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 *AMICI CURIAE* SENATORS JOHN CORNYN, TED CRUZ, ORRIN HATCH, MIKE LEE, ROB PORTMAN, AND MARCO RUBIO; AND REPRESENTATIVES MARSHA BLACKBURN, DAVE CAMP, RANDY HULTGREN, DARRELL ISSA, PETE OLSON, JOE PITTS, PETER J. ROSKAM, PAUL RYAN, AND FRED UPTON IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Senator John Cornyn is the Senate Republican Whip. Senator Ted Cruz is the Ranking Member of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights. Senator Orrin Hatch is the Ranking Member of the Senate Finance Committee. Senator Mike Lee is the Ranking Member of the Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights. Senator Rob Portman is the Ranking Member of the Senate Finance Subcommittee on Fiscal Responsibility and Economic Growth. Senator Marco Rubio is the Ranking Member of the Senate Foreign Relations Subcommittee on East Asian and Pacific Affairs. Representative Marsha Blackburn is the Vice Chair of the House Energy and Commerce Committee. Representative Dave Camp is the Chairman of the House Ways and Means Committee. Representative Randy Hultgren is a member of the House Committees on Financial Services and Science, Space and Technology. Representative Darrell Issa is the Chairman of the House Oversight and Government Reform Committee. Representative Pete Olson is the incoming Vice Chair of the House Energy and Commerce Subcommittee on Energy and Power. Representative Joe Pitts is the Chairman of the House Energy and Commerce Subcommittee on Health. Representative Peter J. Roskam is the

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[1] Pursuant to SUP. CT. R. 37.3(a), amici certify that both parties have given blanket consent to the filing of amicus briefs in support of either party. Pursuant to SUP. CT. R. 37.6, amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel made such a monetary contribution.

incoming Chairman of the House Ways and Means Subcommittee on Oversight. Representative Paul Ryan is the Chairman of the House Committee on the Budget. Representative Fred Upton is the Chairman of the House Committee on Energy and Commerce.

As elected representatives, amici have a powerful interest in protecting the liberty of their millions of constituents. Amici have taken a strong interest in the implementing regulations of the Patient Protection and Affordable Care Act ("ACA") in general and the regulation at issue in this case in particular. Two amici were members of the Senate Republican caucus that originally united against the passage of the ACA. Another amicus, the Ranking Member of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, released a report that outlines the current Presidential Administration's repeated attempts to ignore the ACA's statutory text, including by adopting the interpretation at issue in this case. UNITED STATES SENATOR TED CRUZ, THE LEGAL LIMIT: THE OBAMA ADMINISTRATION'S ATTEMPTS TO EXPAND FEDERAL POWER—REPORT NO. 2 (Dec. 9, 2013), http://goo.gl/BX5oer (all websites last visited Dec. 29, 2014). Two amici are the Chairmen of the House Ways and Means and the House Oversight and Government Reform Committees, which produced a joint report documenting the results of a year-long investigation that revealed that the Internal Revenue Service ("IRS") failed seriously to grapple with the plain meaning of section 36B before issuing its regulation. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM AND H. COMM. ON WAYS & MEANS, 113TH CONG., ADMINISTRATION CONDUCTED INADEQUATE REVIEW OF KEY ISSUES PRIOR TO EXPANDING HEALTH LAW'S TAXES

AND SUBSIDIES (Feb. 5, 2014), http://goo.gl/5thZ4J ("JOINT REPORT").

SUMMARY OF ARGUMENT

The plain text of the ACA reflects a specific choice by Congress to make health insurance premium subsidies available only to those who purchase insurance from "an Exchange established by the State." 26 U.S.C. § 36B(c)(2)(A)(i). The IRS flouted this unambiguous statutory limitation, promulgating regulations that make subsidies available for insurance purchased not only through exchanges established by the States but also through exchanges established by the federal government. And the court below upheld this *ultra vires* action, straining to find ambiguity in a perfectly clear statutory text so that it could defer to the IRS's resolution of this purported ambiguity. This was error. As a panel of the Court of Appeals for the D.C. Circuit rightly concluded, "the ACA unambiguously restricts the section 36B subsidy to insurance purchased on Exchanges 'established by the State' . . . ." *Halbig v. Burwell*, 758 F.3d 390, 394 (D.C. Cir.), *judgment vacated and en banc reh'g granted*, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014). (In granting en banc review, the D.C. Circuit vacated the panel's judgment, not its opinion, and that opinion at a minimum retains its persuasive value. *See, e.g.*, *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Stewart, J., dissenting); *Action Alliance of Senior Citizens of Greater Phila. v. Sullivan*, 930 F.2d 77, 83–84 (D.C. Cir. 1991)). Because Congress "has directly spoken to the precise question at issue," that must be "the end of the matter." *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837, 842 (1984).

