[ORAL ARGUMENT SCHEDULED FOR DECEMBER 17, 2014]

No. 14-5018

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

JACQUELINE HALBIG, et al.,

Plaintiffs-Appellants,

v.

SYLVIA MATHEWS BURWELL, in her official capacity as U.S. Secretary of Health and Human Services, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia (No. 1:13-cv-00623)

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

Bradley Benbrook
brad@benbrooklawgroup.com
Benbrook Law Group, PC
400 Capitol Mall, Suite 1610
Sacramento, California 95814
Telephone: (916) 447-4900
Facsimile: (916) 447-4904

Eric Grant
grant@hicks-thomas.com
Hicks Thomas LLP
8801 Folsom Boulevard, Suite 172
Sacramento, California 95826
Telephone: (916) 388-0833
Facsimile: (916) 691-3261

Counsel for *Amici Curiae* Jonathan H. Adler and Michael F. Cannon

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), I hereby certify as follows:

(A) Parties and Amici. All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellants.

(B) Rulings Under Review. References to the rulings at issue appear in the Brief for Appellants.

(C) Related Cases. *Amici curiae* are not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

Dated: October 3, 2014.

s/ Eric Grant
Eric Grant

Counsel for *Amici Curiae*
Jonathan H. Adler and
Michael F. Cannon

CERTIFICATE REGARDING SEPARATE *AMICUS* BRIEF

Pursuant to Circuit Rule 29(d), I hereby certify that a separate brief for *Amici Curiae* Jonathan H. Adler and Michael F. Cannon is necessary. As elaborated in the Interest of *Amici Curiae* section below (pp. 1–2), *Amici* are authors of the leading scholarly treatment of the issue presented in this appeal. *Amici*'s interest is therefore distinct and narrower from the interests of other persons filing *amicus* briefs in support of Appellants. Moreover, this separate brief is necessary to address the complex legislative history of the Patient Protection and Affordable Care Act of 2010, which neither Appellants nor any other *amici* have addressed in detail. Finally, *Amici* filed a separate brief when this appeal was before the three-judge panel.

Dated: October 3, 2014.

s/ Eric Grant
Eric Grant

Counsel for *Amici Curiae*
Jonathan H. Adler and
Michael F. Cannon

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INTEREST OF *AMICI CURIAE*[1]

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

Jonathan H. Adler is the Johan Verheij Memorial Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law in Cleveland, Ohio. Professor Adler teaches courses in constitutional and administrative law, among other subjects, and is the author of numerous articles on federal regulatory policy and legal issues relating to health care reform, including *Cooperation, Commandeering or Crowding Out? Federal Intervention and State Choices in Health Care Policy*, 20 Kan. J. L. & Pub. Pol'y 199 (2011).

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[1] Counsel for *Amici Curiae* certify that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *Amici Curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

Michael F. Cannon is the Director of Health Policy Studies at the Cato Institute, a non-partisan, non-profit educational foundation organized under section 501(c)(3) of the Internal Revenue Code, located in Washington, D.C., and dedicated to the principles of individual liberty, limited government, free markets, and peace. Cannon is a nationally recognized expert on health care reform. He holds masters degrees in economics (M.A.) and in law and economics (J.M.).

SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act of 2010 ("PPACA"), Pub. L. No. 111-148, 124 Stat. 119, declares in Section 1311 (42 U.S.C. § 18031) that "Each State shall . . . establish" an "Exchange" to regulate health insurance within each state; directs the federal government in Section 1321 (42 U.S.C. § 18041) to "establish" Exchanges "within" states that "[f]ail[] to establish [an] Exchange" or do other tasks; and in Section 1401 (26 U.S.C. § 36B) offers health insurance tax credits to certain taxpayers who enroll in a qualified health plan "through an Exchange established by the State." The statute limits tax credits to state-established Exchanges in a manner that is plain and unambiguous. The remainder of the statute and the PPACA's legislative history are fully consistent with those provisions.

Such conditions are not anomalous. To induce state cooperation, Congress routinely conditions federal benefits to individuals — both via direct spending and the tax code — on their state carrying out congressional priorities. It did that here.

Remarkably little legislative history speaks directly to this provision, yet what history does so supports the plain meaning of the text. The Act's history of enactment lends further support. Political necessity required the Act's authors to give states a leading role in operating health-insurance Exchanges. Thus, the authors expressly conditioned premium-assistance tax credits on states establishing Exchanges and performing other tasks as one among a number of financial inducements to states to implement the law.

