No. 14-114

In the Supreme Court of the United States

DAVID KING, ET AL.,
Petitioners,

v.

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF JONATHAN H. ADLER AND MICHAEL F. CANNON AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici were among the first to question the federal government's authority to issue subsidies for coverage purchased through federally established Exchanges. They have since, separately and together, published numerous articles, delivered lectures and testimony, and advised government officials on that issue and, in particular, on the regulation challenged here. They are the authors of the leading scholarly treatment of this issue, Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 Health Matrix J. L. Med. 119 (2013). *See also* Jonathan H. Adler & Michael F. Cannon, *The* Halbig *Cases: Desperately Seeking Ambiguity in Clear Statutory Text*, 40 J. Health Politics, Pol'y & L. (forthcoming 2015).

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[1] By letters on file with the Clerk, all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act of 2010 ("PPACA"), Pub. L. No. 111-148, 124 Stat. 119, authorizes tax credits for the purchase of health insurance in state-established Exchanges, and only in such Exchanges. Insofar as the IRS has sought to provide tax credits for the purchase of health insurance in federally established Exchanges, its actions are contrary to law and must be set aside.

Section 1311 of the PPACA (42 U.S.C. § 18031) declares that "Each State shall . . . establish" an "Exchange" to regulate health insurance within the state. Section 1321 (42 U.S.C. § 18041) directs the federal government to "establish" Exchanges "within" states that "[f]ail[] to establish [an] Exchange" or implement other specified provisions of the Act. Section 1401 (26 U.S.C. § 36B) offers health-insurance "tax credits" to certain taxpayers who enroll in a qualified health plan "through an Exchange established by the State." The statute limits tax credits to state-established Exchanges in a manner that is plain and unambiguous. The remainder of the statute and the

PPACA's legislative history are fully consistent with those provisions.

Such conditions are not anomalous. To induce state cooperation, Congress routinely conditions federal benefits to individuals — via both direct spending and the tax code — on their states carrying out congressional priorities. Congress conditioned federal subsidies on state action on multiple occasions throughout the PPACA. It did so here as well.

The text of the PPACA is sufficient to resolve this case. Resort to legislative history only reinforces this conclusion. That history supports the plain meaning of the text, and reveals why PPACA supporters approved this requirement even if many of them would have preferred otherwise. Political necessity required the Act's authors to give states a leading role in operating health-insurance Exchanges. In so doing, the Act's authors expressly conditioned premium-assistance tax credits on states establishing Exchanges and performing other tasks. Many of the Act's supporters preferred a different approach. But after those supporters lost their filibuster-proof majority in the U.S. Senate, no other approach could satisfy the constitutional requirements of bicameralism and presentment.

In 2012, the Internal Revenue Service issued a rule that altered that political tradeoff. The IRS rule offers premium-assistance tax credits through Exchanges that were established not *by the State*, but rather *by the federal government*. The agency is presently issuing those tax credits in the 36 states that refused or otherwise failed to establish an Exchange.

The IRS rule is contrary to the plain language of the PPACA. The statutory text speaks directly to the question at issue. Thus the IRS has no authority to provide tax credits in federal Exchanges. Nor is the IRS due deference in its interpretation of the Act. Contrary to the Government's argument that the rule supports one of the Act's general goals, the rule actually *subverts* congressional intent by altering the balance Congress struck between the Act's competing goals. It tries to achieve through regulatory fiat what PPACA supporters could not achieve through the political process: a health care bill that does *not* rely on state cooperation.

The Government has not identified any statutory provisions that conflict with the plain meaning of the PPACA's tax-credit eligibility provisions. Nor has the agency identified a single contemporaneous statement indicating PPACA supporters expected *this* bill to offer tax credits in *federal* Exchanges. The IRS simply rewrote the statute. The IRS's regulation is therefore contrary to law and should be set aside.

ARGUMENT

I. The PPACA Authorizes Premium-Assistance Tax Credits Only in Exchanges "Established by the State."

The PPACA offers premium-assistance tax credits only in states that establish and operate health-insurance Exchanges and perform other tasks that Congress cannot command states to perform. Section 1401's tightly worded tax-credit eligibility rules (26 U.S.C. § 36B) explicitly and carefully limit eligibility

to those who enroll in a qualified health plan "through an Exchange established by the State." These provisions condition the availability of tax credits on states establishing Exchanges, and prevent the issuance of tax credits in federal Exchanges. Section 1321 reinforces and works in conjunction with Section 1401 to condition tax credits on states establishing Exchanges and implementing other features of the law. These conditions mirror conditions Section 1311 imposes on federal grants to states.

The meaning of "established by the State" is plain. Congress defined "State" to mean "each of the 50 States and the District of Columbia." 42 U.S.C. § 18024(d). When Congress sought to expand the meaning of "State" beyond its common usage, it did so explicitly. In addition to defining the District of Columbia as a "State," it provided that U.S. territories that "establish[] such an Exchange . . . shall be treated as a State." PPACA § 1323(a)(1), 42 U.S.C. 18043(a)(1)). The Government has identified nothing in the statute or legislative history suggesting that Congress understood "established by the State" to have any other meaning.

Section 1401 reinforces this requirement at every turn. When it describes the *taxpayers* who are eligible for premium-assistance tax credits, describes the *type of health plan* to which a premium-assistance tax credit may be applied, describes the *premiums* to be used in calculating the credit amount, requires taxpayers *to pay a premium* to be eligible for the credit, and describes the *rating areas* in which to find those plans and premiums, these items and actions are al-

ways "enrolled . . . through" or "enrolled in" or "offered through" or found in "an Exchange established by the State." *See* 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i) (direct language); 26 U.S.C. § 36B(b)(3)(B), (b)(3)(B)(i), (b)(3)(C), (b)(3)(D), (b)(3)(E), (c)(2)(A)(ii), (e)(A) (cross-references).

Nowhere in the rules defining eligibility for tax credits does Congress refer to federal Exchanges, or use language (e.g., "*an* Exchange") encompassing both state-established Exchanges *and* federal Exchanges. Yet Congress did use such phrasing in other provisions of the statute. *See, e.g.*, PPACA § 1421(b)(1), 26 U.S.C. § 45R(a)(1) (offering tax credits to small businesses that offer health plans to employees through "*an* Exchange"). Such differences in usage are plain indicia of statutory meaning and legislative intent.