Deference to the IRS's erroneous interpretation of the ACA is particularly unwarranted in this case for two reasons of special concern to amici. First, the executive branch's decision to rewrite the ACA and extend premium subsidies beyond State exchanges improperly encroaches upon Congress's lawmaking function. The statutory text at issue here was the result of extensive negotiations in the Senate, and the executive should not be able to accomplish through an aggressive interpretation of the ACA's purpose what it could not accomplish in the halls of Congress. Indeed, the unusual procedural path the ACA traversed on its way to enactment makes especially inappropriate the Fourth Circuit's attempt to "interpret the statute as a symmetrical and coherent regulatory scheme." *King v. Burwell*, 759 F.3d 358, 369 (4th Cir. 2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000)). Second, the IRS's erroneous interpretation has immediate, immense, and ongoing implications for the public purse. If the IRS's regulation is permitted to stand, projections indicate that it will result in tens of billions of dollars in unlawful spending over the next year, and hundreds of billions over the next decade. Policy choices that affect the public fisc on this scale are for Congress to make, not IRS bureaucrats.

Finally, even if the IRS's regulation extending premium subsidies to insurance policies purchased on federal exchanges could pass muster under *Chevron*, it still amounts to unlawful agency action that must be vacated, because the IRS arrived at that regulation after a procedurally unreasonable process of decisionmaking.

ARGUMENT

I. Congress Has Not Granted the IRS Any Authority To Extend Premium Subsidies to Health Plans Offered Through an Exchange Established by the Federal Government.

a. The Plain Text of the ACA Demonstrates that Premium Subsidies Are Available Only Through an Exchange Established by a State.

Because our Constitution grants "all legislative powers" to Congress, the executive and judicial branches are bound to "give effect to the unambiguously expressed intent of Congress." *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837, 843 (1984). Thus, when reviewing an executive agency's construction and implementation of a statute, a court must always begin by asking "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. And if Congress has directly spoken to the question, that is also where the analysis must end, for both the courts and the agency must yield to Congress's clear directives. *See id.* at 842–43.

The precise question at issue here is whether individuals who purchase health insurance on an exchange established by the federal government may be eligible for tax credits to offset the cost of their premiums. Congress has directly spoken to this question in the ACA, and the plain text of the statute unambiguously demonstrates that the answer is no.

The ACA provides that an exchange operating in any particular State may be established *either* by the State itself *or* by the federal government. As an

initial matter, section 1311 of the ACA provides that "[e]ach State shall, not later than January 1, 2014, establish an . . . Exchange . . . for the State . . . ." 42 U.S.C. § 18031(b)(1). Because Congress does not have the authority to compel a State to establish an exchange, this provision is precatory, not mandatory. In the event a State does not accept Congress's invitation to establish an exchange, section 1321 of the ACA directs the Secretary of Health and Human Services ("HHS") to "*establish* and operate such Exchange within the State." *Id*. § 18041(c)(1) (emphasis added).

While the ACA expressly provides that exchanges may be established by a State *or* by the federal government, it also expressly provides that premium subsidies are available *only* through an exchange established by a State. As relevant here, eligibility for such subsidies is limited to individuals "covered by a qualified health plan . . . that was enrolled in through an Exchange *established by the State* under section 1311 . . . ." 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added).

The plain text of the ACA thus demonstrates (a) that an exchange may be established either by a State or by the federal government, and (b) that premium subsidies are available only for plans enrolled in through an exchange established by a State. The IRS's attempt to extend this subsidy to insurance purchased on an exchange established by the federal government is *ultra vires* and must be vacated.

While the Fourth Circuit acknowledged that "a literal reading of the statute undoubtedly accords more closely" with the understanding that subsidies are limited to insurance purchased on state-estab-

lished exchanges, *King*, 759 F.3d at 369, it nevertheless strained to find an ambiguity in the statute's plain text in order to uphold the challenged IRS regulation. According to the Fourth Circuit, section 1321 may be read as directing the federal government to establish an exchange "*on behalf of* the state" when the State elects not to establish an exchange itself. *Id.* (emphasis added).

But contrary to the Fourth Circuit's assertion, the ACA cannot reasonably be read as providing that "the federal government acts on behalf of the state when it establishes its own Exchange." *Id*. The notion that a State's refusal to establish an exchange demonstrates that the State intended to appoint the federal government to act as its agent to establish an exchange on the State's behalf is difficult to take seriously. *Cf. Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666–67 (2013). To the contrary, a State that declines to establish an exchange is perforce electing not to play any part in the implementation and operation of an exchange, either directly or through the agency of the federal government. The federal government, of course, remains free to establish *its own exchange* to serve such a State's citizens. But surely the federal government cannot *appoint itself* to serve as an unwilling State's agent to establish an exchange *on behalf of* the State. *Cf. Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that "Congress cannot compel the States to enact or enforce a federal regulatory program" or "circumvent that prohibition by conscripting the State's officers directly").

Furthermore, nothing in the ACA supports the notion that Congress meant to create the legal fiction that the federal government acts on behalf of a State when it establishes an exchange. Indeed, Congress

elsewhere expressly provided that a United States territory that establishes an exchange "shall be treated as a State" for certain purposes. 42 U.S.C. § 18043(a)(1). Congress could have used similar language if it intended an exchange established by the federal government to be treated as an exchange established by a State, but it did not.

Nor do the statutory provisions cited by the Fourth Circuit indicate that Congress deemed the federal government to be acting on the State's behalf when establishing an exchange. The ACA, to be sure, defines the term "Exchange" to mean "an American Health Benefit Exchange established under section [1311]," 42 U.S.C. § 300gg-91(d)(21)—i.e., the section inviting States to establish their own exchanges. And section 1321 directs the federal government to "establish and operate *such* Exchange within the State" if the State does not. *Id.* § 18041(c)(1)(B)(ii)(II) (emphasis added). But these provisions at most provide that federal exchanges should be deemed "Exchanges established under section 1311"; they in no way suggest that federal exchanges are to be deemed to have been established under section 1311 *on behalf of the State*. *See Halbig*, 758 F.3d at 399-400.