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

The IRS rule is contrary to the plain language of the PPACA. The statutory text speaks directly to the question at issue, and thus the IRS has no authority to provide tax credits in federal exchanges. Nor is the IRS due deference in its interpretation of the Act. Contrary to the Government's argument that the rule supports one of the Act's general goals, the rule actually *subverts* congressional intent by altering the very mechanism Congress chose to use in striking a balance between the Act's competing goals.

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

ARGUMENT

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

The Patient Protection and Affordable Care Act offers premium-assistance tax credits only in states that establish and operate health-insurance Exchanges and perform other tasks that Congress cannot command states to perform. Section 1401's tightly worded tax-credit eligibility rules (26 U.S.C. § 36B) explicitly and carefully limit eligibility to those who enroll in a qualified health plan "through an Exchange established by the State." These provisions condition the availability of tax credits on states establishing Exchanges, and prevent the issuance of tax credits in federal Exchanges. Section 1321 reinforces and works in conjunction with Section 1401 to condition tax credits both on states establishing Exchanges and implementing other features of the law.

The meaning of "established by the State" is plain. Congress defined "State" to mean "each of the 50 States and the District of Columbia." 42 U.S.C. § 18024(d). When Congress sought to expand the meaning of "State" beyond its common

usage, it did so explicitly. In addition to defining the District of Columbia as a "State," it deemed U.S. territories that "establish[] such an Exchange . . . shall be treated as a State." PPACA § 1323(a)(1), 42 U.S.C. 18043(a)(1)). The government has identified nothing in the statute or legislative history suggesting that Congress understood "established by the State" to have any other meaning.

Section 1401 reinforces this requirement at every turn. When it describes the *taxpayers* who are eligible for premium-assistance tax credits, describes the *type of health plan* to which a premium-assistance tax credit may be applied, describes the *premiums* to be used in calculating the credit amount, requires taxpayers *to pay a premium* to be eligible for the credit, and describes the *rating areas* in which to find those plans and premiums, these articles are always "enrolled . . . through" or "enrolled in" or "offered through" or found in "an Exchange established by the State." *See* 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i) (direct language); 26 U.S.C. § 36B(b)(3)(B), (b)(3)(B)(i), (b)(3)(C), (b)(3)(D), (b)(3)(E), (c)(2)(A)(ii), (e)(A) (cross-references).

Nowhere in the rules defining eligibility for tax credits does Congress refer to federal Exchanges, or use language (e.g., "an Exchange") encompassing both state-established Exchanges and federal Exchanges. *See, e.g.*, PPACA § 1421(b)(1), 26 U.S.C. § 45R(a)(1) (offering tax credits to small businesses that offer health plans to their employees through "an Exchange").

Section 1321 reinforces this requirement and imposes other conditions on premium-assistance tax credits. Indeed, Subsection 1321(c) is the linchpin of a carefully worded statutory scheme that offers tax credits only in states that take steps Congress cannot constitutionally compel them to take.

Subsection 1321(c) details five tasks that each state must perform. States must (1) elect to establish both an American Health Benefits Exchange and a "SHOP" Exchange, § 18041(c)(1)(A); (2) have an American Health Benefits Exchange operational by 2014, § 18041(c)(1)(B)(i); (3) have a SHOP Exchange operational by 2014, § 18041(c)(1)(B)(i); (4) adopt and implement the Secretary's rules governing Exchanges, § 18041(c)(1)(B)(ii)(I); and (5) adopt and implement guaranteed-issue, community rating, and other "requirements set forth in subtitles A and C," § 18041(c)(1)(B)(ii)(II).

The purpose of Section 1321(c), as given in its heading, is to detail the *consequences* of "Failure to establish [an] Exchange or implement requirements." 42 U.S.C. 18041(c). *If* the Secretary determines a state has failed to perform any of those tasks, *then* "the Secretary *shall* . . . *establish* and operate such Exchange within the State and the Secretary shall take such actions as are necessary to implement such other requirements." § 18041(c) (emphasis added). When subsection 1321(c) directs *the Secretary* to "establish" the Exchange "required" by Section 1311, it prevents taxpayers in that State from receiving tax credits because it

precludes *the state* from establishing "an Exchange . . . under section 1311" as required under Section 1401. 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(I). Any non-compliance with the requirements detailed in Section 1321(c) *automatically* triggers the federal government's obligation to establish an Exchange, rendering state residents ineligible for tax credits. Section 1321 thus conditions tax credits on states implementing *several* provisions of the Act that Congress cannot constitutionally compel states to implement. *See infra* Part IV (pp. 16–22).

