ORAL ARGUMENT SCHEDULED FOR DECEMBER 17, 2014

No. 14-5018

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

JACQUELINE HALBIG, *et al.*,
Plaintiffs - Appellants,

v.

SYLVIA MATTHEWS BURWELL,
SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Defendants - Appellees.

On Appeal from the United States District Court for the District of Columbia
No. 13-cv-623-PLF

BRIEF OF *AMICI CURIAE* PACIFIC RESEARCH INSTITUTE AND CATO INSTITUTE IN SUPPORT OF APPELLANTS

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Dated: October 3, 2014

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the Pacific Research Institute and the Cato Institute certify that:

(A) Parties and *Amici*

In addition to the parties and *amici* listed in the Appellants' Opening Brief, the following *amici* may have an interest in the outcome of this case:

The Pacific Research Institute

The Cato Institute

(B) Rulings under Review

References to the rulings at issue appear in the Appellants' Opening Brief.

(C) Related Cases

References to the related cases appear in the Appellants' Opening Brief.

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief.[1] The Pacific Research Institute ("PRI") and the Cato Institute ("Cato") filed notice of their intent to participate as *amici curiae* on January 30, 2014.

Pursuant to D.C. Circuit Rule 29(d), *amici curiae* certify that a separate brief is necessary because no other *amicus* brief of which we are aware will address the issues raised in this brief: namely, whether the district court improperly elevated legislative purpose over the statute's plain meaning and, more broadly, whether the separation of powers and principles of delegation compelled the district court to enforce the plain meaning of the statutory text. In light of *Amici*'s activities, discussed more fully herein, we are particularly well-suited to discuss the important constitutional and statutory issues implicated by the district court's decision.

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rules 26.1 and 29(b), *amici curiae* Pacific Research Institute ("PRI") and Cato Institute ("Cato") hereby submit the following corporate disclosure statements:

PRI is a nonprofit 501(c)(3) organization. PRI is not a publicly held corporation and no corporation or other publicly held entity owns more than 10 percent of its stock.

Cato is a nonprofit corporation organized under the laws of Kansas. Cato has no parent corporation, and no company owns 10 percent or more of its stock.

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ACA: Patient Protection and Affordable Care Act, 111 Pub. L. No. 148, 124 Stat. 119, 111th Cong., 2d Sess., Mar. 23, 2010

INTEREST OF *AMICI CURIAE*

The Pacific Research Institute ("PRI") is a non-profit non-partisan 501(c)(3) organization that champions freedom, opportunity, and personal responsibility by advancing free-market policy solutions to the issues that impact the daily lives of all Americans. PRI demonstrates how free interaction among consumers, businesses, and voluntary associations is more effective than government action in providing the important results we all seek—good schools, quality health care, a clean environment, and economic growth. Founded in 1979 and based in San Francisco, PRI is supported by private contributions. Its activities include publications, public events, media commentary, invited legislative testimony, filing *amicus* briefs with courts, and community outreach.

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files *amicus* briefs with courts, conducts conferences, and publishes the annual *Cato Supreme Court Review*.

This case is important to *Amici* because of the role they play in ensuring that the government abides by the rule of law.

SUMMARY OF THE ARGUMENT

Despite the political sensitivity of this litigation, it is a simple case that should turn on a fundamental constitutional principle: neither a federal court nor an executive agency is empowered to ignore or override a law's plain meaning. The Affordable Care Act ("ACA") encourages States to establish health insurance Exchanges by offering qualified residents "covered by a qualified health plan … enrolled in through an *Exchange* established by the State under Section 1311" a "premium assistance credit." 26 U.S.C. § 36B(c)(2)(A)(i). In the event a State fails to establish an Exchange, Section 1321 of the ACA empowers the Department of Health and Human Services ("HHS") to establish a federal Exchange. Fulfilling its Article III responsibility, the panel correctly held that Section 36B foreclosed HHS from making premium tax credits available to purchasers on federal Exchanges and properly struck down the Internal Revenue Service ("IRS") regulation "deeming" federal Exchanges to be State Exchanges for these purposes. Opinion ("Op.") 15-42 (invalidating 77 Fed. Reg. 30377 (May 23, 2012) ("IRS Rule")).