The Fourth Circuit also erred in interpreting section 1311(d)(1)'s directive that "[a]n Exchange shall be a governmental agency or nonprofit entity that is established by a State," 42 U.S.C. § 18031(d)(1), as *definitional*, i.e., as "narrowing the definition of 'Exchange' to encompass only state-created Exchanges." *King*, 759 F.3d at 369. Section 1311(d)(1) is *operational*, not definitional. As *Halbig* correctly reasoned, it and "[t]he other provisions of section 1311(d) are operational requirements, setting forth what Exchanges must (or, in some cases, may)

do. Read in keeping with that theme, (d)(1) would simply require that an Exchange operate as either a governmental agency or nonprofit entity." *Halbig*, 758 F.3d at 400 (footnote and citation omitted). Furthermore, Congress elsewhere expressly defined the term "Exchange," *see* 42 U.S.C. § 300gg-91(d)(21), making even less plausible the Fourth Circuit's suggestion that section 1311(d) is a second, *implicit* definition of the term. *See Halbig*, 758 F.3d at 400–01. Finally, section 1311(d)(1) is directed at the *States*, and it naturally requires a State-established exchange to "be a governmental agency or nonprofit entity that is established by a State." 42 U.S.C. § 18031(d)(1). Section 1321, by contrast, is directed at the federal government, and it requires the federal government to establish and operate an exchange "directly or through agreement with a not-for-profit entity," *id.* § 18041(c)(1); it says nothing to suggest these activities are to be deemed to be the actions of a State. In sum, as *Halbig* concluded, "[t]he premise that (d)(1) is definitional . . . does not survive examination of (d)(1)'s context and the ACA's structure." 758 F.3d at 400.

Accordingly, the text of section 36B is perfectly clear, and the Fourth Circuit erred by concluding otherwise. Moreover, by straining to disregard the clear limits that Congress imposed when it enacted section 36B, the court below failed to pay heed to Congress's constitutionally-prescribed legislative supremacy.

b. The IRS's Expansive Interpretation of the ACA's Subsidy Provision Violates the Separation of Powers by Unraveling the Specific Compromises Crafted by Congress in Favor of an Interpretation Foreclosed by the Statutory Text.

1. The Constitution vests Congress with the authority to make laws, and it imposes upon the President the duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. This division of authority is not "merely an end unto itself." *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014). Rather, "the constitutional structure of our Government is designed first and foremost not to look after the interests of the respective branches, but to protect individual liberty." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2593 (2014) (Scalia, J., concurring in judgment) (brackets and quotation marks omitted). In fact, "[s]o convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). As relevant here, "the Constitution diffuses power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). This diffusion of power reflects the founding generation's belief "that checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

Adhering to the Constitution's allocation of powers takes on special importance in a case, such as this one, that involves issues subject to deep and abid-

ing policy disagreement. Recognizing that a free citizenry would often find themselves in reasonable disagreement over "difficult question[s] of public policy," our Constitution invites them "to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people." *Schuette v. Coalition To Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1637 (2014). But the Constitution is equally clear that when federal legislation is at issue, the compromises on these difficult policy questions are to be hammered out by the People's representatives in the halls of Congress—not by unaccountable officials in agency corridors. Under our constitutional system, after all, it is "the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." *TVA v. Hill*, 437 U.S. 153, 194 (1978).

The IRS's decision to extend premium subsidies to health plans available on exchanges established by the federal government flouts these settled limits; it rewrites the law and encroaches on Congress's constitutional authority. Again, the ACA by its terms restricts premium subsidies to individuals "covered by a qualified health plan . . . that was enrolled in through an Exchange established by the State . . . ." 26 U.S.C. § 36B(c)(2)(A)(i). The IRS's regulation, by contrast, makes subsidies available "regardless of whether the Exchange is established and operated by a State . . . or by HHS." 45 C.F.R. § 155.20; 26 C.F.R. § 1.36B-1(k). The executive branch, in other words, effectively has struck the words "established by the State" from section 36B, thus amending it to read that subsidies are

available to individuals "covered by a qualified health plan . . . that was enrolled in through an Exchange ~~established by the State~~ . . . ." But as this Court has emphasized, "[t]here is no provision in the Constitution that authorizes the President . . . to amend . . . statutes." *Clinton*, 524 U.S. at 438; *see also Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("The power of executing the laws . . . does not include a power to revise clear statutory terms that turn out not to work in practice.").

2. The IRS's decision to strike out the express limitations Congress placed in section 36B is all the more troubling in light of the evidence that the very provision the IRS has sought to rewrite was the product of a deliberate compromise that was crucial to the passage of *any* health care reform legislation. The relative roles that would be played under the Act by the States and the federal government were highly controversial and hotly contested. The ACA's supporters did not have the votes to establish a single-payer system or even to take what many feared to be a significant first step towards such a system: the establishment of a *national* exchange providing federal subsidies to low-income participants.

