[ORAL ARGUMENT SCHEDULED FOR MARCH 25, 2014]

No. 14-5018

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

JACQUELINE HALBIG, ET AL.,

Appellants,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Appellees.

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

REPLY BRIEF FOR APPELLANTS

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UPDATED CERTIFICATE AS TO PARTIES

Plaintiffs-Appellants certify that the certificate in their opening brief is complete and correct, except that the following *amici curiae* have now appeared:

Pacific Research Institute; Cato Institute; American Hospital Association; Jonathan Adler; Michael Cannon; State of Oklahoma; State of Alabama; State of Georgia; State of West Virginia; State of Nebraska; State of South Carolina; Consumer's Research; America's Health Insurance Plans; National Federation of Independent Business Small Business Legal Center; State of Kansas; State of Michigan; Galen Institute; Senator John Cornyn; Senator Ted Cruz; Senator Orrin Hatch; Senator Mike Lee; Senator Rob Portman; Senator Marco Rubio; Rep. Dave Camp; Rep. Darrell Issa; a group of Public Health Deans, Chairs, and Faculty; American Cancer Society; American Cancer Society Cancer Action Network; American Diabetes Association; American Heart Association; Families USA; Henry Aaron; Stuart Altman; Susan Athey; Linda Blumberg; Barry Bosworth; Gary Burtless; Amitabh Chandra; Philip Cook; Janet Currie; David Cutler; Karen Davis; Bradford DeLong; Peter Diamond; Ezekiel Emanuel; Austin Frakt; Sherry Glied; Paul Ginsburg; Claudia Goldin; Jonathan Gruber; Genevieve Kenney; Vivian Ho; John Holohan; Jill Horwitz; Lawrence Katz; Frank Levy; Peter Lindert; Eric Maskin; Marilyn Moon; Alan Monheit; Joseph Newhouse; Mark Pauly; Harold Pollack; Daniel Polsky; James Rebitzer; Michael Reich; Robert Reischauer;

Alice Rivlin; Meredith Rosenthal; Isabel Sawhill; John Shoven; Jonathan Skinner; Lawrence Summers; Katherine Swartz; Kenneth Thorpe; Laura Tyson; Paul Van de Water; Justin Wolfers; Stephen Zuckerman; and a group of Members of Congress and State Officials.

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GLOSSARY

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

SUMMARY OF ARGUMENT

I. Lacking any tenable reading of the ACA's text, and abandoning any argument that the legislative history supports the IRS Rule, the Government and its *amici* resort to the policy claim that subsidies are good and so Congress must have wanted them everywhere. This simplistic claim fails because (i) general legislative "purpose" cannot defeat plain statutory text; (ii) it simply ignores Congress's other "purpose" of inducing states to run Exchanges; and (iii) adhering to the ACA's text would have furthered Congress's desire to achieve nationwide subsidies, because states would have established their own Exchanges had they known that subsidies depended on it. Only because the IRS instead told states that there would be no consequences of opting out did Congress's twin goals not come to fruition.

II. The IRS Rule is not entitled to deference. It is implausible to believe that Congress gave the IRS discretion to authorize $150 billion *per year* in federal spending, particularly when Congress had directly spoken to this issue. Major economic decisions like these—indeed, *any* decisions granting tax credits—must be made unambiguously by Congress itself.

III. No barrier exists to this suit. The IRS Rule forces Klemencic to spend *money*, on either insurance he does not want or a penalty; that is classic economic injury, not "ideological" harm. And the APA does not force him to incur a penalty and seek a refund before he may obtain judicial review of a final rule.

ARGUMENT

I. THE GOVERNMENT CANNOT DEFEND THE IRS RULE, WHICH IS CLEARLY *ULTRA VIRES*.

To sustain the IRS Rule, the Government must persuade this Court that "Exchange established by the State under section 1311 of the [ACA]" actually means Exchange established by a state *or HHS* under § 1311 *or § 1321*. But there is no reasonable basis for so interpreting the Act's language to mean the opposite of what it says. Construing the language to mean what it says does not produce an absurd result; that is the end of the matter. The Government's conclusory claim that Congress simply must have intended subsidies to be available nationwide, because a world without subsidies would be bad, provides no legitimate basis for departing from the text; and, anyway, that syllogism simply ignores that Congress expected to induce all states to establish Exchanges precisely by conditioning billions of federal subsidy dollars on such participation.

A. The Government's Reading of § 36B Is Irreconcilable with Its Plain Text, the ACA's Structure, and All Canons of Construction.

Grasping for a textual hook for the IRS Rule, the Government offers the confused theory that the Act directs HHS to establish Exchanges "on behalf of" states that fail to (Govt.Br.19) and thereby somehow equates the HHS-established Exchanges with state-established ones, such that any reference to the latter must necessarily include the former. (Govt.Br.19-23.) That is not remotely tenable.

