final resolution. In *King v. Burwell*, which was also greatly expedited, the Fourth Circuit upheld the IRS Rule that the panel here invalidated. *See* No. 14-1158, 2014 U.S. App. LEXIS 13902 (4th Cir. July 22, 2014). And, even before the Government filed its en banc petition, the *King* plaintiffs filed a certiorari petition asking the Supreme Court to grant review to resolve the Circuit conflict. Exh. A (Pet. for Cert., No. 14-114). The Government's response to the petition is due by September 3, 2014, allowing the Court to grant review in late September or early October and to resolve the case on the merits during the upcoming Term. In light of the division among the lower courts and the self-evident importance of the issue, there is no doubt that, if this Court denies rehearing, the Supreme Court would do just that. There would accordingly be a final, authoritative determination by June 2015 at latest.

C. By contrast, rehearing would either waste effort or, worse, perpetuate damaging uncertainty and postpone definitive resolution. Regardless of how the Supreme Court would respond to a grant of rehearing, and regardless of how the en banc court would rule, the result would be worse for the Nation as a whole.

First, if this Court grants rehearing and then, in October, the Supreme Court chooses to grant the *King* petition nonetheless, any work done in the interim by this Court, the parties, or their *amici* would become effectively moot.

Second, if rehearing is granted and the Supreme Court stays its hand, the en banc court may well agree with the panel, as it does roughly a third of the time. *See* Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991-2002*, 70 GEO. WASH. L. REV. 259, 263 (2002). Yet by then, the chance for the Supreme Court to resolve the Circuit conflict during the upcoming Term will be lost, with final resolution delayed at least a year. Importantly, given that the panel's holding was dictated by the Act's plain text, there is a good chance of en banc affirmance, notwithstanding the Senate Majority Leader's cynical suggestion that the "simple math" of en banc review in this case "vindicates" his elimination of the filibuster to confirm three new judges to this Court. Josh Gerstein, *How Obama's Court Strategy May Help Save Obamacare*, POLITICO, July 22, 2014; *see also* Emily Bazelon, *Obamacare Is Safe*, SLATE, July 22, 2014 (claiming that the panel "will likely be reversed" because "D.C. Circuit (finally!) has four Obama appointees").

Third, even if a divided en banc court ultimately reverses the panel decision, that by no means would reduce the pressing need for Supreme Court review. The panel opinion proved that Appellants' challenge is sufficiently compelling to warrant the Supreme Court's attention, as leading commentators have recognized. *See* Tom Goldstein, *The Fate of the Obamacare Subsidies in the Supreme Court*, SCOTUSBLOG.COM, July 23, 2014 ("[E]ven if [*en banc* reversal] happens, the case seems too close and too important for the Supreme Court to pass it up."). Thus, however the en banc court were to rule, untenable uncertainty would persist until the Supreme Court supplies a definitive answer. This is especially true in light of the fact that *other*, identical legal challenges are already working their way to the Seventh and Tenth Circuits. *Pruitt v. Burwell* (No. 6:11-cv-00030, E.D. Okla.); *Indiana v. IRS* (No. 1:13-cv-01612, S.D. Ind.). And further challenges in yet other Circuits are very likely. Indeed, given the IRS Rule's irreconcilable conflict with the ACA's plain language, it is quite probable that the Rule will be invalidated at some point by another court, even if a majority of the en banc court reverses the panel's decision here.

In short, it is in everyone's interests for the Supreme Court to finally resolve this question *now*, to both preclude further detrimental reliance and to eliminate the cloud that will inevitably hang over the IRS Rule otherwise. En banc rehearing cannot achieve that goal. The Government's petition should therefore be denied.

D. At minimum, if this Court has any doubt over whether the Supreme Court will actually grant the pending certiorari petition in *King*, the Government's en banc petition should be held in abeyance pending action on the *King* petition. If the Supreme Court for some reason denies review, this court can then give the en banc petition further consideration. If the Supreme Court grants review in *King* as expected, the en banc petition can be safely denied. The Court has taken this approach in analogous situations. *Dep't of Def. Dependents Schs. v. FLRA*, 911 F.2d 743 (D.C. Cir. 1990) (per curiam) (at en banc stage, court "ordered that all proceedings be held in abeyance pending the decision of the Supreme Court" on pending certiorari petition in related case); *Trahan v. Regan*, 866 F.2d 1424 (D.C. Cir. 1988) (per curiam) (at en banc stage, court "held our proceedings in abeyance … pending the Supreme Court's decision" in related case).

II. THE PANEL FULLY AND PERSUASIVELY ADDRESSED ALL OF THE GOVERNMENT'S ARGUMENTS ON THE MERITS.

The bulk of the petition contends that the panel erred because its "blinkered view of the plain meaning of a single phrase in Section 36B" did not consider the phrase in "context" or in light of the Act's "overall structure." (Pet.8-9.) That is obviously false. The opinion avowedly and carefully considered the Act's context and "overall structure." (Op.14.) It simply *rejected* the Government's meritless contextual arguments (all but one of which were, notably, *also* rejected by *King*), because the statutory "context" *confirms* that § 36B means what it says.

A. The Government's theme is that while the text of 26 U.S.C. § 36B allows subsidies only for coverage obtained through "an Exchange established *by the State*," reading the ACA in "context" somehow leads to the contrary conclusion: that subsidies are actually available through *any* Exchange, "*regardless* of whether the Exchange is established and operated by a State … *or by* [*HHS*]." 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20 (emphases added). (*See* Pet.2, 8-9, 12-13.)

Actually, a contextual reading of the ACA corroborates § 36B's plain text. *Context* shows that the Act elsewhere used a broad phrase, "Exchange established under this Act," 42 U.S.C. § 18032(d)(3)(D)(i)(II), that clearly encompasses HHS Exchanges. Giving that broader meaning to § 36B's narrower words violates the canon that "differing language" in "two subsections" of a law should not be given "the same meaning." *Russello v. United States*, 464 U.S. 16, 23 (1983). *Context* further shows that when Congress wanted to "deem" (Pet.10) a non-state entity to be a state, it "knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994). Congress said *expressly* that if a *territory* creates an Exchange, it "shall be treated as a State." 42 U.S.C. § 18043(a)(1). There is no such language about HHS Exchanges. *Context* also shows that Congress did not treat state and HHS Exchanges as indistinguishable; it referred *distinctly* to both Exchanges in another subsection of § 36B itself. *See* 26 U.S.C. § 36B(f)(3). Finally, *context* shows that § 36B, far from being a "mousehole" in which Congress would not have naturally

limited subsidies (Pet.15), is, in fact, the *only* provision defining subsidy-eligible purchases; indisputably houses another "crucial" limit on subsidies; and echoes the precise structure Congress used in a neighboring health tax credit. (Op.19 n.4.)

B. In the face of all of this, the Government falsely claims that the panel analyzed only "a single phrase in Section 36B," rather than "all relevant provisions of the Act." (Pet.9, 12.) Again, the panel did not ignore context; it just recognized that reading the Act from cover to cover cannot transform *HHS* into a *state*.