Section 1321(c) does not deem federal Exchanges to be "established by the State" when it directs the Secretary to "establish" the Exchange "required" by § 1311. Federal Exchanges are established by "the *Secretary*," not the State. The Secretary establishes them "*within* the State" — not "on behalf of" the State, an interpretation without any statutory basis. Section 1321(c) further specifies that the Secretary "shall . . . operate" the Exchange, and "shall . . . implement" "the requirements under this title . . . with respect to the . . . operation of Exchanges," 42 U.S.C. § 18041(a)(1), (c), including the requirement that tax-credit recipients obtain coverage through "an Exchange established by the State." Federal Exchanges share the same *intrinsic* characteristics as state-established Exchanges, but tax-credit eligibility hinges on the *extrinsic* characteristic of *who establishes* the Exchange.

The plain-meaning interpretation of Sections 1311, 1321, and 1401 reveals an integrated scheme authorizing tax credits only on state-established Exchanges. This is the only interpretation offered that respects the text of the statute and creates no surplusage.

II. The Evolution of the Statutory Text

The express authorization of tax credits only in Exchanges "established by the State" was no accident. This express language was added to Section 1401 in multiple places at multiple times in the drafting process.

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

By the time the PPACA passed the Senate, the bill's authors had tightened that language in three places. They added language to paragraph (b)(3)(C) to require the Secretary to calculate "adjusted monthly premiums" using premiums from the rating area of "an Exchange established by the State" (cross-reference).

They added language to paragraph (b)(3)(D) to require the Secretary to exclude certain benefits when calculating the "premium assistance amount" for plans purchased "through an Exchange established by the State" (cross-reference).

Most important, S. 1796 as reported already defined "coverage months" as occurring only when a taxpayer was enrolled "through an Exchange established by the State." S. 1796, 111th Cong. (2009), § 1205, *proposing* § 36B(c)(2)(A)(i) (cross-reference). By the time the PPACA passed the Senate, however, its authors inserted a clause *explicitly* defining "coverage months" as occurring only when the taxpayer is enrolled "through an Exchange established by the State." PPACA § 1401, 26 U.S.C. § 36B(c)(2)(A)(i). The more explicit clause was added at a later stage of the legislative process, under the supervision of Senate leaders and White House officials, in the days before the PPACA went to the Senate floor.[2] If there were no difference between an Exchange "established under Section 1311" and an

[2] *Compare* America's Healthy Future Act of 2009, S. 1796, 111th Cong. (2009), § 1205, *proposing* 26 U.S.C. § 36B(c)(2)(A)(i) (limiting credits to those "covered by a qualified health benefits plan described in subsection (b)(2)(A)(i)," a cross-reference to plans "enrolled in through an exchange established by the State"), *with* PPACA § 1401, 26 U.S.C. § 36B(c)(2)(A)(i) ("covered by a qualified health plan described in subsection (b)(2)(A) *that was enrolled in through an Exchange established by the State under section 1311*" (emphasis added). *See also* David M. Herszenhorn & Robert Pear, *White House Team Joins Talks on Health Care Bill*, N.Y. Times, Oct. 15, 2009, at A24; *and* Perry Bacon Jr., *Small Group Now Leads Closed Negotiations on Health-Care Bill*, Wash. Post, Oct. 18, 2009, at http://www.washingtonpost.com/wp-dyn/content/article/2009/10/17/AR2009101701810.html (merger of Finance, HELP Committee bills performed by Senate leaders, committee chairman, their staffs, and White House officials).

Exchange "established *by the State* under Section 1311," there would have been no reason to make these changes.

This eligibility requirement survived multiple rounds of revisions throughout the drafting process, including revisions to the cross-references attached to that language. *Compare, e.g.*, S. 1796, 111th Cong. (2009), § 1205, *proposing* 26 U.S.C. § 36B(b)(2)(A)(i) ("and which were enrolled in through an exchange established by the State *under subpart B of title XXII of the Social Security Act*" (emphasis added)), *with* PPACA § 1401, *creating* 26 U.S.C. § 36B(b)(2)(A) ("and which were enrolled in through an Exchange established by the State *under* [*section*] *1311 of the Patient Protection and Affordable Care Act*" (emphasis added)).

S. 1796 also conditioned new small-business tax credits on states regulating health-insurance premiums. S. 1796, 111th Cong. (2009), § 1221(a), *proposing* 26 U.S.C. § 45R(c)(2) ("STATE FAILURE TO ADOPT INSURANCE RATING REFORMS. — No credit shall be determined under this section . . . for any month of coverage before the first month the State establishing the exchange has in effect the insurance rating reforms . . . ."); S. Rep. No. 111-89, at 48 (2009), http://www.gpo.gov/fdsys/pkg/CRPT-111srpt89/pdf/CRPT-111srpt89.pdf ("If a State has not yet adopted the reformed rating rules, qualifying small business employers in the State are not eligible to receive the credit"). The PPACA's authors dropped this condition at the same time they strengthened the language conditioning tax credits

for individuals on states establishing Exchanges and implementing other features of the Act.

