No. 14-114

IN THE

Supreme Court of the United States

DAVID KING, et al.,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION AND THE HEARTLAND INSTITUTE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF THE *AMICI CURIAE* [1]

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

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

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

The Heartland Institute is a non-partisan, non-profit, 501(c)(3) educational policy institute devoted to promoting understanding of how the free market operates, and how it can be used to better address the nation's social and economic problems.

This case is of interest to the ACRU and the Heartland Institute because both are concerned that America be governed under the rule of law.

STATEMENT OF THE CASE

The Affordable Care Act ("ACA") provides for two, separate, distinct types of health insurance Exchanges that can be established for each state, in two entirely separate sections of the law. One is a health insurance Exchange established by a state government. ACA Section 1311, 42 U.S.C. Section 18031. That Section provides, "Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange…for the state that facilitates the purchase of qualified health plans." ACA Section 1311(b)(1), 42 U.S.C. Section 18031(b)(1).

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

operate such Exchange within the State[.]" ACA Section 1321(c), 42 U.S.C. Section 18041(c).

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

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

"Exchanges established by the Secretary under Section 1321."

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

Restricting federal tax credits for health insurance to residents of the states where the state established a state Exchange was the main way the ACA sought to encourage states to establish such Exchanges. ACA, Section 1401, 26 USC, Section 36B; Jost, *supra*, n. 23 at 7. Congress further encouraged states to establish Exchanges by offering the states federal funding to do so, ACA, Section 1311(a), 42 U.S.C. Section 1803(a), and by providing for the federal government to establish the Exchange in a state if the state does not do it, ACA, Section 1321(c), 42 U.S.C. Section 18041(c).

But a total of 34 states did not accept these inducements to set up a state Exchange under the ACA. Kaiser Family Foundation, *State Health Facts, State Decisions for Creating Health Insurance Exchanges*, (May 28, 2013), http://kff.org/health-

reform/stateindicator/health-insurance-exchanges/. Two other states decided to establish state Exchanges under the ACA, but failed to get them up and running in time. Jennifer Corbett Dooren, *Two States Seek Help With Health Exchanges*, Wall St. J., May 22, 2003, http://online.wsj.com/news/articles/SB10001424127887323336104578499444065609364. That means 36 states do not have state Exchanges under the ACA for 2014. Only 14 do.

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

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

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

In response to this proposed regulation, swarms of commenters, legal scholars, and dozens of members of Congress filed comments objecting that the proposed regulation departed from the text of the ACA in granting eligibility to taxpayers who had enrolled in health insurance plans on state Exchanges established under Section 1311, ***or*** health insurance

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

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

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

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

The availability of the tax credits in a state triggers the employer mandate for most employers, and the individual mandate for most workers without employer provided insurance. Workers and employers are consequently forced to bear some costs as a result.

The District Court below recognized that granted the Plaintiffs standing to challenge the IRS rule, which made them subject to the individual mandate in Virginia, one of the states that did not establish a state health Exchange. Pet.App.53a-60a. Paying for the required health insurance even with the tax credit left them subject to substantial net costs. Pet. App. 52a-53a; *See also* JA29-38.

But the District Court ruled for the government on the merits on February 18, 2014. The Court agreed that Petitioners' "plain meaning interpretation of Section 36B has a certain common sense appeal." Pet. App. 71a. But the Court nevertheless concluded that somehow Congress *unambiguously* intended just the opposite of that "plain meaning." Pet. App. 64a-71a.

The Fourth Circuit confirmed the District Court on July 22, 2014. That Court too recognized "the common sense appeal of plaintiff's argument." Pet. App. 18a. But the Court concluded that the ACA was somehow ambiguous as to whether an Exchange established by the federal Dept. of HHS was "established by the State." Pet. App. 18a.

On the very same day as that Fourth Circuit ruling, the D.C. Circuit held just the opposite, finding that the IRS rule was directly contrary to the plain text of the ACA. *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014). The D.C. Circuit subsequently granted the government's request for rehearing en banc. 2014 U.S. App. LEXIS 17099 (D.C. Cir. Sept. 4, 2014).