Rather than analyze "a single phrase," the panel read § 36B in view of the provisions directing states to establish Exchanges and HHS to do so in states that fail to. ACA §§ 1311, 1321, *codified at* 42 U.S.C. §§ 18031, 18041. The panel considered the Government's theory—that by telling HHS to establish "such" Exchanges in states that refuse, the Act somehow "deems" those HHS Exchanges to be "established by the State" (Pet.9-10)—and squarely rejected it. As the panel explained, § 36B makes subsidies turn on "who established" the Exchange. (Op.17.) Thus, the fact that *HHS* may establish Exchanges cannot imply that those Exchanges are somehow "established by the State." Quite the contrary: Because HHS may establish an Exchange only if the state *fails* to, such Exchanges cannot be established by or "on behalf of" the state. In short, the panel found "no textual basis—in sections 1311 and 1321 or elsewhere—for concluding that a federally-established Exchange is, in fact or legal fiction, established by a state." (Op.22.)

The Government next objects that, in responding to its claims that a plain reading of § 36B causes "anomalies" elsewhere, the panel asked only whether the text created "absurdity," rather than use the other provisions to ascertain § 36B's "plain meaning." (Pet.10-12.) This is wrong and irrelevant. The panel's approach was entirely proper: It analyzed the specific provision addressing subsidies in light of other provisions speaking to the relationship between state and HHS Exchanges, and, having determined that the relevant provisions authorize subsidies only on state Exchanges, asked whether that plain language produces an absurd result. (Op.16-30.) *See Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075, 1088-93 (D.C. Cir. 1996). This critique is also irrelevant: The panel found the supposedly conflicting provisions to be *consistent* with § 36B's text, not just non-absurd. (The *King* panel, too, was "unpersuaded." 2014 U.S. App. LEXIS 13902, at *27.) Preventing states that refuse to create Exchanges from restricting Medicaid was "sensible." (Op.29.) Reporting "serves the purpose of enforcing the individual mandate," even absent subsidies. (Op.24.) The SCHIP provision—which the Government cited only in a *footnote* in its brief—is not odd, because HHS could "step in and perform the same service" where it runs Exchanges. (Op.29 n.10.) And the "qualified individual" definition "creates no difficulty" (Op.27), even in light of the Government's newly cited provisions (Pet.12), which establish only that when Congress sought to define someone as "not … eligible for enrollment," ACA § 1331(e)(2), it did so expressly.

C. Ultimately, the Government resorts to policy arguments: Congress could not have wanted to limit subsidies, since subsidies promote the Act's broad purpose. (Pet.13-14.) Particularly with a law this complex, however, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam). Moreover, the Government ignores the "plausible" reason why Congress would have limited subsidies to state Exchanges—as a powerful incentive for states to establish them, thereby allowing Congress to achieve *both* its goals (state-run Exchanges *and* subsidies nationwide). (Op.35 n.11.) *Accord King*, 2014 U.S. App. LEXIS 13902, at *30 (agreeing that this is a "plausible" purpose). Although it does not matter whether this "plausible" purpose was legislators' actual subjective intent, there is ample evidence that it was—including statements by one of the Act's architects, Prof. Jonathan Gruber (whom the Government cited in its brief, Govt. Br. 39 n.12):

> [I]f you're a state and you don't set up an Exchange, that means your citizens don't get their tax credits. … I hope that that's a blatant enough political reality that states will get their act together and realize that there are billions of dollars at stake here in setting up these Exchanges, and that they'll do it.

Jonathan Gruber at Noblis, at 32:00 (Jan. 18, 2012), https://www.youtube.com/watch?v=GtnEmPXEpr0&feature=youtu.be&t=31m25s.

CONCLUSION

For these reasons, the petition for rehearing en banc should be denied.

August 18, 2014

Respectfully submitted,

/s/ Michael A. Carvin

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CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of August 2014, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Nineteen paper copies of the foregoing document will also be filed today, by hand delivery, with the clerk of this Court.

August 18, 2014

/s/ Michael A. Carvin
MICHAEL A. CARVIN
Counsel for Appellant

No. 14-___

IN THE

Supreme Court of the United States

DAVID KING; DOUGLAS HURST;
BRENDA LEVY; and ROSE LUCK,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, as U.S. Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JACOB LEW, as U.S. Secretary of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE; and JOHN KOSKINEN, as Commissioner of Internal Revenue,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 36B of the Internal Revenue Code, which was enacted as part of the Patient Protection and Affordable Care Act ("ACA"), authorizes federal tax-credit subsidies for health insurance coverage that is purchased through an "Exchange established by the State under section 1311" of the ACA.

The question presented is whether the Internal Revenue Service ("IRS") may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government under section 1321 of the ACA.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellants in the court below, are four individuals: David King, Douglas Hurst, Brenda Levy, and Rose Luck.

Respondents, who were Defendants-Appellees in the court below, are Sylvia Mathews Burwell (as U.S. Secretary of Health and Human Services); the United States Department of Health and Human Services; Jacob Lew (as U.S. Secretary of the Treasury); the United States Department of the Treasury; the Internal Revenue Service; and John Koskinen (as Commissioner of Internal Revenue).

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OPINIONS BELOW

The Fourth Circuit's opinion (Pet.App.1a) has not yet been published, but can be found at 2014 U.S. App. LEXIS 13902. The district court's opinion (Pet.App.42a) is at 2014 U.S. Dist. LEXIS 20019.

JURISDICTION

The Fourth Circuit entered judgment on July 22, 2014. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the Appendix (Pet.App.76a).

STATEMENT OF THE CASE

This is a challenge to the most consequential regulation promulgated under the Patient Protection and Affordable Care Act ("ACA"). Two Courts of Appeals have squarely divided over its facial validity. The resulting uncertainty over this major plank of ACA implementation means that millions of people have no idea if they may rely on the IRS's promise to subsidize their health coverage, or if that money will be clawed back. Employers in 36 states have no idea if they will be penalized under the ACA's employer mandate, or are effectively exempt from it. Insurers have no idea if their customers will pay for health coverage in which they enrolled, or if large numbers will default. And the Treasury has no idea if *billions* of dollars being spent each *month* were authorized by Congress, or if these expenditures are illegal. Only this Court can definitively resolve the matter; it is imperative that the Court do so as soon as possible.

A. For Constitutional Reasons, the ACA Encourages Rather Than Compels States To Establish Exchanges, And It Does So Principally by Limiting Subsidies to State-Established Exchanges.

The ACA regulates the individual health insurance market primarily through insurance "Exchanges." An Exchange is a means of organizing the insurance marketplace to help individuals and small businesses shop for coverage and compare available plans based on price, benefits, and services.

Section 1311(b)(1) of the ACA urges states, in the strongest possible terms, to establish Exchanges. It provides: "Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange … for the State." 42 U.S.C. § 18031(b)(1). Under the Constitution's core federalism commands, however, Congress cannot *compel* sovereign states to create Exchanges. *Printz v. United States*, 521 U.S. 898, 935 (1997). The Act therefore recognizes that some states may not be "electing State[s]," because they may choose not "to apply the requirements" for an Exchange or otherwise "fai[l] to establish [an] Exchange." ACA § 1321(b)-(c), *codified at* 42 U.S.C. § 18041(b)-(c). To address that scenario, the Act authorizes the Department of Health and Human Services ("HHS") to establish fallback Exchanges in states that do not establish their own. In such cases, the Secretary "shall … establish and operate such Exchange within the State." ACA § 1321(c), *codified at* 42 U.S.C. § 18041(c). Thus, if a state declines the role that the ACA urges it to accept, that obligation falls upon the federal government instead.

Congress used a variety of "carrots" and "sticks" to induce states to establish Exchanges voluntarily. For example, the Act authorizes federal grants to states for "activities … related to establishing an [Exchange]." ACA § 1311(a), *codified at* 42 U.S.C. § 18031(a). It also penalizes states that do not create Exchanges, such as by barring them from narrowing their state Medicaid programs until "an Exchange established by the State … is fully operational." ACA § 2001(b)(2), *codified at* 42 U.S.C. § 1396a(gg).