When, after the PPACA became law on March 23, 2010, Congress made several amendments to Section 36B through the "budget reconciliation" process, it left this requirement undisturbed. *See* Health Care and Education Reconciliation Act of 2010 (HCERA), Pub. L. No. 111-152, 124 Stat. 1029 (2010); House Office of the Legislative Counsel, *PPACA & HCERA; Public Laws 111-148 & 111-152: Consolidated Print* 105-13 (2010), http://www.ncsl.org/documents/health/ppaca-consolidated.pdf.

Prior to amendment by the HCERA, Section 36B bore no mention at all of federally established Exchanges. *See* PPACA § 1401 (enrolled bill), https://beta.congress.gov/111/bills/hr3590/BILLS-111hr3590enr.pdf. The HCERA introduced the first and only such mention when it imposed identical reporting requirements on both state-established and federal Exchanges. 26 U.S.C. § 36B(f)(3). Congress clearly meant this requirement to apply to both types of Exchange, and so it referred to each explicitly. This requirement does not alter the meaning of "established by the State." It demonstrates that Congress saw federal and state-established Exchanges, created under Sections 1311 and 1321 respectively, as distinct.

The HCERA also shows how Congress expanded the reach of "established by the State" when that was its aim. It was through the HCERA that Congress

amended the PPACA to provide that "[a] territory that elects . . . to establish an Exchange . . . and establishes such an Exchange . . . shall be treated as a State." HCERA § 1204(a), 42 U.S.C. § 18043. The HCERA contained no provision bringing the federal government within the definition of "State."

It strains credulity to argue that a Congress that intended the PPACA to authorize tax credits in federal Exchanges would notice and remedy the bill's failure to authorize them in territorial Exchanges, but would not notice its failure to authorize them in federal Exchanges.

III. The Text Is Unambiguous.

Efforts to find ambiguity in the phrase "established by the State" have stretched the statutory text beyond recognition.

The panel dissent contends that § 1312's requirement that "qualified individuals" must "reside[] in the State that established the Exchange," 42 U.S.C. § 18032(f)(1)(A)(ii), demonstrates Congress did not understand "established by the State" to mean what it says: "If an HHS-created Exchange does not count as established by the State it is in, there would be no individuals 'qualified' to purchase coverage in the 34 states with HHS-created Exchanges. This would make little sense." Panel Opinion 23 (Edwards, J., dissenting). When read in context, however, this provision makes perfect sense.

Congress defined "qualified individuals" in Section 1312 in terms of "the State that established the Exchange" because in Sections 1311, 1312, and 1313, Congress is speaking *to the states* and *presuming* they would follow Section 1311's directive to establish Exchanges. 42 U.S.C. §§ 18031, 18032, 18033. The requirement that "qualified individuals . . . reside[] in the State *that established the Exchange*" disappears when Congress drops that presumption in the very next section — Section 1321 — which explains what happens when a state "[f]ail[s] to establish [an] Exchange." 42 U.S.C. §18041(c). *See supra* Part I (pp. 6–7). Section 1321 then directs the Secretary to implement "such" a requirement in federal Exchanges — i.e., that "qualified individuals" must reside in the state "within" which "the Secretary . . . establish[es]" the Exchange. 42 U.S.C. § 18041(c). Unlike alternative interpretations, this plain-meaning interpretation creates no surplusage or anomalies, considers both text and context, and is consistent with the structure of the relevant sections.

The government claims a plain-meaning interpretation of "established by the State" creates disharmony in the statute because the PPACA also requires states to maintain their Medicaid programs' eligibility standards until the federal government determines "an Exchange established by the State under [Section 1311] is fully operational," 42 U.S.C. § 1396a(gg)(1), and a plain-meaning interpretation would mean this "obligation that extends forever in States that opt to have HHS

establish Exchanges on their behalf." Petition for Rehearing En Banc 11 (filed Aug. 1, 2014).

It is not disharmony but consistency if the plain meaning of "established by the State" serves the same purpose here — to induce state action — that the Supreme Court found in the PPACA's other Medicaid provisions. *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) (*NFIB*). Moreover, the government's reading — that an Exchange "established by the State" could be an Exchange established by the federal government — creates a more disharmonious result by making a state's ability to modify its Medicaid eligibility rules conditional on federal action.