Section 1321 further reinforces that Congress expected states would make a choice, and that choice would have consequences. Section 1321(a) authorizes the Secretary of Health and Human Services to develop standards for meeting several requirements imposed by Title I, including the operation of Exchanges and implementation of other features of the Act such as reinsurance programs, risk-adjustment programs, guaranteed-issue, and community rating. Section 1321(b) provides: "Each State that elects . . . to apply the requirements described in subsection (a) shall, not later than January 1, 2014, adopt and have in effect" a law that meets those standards. Section 1321(c) provides that if a state "Fail[s] To Establish Exchange or Implement Requirements," either because "a State is not an electing State under subsec-

tion (b)" or because "the Secretary determines, on or before January 1, 2013, that an electing State" will not meet the standards, then "the Secretary shall . . . establish and operate such Exchange within the State and the Secretary shall take such actions as are necessary to implement such other requirements."

The purpose of Section 1321(c), as given in its heading, is to detail the *consequences* of a "Failure To Establish [an] Exchange or Implement Requirements." 42 U.S.C. 18041(c). One consequence of failure is the loss of tax credits. When section 1321(c) directs *the Secretary* to "establish" the Exchange "required" by Section 1311, it prevents taxpayers in that State from receiving tax credits because it precludes *the state* from establishing "an Exchange . . . under section 1311" as required under Section 1401. 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(I). Non-compliance with the requirements detailed in Section 1321(c) *automatically* triggers the federal government's obligation to establish an Exchange, rendering state residents ineligible for tax credits. Section 1321 is thus the linchpin of a carefully worded statutory scheme that gives states a choice between implementing various provisions of the Act or forgoing tax credits. *See infra* Part IV (pp. 22–28).

Tax credits are not the only subsidy that the PPACA conditions on states choosing to implement Exchanges. The conditions that Congress imposed on tax credits are mirrored in the conditions it imposed on the renewability of Exchange "establishment grants." Section 1311 authorizes the Secretary of Health and Human Services to issue unlimited sums

of money to states to assist them with "establishing an American Health Benefit Exchange." 42 U.S.C. § 18031(a)(2), (a)(3). Congress conditioned *renewal* of these grants on states "making progress . . . toward" establishing an Exchange, implementing the Act's guaranteed-issue and community-rating requirements, and "meeting such other benchmarks as the Secretary may establish." 42 U.S.C. § 18031(a)(4)(A).

Further confirming that these conditions reflect congressional intent, Section 1413 categorizes Exchanges with other health programs that make benefits to individuals conditional on state action. The Act defines Medicaid, the State Children's Health Insurance Program, *and* Exchanges — with specific reference to "the premium tax credits under section 36B of the Internal Revenue Code" — as "State health subsidy programs." 42 U.S.C. § 18083(e).

Sections 1311, 1321, and 1401 present states with a choice: a state's residents are eligible for tax credits if and only if state officials establish and operate an Exchange. This plain-meaning interpretation is the only interpretation that respects the text of the statute and creates no surplusage.

II. The Evolution of the Statutory Text Demonstrates that This Restriction Was Intentional.

Restricting tax credits to Exchanges "established by the State" was no accident. This phrasing was added to Section 1401 in multiple places at multiple times in the drafting process.

The first draft of § 36B's tax-credit eligibility rules appeared in the America's Healthy Future Act of 2009, S. 1796, 111th Cong. (2009), § 1205 (approved by the Senate Finance Committee on Oct. 13, 2009). That initial draft authorized tax credits only for those who enroll in coverage "through an Exchange established by the State" via one use of, and five cross-references to, that explicit phrase. America's Healthy Future Act of 2009, S. 1796, 111th Cong. (2009), § 1205, *proposing* 26 U.S.C. § 36B(b)(2)(A)(i), (b)(3)(B)(i), (b)(3)(C), (c)(2)(A)(i), (c)(2)(A)(ii), (e)(1)(A), https://beta.congress.gov/111/bills/s1796/BILLS-111s1796pcs.pdf.

By the time the PPACA passed the Senate, the bill's authors had reinforced that requirement in three ways. First, they added language to paragraph (b)(3)(C) to require the Secretary to calculate "adjusted monthly premiums" using premiums from the rating area of "an Exchange established by the State" (cross-reference). Second, they added language to paragraph (b)(3)(D) to require the Secretary to exclude certain benefits when calculating the "premium assistance amount" for plans purchased "through an Exchange established by the State" (cross-reference).

Third, and most importantly, S. 1796 as reported already defined "coverage months" via cross-reference as occurring only when a taxpayer enrolled in coverage "through an Exchange established by the State." S. 1796, 111th Cong. (2009), § 1205, *proposing* § 36B(c)(2)(A)(i). By the time the PPACA passed the Senate, however, its authors augmented that *cross-reference* with a clause *explicitly* defining "coverage

months" as occurring only when the taxpayer is enrolled "through an Exchange established by the State." PPACA § 1401, 26 U.S.C. § 36B(c)(2)(A)(i).[2]

These identical restrictions were added at a later stage of the legislative process, under the supervision of Senate leaders and White House officials, in the days before the PPACA went to the Senate floor.[3] If there were no difference between an Exchange established "under Section 1311" and an Exchange established "*by the State* under Section 1311," there would have been no reason to use (and to keep adding) the italicized phrase.

This requirement survived multiple rounds of revisions throughout the drafting process, including revisions to the cross-references attached to it.

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[2] *Compare* America's Healthy Future Act of 2009, S. 1796, 111th Cong. (2009), § 1205, *proposing* 26 U.S.C. § 36B(c)(2)(A)(i) (limiting credits to those "covered by a qualified health benefits plan described in subsection (b)(2)(A)(i)," a cross-reference to plans "enrolled in through an exchange established by the State"), *with* PPACA § 1401, 26 U.S.C. § 36B(c)(2)(A)(i) ("covered by a qualified health plan described in subsection (b)(2)(A) *that was enrolled in through an Exchange established by the State under section 1311*" (emphasis added)).