For example, supporters of healthcare legislation needed 60 votes in the Senate to overcome a filibuster, and because there was not a single vote to spare, compromise within the Democratic caucus was necessary to ensure passage of any bill. Senator Ben Nelson, essential to the 60-vote majority, made clear his objection to a federal exchange, describing it as a "dealbreaker" because it would "start us down the road of . . . a single-payer plan." Carrie Budoff Brown, *Nelson: National Exchange a Dealbreaker*, POLITICO (Jan. 25, 2010, 7:59 PM), http://goo.gl/BloeHy. Senator

Nelson was ultimately able to leverage his opposition to "scrub[ ] dozens of . . . things out of it that federalized the bill." Interview with United States Senator Ben Nelson by LifeSiteNews.com (Jan. 26, 2010), *see* http://goo.gl/2fDY1J. Like much of the ACA's drafting, those changes were made behind closed doors, and it is not known which amendments were inserted for what reason. What *is* known is that the statutory language that emerged was the product of lengthy negotiations.

What is more, statements by Professor Jonathan Gruber support the inference drawn from the statute's plain text that Congress limited the availability of subsidies to encourage the States to establish their own exchanges. According to press reports, "Mr. Gruber helped the administration put together the basic principles of the [health care] proposal," and the White House thereafter "lent him to Capitol Hill to help Congressional staff members draft the specifics of the legislation." Catherine Rampell, *Academic Built Case for Mandate in Health Care Law*, N.Y. TIMES, Mar. 29, 2012, http://goo.gl/zht5UU. A book written by Professor Gruber confirms that he "consulted extensively with the Obama administration and Congress during the development of the Affordable Care Act." JONATHAN GRUBER, HEALTH CARE REFORM: WHAT IT IS, WHY IT'S NECESSARY, HOW IT WORKS, *A Note About the Author* (2011).

Speaking in January 2012, Professor Gruber emphasized:

> [I]f you're a state and you don't set up an Exchange, *that means your citizens don't get their tax credits*. But your citizens still pay the taxes

> that support this bill. So you're essentially saying to your citizens, you're going to pay all the taxes to help all the other states in the country. *I hope that 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*.

Video: Jonathan Gruber at Noblis, at 32:00 (Jan. 18, 2012), YOUTUBE.COM, http://goo.gl/QRFnL4 (emphases added) (hereinafter "*Gruber at Noblis*").

During another speech in January 2012, Professor Gruber, in discussing threats to the ACA, expressly tied this feature of the Act to political compromise regarding the role of the States:

> *Through a political compromise, the decision was made that states should play a critical role in running these health insurance exchanges*. . . . I guess I'm enough of a believer in democracy to think that when the voters in states see that by not setting up an exchange the politicians of a state *are costing state residents hundreds and millions and billions of dollars*, that they'll eventually throw the guys out. But I don't know that for sure. And that is really the ultimate threat, is, will . . . people understand that, gee, *if your governor doesn't set up an exchange, you're losing hundreds of millions of dollars of tax credits to be delivered to your citizens*.

Audio: Jonathan Gruber at Jewish Community Center of San Francisco, at 32:55 (Jan. 10, 2012), JCCSF.ORG, http://goo.gl/Vebg4v (emphases added).

In recent testimony before the House Committee on Oversight and Government Reform, Professor Gruber has attempted to disavow these earlier statements about "the availability of tax credits in states that did not set up their own health insurance exchanges," suggesting that "[t]he point I believe I was making was about the possibility that the federal government, for whatever reason, might not create a federal exchange," in which event "the only way that states could guarantee that their citizens would receive tax credits would be to set up their own exchanges." Jonathan Gruber, Written Testimony Before the H. Comm. on Oversight & Government Reform 2 (Dec. 9, 2014), *available at* http://goo.gl/eiOPax. But this post-hoc and self-serving attempt to recharacterize his interpretation of the ACA rings hollow, since the ACA by law *requires* the federal government to establish an exchange in those States that fail to set up their own. 42 U.S.C. § 18041(c)(1). Indeed, only seconds before describing, in his January 18 remarks, how the failure of a State to "set up an Exchange . . . means your citizens don't get their tax credits," Professor Gruber expressly acknowledged that "in the law it says that if the states don't provide [health insurance exchanges], the federal backstop will." *Gruber at Noblis*, at 31:48, http://goo.gl/hAVNCk.

3. The history of the ACA's drafting and enactment is a "story of legislative battle among interest groups, Congress, and the President. . . . Its delicate crafting reflected a compromise amidst highly interested parties attempting to pull the provisions in different directions. As such, a change in any individual provision could have unraveled the whole." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) (citation omitted). In circumstances like these, this Court has

long reminded those on both sides of a controversial issue that "[d]issatisfaction . . . is often the cost of legislative compromise," and that to ignore a provision's unambiguous meaning could undo a negotiated political compromise that was critical to passage. *Id.*; *see also Artuz v. Bennett*, 531 U.S. 4, 10 (2000) ("We hold as we do because respondent's view seems to us the only permissible interpretation of the text—which may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted."); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2417 (2003) ("The reality is that a statutory turn of phrase, however awkward its results, may well reflect an unrecorded compromise or the need to craft language broadly or narrowly to clear the varied veto gates encountered along the way to enactment.").