The Fourth Circuit deferred to the IRS because it found the statute ambiguous, a finding that hangs entirely on the court's conclusion that one may reasonably interpret Section 1311(d)(1) as defining federal Exchanges as "established by a State." *See King v. Burwell*, 759 F.3d 358, 367–72 (4th Cir. 2014). Section 1311(d), titled "REQUIREMENTS," provides: "(1) IN GENERAL. — An Exchange shall be a governmental agency or nonprofit entity that is established by a State." 42 U.S.C. § 18031(d)(1). "*Given that Congress defined 'Exchange' as an Exchange established by the state,'* " the court reasoned, "it makes sense to read § 1321(c)'s directive that HHS establish 'such Exchange' to mean that the federal government acts *on behalf of* the state when it establishes its own Exchange." *King*, 759 F.3d at

369 (emphases added). This interpretation is directly contradicted by the plain text of Section 1311(d)(1).

As Congress explained in both Section 1311(b)(1)(C) and the heading of Section 1311(d), Section 1311(d)(1) is a "requirement," not a definition. 42 U.S.C. § 1311(b)(1)(C). Combining the relevant language of Section 1311(b) and (d)(1) yields: "Each State shall . . . establish an American Health Benefit Exchange . . . that . . . meets the requirement[] [that] [a]n Exchange shall be a governmental agency or nonprofit entity that is established by a State." 42 U.S.C. § 1311(b)(1), (b)(1)(C), (d)(1). Reading this "requirement" as a definition makes a mess of the relevant text. *Accord* Panel Opinion 18 ("The premise that (d)(1) is definitional, however, does not survive examination of (d)(1)'s context and the [PP]ACA's structure.").

The Fourth Circuit's interpretation turns Section 1311(d)(1) on its head by *allowing* private, for-profit entities to operate Exchanges — exactly what this provision was designed to *prevent*. If Section 1304(d)(1)'s "shall be" *defines* a federal Exchange as having been "established by the State," then it defines any such Exchange to be "a governmental agency or nonprofit entity" as well. If the federal government or West Virginia were to contract with Amazon.com to operate that state's Exchange, then under the Fourth Circuit's interpretation Section 1304(d)(1) would *define* Amazon.com to be a government agency or non-profit that was estab-

lished by the state of West Virginia. That interpretation does not "make sense"; neither does the Fourth Circuit's finding of ambiguity.

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

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

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

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

In 2002, Congress made "health coverage tax credits" (HCTCs) available to certain taxpayers. 26 U.S.C. § 35. As with the PPACA's tax credits, HCTCs were allowed only during "coverage months," which occurred only when a taxpayer enrolled in "qualified health insurance." 26 U.S.C. § 35(b), (e). As with the PPACA, the rules defining these terms constituted the HCTC's eligibility rules. Those rules required states to enact specified laws before certain of their residents could claim the HCTC.[3]

The PPACA's primary author was Senate Finance Committee Chairman Max Baucus (D-MT). Sen. Baucus not only sponsored the HCTC, but sponsored a version that would have conditioned the credits on even *more* state actions than the

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[3] 26 U.S.C. § 35(e)(2); *see also* Cong. Res. Serv., *Health Coverage Tax Credit Offered by the Trade Act of 2002*, at ii (Jan. 31, 2008) ("The HCTC can be claimed for only 10 types of qualified health insurance specified in the statute, *7 of which require state action to become effective*." (emphasis added)).

final version. *Compare* 26 U.S.C. § 35, *with* Trade Adjustment Assistance Improvement Act of 2002, S. 2737, 107th Cong. (2002) (additionally requiring states to impose minimum-loss ratios and other regulations). The Finance Committee report on Baucus' S. 1796 cited § 35's HCTC as an antecedent to § 36B's tax credit. *See* S. Rep. No. 111-89, at 35-36.

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

In short, Congress was using a common legislative tool when it chose to condition premium-assistance tax credits on States doing what Congress wanted — establishing an Exchange. Indeed, members of both parties introduced similar measures throughout the debate that produced the PPACA.

The PPACA's other major health-insurance entitlement also conditioned its benefits on state cooperation. As enacted, the Act conditioned all existing and new federal Medicaid grants on the state implementing the law's Medicaid expansion. 42 U.S.C. § 1396a(a)(10)(A)(i)(VII) (as amended by PPACA § 2001(a)(1)(C)). *See*

also America's Healthy Future Act of 2009, *supra*, at § 1601. It is scarcely strange to find Congress conditioning benefits to individuals on state cooperation in a statute that pushed this practice "pas[t] the point at which 'pressure turns into compulsion.'" *NFIB*, 132 S. Ct. at 2604 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). Indeed, the amount of money Congress conditioned on states establishing Exchanges is relatively small. It is less than a fifth of the amount Congress had sought to condition on states implementing the Medicaid expansion.[4] It is still less than the amount of "new" Medicaid subsidies the Supreme Court permitted Congress to condition on states implementing the law's Medicaid expansion in *NFIB*.[5]