[3] *See* David M. Herszenhorn & Robert Pear, *White House Team Joins Talks on Health Care Bill*, N.Y. Times (Oct. 15, 2009), http://www.nytimes.com/2009/10/15/health/policy/15health.html; Perry Bacon Jr., *Small Group Now Leads Closed Negotiations on Health-Care Bill*, Wash. Post (Oct. 18, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/10/17/AR2009101701810.html (merger of Finance Committee bill and HELP Committee bill performed by Senate leaders, committee chairman, their staffs, and White House officials).

Compare, e.g., S. 1796, 111th Cong. (2009), § 1205, *proposing* 26 U.S.C. § 36B(b)(2)(A)(i) ("and which were enrolled in through an exchange established by the State *under subpart B of title XXII of the Social Security Act*" (emphasis added)), *with* PPACA § 1401, *creating* 26 U.S.C. § 36B(b)(2)(A) ("and which were enrolled in through an Exchange established by the State *under* [*section*] *1311 of the Patient Protection and Affordable Care Act*" (emphasis added)).

This requirement was similar to another provision of S. 1796. That bill also conditioned new small-business tax credits on states adopting community-rating. *See* S. 1796, 111th Cong. (2009), § 1221(a), *proposing* 26 U.S.C. § 45R(c)(2) ("STATE FAILURE TO ADOPT INSURANCE RATING REFORMS. — No credit shall be determined under this section . . . for any month of coverage before the first month the State establishing the exchange has in effect the insurance rating reforms . . . ."); S. Rep. No. 111-89, at 48 (2009), http://www.gpo.gov/fdsys/pkg/CRPT-111srpt89/pdf/CRPT-111srpt89.pdf ("If a State has not yet adopted the reformed rating rules, qualifying small business employers in the State are not eligible to receive the credit"). The PPACA's authors dropped this condition while merging the Finance Committee and HELP Committee bills — i.e., at the same time they reinforced the language conditioning tax credits for individuals on states establishing Exchanges and implementing other features of the Act, including community-rating.

After the PPACA became law on March 23, 2010, Congress made seven amendments to Section

36B through the "budget reconciliation" process; in none of these amendments did Congress disturb the language that expressly made tax credits conditional. *See* Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111-152, 124 Stat. 1029 (2010); House Office of the Legislative Counsel, *PPACA & HCERA; Public Laws 111-148 & 111-152: Consolidated Print* 105–13 (2010), http://www.ncsl.org/documents/health/ppaca-consolidated.pdf.

Prior to its being amended by the HCERA, Section 36B bore no mention at all of federally established Exchanges. *See* PPACA § 1401 (enrolled bill), https://beta.congress.gov/111/bills/hr3590/BILLS-111hr3590enr.pdf. The HCERA introduced the first and only such mention when it imposed identical reporting requirements on both state-established and federal Exchanges. *See* 26 U.S.C. § 36B(f)(3). Congress clearly meant this requirement to apply to both types of Exchange, and so referred to each type explicitly. Rather than somehow expand the meaning of "established by the State," this reporting requirement demonstrates that Congress saw *state*-established and *federally* established Exchanges, created under Sections 1311 and 1321 respectively, as distinct.

Indeed, the HCERA elsewhere shows how Congress expanded the reach of "established by the State" when that was its aim. It was through the HCERA that Congress amended the PPACA to provide that "[a] territory that elects . . . to establish an Exchange . . . and establishes *such* an Exchange . . . shall be treated as a State." HCERA § 1204(a), 42 U.S.C. § 18043 (emphasis added). In this provision, Congress

shows it did not understand the word "such" to have the power to transform Exchanges established by non-states into "an Exchange established by the State." We know this because Congress inserted the *subsequent* clause that created equivalence between territories and "States." Yet the HCERA contained no provision erasing or blurring the bright line that Congress drew between the *federal* government and a "State."

The Government would have the Court believe that Congress, which supposedly intended the PPACA to authorize tax credits in federal Exchanges, noticed and remedied the bill's failure to authorize tax credits in *territorial* Exchanges but somehow did not notice the bill's failure to authorize them in *federal* Exchanges. This notion defies credulity.

III. The Government's Efforts to Manufacture Ambiguity Fail.

Both the Government and the court below have strained to find ambiguity in otherwise straightforward statutory provisions, or sought to import potential ambiguity from other portions of the PPACA into Section 1401. These efforts have stretched the statutory text beyond recognition.

A. "Such Exchange"

Section 1321 requires that if a state "fail[s] to establish [an] Exchange or implement [other] requirements," then "the Secretary shall . . . establish and operate such Exchange within the State and the Secretary shall take such actions as are necessary to implement such other requirements." 42 U.S.C.

§ 18041(c). The Government places great weight on the word "such," to the exclusion of the rest of this provision and the rest of the statute. Contrary to the Government's claims, neither the word "such" nor any other part of the statute transforms federal Exchanges into "an Exchange established by the State."

Section 1321 is clear. Federal Exchanges are "establish[ed]" by "the *Secretary*," not the State. The Secretary establishes an Exchange when a state "fail[s]" to establish one. The Secretary establishes an Exchange "*within* the State" — not "on behalf of" the State. The Government's interpretation that the Secretary "stands in the shoes" of the State is without any statutory basis and is contrary to the Government's own implementation of the Act. For example, Section 1311(a) authorizes the Secretary to issue unlimited amounts of money to states for the purpose of establishing Exchanges. 42 U.S.C. § 18031(a). If the Government actually believed its own argument that the Secretary "stands in the shoes" of the state when establishing an Exchange, the Secretary would have funded the creation of federal Exchanges by using that authority to issue grants to her own agency. Yet that is not how federal exchanges were funded. *See* J. Lester Feder, *HHS May Have to Get 'Creative' on Exchange*, Politico (Aug. 16, 2011), http://www.politico.com/news/stories/0811/61513.html.

The Government has ignored other Section 1311 requirements on the grounds that they apply only to state-established Exchanges, and not to federal Exchanges. Specifically, Section 1311 provides that "No federal funds for continued operations" are allowed for

Section 1311 Exchanges. 42 U.S.C. § 18031(d)(5)(A). The Secretary concluded that this provision does not apply to federal Exchanges, which she is financing with federal funds raised through a 3.5 percent premium tax ("user fee") imposed on participating insurers. *See* Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13,744, 13,830 (Mar. 11, 2014) (final rule). Thus, by its actions, the Government has acknowledged that federal Exchanges are not fully equivalent to state-established Exchanges.