The IRS, and those who would support its interpretation of section 36B, advance two broad types of justifications for disregarding the clear terms of that section, both of which fail to respect "the legislative compromise that enabled the law to be enacted." *Artuz*, 531 U.S. at 10. First, the Government in its brief before the Fourth Circuit emphasized that "[t]he purpose of the Affordable Care Act is to increase the number of Americans covered by health insurance and decrease the cost of health care," and that interpreting section 36B according to its plain text "runs counter to this central purpose of the ACA." Appellee's Br. at 31, 35, *King*, No. 14-1158 (4th Cir. 2014), Doc. 33 ("Gov't CA4 Br.") (citations and quotation marks omitted). But, of course, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522,

525–526 (1987) (per curiam). Any "anxiety to effectuate the congressional purpose" behind enacting a statute "must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *Brown & Williamson*, 529 U.S. at 161. Here, Congress plainly indicated that the availability of premium subsidies would stop at State exchanges and not extend to exchanges established by the federal government. The executive branch, and the courts, are required to honor that choice.

Recognizing that this Court does not "simplistically . . . assume that *whatever* furthers the statute's primary objective must be the law," *Rodriguez*, 480 U.S. at 526, the Government attempts to dress up this discredited form of statutory interpretation in more fashionable garb. Beyond advancing the "central purpose of the ACA," its interpretation of section 36B is justified, the Government says, by the principle that "statutory construction is a holistic endeavor" that "look[s] to the provisions of the whole law, and to its object and policy." Gov't CA4 Br. at 13 (citations omitted). The Government thus seeks to take a respected canon of interpretation—"that the words of a statute must be read in their context," *Brown & Williamson*, 529 U.S. at 132—and convert it into a license to unsettle the meaning of a clear statutory text that speaks directly to the question at issue by roving through the ACA's myriad provisions, looking for snippets of text that might somehow be seen as vaguely on point. But this dramatically misunderstands the role of context in statutory interpretation.

While this Court has rightly emphasized the importance of interpreting the words of a statute in context, it has also insisted that where there is a provision specifically addressing the interpretive point in

question, that provision's clear terms prevail over "general [language] in the same or another statute which otherwise might be controlling." *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932); *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071–72 (2012) ("Here, clause (ii) is a detailed provision that spells out the requirements for selling collateral free of liens, while clause (iii) is a broadly worded provision that says nothing about such a sale. The general/specific canon explains that the general language of clause (iii), although broad enough to include it, will not be held to apply to a matter specifically dealt with in clause (ii)." (quotation marks omitted)); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general . . . ."). The IRS's "holistic" interpretation would forsake the clear meaning of the only provision that directly answers the question whether subsidies are available for insurance purchased on federally established exchanges—section 36B—in favor of a flatly contrary answer that is built on nothing more solid than inferences from a grab-bag of other, tangentially related provisions of the ACA—provisions that do not in fact conflict with a proper interpretation of section 36B. *See Halbig*, 758 F.3d at 402–06. Section 36B, to be sure, must be *read* in context; but in the IRS's hands, it has become *buried* in it.

Straining, as both the Government and the court below do, to read section 36B in a way that is "harmonious" with the rest of the ACA is especially inappropriate given the particular way in which this legislation was enacted. The House passed its version of the healthcare legislation on November 7, 2009, and the Senate followed suit with its own very different

bill on December 24. At the time, the Senate version was thought to be little more than a placeholder—one chamber's opening bid in bicameral negotiations that were expected to shape the law's final content. But after supporters of the healthcare legislation unexpectedly lost their filibuster-proof Senate majority, they decided to change course and enact the Senate's bill into law as is, making only limited revisions that were possible through the budget reconciliation process by majority vote in the Senate. With the Act's supporters having thus enacted into law what amounted to a preliminary draft that they could not readily amend, it is hardly surprising that the Act's text does not entirely cohere as a unified and carefully calibrated whole. To name only two of the most jarring examples, the Act contains three section 1563's and amends section 2721 of the Public Health Service Act twice to say two different things. *See* ACA § 1563 (expressing "the sense of the Senate"); *id.* § 10107 (redesignating ACA § 1562 as § 1563 and creating a third § 1563); *id.* § 1562(a)(2)(A), (c)(12). Such mistakes evidence a bill stitched together from disparate sources that had not yet been reconciled and that could never be reconciled once further amendments became politically infeasible. In light of the ACA's unique procedural history and patent inconsistencies, it would be a fool's errand to attempt to harmonize the Act's 2400 pages of text.

4. By ignoring the clear, specific policy choices made by Congress, the IRS's forced interpretation of the ACA dishonors the legislative branch's constitutionally assigned role; and by signaling that the precise terms of the legislative bargains struck by Congress may not be faithfully carried out by agencies or by courts, the IRS's freewheeling "holistic" method

of interpretation makes future compromises less valuable, and future comprehensive legislation that much less likely.

"[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires [the assumption] that the legislative purpose is expressed by the ordinary meaning of the words used." *United States v. Locke*, 471 U.S. 84, 95 (1985) (quotation marks omitted). Because a bill as massive and controversial as the ACA reflects many competing policy considerations and legislative compromises, it is particularly important to hew closely to the statutory text of such a law rather than trying to force it to fit any single overarching policy goal. The IRS's interpretation of section 36B ignores all of this. More fundamentally, the Administration's attempt to upset the legislative compromise embodied in the unambiguous text of the ACA would effectively strike a new and different compromise, one the Congress demonstrably could not and did not pass itself. To cast aside the compromise that resulted in the unambiguous language of section 36B in the name of the Act's purported purposes would effectively amend the Act by handing its most enthusiastic supporters a victory that they were unable to achieve through the political process. But "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice," *Rodriguez*, 480 U.S. at 526, and it is to Congress, not the IRS, that the Constitution grants legislative power. *Cf. Utility Air Regulatory Grp.*, 134 S. Ct. at 2444 ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.").