Judge Edwards, in dissent, agreed that the IRS Rule lacked specific statutory authority, yet would have upheld the regulation under *Chevron* deference. Judge Edwards made clear that his interpretation was driven, in large measure, by two factors. First, he believed that the IRS's regulatory interpretation extending subsidies to those purchasing insurance through federal Exchanges best effectuated

the ACA's broader purpose of universal coverage. Second, a contrary interpretation would have caused the ACA to fail as national health care reform—a result Judge Edwards found "unfathomable" given his perception of the law's broad purposes. Dissent 15. He simply refused to accept that "Congress would have wanted insurance markets to collapse in States that elected not to create their own Exchanges." *Id*. 7.

The majority wisely rejected this appeal to broad congressional purposes and consequentialist reasoning. Elevating the court's own perception of Congress's broad vision over the law's text would ignore the cardinal principle that legislative purpose must be effected by the words Congress uses, not the words it meant to use or should have chosen to use. Article III does not empower courts to divine Congress's overarching objective and then reverse-engineer a version of the law that best achieves it. Quite the opposite: the judicial task is to discern the ordinary meaning of the words Congress uses and enforce them. Even accepting the dissent's contestable belief that Congress would have wanted to extend tax subsidies to those purchasing insurance through federal Exchanges—which is no more plausible than Congress's offering of subsidies as an incentive for states to set up Exchanges—there is no justification for deviating from the expressed will of Congress. Unenacted legislative intentions are not law under the Constitution.

Moreover, the notion of a unified legislative purpose is almost always a myth. Legislation is a product of negotiation and compromise in which lawmakers may sacrifice one interest to achieve another. In the main, a bill successfully runs the legislative gauntlet not because Congress has a unity of purpose—but because it reconciles a multiplicity of purposes, some of which may be incompatible. The notion that *every* Representative and Senator voting in favor of legislation did so for the *same* reason paints an unrealistic picture of the legislative process. The process leading to the ACA's passage illustrates the point. This behemoth of a law—over 2,700 pages—resulted from ad hoc procedures, convenient alliances, special deals to secure holdout votes, admissions by key legislators that they never read it, and a chaotic race to the finish line prompted by the surprising outcome of a special election in Massachusetts. If there were ever a case in which a court should refrain from divining a unified congressional purpose, then this is it.

Attempting to uncover a single legislative purpose in derogation of the law's plain meaning is not only beyond judicial competence, it invades Congress's constitutional province. If the ACA needs to be amended or rewritten to achieve the legislature's intention in passing it in the first place, that is Congress's job. That would be true even if the ACA's limitation on subsidies were nothing more than a drafting error. If the statutory provision at issue was the product of inadvertence or oversight, Congress must fix the problem itself. Corrective

technical legislation, particularly in the complex field of the Internal Revenue Code, is routinely enacted to resolve problems of correlating legislative intent and statutory language. Pursuit of a technical correction, rather than rewriting the statute to suit the Executive's policy preference, was the proper action for the IRS to take to broaden subsidy entitlement. Courts are required by Article III to ensure that federal agencies do not end-run the legislative process.

Resort to the limits of judicial review of administrative rulemaking under *Chevron* cannot justify shirking that duty and departing from the Constitution's requirements. *Chevron* does not permit an executive agency to rewrite statutory law to advance what it perceives, rightly or wrongly, to be the broad purpose of legislation. When the statute's text is unambiguous, as it is here, there is no place for agency deference. Judicial acquiescence to an agency regulation rewriting federal law is not *Chevron* deference. It is usurpation of Congress's lawmaking prerogative.

But even if the IRS were able to claim tenuous ambiguity by cobbling together a miscellany of legislative provisions, as the dissent found, substituting deference for the better textual construction is appropriate only if Congress intended for the agency to fill statutory gaps. There is no indication in the ACA that Congress specifically delegated to the IRS the power to determine whether billions of federal subsidy dollars annually should be dispersed to those purchasing

health coverage on federal Exchanges. An ambiguous statute cannot be used by the IRS to impose a tax or create a tax credit that is not specifically authorized by Congress. Absent administrative deference, there can be no doubt that Appellants have "the better reading of the statute under ordinary principles of construction." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 766 (1999).

It is perhaps understandable that the IRS wanted to aid taxpayers whose ability to afford health coverage was compromised by, among other things, the unavailability of credits on federal Exchanges and the refusal of some States to establish their own Exchanges. But that concern must be resolved through democratic means, however imperfect and inefficient they sometimes may be. The panel decision rightly vindicated the fundamental principle that expediency does not trump first principles. The en banc court likewise should remain true to this fundamental bulwark of our constitutional system and return the ACA subsidy issue to the political system where it belongs.