The directive that the Secretary shall establish "such" Exchange does not make federal Exchanges and state-established Exchanges equivalent in all respects. *See infra* p. 18. They may share *intrinsic* characteristics. But tax-credit eligibility hinges on the *extrinsic* characteristic of *who establishes* the Exchange. *Accord Halbig v. Burwell*, 758 F.3d 390, 400 (D.C. Cir. 2014) ("The problem confronting the IRS Rule is that subsidies also turn on a third attribute of Exchanges: who established them."), *vacated by grant of reh'g en banc*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014).

B. The Government's Misconstruction Creates Surplusage and Anomalies.

The Government's claim that "an Exchange established by the State" may be read to include federally established Exchanges renders each use of that phrase surplusage. The PPACA refers to Exchanges "established by the State" in provisions designed either to facilitate coordination between

state Exchanges and other programs, or to provide incentives for state action. The Government's attempt to expand the meaning of "established by the State" effectively renders this phrase meaningless and leads to anomalous and even absurd results when applied throughout the statute.

For example, Section 1311 provides that a "State may elect to authorize an Exchange established by the State under this section to enter into an agreement with an eligible entity to carry out 1 or more responsibilities of the Exchange." 42 U.S.C. § 18031(f)(3)(A). Under the plain meaning of "an Exchange established by the State," this makes perfect sense. The Government's interpretation that "an Exchange established by the State" also encompasses Exchanges established by the federal government would create an anomalous situation where *a state* that elected not to create its own Exchange would decide whether *the federal government* may contract out responsibilities of a federal Exchange.

Likewise, Section 2201 requires that states receiving Medicaid funds "shall establish procedures for . . . ensuring that . . . an Exchange established by the State under section [1311] . . . utilize[s] a secure electronic interface" to determine eligibility for various forms of assistance. 42 U.S.C. § 1396w-3(b)(1)(D). Under a plain-meaning interpretation of "established by the State," this provision also makes sense. But interpreting "an Exchange established by the State" to include Exchanges established by the federal government creates an anomalous situation where the *federal* government's failure to "utilize a secure elec-

tronic interface" could jeopardize a *state's* receipt of federal Medicaid funds.[4]

States can certainly implement such provisions with respect to the Exchanges they create and control. States cannot, however, tell federal entities what to do. Yet that is the anomalous and absurd implication of the Government's statutory misconstruction.

C. "Qualified Individuals"

The Government has argued that Section 1312's mandate that "qualified individuals" must "reside[] in the State that established the Exchange," 42 U.S.C. § 18032(f)(1)(A)(ii), demonstrates that Congress did not understand "established by the State" to mean what it plainly says. *Accord Halbig*, 758 F.3d at 424 (Edwards, J., dissenting) ("If an HHS-created Exchange does not count as established by the State it is in, there would be no individuals 'qualified' to purchase coverage in the 34 states with HHS-created Exchanges. This would make little sense."). When read in context, however, this provision makes perfect sense. But even if it did not, a potential ambiguity in Section 1312 would not make Section 1401 any less plain.

Congress defined "qualified individuals" in Section 1312 as residing in "the State that established

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[4] It is possible that any such condition would be unenforceable under *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2601–07 (2012), but that possibility does not alter the plain meaning of the statutory text.

the Exchange" for an obvious reason. In Sections 1311, 1312, and 1313, Congress is speaking to the states and presuming that states would follow Section 1311's directive to establish Exchanges. 42 U.S.C. §§ 18031, 18032, 18033. The requirement that qualified individuals reside "in the State that established the Exchange" disappears when Congress drops that presumption in the very next section: Section 1321.

Section 1321(c) explains what happens when a state "[f]ail[s] to establish [an] Exchange." 42 U.S.C. § 18041(c). *See supra* Part I (pp. 6–7). In that event, "the Secretary shall take such actions as are necessary to implement such [a] requirement[]." That is, the Secretary shall require that "qualified individuals" must reside in the state "within" which "the Secretary . . . establish[es]" the Exchange. 42 U.S.C. § 18041(c). Unlike alternative interpretations, this plain-meaning interpretation creates no surplusage or anomalies, considers both text and context, and is consistent with the structure of the relevant sections.

The Government's approach to other Section 1311 requirements when implementing federal Exchanges belies its claim that a literal interpretation of the "qualified individuals" definition would paralyze federal Exchanges. As noted above (*supra* p. 14), the Government has ignored other Section 1311 requirements on the grounds that they apply only to state-established Exchanges, and not to federal Exchanges. The Government has thus acknowledged by its own actions that federal Exchanges are not equivalent to state-established Exchanges in all respects, belying its claim that a literal interpretation of the

"qualified individuals" definition would paralyze federal Exchanges.

D. "Maintenance of Effort"

The PPACA requires states to maintain their Medicaid programs' eligibility standards until the federal government determines "an Exchange established by the State under [Section 1311] is fully operational." 42 U.S.C. § 1396a(gg)(1). According to the Government, a plain-meaning interpretation of this provision would create disharmony in the statute by turning this provision into "an obligation that extends forever in States that opt to have HHS establish Exchanges on their behalf." Petition for Rehearing En Banc 11 (filed Aug. 1, 2014), in *Halbig v. Burwell*, No. 14-5018 (D.C. Cir.).

Contrary to the Government's claim, it is not disharmony but consistency when the plain meaning of "established by the State" in this Medicaid provision serves the same purpose — inducing state action — that this Court found in the PPACA's other Medicaid provisions. *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) (*NFIB*).

Indeed, it is the Government's interpretation that a federally established Exchange is somehow "established by the State" that creates disharmony. First, the Government's interpretation does not change the fact that a state may obtain the freedom to alter its eligibility rules by establishing an Exchange. It does, however, add an anomalous condition. Under the Government's strained interpretation, in states that refused to establish Exchanges, the

state's ability to modify its Medicaid eligibility rules would become conditional on *federal* action — i.e., on whether and when the federal government met its obligation to establish an Exchange. The Government's interpretation thus transforms this provision from one that offers states a clear choice to one that puts resistant states at the mercy of the Secretary's diligence in creating compliant Exchanges. Here, as elsewhere, the Government's efforts to conjure up ambiguity about the meaning of "established by the State" creates more problems that it purports to solve.