One of the PPACA's two antecedent bills — the Affordable Health Choices Act, reported by the Senate Health, Education, Labor & Pensions ("HELP") Committee — contained an almost identical provision. S. 1679 withheld Exchange

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

[5] *See* Cong. Budget Office, *Updated Estimates*, *supra* note 4, at 11 ("Medicaid and CHIP Outlays" for 2014–2022: $931 billion).

subsidies if states failed to establish Exchanges or implement other provisions of that bill. Affordable Health Choices Act, S. 1679, 111th Cong. (2009). The HELP bill asked each state to adopt certain health insurance regulations, and either establish an Exchange itself or ask the federal government to establish one "in" the state. *Id.*, § 142(b), *proposing* section 3104(d)(1)(A) of the Public Health Service Act. The bill withheld Exchange subsidies, as well as many of its insurance regulations, for up to four years until the state complied. After four years, the federal government would establish an Exchange "in" the state and implement stricter guaranteed-issue and community-rating rules than found in the PPACA.[6] Even then, the bill withheld subsidies *permanently* — even in a *federal* Exchange — if the state failed to implement the bill's employer mandate. *Id.*, *proposing* section 3104(d)(2).[7]

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

[7] *See also* Adler & Cannon, *supra*, at 154–55; Timothy Jost, *Health Insurance Exchanges in Health Care Reform Legal and Policy Issues*, Washington and Lee Public Legal Studies Research Paper Series 7 (Oct. 23, 2009) ("A state's residents will only become eligible for federal premium subsidies . . . if the state provides health insurance for its state and local government employees."). *Amici* for the government have conceded the point. Brief *Amici Curiae* of Members of Congress and State Legislatures 17 (filed Feb. 15, 2014) ("if a state chose not to adopt specified insurance reform provisions and make state and local government employers subject to specified provisions of the statute, 'the residents of such State shall not be eligible for credits' " (quoting S. 1679, § 142(b), *proposing* section 3104(d)(2))).

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

As noted above, the PPACA's other antecedent bill — the America's Healthy Future Act of 2009, reported by the Senate Finance Committee — conditioned health-insurance tax credits for small businesses on states enacting specified health insurance regulations. *See supra* pp. 8–10. This proposal demonstrates that the idea of conditioning tax credits on state cooperation was part of the legislative debate from the beginning, in 2008.[8]

The PPACA and its antecedents offered states unlimited Exchange start-up funds as an incentive to establish Exchanges. *See* America's Healthy Future Act of 2009, S. 1796, 111th Cong., § 2237(c) (2009); Affordable Health Choices Act, S. 1679, 111th Cong., § 142(b) (2009), *proposing* section 3101(a) of the Public Health Service Act; PPACA, § 1311, 42 U.S.C. § 18031(a)(2). In contrast, the PPACA authorizes no money for the creation of federal Exchanges.

The PPACA creates new federal grants for states that adopt medical malpractice liability reforms. 42 U.S.C. § 280g-15. The language originated in the Finance

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[8] *See* Sen. Max Baucus, *Call to Action: Health Reform 2009*, at 20, Senate Finance Committee White Paper (Nov. 12, 2008) ("Initially, the credit would be available to qualifying small businesses that operate in states with patient-friendly insurance rating rules.").

Committee bill. *See* S. Rep. No. 111-89, at 285–86. The House-passed Affordable Health Choices for America Act created a similar program. *See* H.R. 3962, 111th Cong., § 2531 (2009). During the Finance Committee's mark-up, Republican senators offered amendments that likewise would have conditioned new Medicaid grants on states enacting medical malpractice reforms. *See* S. Rep. No. 111-89, at 449.

In sum, there were simply too many similar proposals offered by PPACA supporters and opponents alike to claim Section 36B is absurd or an aberration.

V. PPACA Supporters Likened Its Exchange Provisions to a Conditional Grant Program.

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

In early 2010, all 11 Texas Democrats in the House of Representatives warned the President and House leadership about the PPACA's Exchange provisions. The representatives acknowledged: "If the state does not set up the exchange, then the Secretary of Health and Human Services is required to set up an exchange for the state." Yet they warned that uncooperative states would nonetheless prevent residents from receiving "any benefit" from the Exchanges, which they likened to another conditional-grant program (SCHIP):

> [The Senate] approach . . . relies on states with indifferent state leadership that are unwilling or unable to administer and properly regulate a health insurance marketplace . . . . Not one Texas child has yet received any benefit from the Children's Health Insurance Program Reauthorization Act . . . since Texas declined to expand eligibility or

> adopt best practices for enrollment . . . . *The Senate approach would produce the same result — millions of people will be left no better off than before Congress acted.*

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

The letter's authors nevertheless voted for the PPACA without any changes to the language offering tax credits only through state-established Exchanges. *See* U.S. House of Representatives, Final Vote Results for Roll Call 165 (Mar. 21, 2010), http://clerk.house.gov/evs/2010/roll165.xml.