Moreover, the IRS's revisionary interpretation threatens to make future legislation on controversial issues more difficult. The most ardent supporters of a piece of legislation as sweeping and controversial as the ACA are rarely sufficiently numerous to pass the legislation on their own. To attract enough votes to achieve passage, they frequently have to compromise over the scope of "key term[s] in an important piece of legislation," "choosing a middle ground" that has the support of enough votes to clear the necessary procedural hurdles. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002). But these compromises—the ones that enable divisive legislation like the ACA to be passed at all—are possible only because the legislators on the fence have some degree of confidence that the terms of the bargain they strike will be honored, by the courts if not the executive branch. By disrespecting the precise terms of a legislative compromise based on notions of expansive congressional purpose or vague inferences from distantly related, surrounding provisions, a result-driven interpretation like the one pressed by the Government and adopted by the court below makes these types of political bargains less reliable to the pivotal legislators, and major legislation concomitantly more difficult to enact. *See* Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1255 (2007) (concluding that when courts "set aside . . . finely crafted legislative compromises in favor of expansionary readings," this "has a feedback effect on the legislature by making new legislation less likely"). In an era when Congress is often criticized for its inability to forge consensus and enact major legislation, the judiciary should take special

care not to upset the legislative compromises that enabled the passage of laws that come before it.

c. The ACA Should Not Be Interpreted To Delegate to the Executive a Decision with Such Broad-Ranging Consequences in So Cryptic a Fashion.

1. Because the plain text of section 36B clearly forecloses the IRS's regulation—and because the IRS's and the Fourth Circuit's attempts to justify their disregard for the plain meaning of the text fail—Congress has "directly spoken to the precise question at issue," and this Court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. Though the Fourth Circuit concluded otherwise, it did so only to find the text of the statute ambiguous, conceding that "[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." *King*, 759 F.3d at 368. But even granting that the text of section 36B is ambiguous—which it is not—the IRS's interpretation still cannot stand. That is so because "the Judiciary defers to the Executive on what the law is" only if "the Legislative Branch has in fact delegated lawmaking power to an agency within the Executive Branch," *City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting), and "[t]he importance of the issue" presented by this case to Congress's legislative authority over the Nation's finances "makes the oblique form of the claimed delegation all the more suspect." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

"Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Here, the IRS's purported exercise of gap-filling authority opens the door to hundreds of billions of dollars of additional government spending. But this Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Utility Air Regulatory Grp.*, 134 S. Ct. at 2444 (quotation marks omitted). And this expectation that Congress speak clearly should be heightened when, as here, the agency does not have any particular expertise in the subject-matter in question, because "practical agency expertise is one of the principal justifications behind *Chevron* deference." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990). In sum, "Congress could not have intended to delegate a decision of such economic and political significance" as the one at issue in this case "to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160.

2. The Constitution assigns Congress to be "the custodian of the national purse." *United States v. Standard Oil Co.*, 332 U.S. 301, 314 (1947). The Constitution thus establishes that "no money can be expended, but for an object, to an extent, and out of a fund, which the laws have prescribed." 7 THE WORKS OF ALEXANDER HAMILTON 532 (John C. Hamilton ed., 1851) (emphases omitted). *See* U.S. CONST. art. I, § 9, cl. 7. Like the separation of powers generally, this structural provision of the Constitution is intended to secure liberty.

> [I]t is highly proper, that congress should possess the power to decide, how and when any money should be applied for [the engagements of the government]. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1342 (1st ed. 1833). The Constitution thus seeks "to assure that public funds will be spent *according to the letter* of the difficult judgments reached *by Congress* as to the common good . . . ." *OPM v. Richmond*, 496 U.S. 414, 428 (1990) (emphases added).

In June of 2014, the Office of the Assistant Secretary for Planning and Evaluation ("ASPE") of HHS released a report that provides some insight into the magnitude of unlawful spending that is occurring as a result of the IRS regulation at issue here. *See* AMY BURKE ET AL., PREMIUM AFFORDABILITY, COMPETITION, AND CHOICE IN THE HEALTH INSURANCE MARKETPLACE, 2014 (ASPE Research Brief) (June 18, 2014), http://goo.gl/e9zgzh. HHS reported that more than 5.4 million people enrolled in health plans through exchanges established by the federal government during the initial open enrollment period. *Id*. at 3. Of the individuals who enrolled through a federal exchange, 87% selected a plan with premium tax credits, with an average tax credit of $264 per month. *Id*. at 5. These figures indicate that the government is spending over $1.2 billion unlawfully each and every month on premium subsidies. (5.4 million enrollees × .87 with credits × $264 average credit per month = $1,240,272,000 per month.)

