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 *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark presents herein a unique perspective concerning the separation of powers implications of the Fourth Circuit's opinion.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case about first principles. The Executive Branch has not only exceeded the boundaries of the legislative power, but has done so in an effort to circumvent the principles of representative government to avoid securing the consent of the governed. The Executive Branch asks the Court to give its imprimatur to unilateral Executive Branch modifications to a tax credit scheme established in the Patient Protection and Affordable Care Act (ACA), Pub. L. 111-148, 124 Stat. 119; 26 U.S.C. §§ 36B(b)(2)(A), 36b(c)(2)(A)(i). In particular, the Internal Revenue Service (IRS) has issued a regulation making certain tax credits available to individual taxpayers who purchase individual health insurance policies through a state-specific marketplace. The question is whether the IRS has the constitutional authority to make tax credits available in every state regardless of whether a state insurance marketplace (defined as an "Exchange") complies with the enabling statute. *Id.*

The Executive Branch, through the IRS, seeks to rewrite the statute's unambiguous text by issuing a regulation conflicting directly with the law's plain meaning. 26 C.F.R. 1.36B-1(k), 1.36B-2(a); see 77 Fed. Reg. 30,377 (2012). The result is a fundamental policy change effectuated without the Legislature's input.

Moreover, when Congress enacts legislation such as the ACA that is thousands of pages in length, regulates 1/6th of the nation's economy and affects nearly every American citizen, it must be assumed that the representatives of the People will have the desire and the exclusive power to revisit that legislation in the future in order to correct, modify or even repeal it. The current administration and remaining members of Congress who support the ACA want the Court and the American public to view the statute as "the law of the land" and some form of an irrevocable compact- subject only to revisions that the Executive Branch sees fit to make arbitrarily on its own. The Executive has in fact made many such revisions to the ACA, with blatant disregard for both the statute's text and for the legislative process, by ignoring statutory mandates and deadlines and replacing them with new ones out of whole cloth.

By constitutional design, the ACA and every other law passed by earlier Congresses are open for revision, replacement or repeal during the current congressional session. That is fundamental to our constitutional system. The consent of the governed for passage of legislation is obtained by Congress from the People on a regular and, in the case of the House of Representatives, frequent basis. For the Court to permit the Executive Branch to continue arbitrarily altering the ACA without an open debate from the

People's representatives frustrates the electoral process.

The statutory language at issue in this case is clear and unambiguous. That should be the end of the Court's inquiry. *Amicus Curiae* Landmark Legal Foundation respectfully urges the Court reverse the United States Circuit Court of Appeals for the Fourth Circuit. Particularly when the Executive Branch is led by a president intent on "fundamentally transforming" the nation by using his "pen and phone," it is incumbent on the Court to preserve the separation of powers in every instance. Jennifer Epstein, *Obama points to 2014's pen-and-phone strategy*, Politico.com, Jan. 14, 2014, http://politi.co/1hTKkcu.

II. ARGUMENT

The Constitution separates the powers of government to protect the liberty of the American people and prevent the tyranny of a self-aggrandizing government. Attempts by the Executive Branch to assume the legislative function deprives the People of an open debate conducted by their politically accountable representatives and is antithetical to the Constitution's design.

A. The Separation of Powers.

1. The Purpose of the Constitution's Separation of Powers Is to Prevent Tyranny and Preserve Liberty.

The Framers understood that the separation of powers is the cornerstone of good government. It was among the chief virtues of the Constitution, according to its most eloquent proponents, James Madison and Alexander Hamilton. Drawing from the writings of the political philosophers John Locke and

Montesquieu, they believed it was so important that they discussed separation of powers principles repeatedly in *The Federalist Papers*. Madison explained that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other." *The Federalist No. 51* (James Madison) *in* vol 2, *The Debate on the Constitution*, 163, 165 The Library of America, (1993).