1. At the outset, it is worth observing how bizarre this theory truly is. The Government is arguing that Congress intended to capture *all* Exchanges in the subsidy provision, yet inexplicably added the limitations "established by the State" and "under section 1311," which could only defeat that supposed intent. Why add those modifiers? The Government gives no answer. This is not "superfluity" in the usual sense of *redundancy*, the proverbial "belt and suspenders." (Govt.Br.23-24.) Rather, the Government's claim is that Congress inserted limiting clauses that facially state the *opposite* of what it meant. Imprecise "short-hand references" are one thing (Govt.Br.23), but why use needless, contradictory long-hand?

It is not as if the Act unthinkingly says "Exchange established by the State under section 1311" *every time* it wants to refer to all Exchanges. Rather, the Act often refers to "Exchange," standing alone, and elsewhere uses the broad phrase "Exchange established under this Act." ACA § 1312(d)(3)(D)(i)(II), *codified at* 42 U.S.C. § 18032(d)(3)(D)(i)(II). The latter is obviously how Congress would have written § 36B had it intended to extend subsidies to HHS Exchanges. Indeed, it is how the Government's *own brief* (mis)describes that provision, confirming that this is the only sensible way to convey the meaning that the Government attributes to the Act. (Govt.Br.4 (describing Act as providing subsidies for coverage purchased on "Exchanges created *pursuant to the Act*" (emphasis added)).) On the Government's view, Congress not only added unneeded and misleading modifiers,

but did so even though it demonstrably knew exactly how to make its supposed intent perfectly clear. *But see Custis v. United States*, 511 U.S. 485, 492 (1994). Why would Congress do that? Again, the Government has no answer.

Moreover, the Government's theory is that Congress silently equated HHS-established Exchanges under § 1321 of the ACA with state-established Exchanges under § 1311, such that any reference to the latter implicitly includes the former. But, if so, why did Congress—in the *very same* section of the ACA—*expressly* specify *both* types of Exchanges when it imposed certain reporting requirements? 26 U.S.C. § 36B(f)(3). (*Cf.* Govt. Br. 26.) Once again, the Government is silent.

2. In the face of all of the above, the Government contends that the Act's reference to "Exchange established by the State under section 1311" includes an Exchange established by HHS under § 1321, because HHS purportedly acts "on the State's behalf" when it establishes an Exchange under § 1321. (Govt.Br.21.) First, the ACA says no such thing. It says only that HHS should establish an Exchange "within" a declining state. ACA § 1321(c), *codified at* 42 U.S.C. § 18041(c). That is language of *geography*, not *agency*. Anyway, even if the Act said that HHS should establish an Exchange "on the State's behalf," that Exchange would still be established *by HHS for the state*, not *by the state*. Indeed, the crucial premise allowing HHS to act is the state's *failure* to establish one.

The Government emphasizes that the ACA instructs HHS to establish "*such* Exchange," ACA § 1321(c), *codified at* 42 U.S.C. § 18041(c) (emphasis added), referring back to the "required Exchange" that the state is requested to establish. According to the Government, this means that the Act somehow required the impossible: directing HHS to establish a "state-established Exchange." That is just silly. "Such" simply means that HHS must establish the same Exchange "that the State would otherwise have established if it had elected to create an Exchange." (Govt.Br.21.) Thus, "such Exchange" simply describes *what* the Exchange is, not *who* established it. The HHS Exchange should operate just like the Exchange that "the State would otherwise have established." *But it is established by HHS, not the state*. As the Government's use of conditional terms acknowledges, in such a scenario the state has *not* established an Exchange.

Nor does the ACA's global definition of "Exchange" add anything further. The Act defines "Exchange" as "an American Health Benefit Exchange established under section 1311." (Govt.Br.22.) If anything, that makes *Appellants'* argument stronger, as it suggests that § 36B's mere use of the term "Exchange"—even *without* the qualifiers "established by the State under section 1311"—could be read as limiting subsidies to the state-run Exchanges that are established under that section. Yet, to avoid doubt, Congress clarified even further.

The Government suggests that, by plugging the definition of Exchange into the provision directing HHS to establish "such Exchange" if the state fails to do so, the result is that HHS is directed to establish an Exchange "under section 1311." (Govt.Br.22.) But that does not change the dispositive fact that it is still *HHS*, not the *state*, establishing the Exchange. Contrary to the Government's non-sequitur, the definition of "Exchange" does not remotely define "Exchange established by the Secretary" as "the required State Exchange." (Govt.Br.22.) The former is a *fallback* for the latter. It therefore cannot be *the same thing*.[1]

3. Of course, as the Government points out, "Congress is free to define statutory terms in any way that it chooses" (Govt.Br.23), and so Congress could easily have defined or deemed an HHS-established Exchange as "established by the State" for purposes of the subsidy provision. But Congress chose *not* to do so here, although it did precisely that elsewhere in the Act.

[1] At most, the definition could sow doubt over the metaphysical question whether Exchanges established by HHS *pursuant to* § 1321 of the ACA are created "under" that section (as common parlance would dictate and as HHS regulations recognize, 45 C.F.R. § 155.20) or rather "under" § 1311. But, either way, they are established *by HHS*, and only if the state *fails* to establish an Exchange. This potential confusion may in fact be why § 36B further specifies that subsidies are limited to Exchanges "established *by the State* under section 1311."