Most importantly, the Act authorizes subsidies for individual health coverage purchased through *state*-established Exchanges. These subsidies take the form of refundable tax credits, paid by the U.S. Treasury directly to the taxpayer's insurer as an offset against premiums. ACA § 1401(a), § 1412, *codified at* 26 U.S.C. § 36B; 42 U.S.C. § 18082.

Critically, the Act only subsidizes coverage through an Exchange *established by a state*. The Act provides that a credit "shall be allowed" in an "amount," 26 U.S.C. § 36B(a), based on the number of "coverage months of the taxpayer occurring during the taxable year," *id.* § 36B(b)(1). A "coverage month" is a month during which "the taxpayer … is covered by a qualified health plan … enrolled in through an Exchange *established by the State under section 1311* of the [ACA]." *Id.* § 36B(c)(2)(A)(i) (emphasis added). Unless the citizen buys coverage through a state-established Exchange, there are no "coverage months" and so no subsidy. Confirming that, the subsidy for any particular "coverage month" is based on premiums for coverage that was "enrolled in through an Exchange established by the State under [§] 1311 of the [ACA]," *id.* § 36B(b)(2)(A).

These inducements for states to establish their own Exchanges were compelled by political realities. The House of Representatives initially enacted a bill under which the *federal government* would create a national Exchange, though individual states could affirmatively choose to establish their own. H.R. 3962, § 308, 111th Cong. (2009). That scheme, however, was unacceptable to the Senate. *See Halbig v. Sebelius*, No. 13-623, 2014 U.S. Dist. LEXIS 4853, at *61 (D.D.C. Jan. 15, 2014) ("[T]hese proposals proved politically untenable and doomed to failure in the Senate ...."). Senator Ben Nelson of Nebraska, whose vote was critical to passage, called the national Exchange a "dealbreaker," expressing concern that such federal involvement would "start us down the road of ... a single-payer plan." Carrie Budoff Brown, *Nelson: National Exchange a Dealbreaker*, POLITICO, Jan. 25, 2010. For Nelson and other swing Senators, it was important to keep the federal government *out* of the process. It was thus insufficient to merely allow states the *option* to establish Exchanges, as the House bill did. Rather, states had to take the leading role, which, given the constitutional bar on compulsion, required serious incentives to induce state participation.

The robust incentives provided by the ACA—in particular, the conditioning of tax credits on state-run Exchanges—were thought sufficient to do so. As one of the Act's architects, Prof. Jonathan Gruber, later explained, "if you're a state and you don't set up an Exchange, that means your citizens don't get their tax credits. ... I hope that's a blatant enough political reality that states will get their act together and realize there are billions of dollars at stake here in setting up these Exchanges, and that they'll do it."

Jonathan Gruber at Noblis, at 32:00 (Jan. 18, 2012), https://www.youtube.com/watch?v=GtnEmPXEpr0&feature=youtu.be&t=31m25s.

Perhaps in light of that "political reality" deterring states from turning down billions of free federal dollars, "lawmakers assumed that every state would set up its own exchange." Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, N.Y. TIMES, Aug. 4, 2012, at A17. "Congress did not expect the states to turn down federal funds and fail to create and run their own Exchanges." Pet.App.70a. Accordingly, for example, Congress did not appropriate *any* funds in the ACA for HHS to build Exchanges, even as it appropriated unlimited funds to help states establish theirs. *See* ACA § 1311(a), *codified at* 42 U.S.C. § 18031(a). Indeed, ACA proponents emphasized that "[a]ll the health insurance exchanges … are run by states," to rebut charges that the Act was a federal "takeover." SENATE DEMOCRATIC POLICY COMM., *Fact Check: Responding to Opponents of Health Insurance Reform* (Sept. 21, 2009), http://dpc.senate.gov/reform/reform-factcheck-092109.pdf.

B. The IRS Promulgates Regulations That Nonetheless Extend the ACA's Subsidies to HHS-Established Exchanges.

Notwithstanding the ACA's text and purpose, the IRS in 2011 proposed, and in 2012 promulgated, regulations requiring the Treasury to grant subsidies for coverage purchases through *all* Exchanges—not only those established by states under § 1311 of the Act, but also those established by HHS under § 1321. 76 Fed. Reg. 50931, 50934 (Aug. 17, 2011); 77 Fed. Reg. 30,377, 30,378, 30,387 (May 23, 2012).

These regulations ("the IRS Rule") contradict the statutory text restricting subsidies to Exchanges "established by the State under section 1311." Specifically, the Rule states that subsidies shall be available to anyone "enrolled in one or more qualified health plans through an Exchange," and then adopts by cross-reference an HHS definition of "Exchange" that includes *any* Exchange, "regardless of whether the Exchange is established and operated by a State … or by HHS." 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20. Under the IRS Rule, federal subsidies are thus available in *all* states, even those states that failed to establish their own Exchanges. Put another way, the IRS Rule authorizes subsidies for coverage purchased through the federal Exchange colloquially known as HealthCare.Gov, not just for coverage purchased through state-established Exchanges.

Facing comments pointing out this facial inconsistency with the statute, the IRS offered only the following (77 Fed. Reg. at 30,378):

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

C. 34 States Decline To Establish Their Own Exchanges, and Two Others Fail To Do So.

After the IRS announced that taxpayers would be eligible for subsidies whether or not their states established Exchanges, 34 states, including Virginia, declined to establish Exchanges. Pet.App.44a. Two states also failed to establish Exchanges in time for 2014. Pursuant to § 1321 of the ACA, HHS therefore established federal Exchanges to serve those states.

D. The IRS Rule Triggers Other ACA Mandates and Penalties.

By expanding subsidies to coverage on HHS Exchanges, the IRS Rule triggers ACA mandates and penalties for millions of individuals and thousands of employers in the states served by HealthCare.Gov. *Halbig v. Burwell*, No. 14-5018, 2014 U.S. App. LEXIS 13880, at *10-12 (D.C. Cir. July 22, 2014).

For individuals, eligibility for a subsidy triggers the Act's individual mandate penalty for many who would otherwise be exempt. The Act's penalty for violating the mandate does not apply to those "who cannot afford coverage" or who would suffer hardship if forced to buy it. *See* 26 U.S.C. § 5000A(e)(1), (5). Under regulations implementing these exemptions, an individual may obtain an advance exemption from the individual mandate penalty if the annual cost of coverage exceeds eight percent of his projected household income. *See* 45 C.F.R. § 155.605(g)(2); *see also* 26 U.S.C. § 5000A(e)(1)(A). For individuals only able to purchase coverage in the individual market, that cost is calculated as the annual premium for the cheapest insurance plan available to that person in the Exchange in that person's state, minus "the credit allowable under section 36B." 26

U.S.C. § 5000A(e)(1)(B)(ii). Thus, by purporting to make a credit "allowable" in states served by HealthCare.Gov, the IRS Rule reduces the number of people in those states exempt from the individual mandate penalty. Now ineligible for exemptions, those individuals are no longer free to forgo coverage, or to buy "catastrophic" coverage (otherwise limited to those under 30 years old, *see* ACA § 1302(e)(1)(A), (2), *codified at* 42 U.S.C. § 18022(e)(1)(A), (2)).