E. Section 1311 Does Not Define Exchanges as "Established by the State."

The Fourth Circuit deferred to the IRS because it found the statute ambiguous. The court hung its finding of ambiguity entirely on its claim that one may reasonably interpret Section 1311(d)(1) as defining federal Exchanges as having been "established by a State." *See* Pet. App. 14a-25a. This interpretation unreasonably requires treating a *requirement* as a *definition* and thereby rendering another clear provision inoperable.

Section 1311(d), titled "REQUIREMENTS," provides: "(1) IN GENERAL. — An Exchange shall be a governmental agency or nonprofit entity that is established by a State." 42 U.S.C. § 18031(d)(1). "*Given that* Congress defined 'Exchange' as an Exchange established by the state,'" the court reasoned, "it makes sense to read § 1321(c)'s directive that HHS establish 'such Exchange' to mean that the federal government acts *on behalf of* the state when it establishes its own Exchange." Pet. App. 18a (emphases

added). The Fourth Circuit's interpretation of Section 1311(d)(1) is directly contradicted by the plain text of that provision and other provisions of the Act.

Section 1311(b)(1)(C) and the heading of Section 1311(d) both make clear that Section 1311(d)(1) is a "requirement," not a definition, and the provision clearly operates as such. 42 U.S.C. § 1311(b)(1)(C). Combining the relevant language of these provisions reveals there is nothing remotely definitional about this requirement: "Each State shall . . . establish an American Health Benefit Exchange . . . that . . . meets the requirement[] [that] [a]n Exchange shall be a governmental agency or nonprofit entity that is established by a State." 42 U.S.C. § 18031(b)(1), (b)(1)(C), (d)(1). Context confirms that the ambiguity purportedly seen by Fourth Circuit is simply not there. *See Halbig*, 758 F.3d at 400 ("The premise that (d)(1) is definitional, however, does not survive examination of (d)(1)'s context and the [PP]ACA's structure.").

Indeed, reading this "requirement" as a definition would make a mess of the relevant text. If Section 1311(d)(1)'s "shall be" *defines* any given Exchange as having been "established by the State," then it must also *define* any given Exchange as "a governmental agency or nonprofit entity" as well. Under the Fourth Circuit's interpretation, if *either* the federal government or the Commonwealth of Virginia were to contract with Amazon.com to operate that state's Exchange at a profit, Section 1311(d)(1) would *define* Amazon.com as a government agency or non-profit that was established by Virginia. That interpretation turns Section 1311(d)(1) on its head. It transforms a

provision that was designed to *prevent* private, for-profit Exchanges into a provision that instead *allows* them.

IV. Congress Routinely Induces States to Carry Out Federal Priorities by Conditioning Subsidies on State Action, and It Considered Many Such Proposals in Drafting the PPACA.

Conditioning individual benefits on state cooperation with federal priorities is a policy lever that Congress, and the very members who authored and approved the PPACA, have proposed and employed repeatedly. Such "deals" often include tax benefits for state residents, and were ubiquitous throughout the congressional debate.

The federal government "may not compel the states to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997); *see also New York v. United States*, 505 U.S. 144, 162 (1992); *NFIB*, 132 S. Ct. at 2602–03 (Roberts, C.J.). But Congress can, and routinely does, provide various incentives to encourage states to implement federal programs or enact desired legislation. As the Court noted in *New York*, Congress may sometimes indicate its intent to provide incentives for state cooperation using language that appears to compel state action. 505 U.S. at 169–70. *New York* counsels that when a statute provides that states "shall" perform specific functions, courts may either view such language as an unconstitutional command or as the source of an incentive for state cooperation. *Id.*

Since 1966, Congress has conditioned health-insurance subsidies to individuals on states enacting and operating Medicaid programs that meet federal specifications. 42 U.S.C. § 1396c; *NFIB*, 132 S. Ct. at 2601–02. It has done so through the State Children's Health Insurance Program since 1997. *See* 42 U.S.C. §§ 1397aa–1397mm; Cong. Res. Serv., *State Children's Health Insurance Program (CHIP): A Brief Overview* (Mar. 18, 2009). All states and U.S. territories participate in these programs.

In 2002, Congress made "health coverage tax credits" ("HCTCs") available to certain taxpayers. 26 U.S.C. § 35. As with the PPACA's tax credits, HCTCs were allowed only during "coverage months," which occurred only when a taxpayer enrolled in "qualified health insurance." 26 U.S.C. § 35(b), (e). As with the PPACA, the definitions of these terms constituted the HCTC eligibility rules. Those rules required states to enact specified laws before certain of their residents could claim the HCTC. *See* 26 U.S.C. § 35(e)(2); *see also* Cong. Res. Serv., *Health Coverage Tax Credit Offered by the Trade Act of 2002*, at ii (Jan. 31, 2008) ("The HCTC can be claimed for only 10 types of qualified health insurance specified in the statute, *7 of which require state action to become effective.*" (emphasis added)).

The PPACA's primary author was Senate Finance Committee Chairman Max Baucus (D-Mont.). Sen. Baucus not only sponsored the HCTC, but he also sponsored a version that would have conditioned the credits on even more state actions than the final law. *Compare* 26 U.S.C. § 35, *with* Trade Adjustment

Assistance Improvement Act of 2002, S. 2737, 107th Cong. (2002) (additionally requiring states to impose minimum-loss ratios and other regulations). The 2009 Finance Committee report on Sen. Baucus' S. 1796 cited § 35's HCTC as an antecedent to § 36B's tax credit. *See* S. Rep. No. 111-89, at 35–36.

Beginning in 2004, Congress allowed certain individuals to make tax-free contributions to health savings accounts ("HSAs"), but only if their state provided the regulatory environment required by federal law. 26 U.S.C. § 223(c)(2); *see also* Timothy Jost, *State-Run Programs Are Not a Viable Option for Creating a Public Plan* (June 16, 2009) ("These tax subsidies were only available . . . in states where high deductible plans were permitted. This in turn meant that some states had to repeal or amend laws limiting plan deductibles.").

Thus, not only was Congress using a common legislative tool when it chose to condition premium-assistance tax credits on States doing what Congress wanted — establishing an Exchange — but members of both parties introduced similar measures throughout the debate that produced the PPACA.