One *amicus* claims that the ACA also defines Exchanges as "established by the State." (Amicus Br. of Families USA 15.) Not true. The provisions it cites are just parts of ACA § 1311's direction to states to create Exchanges; they are not definitions and do not purport to be.

The ACA provides that a territory that establishes an Exchange "shall be treated as a State." ACA § 1323(a)(1), *codified at* 42 U.S.C. § 18043(a)(1). An earlier version of the ACA (which included a default national Exchange) likewise stated that, if a state established an Exchange, "references in this subtitle to the Health Insurance Exchange … shall be deemed a reference to the State-based Health Insurance Exchange." (A247-248 (H.R. 3962, § 308(e), 111th Cong. (2009)).) And other statutes use similar terms to allow an entity to be treated as if it were another. (App.Br.24-25.) Such clear "deeming" language contrasts starkly with the opaque cross-references and unwritten implications that the Government offers here. For the IRS or this Court to nonetheless read "deeming" language into the Act would "ignore [the] duty to pay close heed to both what Congress said and what Congress did not say in the relevant statute." *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 824 F.2d 108, 115 (D.C. Cir. 1987).[2]

4. The Government and its *amici* also object that the phrase "Exchange established by the State under section 1311" appears in the formula for calculating a subsidy (specifically, in the definition of "premium assistance credit amount"), as

[2] An *amicus* insists that Congress sometimes deems one actor to be another, even without statutory text saying so. Amicus Br. of Families USA 16. But its examples show no such thing. They simply reflect the common law of agency, under which a lawyer may file pleadings for a client, companies can be liable for misconduct by those they hire, and doctors' associates may be subject to privacy laws. *Id.* 16-17 & n.28. HHS, however, is obviously *not* an agent of a state that refuses to establish an Exchange, and Congress did not *deem* it to be.

opposed to the provision defining "applicable taxpayer." (Govt.Br.19, 24; Amicus Br. of Families USA 21-22.) But the "applicable taxpayer" provision obviously specifies the *people* eligible for subsidies, while the "premium assistance credit amount" provision specifies the *purchases* eligible for subsidies. Just as the latter is the vehicle for limiting subsidies to purchases made on an "Exchange"—as all agree—it is the vehicle for limiting them to purchases made on an "Exchange established by the State." There is nothing odd about this; the whole purpose of this subsection is to define and delimit the subsidy-eligible transactions.

Nor is it unusual for Congress to insert conditions on receipt of a tax credit into the formula for calculating its value—even if the conditions require states to take action so as to render their citizens eligible. *E.g.*, 26 U.S.C. § 35(a), (b), (e).[3] And in the ACA itself, the Medicaid "deal" is set forth in a provision defining Medicaid *eligibility*—just like the condition on subsidies here. *See* ACA § 2001(a), *codified at* 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (amending definition of who must be eligible for coverage under state Medicaid programs).

[3] As the Government acknowledges, this provision created a tax credit that could be used "to offset the costs of several different kinds of qualifying health insurance," and "permitted States to designate additional kinds of insurance that would meet certain minimum standards" and therefore qualify for the tax credit. (Govt.Br.25 n.9.) Thus, exactly as Appellants said, § 35 of the Internal Revenue Code, just like § 36B, effectively offers a tax credit for certain residents of a state upon the state's compliance with federal "standards."

B. The Government Fails To Show Any Absurdity Resulting from the Subsidy Provision's Plain Text.

Because § 36B's text is clear, this Court's inquiry is at an end. The only permissible basis for departure from plain text is absurdity, *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004), and even the Government does not contend that it would have been *absurd* for Congress to use subsidies to induce states to establish Exchanges. Congress conditions its spending to induce state action *all the time*. Amici Br. of Okla. *et al*. The Government says that Congress did not actually "intend" such a condition here (Govt.Br.40-44), but the question is not whether "Congress" subjectively "intended" a result (or expressed it in legislative history), but whether *the Act's language* produces an *objectively* absurd result.

The Government argues that *other* provisions of the ACA would be absurd if HHS is not treated as a "State" throughout the ACA. But no absurdity is created *anywhere* in the Act by giving § 36B its plain meaning. Even if *other* provisions using *different* languge are absurd (which they are not), that still would provide no basis for rewriting the perfectly reasonable language in § 36B.[4]

[4] The Government's supposed anomalies pale in comparison to that created by many states' unanticipated refusal to expand their Medicaid programs: Millions of Americans are too *wealthy* for Medicaid yet too *poor* to qualify for subsidies under § 36B. *See* Christopher Weaver, *Millions Trapped in Health-Law Coverage Gap*, WALL ST. J. (Feb 10, 2014). Just as that anomaly stemming from state non-participation does not allow the IRS to expand § 36B subsidies to those with incomes below the statutory cutoff, any miscalculation about state participation in Exchanges does not allow the IRS to expand subsidies to HHS Exchanges.