For employers, the availability of subsidies triggers the "assessable payments" used to enforce the Act's "employer mandate." The Act provides that large employers will be subject to such payments if they do not offer full-time employees the opportunity to enroll in affordable, employer-sponsored coverage. But the payment is only triggered if at least one employee enrolls in coverage for which "an applicable premium tax credit … is allowed or paid." 26 U.S.C. § 4980H. Thus, if no subsidies are available in a state because that state has not established an Exchange, employers in that state may offer their employees non-compliant coverage, or no coverage at all, without being threatened with this liability. Since the IRS Rule authorizes subsidies nationwide, however, it exposes businesses in those states to the employer mandate and its assessable payments.

E. Injured Individuals and Employers Bring Suit To Challenge the IRS Rule.

Petitioners in this case are individuals residing in Virginia, which has declined to establish its own Exchanges and thus is served by HealthCare.Gov. They do not want to comply with the individual mandate, and, given their low incomes, would not be subject to penalties for failing to do so but for the IRS

Rule. The Rule renders them eligible for subsidies that would reduce the net cost of their coverage to below 8% of projected income and so disqualify them from the hardship exemption. Pet.App.47a-50a. Thus, as the district court recognized, "as a result of the IRS Rule, they will incur some financial cost because they will be forced to buy insurance or pay the [individual mandate] penalty." Pet.App.52a-53a.

In at least three other cases, other individuals and businesses injured by the IRS Rule also sued. A group of individuals and employers brought suit in the District of Columbia. *See Halbig*, 2014 U.S. App. LEXIS 13880. The State of Oklahoma filed *Pruitt v. Burwell* (No. 6:11-cv-00030, E.D. Okla.). And the State of Indiana, along with a number of school corporation employers, filed *Indiana v. IRS* (No. 1:13-cv-01612, S.D. Ind.).

F. The Courts Below Uphold the IRS Rule on the Merits, While the D.C. Circuit Finds the Rule Illegal and Orders Its Vacatur.

The district court ruled for the Government on February 18, 2014. It concluded that Petitioners had Article III standing because "their economic injury is real and traceable to the IRS Rule." Pet.App.53a. It also agreed that Petitioners could challenge the IRS Rule under the APA, and that such a challenge was ripe given the purely legal nature of the suit and the hardship that delay would cause. Pet.App.55a-60a.

On the merits, the district court recognized that Petitioners' "plain meaning interpretation of section 36B has a certain common sense appeal." Pet.App.71a. The court, nonetheless, concluded that Congress *unambiguously* intended just the contrary of that "plain meaning." The court inferred that

counter-textual intent from (i) Congress's policy goal "to ensure broad access to affordable health care for all" (Pet.App.71a); (ii) the absence of "direct support in the legislative history" confirming the plain text (Pet.App.70a); and (iii) supposed "anomalous results" under some of the Act's other provisions, were the text given its plain meaning (Pet.App.64a).

The Fourth Circuit granted Petitioners' motion to expedite (which the Government did not oppose). Dozens of *amici* weighed in at the merits stage on behalf of each side, including eight States, many Members of Congress, and industry groups such as the American Hospital Association and America's Health Insurance Plans. On July 22, 2014, the court affirmed on alternative grounds, holding the ACA to be *ambiguous* on whether an HHS Exchange is one "established by the State." Judge Gregory wrote the opinion, which Judges Davis and Thacker joined.

Two hours before the Fourth Circuit issued its opinion, the D.C. Circuit released its own opinion in *Halbig*, another case challenging the same IRS Rule on the same grounds. In *Halbig*, Judge Griffith authored a majority opinion on behalf of himself and Judge Randolph, over a dissent by Judge Edwards. *Halbig*, 2014 U.S. App. LEXIS 13880. The majority held that the IRS Rule was directly contrary to the unambiguous text of the ACA, and ordered that the Rule be vacated. *See id.* at *6.

The two conflicting decisions "inject uncertainty, confusion and turmoil into health insurance markets as the administration firms up plans for another open enrollment season …." Robert Pear, *New Questions on Health Law as Courts Differ on Subsidies*, N.Y. TIMES, July 23, 2014, at A1.

REASONS FOR GRANTING THE PETITION

The reasons for granting the petition are simple and compelling. Two federal Circuits have divided over whether the IRS has authority to spend tens of billions of dollars per year to subsidize health coverage in 36 states. If the ACA means what it says, as the D.C. Circuit held, the consequences are profound: It means millions of people are ineligible for subsidies and exempt from the ACA's individual mandate penalty. It means hundreds of thousands of employers are free of the Act's employer mandate. It means a fundamental change in the health insurance market in two-thirds of the country. And it means that the IRS is illegally spending billions of taxpayer dollars every month without congressional authority. Uncertainty over this issue is simply not tenable. That is why each Circuit expedited its proceedings, and it is why this Court should grant review now and resolve the matter this Term, regardless of whether the D.C. Circuit grants en banc review of *Halbig*.

I. THE FOURTH CIRCUIT AND D.C. CIRCUIT HAVE REACHED OPPOSITE CONCLUSIONS ABOUT THE VALIDITY OF THE IRS RULE.

There is a plain conflict between two federal Courts of Appeals over the validity of the IRS Rule. The D.C. Circuit in *Halbig* ruled that an Exchange established by *HHS* is plainly not "established by the *State*," and therefore ordered the Rule vacated. The court below, however, believed that the statute was ambiguous on this question, and so upheld the Rule as a permissible exercise of agency discretion. The disagreement is clear and all of the arguments on both sides have been thoroughly aired. Only this Court can ultimately resolve the issue.

A. Although they reached contrary conclusions, the *Halbig* and *King* panels actually agreed on a number of important points.

First, both courts agreed that the plain language of § 36B—which is the specific provision authorizing subsidies—indicates that subsidies are limited to Exchanges established by states. *See Halbig*, 2014 U.S. App. LEXIS 13880, at *4 (observing that § 36B, "[o]n its face," allows subsidies only "for insurance purchased on an Exchange established by one of the fifty states or the District of Columbia"); Pet.App.16a & 18a (*King* panel op.) (conceding "common-sense appeal of [Petitioners'] argument," *i.e.*, that "the language says what it says, and that it clearly mentions state-run Exchanges under § 1311," which it would not have done had Congress actually "meant to include federally-run Exchanges"). Indeed, as the court below noted, "[i]f Congress did in fact intend to make the tax credits available to consumers on both state and federal Exchanges, it would have been easy to write in broader language, as it did in other places in the statute." Pet.App.16a-17a (citing reference elsewhere to "Exchange established under this Act").

Second, both courts rejected the Government's claims that giving § 36B its plain meaning would somehow cause "anomalies" in other parts of the Act. The Fourth Circuit below was "unpersuaded" as to the alleged anomalies. Pet.App.22a. "Both parties offer reasonable arguments and counterarguments that make discerning Congress's intent [from these provisions] difficult." *Id.* Additionally, the panel recognized that this Court just admonished courts to avoid "revising" legislation "out of an effort to avoid 'apparent anomal[ies]' within a statute." *Id.* (quoting

Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2033 (2014)). As such, it "decline[d] to accept [the Government's] arguments as dispositive of Congress's intent." Pet.App.22a. *Halbig*, too, found that the supposed anomalies did not reach the "'high threshold' of unreasonableness" necessary to allow a court to "conclude that a statute does not mean what it says." 2014 U.S. App. LEXIS 13880, at *32-33. *Accord Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005) ("[I]t is up to Congress rather than the courts to fix" even "unintentional drafting gap[s]."). Indeed, as to one of the supposed anomalies, *Halbig* determined that it "creates no difficulty, let alone absurdity"; as to the other, the results "seem sensible, not absurd." 2014 U.S. App. LEXIS 13880, at *39, *42. Accordingly, "[n]othing about the imperative to read section 36B in harmony with the rest of the ACA requires interpreting 'established by the State' to mean anything other than what it plainly says." *Id.* at *43.