On Sept. 30, 2014, the Federal District Court for the Eastern District of Oklahoma ruled on the same issue, agreeing with the D.C. Circuit in *Halbig*, and criticizing the Fourth Circuit's ruling in the present case. *Oklahoma v. Burwell*, No. 11-cv-30, 2014 U.S. Dist. LEXIS 139501 (E.D. Okla. Sept. 30, 2014). The Court in that case declared *Halbig* to be "more persuasive," and criticized the Government's defense of the IRS Rule as "lead[ing] us down a path toward Alice's Wonderland, where up is down and down is up, and words mean anything." *Id.* at *14, 16.

With this growing split between the circuits, this Court granted certiorari in the present case, and ordered *Halbig* to be held in abeyance.

SUMMARY OF ARGUMENT

This is a critical case coming at a critical time for our nation and its history. The President has famously announced that he has a phone and a pen, by which he means to say that he can govern the nation perfectly well without Congress. We understand that to imply that the President thinks he is ready and able to assume Congress's Article 1 legislative powers.

Which to our minds may make the real question before this Court today: "Is this America, or is this Venezuela?"

We respectfully submit that the role of the Court today is to stand for and enforce the law and the Constitution so that question never comes before this Court. Consider that what President Obama does today will become the foundation for others to take the currently budding Constitutional abuse even further, transforming America into the very authoritarian despotism our Nation's Founding Fathers intended the fundamental structure of the Constitution to prevent.

This Court should issue a landmark ruling in this case to prevent that national nightmare from ever approaching reality. That landmark ruling would unambiguously reaffirm that the President does not have the Article 1 legislative powers of Congress, and he must follow the law as enacted, even when he is sure he has a better idea, which this President has put at issue again and again.

As widely reported, the Speaker of the House is in the process of trying to sue the President to enforce this rule in regard to another transgression. But this Court can and should settle these matters by a firmly stated rule in this case. That would be firmly restating the obvious, but this President is repeatedly challenging the obvious, which is that he may have a phone and a pen, but he is the President, not the Congress, and he needs to reread the Constitution to see the difference.

This is all the more urgent because of a political philosophy that has been gathering force among a substantial segment of this nation for over a century, which holds that the rules that apply to everyone else do not apply to them, because they are well intentioned to establish "social justice" as they see it, and there is no need or warrant for checks and balances on that. That is precisely a psychological precursor to despotism that has no place in our Constitutional Republic.

The plain words of the ACA statute provide explicitly and unambiguously for tax credits for health insurance purchased on health exchanges established by states under Section 1311. An entirely different Section 1321 provides for the Federal Dept. of HHS to establish health exchanges in states that do not establish their own State Exchanges. The ACA nowhere provides for tax credits for health insurance purchased on federally established health Exchanges under Section 1321.

Yet the IRS Rule challenged in this case, which supposedly interprets and implements the statute, provides that the tax credits are available for health insurance purchased on State Exchanges established under Section 1311, and on Federal Exchanges established under Section 1321. There is no conceivable way within the realms of Aristotelian logic and the English language that the words "established by the State under [Section] 1311" can be read to include "established by the [Federal government] under [Section 1321]."

The rule of this Court that governs this case is, if the statute is clear and unambiguous 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. That governing principle, therefore, resolves this case, and the decision of the court below consequently must be reversed.

ARGUMENT

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

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

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

Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,934 (Aug. 17, 2011) (emphasis added). The addition of the 6 characters "or 1321" as compared to the statutory language has the practical effect of

expanding the federal tax credits beyond the ACA statutory language from 14 states to all 50 states, plus the District of Columbia. Adler and Cannon, supra, at 7.

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

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

Similarly, this Court added in *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986)(quoting *Chevron v. USA Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984)),

> "If the statute is clear and unambiguous '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.'"

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

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

Acceding to that would require not deference, but abdication. But the IRS is not even entitled to deference under *Chevron*, in regard to the regulation at issue here. That in part is because the regulation interprets sections of the ACA involving the Exchanges (such as Sections 1311 and 1321) that are within the domain of HHS to interpret and administer, not the IRS. *Tsosie v. Califano,* 651 F.2d 719, 722 (10th Cir. 1981)(Agency's "construction is not entitled to special deference to the extent it rests on the interpretation of another agency's statutes and regulations."); *Dep't of Treasury v. Fed. Labor Relations Auth.,* 837 F.2d 1163, 1167 (D.C. Cir. 1988) ("[W]hen an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference."); *Cheney R.R. Co. v. R.R. Ret. Bd.,* 50 F.3d 1071, 1073-74 (D.C. Cir. 1995) (no deference where issue "turn[ed] on the interpretation" of laws that were "not the Board's governing statutes.").