ARGUMENT

I. The Panel Fulfilled Its Article III Responsibility By Enforcing The Text Of The Affordable Care Act As Written.

There can be no legitimate dispute that the text of the ACA forecloses purchasers on federal Exchanges from obtaining premium tax credits. Op. 15-21. This is not even a close question. Under the ACA, an eligible taxpayer is entitled to a tax credit "equal to the premium assistance credit amount of the taxpayer." 26

U.S.C. § 36B(a). A "premium assistance credit amount" is defined as the sum of the monthly premium assistance amounts for "all coverage months of the taxpayer occurring during the taxable year." *Id*. § 36B(b)(1). A "coverage month" is one in which "the taxpayer … is covered by a qualified health plan … enrolled in through an Exchange established by the State under section 1311 of the [ACA]." *Id.* § 36B(c)(2)(A)(i). Therefore, only those covered "through an Exchange established by the State under section 1311 of the [ACA]" may receive "premium assistance amounts."

Accordingly, the IRS's decision to extend premium assistance to those enrolled through any Exchange "regardless of whether the Exchange is established and operated by a State … or by HHS" squarely conflicts with the statute's plain meaning. 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20. Indeed, the IRS Rule cannot be considered an "interpretation" of Section 36B if that concept is to have any meaning. "After all, the federal government is not a 'State' … and its authority to establish Exchanges appears in section 1321 rather than 1311." Op. 15. "Congress knew how to provide that a non-state entity should be treated as if it were a state when it sets up an Exchange." *Id*. 17.

The dissent would have upheld the IRS Rule not withstanding the plain meaning of Section 36B because of a perceived variance between the text of the statute and Congress's overall purpose in passing the ACA. Dissent 8. To Judge

Edwards, the key issue was not the statute's text, but rather "what Congress intended" in passing the ACA. *Id*. 6. The assertion that the ACA's *only* goal was to expand health coverage at all costs, however, is overly simplistic and wrong. There is ample evidence that Congress also was concerned with incentivizing State participation and making States politically accountable. The ACA's Medicaid expansion provisions expressly rely on financial incentives to induce expanded State participation or to have their disadvantaged citizens bear the financial consequences of that choice. The assertion that the singular purpose of the federal Exchanges is to provide health care coverage to those individuals eligible for tax subsidies is similarly mistaken. "Federal Exchanges might not have qualified individuals, but they would still have customers—namely, individuals who are not 'qualified individuals.'" Op. 27. They would secure the savings that the ACA envisions as resulting from increased competition at centralized, transparent shopping venues.

Yet even assuming arguendo that the dissent correctly identified Congress's general goal, no canon of statutory interpretation authorizes a court to elevate legislative purpose over the plain meaning of the statutory text. "[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others." *Connecticut Nat'l Bank v. Germain*, 503

U.S. 249, 253 (1992). That "preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *BedRocs Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Germain*, 503 U.S. at 253-54)). Courts "do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). Thus, even if the ACA's text were at cross-purposes with Congress's objective of universal coverage, as the dissent believed, that supposed conflict is irrelevant. "In such a contest, the text must prevail." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 259 n.6 (2009).

Favoring the ACA's text over a differing legislative purpose is not an arbitrary judicial policy—it follows directly from the judiciary's "limited role in [the] tripartite government." *Robbins v. Chronister*, 435 F.3d 1238, 1243 (10th Cir. 2006); *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1092 (D.C. Cir. 1996). "While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (citation omitted). Because the federal courts have "neither Force nor Will, but merely judgment," The Federalist No. 78, 523 (A. Hamilton) (Jacob E. Cooke ed., 1961), they "cannot amend or modify any

legislative acts" or judge "questions as expedient or inexpedient, as politic or impolitic," *License Tax Cases*, 72 U.S. 462, 469 (1866).

The judiciary is structurally bound to respect the compromises wrought during the legislative process, and it must resist the urge to rewrite a more purposeful, internally consistent statute. When courts rewrite statutes to better effectuate Congress's overall purpose, they "become effective lawmakers, bypassing the give-and-take of the legislative process." *City of Joliet, Ill. v. New West, L.P.*, 562 F.3d 830, 837 (7th Cir. 2009). It is not the judiciary's job to achieve "a more coherent, more rational statute." *Robbins*, 435 F.3d at 1243. To the contrary, by glossing over hidden legislative compromises, judicial adjustments invade the heart of Article I. *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 43 (1895) ("We have no authority to add to the clause last quoted the words, 'prior to his application.' To do so would be to legislate, and not to interpret and give effect to the statute as passed by congress.").