Third, both courts agreed that nothing in the Act's legislative history contradicted § 36B's text. As the panel below noted, the history is "not particularly illuminating on the issue." Pet.App.22a. *Accord Halbig*, 2014 U.S. App. LEXIS 13880, at *47 ("[T]he scant legislative history sheds little light on the precise question of the availability of subsidies on federal Exchanges."). Congress seemed to assume that subsidies would be available nationwide, but "it is possible that such statements were made under the assumption that every state would in fact establish its own Exchange." Pet.App.23a-24a. After all, "Congress did not expect the states to turn down federal funds and fail to create and run their own Exchanges." *Id.* As *Halbig* similarly observed, the

assumption of nationwide subsidies is "as consistent with an expectation that all states would cooperate (*i.e.*, establish their own Exchanges) as with an understanding that subsidies would be available on federal Exchanges as well." 2014 U.S. App. LEXIS 13880, at *47-48. Of course, the legislative history did not itself prove that Congress meant what it said in § 36B, but "clear text speaks for itself and requires no 'amen' in the historical record." *Id.* at *46. *Accord Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute.").

Fourth, both courts recognized that there was a "plausible" reason why Congress might have wanted to condition subsidies on the establishment of state Exchanges—an account that would "comport with a literal reading" of § 36B. Pet.App.25a. Namely, Congress could quite reasonably have intended subsidies as an *incentive*, so that states—not the federal government—would bear this burden. *Id.*; *accord Halbig*, 2014 U.S. App. LEXIS 13880, at *52 n.11. After all, "Congress has conditioned federal benefits on state cooperation in other contexts," including in the ACA's own Medicaid expansion, and a Senate committee "proposed a bill that specifically contemplated penalizing states that refused to participate in establishing" Exchanges. *Id.* at *48-49, *52 n.11; *see also* S. 1679, § 3104(a), (d), 111th Cong. (2009). Since it seemed clear that "no state would refuse so good an offer," *Halbig*, 2014 U.S. App. LEXIS 13880, at *52 n.11, using subsidies as an incentive would allow Congress to achieve *both* goals: state-run Exchanges *and* subsidies nationwide.

B. Although *King* and *Halbig* thus both agreed that (i) § 36B limits subsidies to Exchanges that are established by states; (ii) such a reading would not create any anomalous or absurd results in the rest of the statute; (iii) the legislative history did not refute this plain reading of the law; and (iv) Congress had a very plausible basis for meaning precisely what it said, the two courts nonetheless diverged on whether the IRS Rule was legally valid.

The panel below, for its part, rested its result on the notion that, although § 36B limits subsidies to coverage purchased through Exchanges "established by the State," other provisions of the ACA create ambiguity as to whether an Exchange established by HHS is somehow actually "established by the State." Pet.App.17a-18a. In particular, the court reasoned that while § 1311 directs states to create Exchanges, § 1321 clarifies that states may decline to do so—in which case, HHS shall establish "*such* Exchange within the State." ACA § 1321(c)(1), *codified at* 42 U.S.C. § 18041(c)(1) (emphasis added). According to the panel, this may imply a legal fiction under which HHS "acts on behalf of the state when it establishes its own Exchange," which therefore, in some sense, could be described as "established by the State." Pet.App.18a. While the court admitted this does not accord as closely with a "literal reading" of the Act, it found it sufficient to create ambiguity. *Id.*

To resolve this supposed ambiguity, the court applied deference. It reasoned that "the importance of the tax credits to the overall statutory scheme" makes it "reasonable to assume that Congress created the ambiguity" intentionally, so that the IRS could resolve it. Pet.App.27a n.4. The court rejected

Petitioners' argument that a venerable canon of construction—tax credits must be expressed in "clear and unambiguous language," *Yazoo & Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 186 (1889)—had displaced *Chevron* as the way to resolve ambiguity in § 36B. Pet.App.32a-33a. The court further held that deference to the IRS was proper even though the "ambiguity" arose in § 1321 of the Act, administered by *HHS*—not in the Internal Revenue Code. Pet.App.32a. Ultimately, because the Rule advanced "the broad policy goals of the Act," the panel upheld it under *Chevron* Step Two. Pet.App.27a.

By contrast, the *Halbig* panel squarely rejected the argument that § 1321 of the ACA, and use of the word "such," created relevant "equivalence" between state and HHS Exchanges. *Halbig*, 2014 U.S. App. LEXIS 13880, at *22-25. As the court recognized, use of the word "such" directs HHS to establish the same *type* of Exchange as "a state would have established had it elected to do so," which would not otherwise have been clear. *Id.* at *23. Critically, though, that could not change the fact that subsidies under § 36B turn on "*who* established" the Exchange; a federal Exchange is not "established *by the State*." *Id.* at *24 (emphases added). It is established when a state *refuses* to establish an Exchange. Further, § 1321 does not expresly *deem* HHS Exchanges to be "established by the State"—a "significant" omission given that Congress did expressly provide that a U.S. territory "shall be treated as a State" if it elects to establish an Exchange. *Id.* (quoting 42 U.S.C. § 18043(a)). *Halbig* thus found "no textual basis—in sections 1311 and 1321 or elsewhere—for concluding that a federally-established Exchange is, in fact or legal fiction, established by a state." *Id.* at *31.

Given that conclusion, *Halbig* refused to "ignore the best evidence of Congress's intent—the text of section 36B—in favor of assumptions about the risks that Congress would or would not tolerate." *Id.* at *59. It therefore vacated the Rule as contrary to the unambiguous statutory text. After all, "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). "And," the court continued, "neither may we." *Halbig*, 2014 U.S. App. LEXIS 13880, at *59.

C. Thus, while the Fourth and D.C. Circuits agreed on a great number of points, they diverged on the critical issue: Is there ambiguity over whether an Exchange established by the federal government under § 1321 is somehow "established by the State under section 1311"? And that divergence led one court to vacate the Rule and the other to uphold it.

Notably, this Circuit split is especially troubling given uncertainty over how the competing rulings would apply even in the Fourth Circuit's territorial jurisdiction. On one hand, the decision below would ordinarily be thought to resolve the validity of subsidies within the states comprising the Fourth Circuit: Virginia, Maryland, North Carolina, South Carolina, and West Virginia. Yet, on the other hand, one of the *Halbig* plaintiffs resides in West Virginia. Further, the D.C. Circuit has long held that when it vacates a rule under the APA, such a decision has "nationwide" effect. *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998). This division therefore not only has the usual effect of regional disuniformity, but also creates a special sort of nationwide confusion and conflict.

II. PROFOUND CONSEQUENCES OF DELAY MEAN THAT THIS COURT'S DEFINITIVE RESOLUTION IS URGENTLY NEEDED.

The monumental significance of this legal issue requires this Court's immediate, urgent attention. The two conflicting Circuit decisions have created intolerable uncertainty over a major component of the ACA's implementation. If this Court ultimately agrees with the D.C. Circuit that the IRS Rule is contrary to law, as is highly likely, the consequences for individuals, employers, insurers, states, and federal spending will be vast—and the longer that the lawless IRS Rule is in effect, the greater the upheaval when it is ultimately vacated. As both Courts of Appeals recognized by expediting their own proceedings, it is in everyone's interest to obtain final resolution as soon as possible. Only this Court can provide that resolution, and this petition is the only vehicle by which it could do so this Term.