The PPACA's other major health-insurance entitlement conditioned all existing Medicaid grants, plus the Act's new federal Medicaid grants, on states implementing the Act's Medicaid expansion. 42 U.S.C. § 1396a(a)(10)(A)(i)(VII) (as amended by PPACA § 2001(a)(1)(C)); *see also* America's Healthy Future Act of 2009, *supra*, at § 1601. It is scarcely strange to find Congress conditioning benefits to individuals on state cooperation in a statute that pushed this prac-

tice "pas[t] the point at which 'pressure turns into compulsion.'" *NFIB*, 132 S. Ct. at 2604 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). The amount of money Congress conditioned on states establishing Exchanges is less than a fifth of the amount Congress had sought to condition on states implementing the Medicaid expansion,[5] and is still less than the amount of "new" Medicaid subsidies that this Court in *NFIB* permitted Congress to condition on states implementing the Medicaid expansion.[6]

One of the PPACA's two antecedent bills — the Affordable Health Choices Act, or S. 1679, reported by the Senate Health, Education, Labor & Pensions ("HELP") Committee — contained a provision almost *identical* to the one at issue in this case. S. 1679 withheld its Exchange subsidies if states failed to establish Exchanges or implement other provisions of that

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[5] *Compare* Cong. Budget Office, *Updated Estimates for the Insurance Coverage Provisions of the Affordable Care Act* 11 (Mar. 13, 2012), http://www.cbo.gov/sites/default/files/cbofiles/attachments/03-13-Coverage%20Estimates.pdf ("Exchange Subsidies and Related Spending" for 2014–2022: $802 billion), *with* Cong. Budget Office, *Medicaid Spending and Enrollment Detail for CBO's March 2012 Baseline* (Mar. 13, 2012), http://www.cbo.gov/sites/default/files/cbofiles/attachments/43059_Medicaid.pdf (total federal Medicaid spending for 2014–2022: $4.315 trillion). In *NFIB*, this Court permitted Congress to condition only the PPACA's new Medicaid grants on states implementing the expansion. 132 S. Ct. at 2607–08. Though the original conditions were invalidated, there is no dispute about what Congress sought to accomplish or the meaning of the relevant statutory text.

[6] *See* Cong. Budget Office, *Updated Estimates*, *supra* note 5, at 11 ("Medicaid and CHIP Outlays" for 2014–2022: $931 billion).

bill. Affordable Health Choices Act, S. 1679, 111th Cong. (2009).

S. 1679 asked each state to adopt certain health insurance regulations, and either establish an Exchange itself or ask the federal government to establish one "in" the state. *Id*., § 142(b), *proposing* section 3104(d)(1)(A) of the Public Health Service Act. S. 1679 withheld Exchange subsidies, as well as many of its insurance regulations, for up to four years until the state complied. After four years, the federal government would establish an Exchange "in" the state and implement guaranteed-issue and community-rating rules even stricter than those found in the PPACA.[7] If a state thereafter failed to implement the bill's employer mandate, S. 1679 withheld Exchange subsidies *permanently* — even in a *federal* Exchange. *Id*., *proposing* section 3104(d)(2).[8]

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[7] *Compare id.*, § 101(5), *proposing* section 2701(a)(1)(D) of the Public Health Service Act (allowing no more than a 2 to 1 variation in health insurance premiums based on age), *with* 42 U.S.C. § 300gg(a)(1)(A)(ii) (allowing a 3 to 1 variation in premiums based on age).

[8] *See also* Adler & Cannon, *Taxation Without Representation*, *supra*, at 154–55; Timothy Jost, *Health Insurance Exchanges in Health Care Reform Legal and Policy Issues*, Washington and Lee Public Legal Studies Research Paper Series 7 (Oct. 23, 2009) (on S. 1679: "A state's residents will only become eligible for federal premium subsidies . . . if the state provides health insurance for its state and local government employees."). *Amici* for the Government have conceded the point. *See* Brief *Amici Curiae* of Members of Congress and State Legislatures 17 (filed Feb. 15, 2014) ("if a state chose not to adopt specified insurance reform provisions and make state and local government employers

During the HELP committee's mark-up of S. 1679, Republicans offered alternative legislation that would have conditioned new Medicaid payments to states on states establishing Exchanges. *See* Patients' Choice Act, S. 1099, 111th Cong. (2009).

As noted above, the PPACA's other antecedent bill — the America's Healthy Future Act of 2009, or S. 1796, reported by the Senate Finance Committee — both conditioned tax credits to individuals on states establishing Exchanges and conditioned health-insurance tax credits for small businesses on states enacting specified health insurance regulations. *See supra* pp. 9–10. The latter proposal demonstrates that the idea of conditioning tax credits on state co-operation was part of the legislative debate over the PPACA from its beginning, in 2008. *See* Sen. Max Baucus, *Call to Action: Health Reform 2009*, at 20, Senate Comm. on Finance White Paper (Nov. 12, 2008) ("Initially, the credit would be available to qualifying small businesses that operate in states with patient-friendly insurance rating rules.").

As a further inducement to state action, the PPACA (like its antecedents) offered states unlimited Exchange start-up funds to establish Exchanges. *See* America's Healthy Future Act of 2009, S. 1796, 111th Cong., § 2237(c) (2009); Affordable Health Choices Act, S. 1679, 111th Cong., § 142(b) (2009), *proposing* section 3101(a) of the Public Health Service Act;

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subject to specified provisions of the statute, 'the residents of such State shall not be eligible for credits'" (quoting S. 1679, § 142(b), *proposing* section 3104(d)(2))), in *Halbig v. Burwell*, No. 14-5018 (D.C. Cir.).

PPACA, § 1311, 42 U.S.C. § 18031(a)(2). In contrast, the PPACA authorizes no funds for the creation of federal Exchanges.

As another example, the PPACA creates new federal grants for states that adopt medical malpractice liability reforms. 42 U.S.C. § 280g-15. That language originated in the Finance Committee bill. *See* S. Rep. No. 111-89, at 285–86. The House-passed Affordable Health Choices for America Act created a similar program. *See* H.R. 3962, 111th Cong., § 2531 (2009). During the Finance Committee's mark-up, Republican senators offered amendments that would have conditioned new Medicaid grants on states enacting medical malpractice reforms. *See* S. Rep. No. 111-89, at 449.