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

Political necessity required the authors of the PPACA to rely on states to operate the law's health-insurance Exchanges. The statutory language restricting "premium assistance tax credits" to states that implemented an Exchange and other elements of the Act is, like its conditional Medicaid grants, a routine way for Congress to induce states to perform tasks it cannot command states to perform. The ubiquity of such proposals, combined with the widespread belief that all states

would establish Exchanges, made it unremarkable. The IRS may not rewrite a statute simply because Congress' assumptions about how it would be received have proved false.

Many PPACA supporters initially advocated a federal Exchange. *See* Baucus, *Call to Action*, *supra* note 8. Yet key U.S. Senators favored a system of 50 state-run Exchanges.[9] The need to reach 60 votes to overcome a promised filibuster required PPACA supporters in the Senate (and House) to hew to the preferences of moderate senators who preferred state-run Exchanges.[10]

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

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[9] Patrick O'Connor & Carrie Brown, *Nancy Pelosi's Uphill Health Bill Battle, Politico* (Jan. 9, 2010) ("Two key moderates — Sen. Ben Nelson (D-Neb.) and Sen. Joe Lieberman (I-Conn.) — have favored the state-based exchanges over national exchanges."); *see also* Reed Abelson, *Proposals Clash on States' Roles in Health Plans*, N.Y. Times (Jan. 13, 2010) ("Senator Ben Nelson, Democrat of Nebraska, is a former governor, state insurance commissioner and insurance executive who strongly favors the state approach. His support is considered critical to the passage of any health care bill.").

[10] Bacon, *supra* note 2 ("the final legislation is expected to resemble more closely the version in the Senate, where final passage would require support from more-conservative Democrats").

To avoid an unconstitutional commandeering of states, both the Finance and HELP bills conditioned their health insurance subsidies to individual taxpayers on states establishing compliant Exchanges and implementing other elements of the bills' regulatory schemes. *See supra* pp. 19–20 (discussing HELP bill). Those requirements were consistent with other incentives the bills created to encourage state-run Exchanges, including unlimited start-up funds and the Finance Committee bill's costly Medicaid "maintenance of effort" requirement.

It may be the case that few PPACA supporters expected it to be the bill that would become law. When PPACA supporters lost their filibuster-proof Senate majority in early 2010, however, the *only* comprehensive health care bill that Congress could enact was the already Senate-passed PPACA. The choice was either the PPACA, which many members of Congress found quite unsatisfactory, or no health care bill at all.

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

"established by the State"; recognized state-established and federal Exchanges as distinct; and demonstrated how Congress expanded the meaning of "established by the State" when that was its intent. *See* Pub. L. No. 111-152, 124 Stat. 1029, 1035 (2010); *see also* Adler & Cannon, *supra*, at 162–63.

The PPACA thus authorizes tax credits only in compliant states even though some of its supporters may have preferred other language. Whatever their preferences might have been, and despite many opportunities, *none* of the Act's authors deleted, expanded, or amended the relevant statutory text. What matters in a constitutional system is what the law actually says. "Established by the State" was the only language to pass both chambers of Congress because, when the time came for members of Congress to vote, it was the only language that *could* pass both chambers. The choice faced by supporters was between a bill many considered flawed and no bill at all.[11] Members of Congress *intended* for *this requirement* to become law, because otherwise *there would have been no law*. The PPACA's tax-credit eligibility rules thus are not only clear, but accurately reflect congressional intent.

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[11] *See* Harold Pollack, *47 (Now 51) Health Policy Experts (Including Me) Say 'Sign the Senate bill,'* The New Republic (Jan. 22, 2010), http://www.newrepublic.com/blog/the-treatment/47-health-policy-experts-including-me-say-sign-the-senate-bill (urging House passage of the "imperfect" PPACA, despite "the allocation of premium subsidies" and "other limitations," because otherwise "we doubt that any bill would reach the President's desk"); *see also* Bacon, *supra* note 2 (quoting Senate Majority Leader Harry Reid: "Neither I nor any other senator has the luxury of passing a perfect bill . . . that conforms exactly to his or her beliefs . . . . But we must act.").