Courts apply laws not intentions because laws are the only thing that command legitimacy. "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself." *Aldridge v. Williams*, 44 U.S. 9, 24 (1845); *P.R. Dep't of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws."); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618

(1992) ("The question … is not what Congress 'would have wanted' but what Congress enacted."). In other words, "the law *is* what the law *says*." *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring). Even if ACA's purpose were discernible through the foggy lens of legislative history, then, courts do not sit to vindicate purpose in derogation of the words chosen by Congress. "[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998).

The reality, of course, is that the search for a unified legislative intent will almost always end in disappointment. "Every legislat*or* has an intent, which usually cannot be discovered, since most say nothing before voting on most bills; and the legislat*ure* is a collective body that does not have a mind; it 'intends' only that the text be adopted, and statutory texts usually are compromises that match no one's first preference." Frank H. Easterbrook, foreword to *Reading Law: The Interpretation of Legal Texts*, by Antonin Scalia & Bryan A. Garner (1st ed. 2012) (emphasis in original). More often than not, individual legislators have sharply different views on the goals and scope of their enactments, so "the words by which the legislature undertook to give expression to its wishes" offer the most "persuasive evidence" of a statute's purpose. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

It should come as no surprise that final legislation may lack an internally consistent purpose as legislation often is passed through compromise and negotiation among competing interests. "[L]egislative preferences do not pass unfiltered into legislation; they are distilled through a carefully designed process that requires legislation to clear several distinct institutions, numerous veto gates, the threat of a Senate filibuster, and countless other procedural devices." John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2390 (2003). Results that might seem ill-fitting as an abstract policy matter "may be perfectly rational from a legislative process perspective." *Id.* at 2431. For "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646-47 (1990).

Attempting to divine a singular legislative purpose from the legislative process is therefore hazardous even as a last resort. *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."). But to use the results of this kind of vague judicial inquiry into legislative motive as the interpretative

touchstone when the text of the statute is unambiguous, as is the case here, is constitutionally intolerable.

Indeed, the legislative history of the ACA is a case study in why the search for a unified legislative intent is treacherous. To state the obvious, the ACA was hardly the result of a deliberative, rational process in which the Congress acted with clarity of purpose. "The debate over health care was contentious from the legislation's inception, and enacting it required a variety of ad hoc procedures." John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 Law Libr. J. 131, 133 (2013). "[F]ragile truce[s]" and "delaying tactic[s]" plagued the process as the ACA's proponents scrambled to insulate themselves from filibuster. *Id.* at 156. For example, one key Senator's vote was secured by adding an amendment to boost his state's Medicaid reimbursement rates, and another's was reportedly obtained in exchange for similar inducements. Vincent L. Frakes, *Partisanship and (Un)Compromise: A Study of the Patient Protection and Affordable Care Act*, 49 Harv. J. on Legis. 135, 138-39 (2012).

Amendments reflected more unusual bargains as well. "Opposition to funding the proposal through taxes on elective cosmetic surgery," for instance, "led to a change that taxed 'indoor tanning services' instead." Cannan, *supra*, at 156-57. And after Senator Scott Brown replaced Senator Ted Kennedy, the bill stood

on a knife's edge, as the filibuster-proof majority in the Senate unexpectedly collapsed. The bill survived only because a slim House majority passed it *in toto*—and separately pushed through amendments by way of a short-fuse "reconciliation" bill that was immune to filibuster. H.R. Res. 1225, 111th Cong. (Mar. 25, 2010). More than any other law in recent history, "[a] change in any individual provision [in the ACA] could have unraveled the whole." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002). The end result was a 2,700-page reformation of the American health care system that few, if any, legislators actually read. Key House and Senate members admitted as much. Speaker Nancy Pelosi explained: "We have to pass the bill so that you can find out what is in it—away from the fog of the controversy."[2] Senate Finance Committee Chairman Max Baucus similarly added: "I don't think you want me to waste my time to read every page of the healthcare bill."[3]

Given this "rough and tumble of the legislative process," *Robbins*, 435 F.3d at 1243, it would be folly to rely on legislative purpose as an interpretative anchor, *Barnhart*, 534 U.S. at 461 (refusing to "judge or second-guess" the legislative

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[2] Democratic Leader Nancy Pelosi, News Room: Speeches, http://www.democraticleader.gov/news/press/pelosi-remarks-2010-legislative-conference-national-association-counties (last visited Oct. 2, 2014).