In sum, there were simply too many similar proposals offered by PPACA supporters and opponents alike to claim Congress could not have meant what it said in Section 36B.

V. PPACA Supporters Complained that the Bill Conditioned Exchange Benefits on State Cooperation.

Many House members disapproved of the Senate-passed PPACA, some *because* they recognized it conditioned subsidies on states creating Exchanges.

In early 2010, all 11 Texas Democrats in the House of Representatives warned the President and House leadership about the PPACA's Exchange provisions. The representatives acknowledged that "[i]f the state does not set up the exchange, then the Secretary of Health and Human Services is required to

set up an exchange for the state." Yet they warned that uncooperative states could nonetheless prevent residents from receiving "any benefit" from the Exchanges, which they likened to another conditional-grant program:

> [The PPACA] relies on states with indifferent state leadership that are unwilling or unable to administer and properly regulate a health insurance marketplace . . . . Not one Texas child has yet received any benefit from the Children's Health Insurance Program Reauthorization Act . . . since Texas declined to expand eligibility or adopt best practices for enrollment . . . . *The [PPACA] would produce the same result — millions of people will be left no better off* than before Congress acted.

U.S. Rep. Doggett: Settling for Second-Rate Health Care Doesn't Serve Texans, My Harlingen News (Jan. 11, 2010) (emphasis added); *see also* Julie Rovner, *House, Senate View Health Exchanges Differently*, Nat'l Public Radio (Jan. 12, 2010) (the letter's authors "worry that because leaders in their state oppose the health bill, they won't bother to create an exchange, leaving uninsured state residents with *no way to benefit* from the new law" (emphasis added)).

The letter's authors nevertheless voted for the PPACA without any changes to the language requiring tax credit recipients to enroll in coverage through state-established Exchanges. *See* U.S. House of Representatives, Final Vote Results for Roll Call 165

[H.R. 3590] (Mar. 21, 2010), http://clerk.house.gov/evs/2010/roll165.xml.

VI. The Text Reflects Congressional Intent, and the IRS Is Not Free to Rewrite the Law Just Because Congressional Assumptions Proved Faulty.

Political necessity required the authors of the PPACA to rely on states to operate the law's health-insurance Exchanges. The widespread expectation that all or nearly all states would establish Exchanges made the requirement tying tax credits to state co-operation all but unremarkable. Yet the IRS may not rewrite a statute simply because Congress' assumptions about how the statute would be received turned out wrong.

Many PPACA supporters initially advocated a federal Exchange. *See generally* Baucus, *Call to Action*, *supra*. Yet key U.S. Senators favored a system of 50 state-run Exchanges. *See* Patrick O'Connor & Carrie Brown, *Nancy Pelosi's Uphill Health Bill Battle, Politico* (Jan. 9, 2010) ("Two key moderates — Sen. Ben Nelson (D-Neb.) and Sen. Joe Lieberman (I-Conn.) — have favored the state-based exchanges over national exchanges."); *see also* Reed Abelson, *Proposals Clash on States' Roles in Health Plans*, N.Y. Times (Jan. 13, 2010) ("Senator Ben Nelson, Democrat of Nebraska, is a former governor, state insurance commissioner and insurance executive who strongly favors the state approach. His support is considered critical to the passage of any health care bill."). The need to reach 60 votes to overcome a promised filibuster required PPACA supporters in

the Senate (and House) to hew to the preferences of moderate senators who preferred state-run Exchanges. *See* Bacon, *supra* note 3 ("the final legislation is expected to resemble more closely the version in the Senate, where final passage would require support from more-conservative Democrats").

Authors of both the Finance Committee and the HELP Committee bills therefore abandoned their initial support for a single, nationwide Exchange in favor of 50 state-run Exchanges, with the federal government operating Exchanges only in those states that declined to do so. *See* America's Healthy Future Act of 2009, S. 1796, 111th Cong. (2009); Affordable Health Choices Act, S. 1679, 111th Cong. (2009).

To avoid an unconstitutional commandeering of states, both the Finance and HELP bills conditioned their health insurance subsidies to individual taxpayers on states establishing compliant Exchanges and implementing other elements of the bills' regulatory schemes. *See supra* pp. 25–27 (discussing HELP bill). Those requirements were consistent with other incentives the bills created to encourage state-run Exchanges, including unlimited start-up funds and the Finance Committee bill's costly Medicaid "maintenance of effort" requirement.

It may be the case that few PPACA supporters expected it to be the bill that would become law. When PPACA supporters lost their filibuster-proof Senate majority in early 2010, however, the *only* comprehensive health care bill that Congress could enact was the already Senate-passed PPACA. The choice was either the PPACA, which many members

of Congress found quite unsatisfactory, or no health care bill at all.[9]

House Democrats grudgingly agreed to enact the PPACA, making only limited changes through the reconciliation process. *See generally* Cong. Res. Serv., *The Budget Reconciliation Process: The Senate's "Byrd Rule"* (July 2, 2010) (requiring only 51 rather than 60 votes in the Senate to make certain legislative changes). As noted above, the HCERA amended Section 36B seven times, but did not alter the rules restricting credits to state-established Exchanges; recognized state-established and federal Exchanges as distinct; demonstrates Congress did not understand the word "such" as transforming Exchanges established by non-states into Exchanges "established by the State"; and demonstrates how Congress did expand the meaning of "established by the State"

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[9] *See* Harold Pollack, *47 (Now 51) Health Policy Experts (Including Me) Say "Sign the Senate bill,"* New Republic (Jan. 22, 2010), http://www.newrepublic.com/blog/the-treatment/47-health-policy-experts-including-me-say-sign-the-senate-bill; *see also* CNN, *Obama Willing to Work with GOP on Health Care; Jobless Aid Restored* (Mar. 3, 2010), http://www.edition.cnn.com/TRANSCRIPTS/1003/03/cnr.05.html (quoting correspondent Gloria Borger on House passage of the PPACA: "I was talking with a senior White House adviser today . . . who put it to me this way. He said, 'This is the last helicopter out of Saigon,' meaning they have made a political decision that they're going to use their Democrats to get this through, because what they need, this aide says, is they need an accomplishment. And they believe that once this passes, people will begin to see the benefits of it, and it will not ricochet against them, but will work for them.").

when that was its intent. *See* Pub. L. No. 111-152, 124 Stat. 1029, 1035 (2010); *see also* Adler & Cannon, *supra*, at 162–63.