1. The Government argues that, without subsidies, HHS Exchanges would "nonsensical[ly]" (Govt.Br.27) have to report as "zero" the "amount of any advance payment of [the § 36B] credit" paid to each enrollee, and report nothing for two other categories of information concerning subsidies to enrollees. 26 U.S.C. § 36B(f)(3)(C), (E), (F). There is nothing nonsensical here: The *same* "[i]nformation requirement" applies to both HHS- and state-established Exchanges. Some data points may be irrelevant for federal Exchanges (because they offer no subsidies) but those data points *are* relevant to state-run Exchanges—and so not superfluous. And the *other* data points ("level of coverage," "total premium," and "name, address, and TIN" of each enrollee, 26 U.S.C. § 36B(f)(3)(A), (B), (D)) are equally relevant to HHS Exchanges. The only alternative would have been to enact two *separate* redundant reporting requirements—one for federal Exchanges listing items (A), (B), and (D), and another for state Exchanges *repeating* those items and adding the rest. Avoiding such redundancies is hardly "anomalous."

The Government argues that there is no reason to require reporting except "to enable the IRS to reconcile end-of-year premium tax credits" with advance payments. (Govt.Br.27.) That is plainly wrong, however, since reporting applies to "any health plan provided through the Exchange," even health plans purchased without subsidies. 26 U.S.C. § 36B(f)(3). Congress thus clearly had an interest in obtaining this data about *all* enrollees, whether they receive subsidies or not.

Indeed, as Appellants explained, Treasury needs enrollment information to enforce the individual mandate. The Government responds that Congress already requires *insurers* to report enrollment information. (Govt.Br.28.) But, of course, the ACA is broadly premised on distrust of insurance companies, so it makes good sense to require *Exchanges* to report enrollment information too—at the very least, as an extra safeguard. Moreover, Appellants pointed out that the very same section requires a "study on affordable coverage" (ACA § 1401(c)), providing yet another reason to track data on *all* Exchanges. That the study is meant to evaluate "the impact of the tax credit" (Govt.Br.29) only proves the point: HHS Exchanges without subsidies are the ideal "control group" for studying subsidies' effects.

2. The Government contends that nobody would be eligible to purchase coverage on HHS Exchanges unless one assumes that HHS somehow acts as a state when it creates an Exchange, because the Act defines "qualified individual" as someone who "resides in the State that established the Exchange," ACA § 1312(f)(1)(A), *codified at* 42 U.S.C. § 18032(f)(1)(A). (Govt.Br.29-32.) At the outset, an absurdity in *this* provision cannot justify rewriting the plain, concededly non-absurd text of the *subsidy* provision. Anyway, Appellants identified three sensible ways to read this provision without creating absurdity. (App.Br.32-35.) All are clearly preferable to adopting the Government's countertextual view that, across the entire ACA, "State" must be read to include HHS.

Of Appellants' three readings, the Government ignores one completely—that, in light of the Act's definition of "Exchange," this eligibility provision does not apply *at all* to HHS-established Exchanges. (App.Br.33.) That alone resolves the supposed absurdity *consistent* with the Act's plain text.

Moreover, the Government is unable to point to *any* language that actually *restricts* Exchange enrollment to "qualified individuals." The "Consumer Choice" provision says that qualified individuals have the *right* to enroll in "any" plan available to them. ACA § 1312(a)(1), *codified at* 42 U.S.C. § 18032(a)(1). On its face, this is a non-exclusion provision, not a bar.[5] The Government responds that non-"qualified individuals" *must* be excluded because otherwise illegal aliens could enroll. (Govt.Br.31.) But the Act says *expressly* that such aliens "may not be covered under a qualified health plan … offered through an Exchange," ACA § 1312(f)(3), *codified at* 42 U.S.C. § 18032(f)(3), which would be unnecessary if the Act automatically excluded those who are merely not "qualified individuals."[6]

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[5] The Government responds that the Act already includes non-discrimination provisions, but those serve quite different purposes. ACA § 1201, *codified at* 42 U.S.C. § 300gg *et seq.*, forbids insurers from discriminating based on "health status"; and ACA § 1557, *codified at* 42 U.S.C. § 18116, prohibits discrimination based on race, color, national origin, sex, age, or disability. Neither broadly guarantees the right to enroll in any plan for which an individual is eligible.

[6] Incarcerated individuals are not similarly barred from Exchanges. But, conclusory assertions aside (Govt.Br.31), Congress may well not have wanted to categorically exclude all such individuals from buying coverage on an Exchange (especially if such coverage would reduce their jailers' medical expenditures).

In short, there is no reason to believe that even a straightforward reading of the qualified individual provision would bar enrollment on federal Exchanges—and certainly no reason to leverage any such absurd result to ignore the plain text of a distinct ACA provision using distinct language. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring) (courts should adopt non-absurd interpretation that "does least violence to the text").

3. Finally, the Government points to the provision precluding states from restricting Medicaid eligibility until an Exchange "established by the State under section 1311" is operational. As the Government correctly says, this is "to protect Medicaid recipients from the loss of coverage until [they] … would be able to obtain subsidized health insurance." (Govt.Br.32.) This *proves Appellants' point*: Until the state establishes its own Exchange, no "subsidized" coverage is available, and so Medicaid beneficiaries will still need "protection" from Medicaid cutbacks.