During the Constitutional Convention, Madison argued for independent branches of government all in service to the will of the people. "An independence of the three great departments of each other, as far as possible, and the responsibility of all to the will of the community seemed to be generally admitted as the true basis of a well constructed government." James Madison, *Notes of Debates in the Federal Convention of 1787*, 313, (Ohio University Press 1985). The separation of powers, as he described, was a guarantor of liberty for the people.

> If it be a fundamental principle of free Gov't that the Legislative, Executive & Judiciary powers should be separately exercised, it is equally so that they should be independently exercised. There is the same & perhaps greater reason why the Executive [should] be independent of the Legislature, than why the Judiciary should: A coalition of the two former powers could be more immediately & certainly more dangerous to the public liberty. *Id*. 326-27. (Comments of J. Madison.)

Liberty is preserved because power is restrained from its tendency to expand. "Power, however, is of an encroaching nature, and it ought to be effectually restrained from pressing the limits assigned to it." 1, Joseph Story, "*Commentaries on the Constitution*,"

I § 530, (The Lawbook Exchange, 4th Ed., 2011). As the Court has written, "The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). This separation was a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Id. at 122. As the history of the ACA's implementation shows, the instant case is not one of mere statutory construction, but part of a troubling pattern of encroachment and aggrandizement of the Executive at the expense of the Legislature.

2. The Legislature Writes the Laws Because It is Most Responsive to the People and Provides Open and Reasoned Deliberation.

When functioning properly, the Framers believed that the Legislature would be the dominant branch under the Constitution. As Madison wrote, "In republican government the legislative authority, necessarily, predominates." *The Federalist No. 51*, *ibid* at 165. Of course, the Framers were very unlikely to have anticipated the degree to which the Legislative Branch has delegated its authority to the Executive Branch. Nonetheless, the Framers viewed the legislative function as the most powerful governmental act and one that should be conducted by those most responsive to the People.

Justice Joseph Story explained the legislature's design as a means to ensure that laws would have the consent of the governed:

> First, the principle of representation. The Representatives are to be chosen by the People. No reasoning was necessary to satisfy the American people of the advantages of a House of Representatives, which should emanate directly from themselves, which should guard their interests, support their rights, express their opinions, make known their wants, redress their grievances and introduce a pervading popular influence throughout all the operations of the national government. Joseph Story, *A Familiar Exposition of The Constitution of the United States*, § 67, 73 (Regnery Publishing, 1986).

A strong legislature would also preserve the rights of the states from an oppressive national government, which was paramount among many of the Framers' concerns about the new Constitution. Justice Story recognized this concern:

> Their own experience, as colonists, as well as the experience of the parent country, and the general deductions of theory, had settled it as a fundamental principle of a free government, and especially of a republican government, that no laws ought to be passed without the consent of the people, through representatives, immediately chosen by, and responsible to them. *Id*. at 73-74.

In order to further protect the people from the national government, the Framers established a two-chamber legislature. That is, the legislative power was so important it would have its own internal check. Of the two houses, the frequency of elections for the House of

Representatives ensured that it would be closest to the popular will. As Madison wrote:

> As it is essential to liberty that the government in general, should have a common interest with the people; so it is particularly essential that the branch of it under consideration, should have an immediate dependence on, & an intimate sympathy with the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured. *The Federalist No. 52* (James Madison) *in* vol 2, *The Debate on the Constitution*, 182, 183 The Library of America (1993).

Having two houses would assist the deliberative process, as well as provide a check on the legislative power, according to Madison. The purpose of the Senate, he explained, was, "[F]irst to protect the people against their rulers: secondly to protect the people against the transient impressions into which they themselves might be led." *Notes on Debates*, 193 (Comments of J. Madison). The public is at risk that Government might betray the people's trust. Accordingly, he wrote:

> An obvious precaution against this danger would be to divide the trust between different bodies of men, who might watch & check each other. In this they would be governed by the same prudence which has prevailed in organizing the subordinate departments of Gov't, where all business liable to abuses is made to pass thro' separate hands, the one being a check on the other. *Id.* 193-94

Furthermore, he wrote that the Senate was necessary because of "the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions." *The Federalist No. 62* (James Madison) *in* vol 2, *The Debate on the Constitution*, 244, 247 The Library of America, (1993). Thus, great care was given to ensure that the Legislature would engage in reasoned and cautious deliberations on behalf of the People. By contrast, if the Executive is allowed to write laws himself, the deliberations may be entirely within his private councils or his own head.