It is for these reasons the PPACA authorizes tax credits only in compliant states despite the fact some of its supporters may have preferred otherwise. Whatever their preferences might have been, *none* of the Act's authors deleted, expanded, or amended the language conditioning tax credits on states establishing Exchanges despite many opportunities to do so. What matters in a constitutional system is what the law actually says. "Established by the State" was the only language to pass both chambers of Congress because, when the time came for members of Congress to vote, it was the only language that *could* pass both chambers. The choice faced by supporters was between a bill many considered flawed and no bill at all. *See* Pollack, *supra* note 9 (urging House passage of the "imperfect" PPACA, because otherwise "we doubt that any bill would reach the President's desk"); *see also* Bacon, *supra* note 3 (quoting Senate Majority Leader Harry Reid: "Neither I nor any other senator has the luxury of passing a perfect bill . . . that conforms exactly to his or her beliefs . . . ."). Members of Congress *intended* for *this requirement* to become law, because had they intended anything else *there would have been no law*. *See* CNN, *supra* note 9 ("This is the last helicopter out of Saigon."). The PPACA's tax-credit eligibility rules thus are not only clear, but accurately reflect congressional intent.

As was widely reported at the time of the PPACA's enactment, PPACA proponents were confident that all states would establish Exchanges, and they scarcely contemplated the possibility that many states would refuse.[10] This mistaken assumption accounts for why Congress did not authorize funding for the creation of federal Exchanges. It accounts for why the Congressional Budget Office scored the PPACA without considering whether tax credits would be limited to state-run Exchanges. It accounts for why the CBO scored the bill as if the federal government would not have to spend any money to implement federal Exchanges. Adler & Cannon, *Taxation Without Representation*, *supra*, at 186–88; Feder, *supra*. Finally, it accounts for why the CBO likewise scored S. 1679 (the HELP bill) as providing Exchange subsidies in all states, even though — as all sides

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[10] *See* Remarks on Health Insurance Reform in Portland, Maine, 2010 Daily Comp. Pres. Doc. 220 (Apr. 1, 2010) (quoting President Obama: "by 2014, each state will set up what we're calling a health insurance exchange"); *see also Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 2011: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 111th Cong. 171 (Apr. 21, 2010) (statement of Health and Human Services Secretary Kathleen Sebelius) ("We have already had lots of positive discussions, and States are very eager to do this. And I think it will very much be a State-based program."), http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg58233/pdf/CHRG-111hhrg58233.pdf; *see also* Nicholas Bagley, *Three Words and the Future of the Affordable Care Act*, 40 J. Health Politics, Pol'y & Law (forthcoming 2015) (acknowledging that the PPACA's text reflects "Congress's assumption, unchallenged at the time, that the states would establish their own exchanges").

acknowledge — the bill withheld Exchange subsidies in non-compliant states.[11]

By the rule at issue in this case, the IRS is trying to rewrite the statute because supporters failed to anticipate the widespread rejection by states of the role the law had assigned them. Yet the IRS cannot rewrite the statute simply because this assumption proved false. It nevertheless did so, without any serious attempt to ascertain Congress' intent. *See* H.R. Comm. on Oversight and Gov't Reform, 113th Cong., *Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies* (Comm. Print 2014) (key IRS and Treasury staff describe to congressional investigators how the agencies never seriously considered that "established by the State" might reflect congressional intent).

Because the Government can identify no textual or other basis for its rule, it can provide no limit to the power the IRS asserts here. If the IRS can offer tax credits to those who purchase health insurance in federally created Exchanges, citing the PPACA's overarching purpose of expanding access to affordable health insurance, there is nothing to stop it from offering them to other ineligible categories of individuals, such as households with income below 100 percent or above 400 percent of the poverty level, Medicare and

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[11] *See* Sen. Comm. on Health, Education, Labor, and Pensions, Draft of Title I of the Affordable Health Choices Act (June 9, 2009); Letter from Douglas W. Elmendorf, Director, Cong. Budget Office, to Sen. Edward M. Kennedy, Chairman, Sen. Comm. on Health, Education, Labor, and Pensions (Jul. 2, 2009).

VA enrollees, workers with employer-sponsored health insurance, undocumented residents, or purchasers of non-qualified health plans. Such choices must be made by Congress, not the IRS.

VII. The Legislative Process Is the Proper Remedy.

Many provisions of the PPACA have not worked the way its supporters had hoped. *See, e.g., PPACA Implementation Failures: Answers from HHS: Hearing Before the House Comm. on Energy & Commerce*, 113th Cong. (2013) (testimony of Secretary Kathleen Sebelius on the failures of Healthcare.gov). Other provisions of the Act have been invalidated by this Court. *See NFIB*, 132 U.S. at 2601–07 (mandatory Medicaid expansion). Still other provisions have been repealed. *See, e.g.*, American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 642, 126 Stat. 2313, 2358 (2013) (repealing the CLASS Act). Even President Obama has acknowledged: "Obviously, we didn't do a good enough job in terms of how we crafted the law." NBC News, Interview with President Obama (Nov. 7, 2013), http://www.nbcnews.com/video/nbc-news/53492840.

The decision to limit the availability of premium-assistance tax credits to the purchase of qualified health insurance plans in Exchanges established by states under Section 1311 may or may not have been a sound policy decision. But that is not the question before this Court. The text of the PPACA unambiguously does so limit such availability, and the remainder of the Act and its legislative history fully support the unambiguous meaning of the text. If the PPACA's

premium-assistance tax credit eligibility rules are flawed, the legislative process is the proper remedy.

By this rule, the IRS claims the power to tax and spend outside the legislative process. Such "administrative hubris," *Brungart v. BellSouth Telecommunications, Inc.*, 231 F.3d 791, 797 (11th Cir. 2000), *cert. denied*, 532 U.S. 1037 (2001), cannot stand. The more significant the agency's overreach, the *more* important it is that the Court enforce — and ensure that the Government derives no benefit from disregarding — the clear limits that Congress imposed on the agency's delegated powers. To vitiate this or any other condition that Congress imposed on premium-assistance tax credits would "transcend[] the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926).

CONCLUSION

The judgment of the court of appeals should be reversed, and the challenged rule should be vacated.

Respectfully submitted.

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