The Government claims that Appellants' reading may "present constitutional problems" that its interpretation avoids. (Govt.Br.33.) That is irrelevant and false. The question is whether interpreting the law to mean what it says creates an *absurd* result that *Congress* could not have *intended*, not whether a non-absurd intended result would be viewed as constitutionally problematic by the Supreme Court. Anyway, the (irrelevant) constitutional issue surely does not turn on whether the federal "coercion" persists past 2013 (and Appellants never said otherwise).

C. The Government's Broad "Purpose" Argument Is Irrelevant, Wrong, and Directly Refuted by the Legislative History.

All that remains is the claim that Congress's "purpose" would be ill-served by § 36B's plain text. The Government argues that having subsidies nationwide is critical to Congress's goal of making coverage affordable, by directly helping low-income people purchase it and by helping insurance companies keep premiums low by inducing more healthy people to buy their product. (Govt.Br.34-40.) There are multiple fatal flaws with this argument.

1. Most fundamentally, broad appeals to supposed legislative purpose cannot defeat plain text. "[N]either courts nor federal agencies can rewrite a statute's plain text to correspond to its supposed purposes." *Landstar Express Am., Inc. v. Fed. Maritime Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009). "The fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States v. Locke*, 471 U.S. 84, 95 (1985). Ignoring text in favor of "further[ing] what a court perceives to be Congress's general goal … is simply too susceptible to error to be tolerated within our scheme of separated powers." *Consol. Rail Corp. v. United States*, 896 F.2d 574, 578 (D.C. Cir. 1990). And, particularly since the Government abandons any reliance on legislative history, there would be no way (other than through the statutory text) to determine what Congress "wanted"—even if that *were* the relevant inquiry. *But*

see Republic of Argentina v. Wetlover, Inc., 504 U.S. 607, 618 (1992) (question is "not what Congress 'would have wanted' but what Congress enacted").[7]

Thus, even where ACA provisions *did* have the adverse policy consequences that the Government warns of here, everyone recognized that only *Congress* could fix them. For example, Congress extended guaranteed issue and community rating to U.S. territories—but not the individual mandate; this "messed up the individual market in the Northern Mariana Islands so badly" that it is "literally impossible for an individual to buy a new policy" there now. Sarah Kliff, *Think Your State Has Obamacare Problems? They're Nothing Compared to Guam*, 2013 WLNR 31695303, WASH. POST (Dec. 19, 2013). Yet HHS recognized that it could not change the law "[a]s written by Congress." *Id.*; *see also* Amici Br. of Economic Scholars 22-25. And the ACA enacted the CLASS Act, a long-term care program offering generous benefits but no individual mandate, meaning that "only those who were sick and anticipating needing long-term care would enroll." Sarah Kliff, *The Small End of Ted Kennedy's Big CLASS Act Dream*, 2013 WLNR 23345419, WASH. POST (Sep. 18, 2013). Unworkable, it was repealed by *Congress*. *Id.*

[7] *Amici* renew some legislative-history arguments that even the district court did not invoke, and that the Government abandons. The banal legislator statements do not even purport to address HHS Exchanges; the Joint Committee on Taxation actually referred repeatedly to "state" Exchanges in discussing the subsidies; and the House report on a subsequent bill said nothing at all about federal Exchanges. *See* Amici Br. of Members of Cong. *et al.* 12-15, 19-20. All of these arguments were thoroughly deubunked below. *See* Pls.' SJ Opp.-Reply, ECF 57, at 17-23.

2. In any case, unlike those provisions, § 36B's plain text is eminently compatible with the "purpose" that the Government attributes to Congress. Just as Congress intended to ensure expanded Medicaid nationwide by threatening to withhold funding from non-compliant states, Congress intended to ensure state-established Exchanges with subsidies nationwide by threatening to withhold subsidies from residents of non-compliant states. After all, what state would refuse to establish an Exchange if its citizens would lose billions of federal dollars per year? And if the Government is right that, absent subsidies, premiums would increase for all, that *underscores* why states would have felt compelled to establish Exchanges: Not doing so would hurt not only low-income constituents, but people of *all* income levels—plus insurers, hospitals, pre-Medicare adults, and all of the other *amici* interest groups that have directed these policy arguments to this Court. *See* Amicus Br. of Am. Hosp. Ass'n; Amicus Br. of Am. Health Ins. Plans; Amici Br. of AARP *et al*. The political pressure would have been insurmountable, if not *before* the scheme took effect then certainly *after*, when premiums on the HHS Exchanges were revealed to be far higher than those in state Exchanges.

The Government's state-legislator *amici* prove the point, conceding that had they known "that their constituents would lose access to these tax credits unless the State established its own Exchange, they would have vigorously advocated for a state-run Exchange citing this potential consequence." Amici Br. of Members of

Cong. *et al.* 5. Of course, they did *not* know, precisely because the IRS told them that states would be treated identically whether they participated or not. Similarly proving the point is the Georgia Health Insurance Exchange Advisory Committee report that the Government cites (Govt.Br.40 n.13)—which, *after* the IRS proposed its Rule, 76 Fed. Reg. 50931, 50934 (Aug. 17, 2011), noted that Georgians would be eligible for subsidies whether the Georgia Exchange "is established by the state or federal government" and concluded that it would be "less appealing" for the state to establish its own Exchange. Georgia Health Ins. Exchange Adv. Comm., *Report to the Governor* 15 (Dec. 15, 2011). Any allegedly adverse policy effects from lack of subsidies on federal Exchanges thus arose only because the IRS failed to faithfully transmit Congress's condition on the receipt of subsidies and thereby discouraged states from establishing Exchanges. Those effects obviously cannot be cited in defense of the very Rule that created them.