In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Black stated:

> "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States. . . .'" 343 U.S. 579, 587-588 (1952).

Moreover, a federal agency may not "avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy." *Friends of the Earth v. EPA,* 446 F.3d 140, 145 (D.C. Cir. 2006) *quoting Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996).

"Nor can we set aside a statute's plain language simply because the agency thinks it leads to undesirable consequences in some applications. *Id. (*citing *Sierra Club v. EPA*, 294 F.3d 155 (D.C. Cir. 2002)).

In short, there is nothing in our constitutional system that permits the President or his administrative agencies to write the laws:

> The procedures governing the enactment of statutes set forth in the text of Article I were the product of great debates and compromise that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered procedure.'" *City of New York v. Clinton,* 524 U.S. 417, 439-40 (1998) (quoting *INS v. Chadha*, 462 U. S. 919, 951 (1983).

Only the Legislature has the authority to enact the tax credit scheme revision that the IRS seeks to implement.

3. Failure to Preserve the Constraints on The Branches Leads to Uncertainty And The Loss of Liberty.

The consequence of concentrating powers of government in a single individual or institution is the loss of liberty. As Montesquieu wrote:

> The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be

> so constituted as one man need not be afraid of another.
>
> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Montesquieu, *Spirit of the Laws*, BK. 11, Ch. 6 (T. Nugent transl. 1750), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch17s9.html.

Tyranny flows from the arbitrary wielding of power. As Professor Gary L. McDowell wrote:

> "The greatest danger to the government is always going to be the tendency of rulers to subject them to arbitrary decisions as the result of a general 'capriciousness' in the administration of power. As Locke had taught, there need to be known and settled laws that people can depend upon. *The essence of despotic government, for Montesquieu no less than for Locke, was the fact that 'all is uncertain, because all is arbitrary.'"* Gary L. McDowell, "*The Language of Law and the Foundations of American Constitutionalism*," (Cambridge University Press 2010), 218 (quoting Montesquieu, "*Spirit of the Laws*") (emphasis added).

The public record is full of examples of the chaos and uncertainty for American states, businesses, and individual citizens caused by the arbitrary changes to the ACA made by the Executive Branch. For example, the Administration's unilateral decision to delay for

one year ACA's statutory requirement that individual insurance plans contain certain minimum provisions criticized by customers and state governments. Arkansas' insurance commissioner, Jay Bradford, did not permit the extension. "It would be more chaos added to an already chaotic situation," he said. Juliet Eilperin, Amy Goldstein and Lena H. Sun, *Obama announces change to address health insurance cancellations*, *Washington Post*, Nov. 14, 2013, http://www.washingtonpost.com/politics/obamato-to-announce-change-to-address-health-insurance-cancellations/2013/11/14/3be49d24-4d37-11e3-9890-a1e0997fb0c0_story.html.

"I've never seen the chaos I've seen the last three years, and it gets increasingly worse as we get to the deadlines, which then get delayed," said Daniel Severino, president of the Meadville, Pa.-based insurance broker DJB Group, which itself provides health insurance for 10 employees. "How do I plan when it keeps changing every couple of months?" Steve Twedt, *Changes in Affordable Care Act frustrating employers, insurers*, *Pittsburgh Post-Gazette,* March 8, 2014, http://www.post-gazette. com/business/2014/03/09/Changes-in-Affordable-Care-Act-frustrating-employers-insurers.print. "There is mass confusion out there," agreed Deb Wilkinson, vice president for health plan options at the wholesale brokerage firm URL Insurance Group in Harrisburg. Id.

This is precisely the kind of scenario the Framers sought to avoid when they built the Constitution on a separation of powers foundation.

B. The Executive Branch's Revisions to the ACA Violate the Separation of Powers.

1. The Executive Branch Seeks to Avoid A Full and Open Debate of Any Revision to the ACA In the Legislature, Despite Its Massive Impact on American Society.