A. Given the self-evident enormous importance of the IRS Rule to the *ongoing* implementation of the ACA, to the *immediate* economic decisions of millions of Americans and thousands of businesses, and to the *currently flowing* billions of dollars in expenditures that the D.C. Circuit ruled illegal, the need for this Court's review is plainly and uniquely urgent.

As to *individuals*, the *Halbig* court recognized that its ruling would have "significant consequences" for the "millions of individuals receiving tax credits through federal Exchanges." *Halbig*, 2014 U.S. App. LEXIS 13880, at *61-62. Estimates show that nearly 5 million individuals have been receiving subsidies through HHS Exchanges. *See* Pear, *New Questions on Health Law*, *supra* (noting that "more than 4.5

million people … were found eligible for subsidized insurance in the federal exchange"). In the wake of the conflicting Circuit decisions, these millions of Americans who have been relying on subsidies do not know whether they can continue to count on them or need to make other arrangements for health care. Importantly, these consequences become more severe the longer it takes to finally vacate the IRS Rule. Indeed, under the ACA as written, if the Treasury improperly pays for part of an individual's premium, but it later turns out that the individual is not entitled to a subsidy, it is the low- or middle-income American who may be on the hook to repay the improper payments (subject to certain caps). *See* 26 U.S.C. § 36B(f)(2). Every month that subsidies are paid on the authority of the IRS Rule, its millions of beneficiaries thus not only detrimentally rely on its validity to make important economic decisions, but are potentially incurring thousands of dollars of potential debt—owed to the IRS as back taxes. This is grossly unfair, and only prompt resolution of the legal dispute can curtail that unfairness.

Further, millions of Americans are in the same position as Petitioners here—namely, subject to the Act's individual mandate only if the IRS Rule stands. In light of the conflicting rulings, these individuals have no idea whether they are required to purchase comprehensive health coverage (which they may well not want) or are free instead to forgo coverage or buy only catastrophic coverage. Nor do they know if they will be subject to fines if they fail to purchase ACA-compliant coverage. *Cf. Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967) (citing "dilemma" of either "comply[ing] … and incur[ring] the costs" of doing so or violating law "and risk[ing]" penalties if challenge

fails). This uncertainty, affecting the economic decisions of an untold number of Americans, can be resolved only through this Court's immediate review.

As to *employers*, the ACA's employer mandate is scheduled to take effect January 1, 2015 (after delays imposed unilaterally by the Administration). Under that provision, many employers must either sponsor affordable coverage for their full-time employees or else pay large penalties. But penalties are triggered only if "at least one full-time employee enrolls in a health plan and qualifies for a subsidy" under the Act. *Burwell v. Hobby Lobby Stores, Inc.*, Nos. 13-354, 13-356, 2014 U.S. LEXIS 4505, at *22-23 (2014). Thus, in the 36 states served by HealthCare.Gov, employers will be exposed to these penalties only if the IRS Rule is upheld. *See* Dan Eaton, *Who Gets the Last Word on Obamacare?*, CNBC.com, July 23, 2014 ("The answer matters to the estimated 250,000 employers in the 36 states with federally facilitated exchanges ...."). Again, therefore, in light of the conflicting Circuit decisions, hundreds of thousands of businesses in three dozen states have no idea whether they are required to provide ACA-compliant coverage to employees next year. That uncertainty also threatens many *employees*, because employers worried by potential penalties may lay off workers or reduce their hours to evade the employer mandate. *See, e.g.*, Robert Pear, *Public Sector Capping Part-Time Hours to Skirt Health Care Law*, N.Y. TIMES, Feb. 21, 2014, at A12. This damaging uncertainty can be lifted only by this Court's final review.

As to *insurers*, the validity *vel non* of the IRS Rule is crucial to their budgeting, planning, and rate-setting for future coverage. If the Rule is invalid as

the D.C. Circuit held, that will have a substantial effect on the makeup and revenue of the insurance pool going forward. Pear, *New Questions on Health Law*, *supra* ("The contradictory rulings … could inject uncertainty, confusion and turmoil into health insurance markets …."). Delay in resolving the matter is thus likely to impose even heavier logistical and financial stresses on insurance markets. *Cf. Halbig*, 2014 U.S. App. LEXIS 13880, at *61-62 (acknowledging decision's "significant consequences" for "health insurance markets more broadly").

As to *states*, the resolution of this issue will have a dramatic impact on incentives regarding whether to establish their own Exchanges prospectively (or, as some states are now considering, shutting down their Exchanges in favor of HealthCare.Gov). States are likely to act very differently if establishing an Exchange will determine whether state residents are entitled to billions in tax credits. *See, e.g.*, Louise Radnofsky, *States Try To Protect Health Exchanges from Court Ruling*, WALL ST. J., July 25, 2014 ("A leading proponent of a fully state-run exchange [in Illinois] said he believed legislators would back his position if the D.C. panel's decision is upheld."). Indeed, as a group of state legislator *amici* told the court below, had they known "that their constituents would lose access to these tax credits unless the State established its own Exchange, they would have vigorously advocated for a state-run Exchange citing this potential consequence." Amici Br. of Members of Cong. et al. 5. Immediate review by this Court would allow states more time to make this decision with a full understanding of its legal consequences, whereas delay would potentially preclude them from timely "opting-in" to the ACA for subsequent years.

Finally, and perhaps most importantly, billions of taxpayer dollars are *right now* streaming out of the federal Treasury under the authority of the IRS Rule. (The Government estimated below that the cost of the subsidies would eventually amount to approximately $150 billion per year. Govt. C.A. Br. 5.) These funds will continue to be spent *every month* until vacatur of the IRS Rule takes effect. *See* Editorial, *Fast-Tracking ObamaCare to the Supreme Court*, WALL ST. J., July 23, 2014 ("The subsidies will continue to flow as long as the litigation is ongoing, which means that tens of billions of dollars are being distributed illegally."). Because "the protection of the public fisc is a matter that is of interest to every citizen," *Brock v. Pierce Cnty.*, 476 U.S. 253, 262 (1986), there is thus an enormous public interest in ensuring that these funds are not illegally disbursed. The longer this litigation drags on, the more money is unlawfully spent without congressional approval—a very serious matter indeed. *Cf.* 31 U.S.C. § 1341 (criminalizing payments from U.S. Treasury not "authorized by law"). This is yet another powerful reason why this Court should strive to provide a definitive resolution as quickly as possible.

B. Both of the Circuits to have considered this issue recognized the important public interest served by prompt disposition. The D.C. Circuit granted the *Halbig* plaintiffs' motion to expedite—and, indeed, ordered expedition even more drastic than requested, allowing them only seven days to file their opening brief. After that ruling, the Government chose not to oppose Petitioners' motion asking the Fourth Circuit to similarly expedite this case—which that court also granted.

C. This petition is the only vehicle that would allow this Court to resolve this matter within the October 2014 Term. The cases filed by Oklahoma and Indiana have not yet been decided by district courts, and the Government has announced its intent to seek *en banc* review of *Halbig*, rather than proceed directly to this Court as it did when the Eleventh Circuit invalidated the individual mandate in 2011. *DOJ To Appeal "Incorrect' Halbig Ruling*, POLITICO, July 22, 2014 ("The government will seek an en banc review from the full D.C. court of appeals, a Justice official said."). If the D.C. Circuit grants rehearing, *Halbig* would not reach the Court this Term.