A more recent HHS report indicates that as of October 2014 roughly 84 percent of those who enrolled through both the federal and state marketplaces during the first open enrollment period were "effectuated" enrollees—i.e., "were enrolled and paying for health coverage." *See* ASPE, HOW MANY INDIVIDUALS MIGHT HAVE MARKETPLACE COVERAGE AFTER THE 2015 OPEN ENROLLMENT PERIOD? 1 & n.3 (Issue Brief) (Nov. 10, 2014), http://goo.gl/NqDgui. This report does not indicate, however, what percentage of those who failed to effectuate coverage enrolled through the federal marketplace, or how many of them were eligible for premium tax credits. Assuming that the rate of attrition was the same across both categories, and that the average credit amount was not affected, the amount of unlawful spending would still exceed $1 billion per month (1,240,272,000 × .84 effectuation rate = $1,041,828,480). And the number of individuals receiving subsidies is poised to increase—indeed, HHS has reported that through the first four weeks of open enrollment for 2015 over one million new consumers have enrolled in plans through the federally operated exchange. *See Open Enrollment Week 4: December 6–December 12, 2014*, HHS.GOV (Dec. 16, 2014), http://goo.gl/WEKf4u.

In all events, the figures discussed above understate the fiscal effects of the IRS's regulation, both because the number of individuals enrolling in plans through exchanges is expected to increase and because they do not include cost-sharing subsidies available to a subset of individuals receiving premium subsidies. *See* 42 U.S.C. § 18071(f)(2). A Congressional Budget Office ("CBO") report helps to fill out the picture. *See* CBO, UPDATED ESTIMATES OF THE EFFECTS

OF THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT, APRIL 2014, http://goo.gl/iEeX0b. The CBO

> anticipate[s] that coverage through the exchanges will increase substantially over time as more people respond to subsidies and to penalties for failure to obtain coverage. Coverage through the exchanges is projected to increase to an average of 13 million people in 2015, 24 million in 2016, and 25 million in each year between 2017 and 2024. Roughly three-quarters of those enrollees are expected to receive exchange subsidies.

Id. at 6. The cost of these subsidies is expected to be steep. In fiscal year 2015 alone (beginning October 1, 2014), the CBO projects outlays of $23 billion for premium subsidies and $7 billion for cost-sharing subsidies, along with a $5 billion reduction in tax revenue as a result of premium subsidies, for a total budgetary effect of $35 billion. *Id.* at 10 tbl.3. This number increases to $74 billion in 2016, $93 billion in 2017, and $101 billion in 2018. *Id.* All told, outlays and reductions in revenue from premium tax credits and cost-sharing subsidies are projected to amount to over $1 trillion over the next 10 years. *Id.* These costs are expected to be a major driver of the federal deficit. Over the next 10 years, the CBO forecasts that "annual outlays are projected to grow, on net, by $2.3 trillion, reflecting an average annual increase of 5.2 percent," due in large part to "the aging of the population, the expansion of federal subsidies for health insurance, [and] rising health care costs per beneficiary," and resulting in "persistent and growing deficits."

CBO, AN UPDATE TO THE BUDGET AND ECONOMIC OUTLOOK: 2014 TO 2024, at 2–3 (Aug. 2014), http://goo.gl/MEAKLZ.

The totals described in the previous paragraph are for all exchanges, not just exchanges established by the federal government. But if present circumstances persist, it can be expected that a majority of these costs will be incurred for plans enrolled in through federal exchanges. HHS's figures indicate that over two-thirds of individuals enrolling in health plans through exchanges have done so through a federal exchange. *See* ASPE, HEALTH INSURANCE MARKETPLACE: SUMMARY ENROLLMENT REPORT FOR THE INITIAL ANNUAL OPEN ENROLLMENT PERIOD 4 tbl.1 (Issue Brief) (May 1, 2014), http://goo.gl/qmr9Ph (noting approximately 5.4 million federal exchange enrollees out of approximately 8 million total exchange enrollees).

In sum, the IRS's decision to extend subsidies to federal exchanges has serious implications for Congress's legislative authority and this Nation's finances. Again, it is doubtful that "Congress [would] have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160. As the text of the ACA demonstrates, "Congress is more likely to have focused upon, and answered, major questions" such as the one at issue here, "while leaving interstitial matters to answer themselves in the course of the statute's daily administration." *Id*. at 159 (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)).

3. Of course, it is not necessarily the case that long-term federal spending will decrease if the

IRS's regulation is vacated. States facing the loss of billions of dollars for their citizens would face a very different set of incentives than they do now, and it is entirely possible that many will reconsider their decisions not to establish their own exchanges. But even if every State were to establish its own exchange, vacatur of the IRS's regulation would put a halt to the massive amount of *illegal* spending that is occurring now. And it would also mean that the States, rather than the federal government, would take the lead in establishing exchanges. That result would plainly be in keeping with the ACA's structure, which exhorts States to establish their own exchanges and directs the federal government to step in only if States fail to do so.

Indeed, the very strong possibility that States would establish their own exchanges in reaction to the unavailability of subsidies for insurance purchased on a federally established exchange cuts strongly against the Government's suggestion that interpreting section 36B according to its clear textual meaning "runs counter to [the] central purpose of the ACA." Gov't CA4 Br. at 34. It also alleviates the fear expressed by several amici below that following the clear meaning of section 36B would result in millions of Americans losing their insurance. *See, e.g.*, Brief of Amicus Curiae America's Health Insurance Plans 24–34, *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014) (No. 14-1158); Brief of Amicus Curiae The American Hospital Association 10–13, *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014) (No. 14-1158). It is highly unlikely that *all* of the affected States would fail to respond to the new political dynamics that would be created by the vacatur of the IRS's *ultra vires* interpretation of section 36B. And, ultimately, the decision will be made by the people of

the States themselves through the selection and retention (or not) of their elected representatives.