The scope of the ACA cannot be overstated. It runs over a thousand pages in length and affects all aspects of American society: government, business, religious and charitable institutions and individuals. Given its size, it must be assumed that the Congress will revisit that legislation in the future in order to correct, modify or even repeal it.

A federal agency is not the proper place to make major policy changes. The People are denied an open policy debate made by politically accountable representatives. There is no compromise of different interests or evaluation of "transient impressions" and virtually no input from the public. As U.S. Circuit Court Judge David S. Tatel stated, "The legislative process set out in the Constitution, with its bi-cameralism and veto provisions, is designed to make it difficult to alter the legal status quo. By contrast, agencies, staffed by appointment and somewhat insulated from political accountability, can exercise such power with one bureaucratic pen stroke." The Honorable David S. Tatel, *The Administrative Process And The Rule Of Environmental Law*, 34 Harv. Envtl. L. Rev. 1, 2 (2010).

The IRS regulation at issue, drafted by members of the Executive Branch, received only 30 Comments from the public on the final rule, and 242 comments on

the proposed rule. IRS, Health Insurance Premium Tax Credit, Docket ID: Information IRS-2011-0024-0205 (Aug. 21, 2012), available at http://www.regulations.gov/#!documentDetail;D=IRS-2011-0024-0205. Many, if not most, Americans are not even aware of their ability to make public comment to proposed regulations. Nor can they be expected to keep track of a federal administrative state that has propounded more than 3,000 new regulations every year for several years. Maeve P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register*, Congressional Research Service, Nov. 26, 2014, p. 18-19, http://fas.org/sgp/crs/misc/R43056.pdf.

The Executive is reluctant to reopen debate on the ACA's tax credits in Congress because it is apparent from the last two national election cycles that the People's opinion is not supportive of the law. National health insurance, however, has been a goal of political progressives and self-proclaimed social reformers for over a hundred years. Presidents Franklin D. Roosevelt, Harry Truman, and Bill Clinton all attempted and failed to provide some form of a national health insurance program. *The Long, Long Road to National Health Reform (A Short History)*, Modern Healthcare, (July 2, 2012) p. 14, available at http://www.modernhealthcare.com/article/20100329/magazine/100329967. In 2009, however, the political moment arrived and the ACA passed, albeit by party line vote. The moment was fleeting, however, as what had been the Senate supermajority required to pass the law was lost immediately afterwards, in January, 2010, by special election.

The proponents of the ACA in Congress tolerated minor adjustments after passage: classifying TRICARE and Veterans Affairs health care as meeting minimum

essential health care coverage; changing drug prices, tax credits, and eligibility for Medicaid requirements; and cutting funds for CO-OP program, and Independent Payment Advisory Board, among other modifications. *See* Galen Institute, "*42 Changes to Obamacare . . . So Far*," Nov. 6, 2014, http://www. galen.org/newsletters/changes-to-obama-care-so-far/.

The ACA, however, has become less popular over time. It was a major issue in the congressional elections of 2012 and 2014 and its supporters lost strength in both houses of Congress. See Thomas B. Edsall, *Is Obamacare Destroying the Democratic Party?*, The New York Times, Dec. 2, 2014, http://www.nytimes.com/2014/12/03/opinion/is-obamacare-destroying-the-democratic-party.html; Jeffrey H. Anderson, *A Huge Loss for Obamacare and Its Allies*, The Weekly Standard, Nov. 6, 2014, http://www.weeklystandard.com/blogs/huge-loss-obamacare-and-its-allies_818291.html#. As public opinion and the make-up of Congress have changed, the Executive Branch, as shown below, began to change portions of the law by administrative action, sometimes with legal justification that was dubious at best.