Importantly, even *en banc* reversal of *Halbig* would by no means reduce the pressing need for this Court's review. The issue is obviously exceptionally important, and the *Halbig* panel opinion proved that Petitioners' challenge is sufficiently compelling to require the Court's attention. *Accord* Tom Goldstein, *The Fate of the Obamacare Subsidies in the Supreme Court*, SCOTUSBLOG.COM, July 23, 2014 ("But even if [*en banc* reversal] happens, the case seems too close and too important for the Supreme Court to pass it up."). Untenable uncertainty will persist until this Court supplies a definitive answer, especially since other challenges are already working their way to the Seventh and Tenth Circuits, and challenges in other Circuits are very likely. Indeed, given the IRS Rule's irreconcilable conflict with the ACA's plain language, it is quite probable that the Rule will be invalidated at some point by another court. It is far better for this Court to resolve this question now, to both preclude further detrimental reliance and to eliminate the Sword of Damocles that will inevitably hang over the IRS Rule otherwise.

III. THE FOURTH CIRCUIT PLAINLY ERRED BY FINDING AMBIGUITY IN § 36B AND BY DEFERRING TO THE IRS TO RESOLVE IT.

If it were clear that *Halbig* was plainly wrong in construing § 36B as it did, perhaps this Court could safely assume that the *en banc* court would correct its error and no other court would follow its lead. But, to the contrary, it is the court below that plainly erred, both in finding ambiguity despite clear text, and by deferring to the IRS as a means to resolve that supposed ambiguity. Those errors make this Court's intervention all the more inevitable.

A. As explained, the Fourth Circuit did not accept the Government's arguments that § 36B's plain text would create absurd results, or that the legislative history refuted that text, or that Congress could not possibly have meant to condition subsidies on state Exchanges. Rather, it acknowledged the "common-sense appeal of the plaintiffs' argument" and admitted that it was "at least plausible" that Congress meant what it said in § 36B. Pet.App.18a, 25a. The panel nonetheless found the Act ambiguous by claiming that the provision directing HHS to establish Exchanges in states that failed to do so could be read as creating a legal fiction under which even Exchanges established by HHS are "established by the State." That reading is obviously wrong.

First, ambiguity exists for *Chevron* purposes only if it remains after the court "employ[s] traditional tools of statutory construction." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Yet every canon of construction confirms that "established by the State" *cannot* be read to include *all* Exchanges, even those created by HHS.

On such a reading, the modifier "established by the State" in § 36B would serve no purpose, violating the "cardinal principle" that "no clause … shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). More to the point, the problem here is not *redundancy*, but that § 36B specifically answers the precise question at issue; on the Government's view, Congress added superfluous words that *directly contradict* its own intent. Moreover, Congress elsewhere used the broader phrase "Exchange established under this Act," Pet.App.17a, which clearly includes HHS-established Exchanges. Giving that broader meaning to § 36B's narrower words violates the canon that "differing language" in "two subsections" of a statute should not be given "the same meaning." *Russello v. United States*, 464 U.S. 16, 23 (1983). Further, § 36B itself elsewhere refers expressly to *both* state- and HHS-established Exchanges distinctly, proving that the Act does not equate them: A subsection of § 36B requiring information reporting by Exchanges applies to an "Exchange under Section 1311(f)(3) or 1321(c)." 26 U.S.C. § 36B(f)(3). This proves that when Congress wanted to encompass both state- and HHS-established Exchanges, it "knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994).

Second, the panel's notion that HHS acts *on the state's behalf* in establishing a fallback Exchange is neither correct nor relevant. The ACA does *not* say that HHS should establish Exchanges "on behalf of" declining states. It says that HHS should establish Exchanges "within" them. ACA § 1321(c), *codified at* 42 U.S.C. § 18041(c). That is language of *geography*, not *agency*. And even if the Act had said that HHS should act "on the State's behalf," that Exchange

would still be established *by HHS for the state*, not *by the state*. Finally, the crucial premise allowing HHS to act in the first place is the state's *failure* to. HHS thus cannot be acting "on behalf of the state," Pet.App.18a, because the state has clearly decided that it does *not* want to establish an Exchange. HHS is acting *instead of* the state.

Third, because § 1321 describes only when and how HHS Exchanges come into *existence*, but says nothing about whether they may grant subsidies, Congress could have extended subsidies to those Exchanges only by "deeming" Exchanges established by HHS to be "established by the State." Congress did just that for Exchanges established by *territories*: Section 1323 provides that if a territory creates an Exchange, it "shall be treated as a State" for such purposes. 42 U.S.C. § 18043(a)(1). Likewise, a House version of the ACA—which created a national Exchange but allowed states to choose to run their own—said that, if a state did so, "any references in this subtitle to the Health Insurance Exchange … shall be deemed a reference to the State-based Health Insurance Exchange." H.R. 3962, § 308(e), 111th Cong. (2009). No equivalent language about HHS Exchanges appears in the enacted ACA; as noted, § 1321's language comes nowhere close.

The panel below apparently believed, incorrectly, that "Congress defined 'Exchange' as an Exchange established by the state," supposedly bolstering the claim that § 1321 somehow commands the literally nonsensical: "state-established" Exchanges established by HHS. Pet.App.18a. In fact, the Act defines "Exchange" as "an American Health Benefit Exchange established under section 1311." ACA

§ 1563(b)(21), *codified at* 42 U.S.C. § 300gg-91(d)(21). At most, that definition could sow doubt over the metaphysical question whether Exchanges created by HHS *pursuant to* § 1321 are created "under" that section or "under" § 1311. Either way, however, they are established *by HHS*, not the state. Indeed, this potential confusion is presumably why § 36B specifically limits the subsidies to Exchanges "established *by the State* under section 1311."

Beyond the Act's global definition of "Exchange," the panel also cited § 1311(d)(1) of the ACA, which explains that an Exchange "shall be a governmental agency or nonprofit entity that is established by a State." 42 U.S.C. § 18031(d)(1). The panel thought that this "narrow[s] the definition of 'Exchange' to encompass only state-created Exchanges," and that a narrow focus on "state-created Exchanges" somehow *supports* inclusion of "HHS-created Exchanges" in § 36B. Pet.App.17a. Even the Government did not make that argument—for good reason: Section 1311 is the provision directing *states* to establish Exchanges. Section 1311(d)(1) simply specifies that states may do so through a state agency or nonprofit. This is not a "definition" of "Exchange," much less one that somehow transmogrifies HHS Exchanges into Exchanges that are "established by the State." *See Halbig*, 2014 U.S. App. LEXIS 13880, at *25-30.

B. The panel below erred again by deferring to the IRS Rule to resolve this supposed "ambiguity." For four distinct reasons, deference is inapplicable.

First, for the reasons discussed, the Act's text is unambiguous. Where Congress has "unambiguously expressed [its] intent" in the law, "that is the end of the matter." *Chevron*, 467 U.S. at 842-43.

Second, as this Court just reiterated, "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air*, 134 S. Ct. at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). Few decisions will have greater economic or political significance than one triggering hundreds of billions of dollars per year in spending and expanding major components of the ACA to more than two-thirds of the states. The panel below recognized as much, but backwardly argued that "the importance of the tax credits" makes it *more* "reasonable to assume that Congress created the ambiguity." Pet.App.27a n.4. As this Court's cases make clear, however, the opposite is true: It is inherently implausible that Congress wanted *the IRS* to decide on the expenditure of this huge sum of money, or on how far the ACA's mandates should extend. The IRS Rule is thus a major policy in search of ambiguity—not a mere detail that Congress intended the IRS to fill. Indeed, that is why § 36B "directly spok[e] to the precise question" at issue, rather than leave the answer ambiguous. *Chevron*, 467 U.S. at 842.