This plain meaning of the statute is reinforced all the more because later in the very same Section 36B providing for the tax credits the statute uses different language very clearly to refer to both state and federal Exchanges in elucidating reporting requirements applying to both. There it refers to the "responsibilities of an Exchange under Section 1311(f)(3) or 1321(c)." 26 U.S.C. Section 36B(f)(3). This shows that when Congress wanted to refer to both state and HHS Exchanges, it "knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994). Yet, in defining where the tax credits apply, the statute refers only to state Exchanges.

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

was the product of agency expertise, all in violation of *Citizens to Preserve Overton Park*.

The IRS even certified that the challenged regulation was "not a significant regulatory action," 77 Fed. Reg. at 30,385, yet expanding the availability of the credit from 14 states following the statutory language to all 50 as provided in the regulation's language will cost the federal government hundreds of billions at least over the next 10 years alone. Executive Order 12866, referenced by the IRS, defines "significant regulatory action" as having an expected cost of $100 million or more. Exec. Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). *See also* 5 U.S.C. Section 804(2) (defining a major rule as having an expected annual cost of $100 million or more). This further indicates inadequate consideration of the effects of the regulation, in violation of APA requirements.

II. THE ACA PROVIDES FOR TAX CREDITS FOR HEALTH INSURANCE PURCHASED ON STATE ESTABLISHED EXCHANGES ONLY; THERE IS NO VALID ALTERNATIVE INTERPRETATION OF THE LAW.

Since the statutory language regarding health insurance tax credits is not ambiguous, the legislative history of the ACA is not relevant to this case. *Davis v. Mich. Dep't. of Treasury*, 489 U.S. 803, 808 n.3 (1989)("Legislative history is irrelevant to the interpretation of an unambiguous statute…."); *Husted, supra*. But that legislative history only supports the same conclusion as the clear statutory

language – the ACA tax credits for the purchase of health insurance are only available for health insurance purchased on Exchanges established by the states, not on federal Exchanges established by the U.S. Dept. of HHS.

The policy of the ACA as passed by Congress and enacted into law is that the Exchanges should be established by each of the states. The statute, in fact, purports to command the states to establish such Exchanges. 42 U.S.C. Section 18031 (b)(1).

But, of course, the Congress does not have the power under the Constitution to order the states to take this or any other action, as discussed above. So Congress adopted the policy of providing for hundreds of billions in tax credits for the purchase of the mandated health insurance only for insurance purchased on Exchanges established by the states, not on those established by the Federal Dept. of HHS, in order to give states a politically compelling incentive to establish their own State Exchanges under the ACA (so their citizens could get the tax credits). 26 USC, Section 36B; Jost, *supra*, n. 23 at 7.

The House version of the bill only *allowed* states to establish Exchanges, but did not provide any incentives for them to do so. H.R. 3962, Section 308, 111th Cong. (2009). But that was not going to satisfy more moderate Senate Democrats, who were more insistent on state rather than federal Exchanges. *Halbig v. Sebelius*, No. 13-623, 2014 U.S. Dist. LEXIS 4853 (D.D.C. Jan. 15, 2014), at *61. Carrie Budoff Brown, *Nelson: National Exchange a Dealbreaker*, POLITICO, Jan. 25, 2010.

High level ACA architects and advisors Timothy Jost and Jonathon Gruber proposed limiting the tax credits *only* to health insurance purchased on state Exchanges that met federal requirements, as a politically compelling way to induce states to establish such Exchanges. Timothy S. Jost, *Health Insurance Exchanges: Legal Issues*, O'Neill Inst., Georgetown Univ. Legal Ctr., no. 23 at 7, Apr. 27, 2009; Jonathon Gruber at Noblis, January 18, 2012 (YouTube Video); Michael D. Shear, *Care Act Supporter Ignites Fury with a Word: 'Stupid',* N.Y. Times, Nov. 14, 2014, at A12.

The Senate Finance Committee included that insight in its version of the bill. That became the definitive resolution of the issue after ACA supporters lost their filibuster proof majority with the election of Scott Brown in a Massachusetts special election to fill the seat of former Sen. Ted Kennedy, who died in office. That left the House with no choice other than to pass the Senate version of the bill without change, to avoid any further Senate vote that could be filibustered. John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 Law Library J. 131, 159 (2013); Pet. App. 23a.