[3] Matthew Sheffield, "Max Baucus, Author of Obamacare, Admits He Never Read His Own Bill," *San Francisco Examiner*, Oct. 2, 2010.

process). Legislative intent is, on its best day, a secondary tool of statutory construction that courts will sometimes employ when the primary interpretative means fail to yield a clear answer. Op. at 31-32. But that is not the situation here. The ACA's text is unmistakably clear. It just does not embody the dissent and the IRS's perception of what Congress was trying to achieve in this legislation. The kind of reverse-engineered interpretative process urged by the IRS in seeking en banc review is wholly inappropriate, especially given the ACA's chaotic path to law. In a case like this, the statute's text is the only sure footing. It must be enforced as written.

II. The IRS Has No Authority To Usurp Congress's Lawmaking Power By Making Tax Credits Available To Those Purchasing Insurance Through Federal Exchanges.

Interpreting Congress's enactments faithfully is equally important in reviewing agency regulations. "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). An agency's reasonable construction is entitled to judicial respect when, by leaving a gap in the statute, Congress has implicitly chosen to delegate *its* "lawmaking power" to the federal agency. *Ford Motor Credit Co. v. Milhollin*,

444 U.S. 555, 566 (1980). Respect for the agency's regulatory choices vindicates Congress's delegation.

By the same token, however, "if the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). That is because "[w]hen the statute is unambiguous, there has been no delegation to the agency to interpret the statute and therefore the agency's interpretation deserves no consideration at all, much less deference." *Terrell v. United States*, 564 F.3d 442, 450 (6th Cir. 2009). Unlike when there is a statutory gap, signaling a congressional delegation, upholding a regulation that varies from the law's unambiguous terms usurps Congress's choice *not* to delegate its lawmaking power to the agency.

Section 36B is not ambiguous. Thus, to allow the IRS to ignore the ACA's plain meaning would deal a double blow to our tripartite system. Foremost, it would allow the Executive to ignore the will of Congress—expressed in the text—and substitute his preferred policy for the one provided for by law. The Constitution does not give the executive branch "the unilateral power to change the text of duly enacted statutes." *Clinton v. City of New York*, 524 U.S. 417, 447 (1998); *Landstar Express America, Inc. v. Fed. Maritime Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009) ("[N]either courts nor federal agencies can rewrite a statute's

plain text to correspond to its supposed purposes."). As this Court has explained, "the President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress." *In re Aiken Cnty*, 725 F.3d 255, 260 (D.C. Cir. 2013). The IRS may disagree with Congress's choice not to afford tax subsidies to those purchasing insurance through federal Exchanges, but it is Congress's choice to make. "When Congress gives an agency its marching orders, the agency must obey all of them, not merely some." *Pub. Citizen v. NRC*, 901 F.2d 147, 156 (D.C. Cir. 1990).

In addition, the improper invocation of administrative deference would allow the judiciary to use it as an excuse to impose its own sense of what is best and thus arrogate to the court power the Constitution assigned to Congress. That is the very problem that *Chevron* was designed to solve. "Before *Chevron*, each of hundreds of federal judges had substantial policymaking power." Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 Geo. L.J. 2225, 2233 (1997). *Chevron* ensures that policymaking resides in the political branches and that the power either to make the legislative choice itself or delegate that responsibility to an agency remains "under the control of Congress." Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 NW. U. L. Rev. 551, 555-56 (2012). When there has been a delegation, *Chevron* thus keeps judges "from substituting their own interstitial lawmaking for that of an agency." *City of*

Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1873 (2013). And when there has not been a delegation, as here, the court's only "task is to enforce the unambiguously expressed intent of Congress." *American Land Title Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 892 F.2d 1059, 1062 (D.C. Cir. 1989).

But even if the statute were ambiguous, as the dissent found, the claim of an implicit delegation is especially inappropriate here given that the IRS Rule affects individual tax liability and involves Congress's taxing power. Close examination of the power of taxation reveals there is no basis for concluding that the IRS has the authority to impose taxes or grant tax credits by means of an ambiguous statute. The taxing power has a unique place in our history. King George's unjust imposition of taxes on the Colonies was one of the chief charges against him, specifically, "imposing taxes on us without our Consent." U.S. Declaration of Independence para. 15 (1776); *Gordon v. Holder*, 721 F.3d 638, 649 (D.C. Cir. 2013) ("The demand that taxation regimes possess democratic legitimacy finds deep roots in the founding of our republic.").