In short, conditioning subsidies on the state's establishment of an Exchange would accomplish *both* the Act's purpose of inducing states to undertake this thankless task *and* (almost certainly) its purpose of universal subsidies. The IRS Rule, in contrast, completely subordinates the former purpose to the latter, by eliminating *any* incentive for states to undertake the arduous obligation of running an Exchange. The Government cannot dispute that the subsidies are an enormous incentive, or rationally suggest why states would run Exchanges absent them.

That being so, it vainly attempts to fill this gaping hole by contending that Congress was *indifferent* to whether states ran Exchanges—and only offered them "the option" out of comity. (Govt.Br.40-44.) That is nonsense. *First*, it is wholly irreconcilable with the Act's plain language, which says that states "shall" establish Exchanges and authorizes funding only for state-run Exchanges. ACA § 1311(a), (b), *codified at* 42 U.S.C. § 18031(a), (b). *Second*, the model the Government describes—in which states could *choose* to run Exchanges but were offered no benefits to induce them to do so—is precisely the model that the *House of Representatives* adopted. (A242-248 (H.R. 3962, § 308, 111th Cong. (2009)).) But that approach was "politically untenable and doomed to failure in the Senate" (A360) because of Senator Ben Nelson's opposition. (App.Br.3.) So the Senate insisted that the bill *favor* state-operated Exchanges. It was not enough to give states the *option*, as the House bill did; the Senate wanted the federal government *out* of the process entirely, to avoid the slippery slope to single-payer nationalized health care.[8] The final bill thus had to include strong incentives "to encourage State participation." 156 Cong. Rec. H2423-24 (Mar. 25, 2010) (Rep. Waxman).

[8] Tellingly, none of the swing Senators who objected to the House bill joined the congressional amicus brief supporting the Government. Rather, its signatories favored a national Exchange from the start, and now are trying to achieve through the IRS and this Court what they were unable to achieve in Congress. This is exactly why statements of individual legislators are given no weight in statutory construction—particularly when asserted *ex post* in litigation.

The Government's contrary, revisionist theory does not explain why the Senate disapproved of the House bill, or why Congress was so confident of full state participation that it appropriated no funds for HHS Exchanges.[9]

3. In sum, just as no court would disregard the plain language of the Act's Medicaid "deal" to further Congress's "purpose" of expanding Medicaid, or ignore the Act's guaranteed-issue provision because, contrary to Congress's plain "purpose," that reform would make coverage *less* affordable, there is no basis for rejecting § 36B's plain language just because it created the (unrealistic) theoretical potential of slightly undermining Congress's goal of universal subsidies. Indeed, the Government's arguments in this regard exemplify why the Supreme Court forbids courts to analyze what Congress "wanted" in the abstract and instead requires them to exclusively focus on what Congress *did* in the statute.[10]

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[9] The sources that *amici* contend show "widespread awareness" that states would refuse to establish Exchanges actually show only that there was opposition to the Act *generally*. Amici Br. of Members of Cong. *et al.* 10-11. That is exactly why Congress knew it needed to provide robust incentives for state participation.

[10] The Government also cites the unsuccessful private *NFIB* plaintiffs' brief on severability for the proposition that Congress did not intend Exchanges to exist without subsidies. (Govt.Br.39.) Again, as explained above, Appellants agree that Congress intended subsidies to be available nationwide—because it intended all states to establish their own Exchanges. Incidentally, the Government took the *opposite* position in *NFIB*, telling the Court that subsidies and Exchanges were "stand-alone provision[s] that independently advanc[e] in distinct ways Congress's core goal of expanded affordable coverage." Br. for Resps. on Severability, *NFIB v. Sebelius*, Nos. 11-393 & 11-400, 2012 WL 273133 at *33 (S. Ct.).

II. THE IRS RULE IS NOT ENTITLED TO *CHEVRON* DEFERENCE.

As this Court recently reiterated in vacating another IRS regulation as *ultra vires*, "courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies." *Loving v. IRS*, No. 13-5061, 2014 WL 519224, at *8 (D.C. Cir. Feb. 11, 2014). Few decisions will have more "major economic or political significance" than one triggering $150 billion *per year* in spending (Govt.Br.5) and depriving states of the ability to shield their residents from federal regulation. *See* Amicus Br. of Galen Inst. It is clear that the IRS was not empowered to make such important fiscal policy decisions. Rather, Congress "has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

Further confirming that Congress did not want the IRS to make this call, the Internal Revenue Code contains no ambiguity. Even the Government argues only that provisions in *Title 42* implicitly equate HHS and state Exchanges, a supposed equivalence that should carry through the Act. (Govt.Br.20-23.) But the IRS has no authority to construe Title 42, just as HHS has no authority to construe the Tax Code. This parallels a recent case, in which the VA sought to construe "collective bargaining," a term appearing in a law it administered but as a cross-reference to another law that it did *not* administer; this Court accorded no deference. *See Am. Fed'n of Gov't Employees v. Shinseki*, 709 F.3d 29, 30-31, 33 (D.C. Cir. 2013).