Moreover, the IRS's interpretation of the ACA is especially specious since it is *the very IRS regulation at issue in this litigation* that has created the illusion that rejection of its interpretation "would effectively destroy the statute." *King*, 759 F.3d at 379 (Davis, J., concurring). The availability of subsidies for insurance purchased on the federal exchange seems so critical to the proper functioning of the ACA only because most States have declined to establish their own exchanges. But as the Fourth Circuit noted, "Congress did not expect the states to . . . fail to create and run their own Exchanges," *id.* at 371, having in fact embedded a set of incentives in the ACA designed to encourage each State to set up its own exchange or risk a loss of subsidies to its citizens. It is the IRS's flawed interpretation of section 36B that, by shielding the States from this consequence, has interfered with the operation of the incentive structure Congress designed. It cannot use the consequences of that flawed interpretation to bootstrap its own very different solution, one that Congress specifically rejected. *Cf. Kloekner v. Solis*, 133 S. Ct. 596, 607 (2012) (holding that where "[i]t is the Government's own misreading that creates the need to 'fix' " a statute, the proper remedy is not to rewrite the statute but to "reject" the Government's erroneous interpretation).

But regardless of how the States may react to a decision vacating the IRS's regulation, it is emphatically not the role of the IRS—or, needless to say, of this Court—to "protect the people from the consequences of their political choices." *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012). There is, after all, "a basic difference between filling a

gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004). Should the States that have declined to set up exchanges fail to respond to the threatened loss of subsidies in the way Congress expected, "it is up to Congress rather than the courts to fix it." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005).

II. The IRS's Regulation Was Not the Product of the Reasoned Decisionmaking Required of All Agency Action.

For the foregoing reasons, the IRS's attempt to extend premium subsidies through federal exchanges fails to clear *Chevron*'s first step. Because the IRS acted in direct contravention of Congress's clear statutory directives, its interpretation of section 36B is *ultra vires* and must be vacated for that reason. But even if the agency could clear this hurdle, its regulation still fails because it was not "the product of reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

The Administrative Procedure Act ("APA") instructs courts to hold unlawful not only those agency actions that are "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(C), but also those that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A). And it is black-letter administrative law that administrative action is "arbitrary and capricious" under the APA if an inquiry into "whether the decision was based on a consideration of the relevant factors" reveals that the challenged action was not

"the product of reasoned decisionmaking." *State Farm*, 463 U.S. at 43, 52 (quotation marks omitted).

The Joint Report prepared by the House Committees on Ways and Means and Oversight and Government Reform indicates that the IRS's regulation was not the product of reasoned decisionmaking:

> The Committees' investigation, which focused on the rulemaking process and not the merits of IRS and Treasury's interpretation, . . . concluded that . . . neither IRS nor Treasury engaged in reasoned decision-making of this important issue prior to issuing the final rule that extended [ACA's] premium subsidies to federal exchanges.

JOINT REPORT 35.

The Joint Report found that "IRS failed to conduct a thorough or serious analysis of the issue prior to the release of the proposed rule" in August 2011. *Id.* at 19 (emphasis omitted). Indeed, "[t]he only written analysis explaining IRS's decision to extend [ACA's] subsidies to individuals who purchase coverage in federal exchanges was [a] single memo produced by IRS's Office of Chief Counsel with a single paragraph with a single reason to support their interpretation." *Id.* (emphasis omitted). The failure to conduct a thorough analysis was not the result of ignorance about the problem. To the contrary, an early draft of the proposed rule "*included* the language 'Exchange established by the State' in the section entitled 'Eligibility for Premium Tax Credit.' " *Id.* at 17 (emphasis added). And internal documents reviewed by the committees indicate that "Treasury officials expressed concern that there was no direct statutory authority to interpret federal exchanges as an 'Exchange established by

the State.' " *Id*. at 18. IRS and Treasury nevertheless proposed extending premium subsidies to federal exchanges.

Numerous commenters opposed the proposed rule extending premium subsidies to federal exchanges as counter to the ACA's plain text, but "the Committees . . . learned that neither IRS, nor Treasury, took the issue seriously and that a thorough and complete review of this important issue was not conducted prior to the Administration's final rule." *Id*. at 20.

> [N]one of the seven IRS and Treasury employees interviewed by the Committees were aware of any internal discussion within IRS or Treasury, prior to the issuance of the final rule, that making tax credits conditional on state exchanges might be an incentive put in the law for states to create their own exchanges.

Id. at 29 (emphasis omitted). And the employees also "stated they did not consider the Senate's preference for state exchanges during the development of the rule." *Id*. at 32 (emphasis omitted).

In short, "[t]he evidence gathered by the Committees indicates that neither IRS nor the Treasury Department conducted a serious or thorough analysis of the [ACA] statute or the law's legislative history with respect to the government's authority to provide premium subsidies in exchanges established by the federal government." *Id*. at 3.

CONCLUSION

For the foregoing reasons, the Fourth Circuit's judgment should be reversed and the IRS rule should be vacated.

Respectfully submitted,

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December 29, 2014