The Framers knew all too well that "the power to tax involves the power to destroy." *M'Culloch v. Maryland*, 17 U.S. 316, 431 (1819). That is why all taxation legislation must originate in the House of Representatives. U.S. Const. art. I, § 7, cl. 1. Members of the House "were chosen by the people, and supposed to be the best acquainted with their interest and ability," 1 Annals of Cong. 65

(1789) (Joseph Gales ed., 1834), and thus most likely to protect the federal treasury against profligate spending, The Federalist 66, at 401-02 (A. Hamilton) (Jacob E. Cooke ed. 1961). As a result, judicial review of tax laws has been framed by the understanding that the "taxing power is one of the most jealously guarded prerogatives exercised by Congress." *Air Power, Inc. v. United States*, 741 F.2d 53, 56 (4th Cir. 1984). "[E]xemptions from taxation" therefore "are not to be implied; they must be unambiguously proved." *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988). That holds true for tax credits, which "are only allowed as clearly provided for by statute, and are narrowly construed." *United States v. McFerrin*, 570 F.3d 672, 675 (5th Cir. 2009).

Hence, the IRS's interpretation of Section 36B is not entitled to deference. Because Congress did not "indicate clearly its intention to delegate to the Executive the discretionary authority" to grant these tax credits, *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 214 (1989), there is no basis for deferring to the IRS's interpretation of Section 36B. There is a fundamental "difference between delegating the underlying power to set basic policy … and the authority to exercise discretion in administering the policy." *The Constitution of the United States of America: Analysis and Interpretation*, Congressional Research Service, Sen. No. 112-9, at 93 (2013). *Mayo Foundation v. United States*, 131 S. Ct. 704 (2011), illustrates the difference. Unlike here, the issue in *Mayo* was not whether Congress

had authorized a tax-exemption regime; no one disputed that Congress had ambiguously exempted from certain taxes "a student who is enrolled and regularly attending classes at such school, college, or university." *Id.* at 709 (quoting 26 U.S.C. § 3121(b)(10)). The issue was whether medical residents qualified as "a student" for purposes of the statute. *Id.* at 708. In finding that the IRS was entitled to deference in making that narrow determination, the Court merely held that the IRS—like other agencies—had discretionary authority to administer a tax regime that Congress had clearly established without comprehensively determining its applicability to every circumstance that might arise. But nothing in *Mayo* alters the longstanding proposition that the IRS cannot rely on an ambiguous statute to impose a tax or create a credit.

Put simply, authorizing the President to disperse billions of dollars in tax credits without clear authorization from Congress would have been unthinkable to the Founders. *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance."). Thus, even if such legislation were theoretically eligible for *Chevron* deference, which it is not, it is not credible to presume that Congress surrendered *this* massive tax spending authority sub silentio. "*Chevron* deference … rests on a recognition that Congress has delegated to an agency the interpretative authority to implement a particular provision or

answer a particular question." *City of Arlington, Tex.*, 133 S. Ct. at 1882. There is no reason to believe Congress gave the IRS the power to grant federal tax credits to those purchasing health coverage through federal Exchanges. The Court is "guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson*, 529 U.S. at 133. It defies common sense to think Congress used Section 36B to give the IRS the unfettered discretion to decide whether to spend billions of taxpayer dollars annually.

III. The En Banc Court Cannot Legitimately Decide This Appeal Based On The Perceived Policy Consequences Of Appellants' Claim.

Finally, the dissent's endorsement of the IRS's construction appears to have been driven by concern over the consequences of enforcing the statute as written. Dissent 19 ("It is inconceivable that Congress intended to give States the power to cause the ACA to 'crumble.'"); *id.* 19 ("This case is about Appellants' not-so-veiled attempt to gut the [ACA]."); *id.* 6 ("poison pill to the insurance markets in the States that did not elect to create their own Exchanges"); *id.* 7 ("no legitimate method of statutory interpretation ascribes to Congress the aim of tearing down the very thing it attempted to construct"); *id.* 12 ("would destroy the fundamental policy structure and goals of the ACA").

That is deeply troubling. Judicial decisions cannot turn on antipathy for petitioners' purported motives or judicial sympathy for those who would benefit

from rewriting a statute. "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). To decide a statutory question based on such grounds thus would cause long-term institutional damage. After all, we are a "government of laws, and not of men." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Those laws must be written by Congress—not the IRS.