Furthermore, proponents of the ACA have tried to create the impression that it is foolhardy to attempt repeal or large scale revisions in Congress. The Senate Majority Leader proclaimed in 2013 that "Obamacare is the law of the land and it will remain the law of the land as long as Barack Obama is President of the United States and as long as I am the Senate Majority Leader." 159 Cong. Rec. S6674 (September 23, 2013) (statement of Sen. Harry Reid). Yet the President's own Secretary of Health and Human Services referred to the implementation of healthcare.gov, the federal government's website for obtaining health insurance,

as a "debacle." Stephanie Condon, *Sebelius: "Hold me accountable for the debacle" of Healthcare.gov*," CBS News, Oct. 30, 2013, http://www.cbsnews.com/news/sebelius-hold-me-accountable-for-the-debacle-of-healthcaregov/. That opinion is shared by the American people and has been reflected in congressional elections.

The simple fact is that the 111th Congress that passed the ACA no longer exists. Neither does the electorate that voted for the 111th Congress. The ACA and every law passed by earlier Congresses are open for revision, replacement or repeal during the current session of the current Congress. Congress is bound by the Constitution, not prior laws, and the Constitution itself provides methods for its Amendment. U.S. Const., Article V. To allow the Executive Branch to accomplish a substantial change to the plain meaning of the statute is to deny the electoral process and bind the citizens of today to the past for nothing more than the political convenience of the Executive.

2. The Executive Branch Has Made Repeated Changes to the ACA's Implementation By Agency Action Without Statutory Authority.

The Executive Branch's regulation at issue does not stand alone. It is a part of disturbing pattern of flouting the Legislature. The Executive Branch has delayed implementation of key elements of the ACA, announced exemptions and extensions, and has waived reporting requirements. *See* C. Stephen Redhead, *Implementing the Affordable Care Act: Delays, Extensions, and Other Actions Taken by the Administration*, Congressional Research Service, (Aug. 1, 2014) http://fas.org/sgp/crs/misc/R43474/pdf.

For example, in July, 2013, the IRS announced that it would delay enforcement of the ACA's "employer mandate" requiring certain employers to provide health insurance to employees until 2015, even though it took effect on January 1, 2014, under the statute. In February, 2014, it announced another delay in enforcement for some employers until 2016. *Id*. at 8.

In November, 2013, the President announced that the principle of "grandfathering" plans in effect at ACA's passage would be extended "both to people whose plans have changed since the law took effect, and to people who bought plans since the law took effect." The White House, *Statement by the President on the Affordable Care Act*, Nov. 14, 2013, http://www.whitehouse.gov/the-press-office/2013/11/14/statement-president-affordable-care-act. The Administration described the unilateral action as a "transitional policy." The White House, *Fact Sheet: New Administration Proposal To Help Consumers Facing Cancellations*, Nov. 14, 2013, http://www.whitehouse.gov/the-press-office/2013/11/14/fact-sheet-new-administration-proposal-help-consumers-facing-cancellatio. This change was made in the wake of state insurance commissioners issuing cancellation notices to holders of health insurance policies that did not meet the ACA's minimal standards. Redhead at 6. CMS also later announced a hardship exemption from the individual mandate for certain people with such cancelled policies. In March 2014, CMS announced that it extended the "transitional policy" an additional two years. *Id.*

In February, 2014, the CMS announced that it would provide subsidies to certain people who had obtained insurance in the private market outside of health care exchanges because of technical problems

at the exchanges. *Id*. The law itself, however, stated that subsidies would only be available to those enrolled in a qualified health plan through an exchange. *Id.* The CMS also announced that retroactive payment of subsidies would be available to such people. *Id.*

In short, the Executive has made repeated arbitrary changes to the implementation of the ACA without legal justification. These changes have been made in defiance of the Legislative Branch and the American people. These arbitrary changes to the ACA have caused chaos and uncertainty for American states, employers and individuals. The very dangers warned about by Locke and Montesquieu and considered by the Framers during the Constitutional Convention have come to pass. The Judicial Branch should not allow this to continue.

CONCLUSION

For the foregoing reasons, the regulations issued by the Executive Branch in the instant case were constitutionally invalid. The Fourth Circuit's decision should be reversed and the legislative power restored to its properly limited exercise.

Respectfully submitted,

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