The Government insists that deference is nonetheless proper because the IRS and HHS engaged in "coordinated" regulation. (Govt.Br.46-47.) But coordination does not help matters when one agency (the IRS) has no authority to construe the allegedly ambiguous statutory language and the other agency (HHS) has no power to construe tax laws. Moreover, this Court has "repeatedly pointed to … agencies' joint administrative authority … to justify *refusing* deference." *DeNaples v. Office of Comptroller of Currency*, 706 F.3d 481, 488 (D.C. Cir. 2013) (emphasis added). None of the Supreme Court cases that the Government cites for the contrary proposition actually addresses this issue, and all predate *DeNaples*.

Accordingly, even if there were any ambiguity here, it would not fall to the IRS to address it. Such ambiguity would be resolved, rather, by application of the venerable clear-statement rule for tax benefits; the major economic decision to dole out billions of dollars in tax credits must be *unambiguous*, to protect Congress's Spending and Taxing Powers. (App.Br.49-52.) The Government objects that "the Supreme Court has never suggested that this principle displaces *Chevron* deference." (Govt.Br.47.) But the Court *has* held that an agency may act only if ambiguity remains after "employing traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, and that "no ambiguity" exists if a canon requires ambiguity to be construed in one direction, *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001). Just like canons concerning (for example) retroactivity, extraterritoriality,

constitutional avoidance, and Indian law (App.Br. 50-51), the tax-credit canon does exactly that—and the Government provides no basis to distinguish it.[11]

III. THE GOVERNMENT'S HALF-HEARTED JURISDICTIONAL ARGUMENTS ARE MERITLESS.

The Government renews jurisdictional arguments that even the district court soundly rejected, but they are facially meritless. Klemencic plainly has standing to challenge the IRS Rule, because it indisputably requires him to pay money for a product he does not want or else incur a penalty. Nor is there any genuine doubt that the APA allows him to challenge unlawful final agency action. The employer plaintiffs are thus irrelevant—but they, too, are properly before this Court.

A. It Is Undisputed That the IRS Rule Imposes Economic Injury on Klemencic, Plainly Conferring Standing.

The Government does not dispute that, because of the subsidy to which the IRS Rule entitles him, Klemencic is subject to the individual mandate penalty and so must either "purchase subsidized health insurance" that he does not want or else "pay some higher amount per year as a Section 5000A tax penalty." (A335.) The Rule thus "imposes a financial cost" on Klemencic, a quintessential injury-in-fact.

[11] In *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011), the Government construed the tax exemption narrowly, so *Chevron* and the tax-credit canon reinforced one another. That case is thus inapposite. And the Government's competing canon, that tax laws must be construed as uniform nationwide, recognizes that "express language" may provide otherwise. *Burnet v. Harmel*, 287 U.S. 103, 110 (1932). Section 36B could hardly be more "express" in limiting subsidies to Exchanges "established by the State."

The Government nonetheless objects to Klemencic's standing, apparently on the basis that, in *NFIB*, he alleged that he would be subject to the mandate penalty, where here he alleges that (absent a subsidy) he would be exempt. (Govt.Br.49-50.) That is absurd. Standing turns on the facts *in this case*—and those *undisputed* facts show that the IRS Rule disqualifies Klemencic from an otherwise-applicable exemption from the individual mandate penalty, causing him economic injury. Anyway, the reason Klemencic did not allege in *NFIB* that he was exempt from that penalty is that his declaration there was executed in *October 2010* (A33), when he did not know (i) how much his premiums would cost in 2014, or (ii) that West Virginia would opt against establishing its own Exchange, a decision that did not come until February *2013* (A113). So Klemencic had no reason to believe, in October 2010, that he ought to be eligible for an exemption in 2014. Now, of course, he does—and the Government does not dispute that dispositive point.

Even more bizarrely, the Government suggests that Klemencic's economic injury of paying out-of-pocket for health coverage or else incurring a penalty does not create standing, purportedly because Klemencic would object on "ideological" grounds even if the subsidy (counterfactually) would cover *all* of his premiums. (Govt.Br.50.) But it is undisputed that Klemencic would have to pay out-of-pocket to comply with the mandate; the subsidy would *not* cover his premiums in full. (A335; A60-61.) As the district court explained, the IRS Rule "imposes a financial

cost on Klemencic" and causes him "economic injury." (A335.) And a plaintiff suffering economic injury does not somehow forfeit his standing simply because he is also ideologically opposed to the Rule he is challenging. One injury suffices for standing, and libertarians have the same Article III rights as statists.

B. Klemencic Is Not Required To Violate the Individual Mandate and Incur Penalties Before He May Challenge the IRS Rule.

Next, the Government briefly contends that even if Klemencic has standing, the only way in which he may challenge the IRS Rule is to violate the individual mandate, incur a tax penalty, sue for a *refund*, and raise his challenge as a basis for recovering the tax penalty. (Govt.Br.50-51.) In other words, the issue that this Court greatly expedited review to resolve must await, at best, a tax-refund action in the Court of Federal Claims sometime in late 2015. The Government's desire for delay is unsurprising, but its argument has zero legal support.