In any event, like Mark Twain's death, the report of the ACA's demise at the hands of petitioners has been greatly exaggerated. The IRS Rule would make State refusals to establish Exchanges politically costless. States will have a much more difficult choice to make if refusal denies their residents tax credits that help make health insurance coverage more affordable. "Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds" and States are free to reject the bargain. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2603 (2012). "The States are separate and independent sovereigns. Sometimes they have to act like it." *Id.* The IRS Rule obliterates that responsibility.

But even if Judge Edwards was correct in his assessment that accepting Appellants' argument will cause the ACA to "crumble," Dissent at 2, Article III does not license either the court or the agency to save it. "What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the

court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 250-51 (1926). In short, "these always-fascinating policy discussions are beside the point. The role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might 'accor[d] with good policy.'" *Burrage v. United States*, 124 S. Ct. 881, 892 (2014) (quotation omitted)).

In fact, the statutory text could be a pure drafting error—producing a law precisely the *opposite* of what Congress intended—and the Court *still* must enforce it as written. This Court cannot "soften the import of Congress's chosen words even if [it] believe[s] the words lead to a harsh outcome." *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004). Instead, "if Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond [this Court's] province to rescue Congress from its drafting errors, and to provide for what [it] might think is the preferred result." *Id.* at 542 (citations and alterations omitted); *United States v. Locke*, 471 U.S. 84, 95 (1985) ("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."); *W. Va. Univ. Hosps., Inc. v. Casey*,

499 U.S. 83, 101 (1991) ("The facile attribution of congressional 'forgetfulness' cannot justify [judicial] usurpation.").

If it was an error in the ACA's drafting that excluded individuals purchasing insurance through federal Exchanges from eligibility for tax credits and, "that effect was unintended, it is a problem for Congress, not one that federal courts can fix." *Lewis v. City of Chicago, Ill.*, 560 U.S. 205, 217 (2010). "Judicial nullification of statutes … has, happily, no place in our system. The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes." *Sorrells v. United States*, 287 U.S. 435, 450 (1932).

Congress has a long history of doing just that. In one of its first decisions, the Supreme Court read Article III's grant of federal jurisdiction to cases "between a State and Citizens of another State" as exposing states to federal-court suits by citizens of other states. *Chisholm v. Georgia*, 2 U.S. 419, 420 (1793). "Each of the four Justices who concurred in the judgment issued a separate opinion. The common theme of the opinions was that the case fell within the literal text of Article III, which by its terms granted the federal courts jurisdiction over controversies 'between a State and Citizens of another State,' and 'between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.'" *Alden v. Maine*, 527 U.S. 706, 719 (1999). In enforcing Article III as drafted, the Court rejected the views of Justice Iredell, who "contended that it was not the intention to create

new and unheard of remedies by subjecting sovereign States to actions at the suit of individuals, which he conclusively showed was never done before." *Hans v. Louisiana*, 134 U.S. 1, 12 (1890) (citing *Chisholm*, 2 U.S. at 434-50).

The Court's ruling "fell upon the country with a profound shock." *Alden*, 527 U.S. at 720. Indeed, Georgia promptly enacted "a bill providing that anyone attempting to enforce the … decision would be 'guilty of felony and shall suffer death, without benefit of clergy, by being hanged.'" *Id*. at 720-21. Congress responded to the Supreme Court's ruling by promptly passing a constitutional amendment reaffirming the states' sovereign immunity from suit in federal courts and plugging the hole in Article III. *Hans*, 134 U.S. at 11 ("[A]t the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed."). Each branch thus fulfilled its role. The Supreme Court faithfully interpreted the Constitution's text. And Congress amended it to solve the problem.

As another example, in the 1940s the Supreme Court broadly interpreted the undefined terms "work" and "workweek" in the Fair Labor Standards Act. The Court concluded that these terms "encompassed time spent 'pursu[ing] certain preliminary activities after arriving … , such as putting on aprons and overalls [and] removing shirts.'" *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 875 (2014) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-93 (1946)).

Congress responded through legislation to ensure that the law continued to operate consistent with the legislature's original purpose by passing the Portal-to-Portal Act of 1947, which expressly rectified the Court's "disregard of long-established customs, practices, and contracts between employers and employees." *Id.* (quoting 61 Stat. 84 (1947), as amended, 29 U.S.C. § 251(a)).