With the rule at issue in this case, the IRS is trying to rewrite the statute because supporters failed to anticipate the widespread rejection by states of the role the law had assigned them. As was widely reported at the time of the PPACA's enactment, PPACA proponents were confident that all states would establish Exchanges and never even contemplated the possibility that numerous states would refuse.[12]

This mistaken assumption accounts for why Congress did not authorize funding for the creation of federal Exchanges. It accounts for why the Congressional Budget Office scored the PPACA without considering whether tax credits would be limited to state-run Exchanges. It accounts for why the CBO scored the bill as if the federal government would not have to spend any money to implement federal Exchanges. Adler & Cannon, *supra*, at 186–88; J. Lester Feder, *HHS May Have to Get 'Creative' on Exchange*, Politico (Aug. 16, 2011), http://www.politico.com/news/stories/0811/61513.html. Finally, it accounts for why the CBO likewise

[12] *See* Remarks on Health Insurance Reform in Portland, Maine, 2010 Daily Comp. Pres. Doc. 220 (Apr. 1, 2010) (quoting President Barack Obama: ''by 2014, each state will set up what we're calling a health insurance exchange"); *see also* Dep'ts of Labor, Health & Human Servs., Educ., & Related Agencies Appropriations for 2011: Hearing Before a Subcommittee on Appropriations, House of Representatives, 111th Cong. 171 (Apr. 21, 2010) (statement of Kathleen Sebelius, Secretary, Department of Health & Human Services), http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg58233/pdf/CHRG-111hhrg58233.pdf (''We have already had lots of positive discussions, and States are very eager to do this. And I think it will very much be a State-based program.'').

scored *the HELP bill* as providing Exchange subsidies in all states, even though — as all sides concede — the bill *withheld subsidies in non-compliant states*.[13]

The IRS cannot rewrite the statute simply because this assumption proved false. Yet the agency did, without any serious effort to ascertain Congress' intent, *See* H.R. Comm. on Oversight and Gov't Reform, 113th Cong., Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies (Comm. Print 2014) (key IRS and Treasury staff describe to congressional investigators how the agencies never seriously considered that "established by the State" might reflect congressional intent).

CONCLUSION

Many provisions of the PPACA have not worked the way its supporters had hoped. *See, e.g.*, PPACA Implementation Failures: Answers from HHS Before the Energy and Commerce Comm., 113th Cong. (2013) (testimony of Sec. Kathleen Sebelius on the failures of Healthcare.gov). Some provisions of the Act have been struck down in Court. *See NFIB*, 132 U.S. at 2600 (striking down mandatory Medicaid expansion). Other provisions have been repealed. *See, e.g.*, American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 642, 126 Stat. 2313, 2358

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

(2013) (repealing the CLASS Act). President Obama acknowledged: "Obviously, we didn't do a good enough job in terms of how we crafted the law." NBC News, Interview with President Obama (Nov. 7, 2013), http://www.nbcnews.com/video/nbc-news/53492840.

If the PPACA's premium-assistance tax credit eligibility rules are flawed, the legislative process is the remedy. With this rule, the IRS claims the power to tax and spend outside the legislative process. Such "administrative hubris" cannot stand. *See Brungart v. BellSouth Telecommunications, Inc.*, 231 F.3d 791, 797 (11th Cir. 2000).

As the IRS can identify no textual or other basis for its rule, it can provide no limit to the power it asserts here. If the IRS can offer tax credits to those who purchase health insurance in federally created Exchanges, there is nothing to stop it from offering them to other ineligible categories of individuals, such as households with income below 100 percent or above 400 percent of the poverty level, Medicare and VA enrollees, workers with employer-sponsored health insurance, undocumented residents, or purchasers of non-qualified health plans.

The decision to limit the availability of premium-assistance tax credits to the purchase of qualified health insurance plans in Exchanges established by states under Section 1311 may or may not have been a sound policy decision. That is not the question before this Court. The text of the PPACA unambiguously does so, and

the remainder of the Act and its legislative history fully support the plain meaning of the text. The IRS lacks the authority to issue this rule.

For all of the foregoing reasons, the judgment of the district court should be reversed, and the challenged IRS rule should be vacated.

Dated: October 3, 2014.

Respectfully submitted,

s/ Eric Grant
Eric Grant
Bradley Benbrook

Counsel for *Amici Curiae*
Jonathan H. Adler and
Michael F. Cannon

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 6,985 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: October 3, 2014.

s/ Eric Grant
Eric Grant

Counsel for *Amici Curiae*
Jonathan H. Adler and
Michael F. Cannon

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system on October 3, 2014.

I hereby certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 3, 2014.

s/ Eric Grant
Eric Grant

Counsel for *Amici Curiae*
Jonathan H. Adler and
Michael F. Cannon