First, if the Government were correct, the Supreme Court could not have reached the constitutionality of the individual mandate in *NFIB*, but instead would have told the plaintiffs there to violate that mandate, incur a penalty, and raise the constitutional issue in a refund suit. Of course, it did not—because it held that the individual mandate penalty does *not* fall within the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a), which requires certain challenges to proceed by way of tax-refund suit. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2584 (2012). Since the AIA did not bar the suit, it could proceed in pre-enforcement posture. On the Government's

contrary view, the AIA is a superfluous nullity, because general equitable principles supposedly preclude Klemencic's suit even though the AIA concededly *permits* it. Moreover, since the AIA does not apply here, the AIA cases cited by the Government—*Bob Jones University v. Simon*, 416 U.S. 725 (1974), and *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (en banc)—are wholly inapposite.

Second, the premise of the Government's argument is that a tax-refund suit would be an "adequate" remedy for plaintiffs like Klemencic. But that misses the fundamental point that requiring Klemencic to incur penalties and only *then* obtain judicial review forces him to bear the risk of suffering those penalties if his legal challenge is rejected. Pre-enforcement review under the APA is meant precisely to spare parties such Hobson's choices. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967) (allowing pre-enforcement review where party subject to regulation faced "dilemma" of complying or risking penalties); *Ciba-Geigy Corp. v. U.S. EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986) (review where party must choose "between disadvantageous compliance or risking imposition of serious penalties"). An *ex post* remedy is thus plainly not "adequate" for purposes of the APA. *See Bowen v. Massachusetts*, 487 U.S. 879, 904-05 (1988) (rejecting "unprecedented" argument that damages action was "adequate substitute for prospective relief"); *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (unanimously finding alternative remedy inadequate where party would be forced to accrue "potential liability" prior to

obtaining judicial review). Or, as this Court recently recognized, an after-the-fact, case-by-case tax refund remedy cannot substitute for an "APA action" seeking broad "prospective relief" like vacatur of a final rule. *Cohen*, 650 F.3d at 731-33.

C. The Employer Plaintiffs May Also Pursue This Challenge.

Although it does not matter given Klemencic's clear standing, the employer plaintiffs are properly before this Court as well.

1. The Government objects that the employers lack standing because, even if they win this suit, their employees would somehow still be able to claim tax credits and thereby subject the employers to assessable payments. (Govt.Br.53-54.) That is bizarre. If this Court holds that the Act limits subsidies to state Exchanges and vacates the IRS Rule, employees in states like Texas will obviously *not* be able to claim subsidies. It does not matter that this "is not a class action" (Govt.Br.54); APA plaintiffs "obtain 'programmatic' relief that affects the rights of parties not before the court." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting), which spoke for all Justices on this).

Even if the employees could obtain a *conflicting* judgment that the ACA *mandates* subsidies on HHS Exchanges, that speculation clearly does not render the employers' injury non-redressable. Courts routinely disagree; that hardly means that none has jurisdiction. Moreover, redressability asks only whether a

favorable ruling would "likely" redress the injury. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Even if employees would be likely to sue for subsidies (Govt.Br.54), vacatur of the IRS Rule would all but destroy their likelihood of *success*.

2. As to the AIA, the Government adds little to the district court's faulty analysis, failing to explain why Congress would have repeatedly used the distinct term "assessable payment" to refer to the employer mandate penalty if it was just a typical tax; failing to explain why Congress would have wanted to allow pre-enforcement challenges to the individual, but not employer, mandate; and failing to show error in *Liberty University, Inc. v. Lew*, 733 F.3d 74 (4th Cir. 2013).

Moreover, the Government's only argument for why the employers' suit is for the "purpose" of restraining the employer mandate penalty is that their Article III injury derives from the threat of that penalty. (Govt.Br.59.) That is like saying that the "purpose" of the suit in *Clinton v. New York* was to facilitate the private plaintiff's desired purchase of certain potato processing facilities. 524 U.S. 417, 426, 432 (1998). Of course, the suit's *objective purpose* was actually to invalidate the Line Item Veto Act; the processing-facility purchase was just the *subjective reason* that the private plaintiff cared. Likewise here, the "purpose" of this suit is to invalidate the IRS Rule; the employer mandate penalty is just the reason why the employers (as opposed to, *e.g.*, the individuals) are interested in securing that result. Not a single case has barred a suit on AIA grounds on such facts.

CONCLUSION

For these reasons, Appellants respectfully seek reversal of the judgment below and vacatur of the IRS Rule.

February 19, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,975 words, excluding the parts of the brief exempted by that Rule and D.C. Cir. R. 32(a)(1), as counted using the word-count function on Microsoft Word 2007 software.

February 19, 2014

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CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of February 2014, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Pursuant to this Court's order, I will also file, within one business day, eight copies of the foregoing document, by hand delivery, with the clerk of this Court.

February 19, 2014

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