More recently, in 2009, the Lilly Ledbetter Fair Pay Act was enacted to supersede a judicial interpretation of the charging period set forth in Title VII of the Civil Rights Act. Noting "the legislative compromises that preceded the enactment of Title VII," the Supreme Court held that Title VII's charging period was triggered on the date an employer made its initial discriminatory wage decision, not on the date of the most recent paycheck issued. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630-31 (2007). Congress viewed this interpretation as "at odds with the robust application of the civil rights laws that Congress intended," Pub. L. No. 111-2, § 2, 123 Stat. 5 (2009), and promptly amended Title VII to ensure that the limitations period for equal-pay claims renews with each paycheck affected by discriminatory action, *id.* § 3.

This case is no different. Nothing prevents Congress from amending the ACA to provide for tax credits in both state and federal Exchanges if that is what it intended in the first place. As always, Congress is free to "turn[] to technical corrections" when "it wishes to clarify existing law." *Exxon Mobil Corp. &*

Affiliated Cos. v. C.I.R., 136 T.C. 99, 119 (Tax Ct. 2011). Indeed, Congress "must routinely correct for technical errors and sometimes amend new provisions after enactment to harmonize old and new laws." Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 Va. Tax Rev. 645, 670 (2003); *see, e.g.*, Tax Technical Corrections Act of 2007, Pub. L. No. 110-172, 121 Stat. 2473 (2007); Tax Technical Corrections Act of 2005, Pub. L. No. 109-135, 119 Stat. 2610 (2005); Tax Technical Corrections Act of 1998, Pub. L. No. 105-206, 112 Stat. 790 (1998); Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (1988); Technical Corrections Act of 1982, Pub. L. No. 97-448, 96 Stat. 2365 (1983).

If Congress wants to correct any errors it can do so immediately. "Existing procedures such as suspension of the rules or proceeding under unanimous consent" give Congress the tools to fix legislation "on an expedited schedule." John C. Nagle, *Corrections Day*, 43 UCLA L. Rev. 1267, 1281 (1996). "It should not be hard to secure legislative correction of [an] alleged judicial error if the courts have in fact misread the Congressional purpose and the consequences to the revenue are as serious as the government says." *Paddock v. United States*, 280 F.2d 563, 568 (2d Cir. 1960) (Friendly, J.).

That the ACA itself is deeply controversial does not alter the analysis. In 1992, for example, Congress passed the Coal Industry Retiree Health Benefit Act,

but only after enduring "a maelstrom of contract negotiations, litigation, strike threats, a Presidential veto of the first version of the bill and threats of a second veto, and high pressure lobbying, not to mention wide disagreements among Members of Congress." *Barnhart*, 534 U.S. at 445-46. By the end, the statute was "quite absurd—made no sense." Scalia & Manning, *supra*, at 1615. As enacted by Congress, if certain coal companies sold their mining business to a third party, the purchaser had no liability to pay taxes for underfunded coal-miner pensions. *Id.* at 1614. "But if one of the original coal companies also owned an affiliated business (say, a bakery) and sold those assets to a third party, that third party would inherit the tax obligation for the miners' pensions." *Id.*

Despite this incongruity, the Supreme Court "interpret[ed] the language of the statute enacted by Congress" and enforced the statute as written. *Barnhart*, 534 U.S. at 461. In light of the Coal Act's contentious origins, the Court reasoned, abandoning the plain text in search of a more sensible construction could well produce a law that "would not have survived the legislative process" if advanced in Congress. *Id.* That the legislation was controversial was a prime reason to adhere *more closely* to the text, not less. "These are battles that should be fought among the political branches and [private stakeholders]," not through appeal to the courts. *Id*. at 462.

Nor does the political likelihood of correction bear on the proper result here. "The Framers of the Constitution could not command statesmanship," and "[f]ailure of political will does not justify unconstitutional remedies." *Clinton*, 524 U.S. at 449, 452-53 (Kennedy, J., concurring). "The Constitution's structure requires a stability which transcends the convenience of the moment." *Id*. at 449. Regardless of legislative inaction, the courts "are not at liberty to rewrite [laws] to reflect a meaning [they] deem more desirable." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008).

* * *

This should not be a particularly close case. Separation of powers principles plainly require the Court to draw a hard line. But "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary," and "judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means." *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring). The en banc court should too.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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Dated: October 3, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6,976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2014, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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