Moreover, there is exactly *zero* legislative history to the contrary indicating any Congressional intent in support of the reading of the statute the government is urging upon this Court today, that the tax credits may be available for health insurance purchased on federal HHS Exchanges as well. This only further

confirms how completely lawless the government's position is in the present case.

The ACA's supporters may bitterly regret that the great majority of states nevertheless have refused or failed to establish state Exchanges, which eliminates the Act's mandates as well as tax credits in all of those states. But as this Court ruled just last term, neither courts nor agencies may "revise clear statutory terms that turn out not to work in practice." *Utility Air Regulatory Grp. V. EPA*, 134 S. Ct. 2427, 2446 (2014). ACCORD: *United States v. Locke*, 471 U.S. 84, 95 (1985)("[T]hat Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do."); *Nixon v. Mo. Mun. League*, 541 U.S. 125, 141 (2004) (Scalia concurring in the judgment**) (**"I do not think…that the avoidance of unhappy consequences is adequate basis for interpreting a text.").

Congress still sits and is open for business. So if the President and other ACA supporters are unhappy with the results of their law, they are free to ask Congress to change it. Of course, exactly half of the Senators that originally voted for the ACA have been replaced by the voters. That is their prerogative and right. The President and other ACA supporters do not have the prerogative and right to evade this judgment of the voters, and rewrite their statute as they prefer. This Court should not indulge them in this anti-Constitutional and anti-democratic abuse, but enforce the will of the people as the Constitution provides.

The reading of the statute that the government urges upon this Court is further foreclosed by the long-standing, venerable canon of construction providing that tax credits, deductions and exemptions "must be expressed in clear and unambiguous terms." *Yazoo & Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 183 (1889). A tax agency cannot recognize a tax credit that the agency determines was "implied" by a statute, *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988), nor can it be interpreted based on a doubt or ambiguity in a statute. *United States v. Stewart*, 311 U.S. 60, 71 (1940).

This rule applies all the more to *refundable* tax credits, which the IRS proclaims in the present case to apply to health insurance purchased on federal Exchanges, as well as on state Exchanges, and which are indistinguishable from direct spending. In regard to such refundable tax credits, the canon serves the Constitution's requirement that Congress exclusively control all "Money…drawn from the Treasury," which means that the Executive "cannot touch moneys in the Treasury of the United States, except [as] expressly authorized." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424, 426 (1990) (quoting U.S. Const., Art. I, Sect. 9, Cl. 7); *Knote v. United States*, 95 U.S. 149, 154 (1877).

In *Knote*, this Court said, "Any other course would give to the fiscal officers a most dangerous discretion." *Id.*, at 425 (quoting from *Reeside v. Walker*, 52 U.S. 272, 291 (1851). *See also Util. Air*, 134 S. Ct. at 244 (This Court reiterated just last term, "We expect Congress to speak clearly if it wishes to assign to an

agency decisions of vast 'economic and political significance.'") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

Does a statute providing for a federal tax credit for health insurance "enrolled in through an Exchange established by the State under [Section] 1311 of the Patient Protection and Affordable Care Act," express "in clear and unambiguous terms" that Congress has provided in the statute for federal tax credits for health insurance "enrolled in…through an Exchange established under Section 1311 ***or 1321*** of the Affordable Care Act….," as the IRS has provided in the interpretive Rule challenged in the present case?

Given the precedents just reviewed above, that is what the Internal Revenue Service, through its representative before the Court in this case, the United States Department of Justice, must be arguing, given the precedents above, for its proposed Rule to be valid.

Are the Internal Revenue Service and the United States Department of Justice not aware of the precedents discussed above? Given that these are the official U.S. government agencies responsible for implementing federal tax law, and for representing federal tax law before this Court, must we not presume and hold them responsible for knowing those precedents?

We respectfully request that this Court take judicial notice that this case is not being heard in Wonderland, and that the Internal Revenue Service and the United States Justice Department are not

Alice. Therefore, Aristotelian logic and the English language still apply to this case. On these grounds, we respectfully submit the question, do not the Internal Revenue Service and the United States Department of Justice warrant sanctions for the Through the Looking Glass illogic of the arguments they have presented to this Court in the present case?

CONCLUSION

For all of the foregoing reasons, *Amici Curiae* American Civil Rights Union and the Heartland Institute respectfully submit that the decision below should be reversed.

Respectfully submitted,

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