Third, ambiguity may be resolved by an agency only if it remains after "employing traditional tools of statutory construction," including presumptions that resolve ambiguity. *Id.* at 843 n.9. Thus, where established canons require a clear statement of Congress's intent to infer certain results, an agency cannot impose those results through ambiguous text. *See, e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 250, 258 (1991) (deference cannot "overcome the presumption against extraterritorial application"); *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) ("[A]

statute that is ambiguous with respect to retroactive application is construed … to be unambiguously prospective," so that "there is, for *Chevron* purposes, no ambiguity."); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444-45 & n.8 (D.C. Cir. 1988) (refusing to defer because if law "can reasonably be construed" in Indian tribe's favor, "it *must* be").

To protect *Congress's* exclusive authority over the federal purse, this Court has long held that tax credits must be expressed in "clear and unambiguous language" in statutes. *Yazoo*, 132 U.S. at 186. Such benefits "must rest … on more than a doubt or ambiguity." *United States v. Stewart*, 311 U.S. 60, 71 (1940). If "doubts are nicely balanced," that defeats the claimed tax benefit. *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933). In light of this venerable rule allowing money to be drawn from the Treasury only when the congressional custodian of the federal purse has unambiguously authorized it, deference cannot apply to the proper interpretation of § 36B. The IRS cannot by regulation extend or expand the credits by resting on "doubt or ambiguity" in the ACA. *Stewart*, 311 U.S. at 71.

The court below contended, based on *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011), that this canon does not displace *Chevron* deference. Pet.App.33a. Actually, *Mayo* expressly *confirmed* that tax exemptions must be "construed narrowly." *Id.* at 715. Because the Government construed the exemption narrowly there, *Chevron* and the tax-credit canon reinforced one another. Here, however, the canon has the effect of eliminating any ambiguity, giving *Chevron* deference no room to operate.

Fourth, there is no basis for *Chevron* deference to the IRS, because § 36B—the only relevant provision that falls within the Internal Revenue Code—is not ambiguous on its own. Pet.App.16a-17a. Rather, it is only the distinct ACA provisions allowing for state and federal Exchanges that purportedly make it plausible to construe the Act as extending subsidies to the latter. *See* Pet.App.18a. Yet those provisions are codified in a chapter of *Title 42* of the U.S. Code—the domain of *HHS*, not the IRS. *See* 42 U.S.C. §§ 18031, 18041. Thus, the fact that the IRS has "authority to resolve ambiguities in 26 U.S.C. § 36B," Pet.App.32a, does not save the IRS Rule—because § 36B is not the arguably ambiguous provision. *Cf. Cheney R.R. Co. v. R.R. Ret. Bd.*, 50 F.3d 1071, 1073-74 (D.C. Cir. 1995) (no deference to agency where issue "turn[ed] on the interpretation" of laws "not the Board's governing statutes").

C. Although the panel did not rely on them, Judge Davis's concurrence (and Judge Edwards's *Halbig* dissent) made other arguments for why HHS Exchanges are supposedly "established by the State." These turn statutory interpretation on its head.

First, both judges emphasized the need to read statutory language "in context," as if that somehow supports the IRS Rule. *See* Pet.App.36a; *Halbig*, 2014 U.S. App. LEXIS 13880, at *65 (Edwards, J., dissenting). To the contrary, all that a "contextual" reading demonstrates is that § 36B is the *only* provision that addresses subsidies. Yet that is the provision these judges ignore. They cite § 1321, but the fact that the Act *envisions* HHS Exchanges when states default cannot suggest that the subsidy provision's reference to "Exchange established by the

State" somehow connotes an HHS Exchange. To the contrary, precisely *because* the ACA calls for two distinct entities to establish Exchanges, the phrase "Exchange established by the State" cannot include one established by HHS. And reading the statute "as a whole" *confirms* that Congress knew how to deem non-state entities to be states when it intended to. *See* p.26, *supra* (U.S. territories).

Second, both judges objected that if Congress had sought to limit subsidies to state Exchanges, it would not have done so by "tinkering with the formula" for how to compute the subsidy's value. Pet.App.39a; *see also Halbig*, 2014 U.S. App. LEXIS 13880, at *78 (Edwards, J., dissenting). But the formula is the *only* provision that defines the transactions eligible for subsidies. Even the Government agrees that only coverage purchased through an *Exchange* can be subsidized; that limit is found only in the same clause that these judges object is too obscure to take seriously. Moreover, it is not at all unusual for Congress to put conditions on eligibility for tax credits into the formula for calculating them—even if the conditions require states to take action to render their citizens eligible. *See, e.g.*, 26 U.S.C. § 35(a), (b), (e); *Halbig*, 2014 U.S. App. LEXIS 13880, at *27 n.4.

Third, lacking any serious textual argument, Judges Davis and Edwards fall back on the supposed broad "purposes" of the ACA. Subsidies are "critical" to proper operation of the Act, because they make coverage more affordable, Pet.App.40a, and are purportedly intended to counteract upward pressure on premiums caused by the Act's regulatory provisions, *Halbig*, 2014 U.S. App. LEXIS 13880, at *80-93 (Edwards, J., dissenting). Yet, as this Court

has often repeated, "vague notions of a statute's 'basic purpose' are … inadequate to overcome the words of its text." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). Particularly with a law as complex as the ACA, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam).

In any case, as both the *King* and *Halbig* panels agreed, it is entirely plausible that Congress used subsidies as an incentive to induce states to establish their own Exchanges. Indeed, Congress in the ACA did the same thing by conditioning Medicaid grants on states' expansion of their Medicaid programs. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601 (2012). Only by promising states the "quid" of subsidies without demanding the "quo" of state Exchanges did the IRS Rule eliminate the incentive, depriving Congress of the opportunity to satisfy *both* of its policy "purposes"—universal subsidies *and* state-established Exchanges.

Judges Davis and Edwards scoff that there is no support for this theory. *See* Pet.App.37a; *Halbig*, 2014 U.S. App. LEXIS 13880, at *101 (Edwards, J., dissenting). But the support is the clear statutory *text*, which would govern even in the face of *contradictory* legislative history. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). It is thus outrageous to suggest that legislative history must *confirm* plain text that is consistent with plausible, non-absurd purposes. "[C]lear text speaks for itself and requires no 'amen' in the historical record." *Halbig*, 2014 U.S. App. LEXIS 13880, at *46.

Moreover, it is simply false that the "incentive" purpose is "made up out of whole cloth." *Halbig*, 2014 U.S. App. LEXIS 13880, at *67 (Edwards, J., dissenting). The subsidy incentive mirrors the ACA's own Medicaid incentive. Also, a Senate committee version of the ACA conditioned subsidies on the state's adoption of, *inter alia*, "insurance reform provisions." S. 1679, § 3104, 111th Cong. (2009). Moreover, the incentive was well understood by, among others, Prof. Jonathan Gruber, a leading architect of the ACA who helped "draft the specifics of the legislation," Catherine Rampell, *Mr. Health Care Mandate*, N.Y. TIMES, Mar. 29, 2012, at B1, and later explained that "if you're a state and you don't set up an Exchange, that means your citizens don't get their tax credits." Robert Pear & Peter Baker, *Ex-Aide's Statements in 2012 Clash with Health Act Stance*, N.Y. TIMES, July 26, 2014, at A16.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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