ORAL ARGUMENT SCHEDULED FOR DECEMBER 17, 2014

APPEAL NO. 14-5018

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

JACQUELINE HALBIG, *et al.*,

Appellants,

v.

SYLVIA MATTHEWS BURWELL, In Her Official Capacity as U.S. Secretary Of Health And Human Services, *et al.*,

Appellees.

AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC. IN SUPPORT OF APPELLANTS

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CERTIFICATE AS TO PARTIES,
RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Judicial Watch, Inc. certifies that:

(A) Parties and *Amici Curiae*:

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

Judicial Watch, Inc.

(B) Rulings under Review:

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

(C) Related Cases:

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

/s/ Michael Bekesha

CORPORATE DISCLOSURE STATEMENT

Judicial Watch, Inc. is a not-for-profit, educational organization that has no parent company, and no publicly held corporation has a 10% or greater ownership interest in Judicial Watch, Inc.

/s/ Michael Bekesha

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief. Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, Judicial Watch, Inc. states 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 Judicial Watch, Inc. or its counsel made a monetary contribution to its preparation or submission. Judicial Watch, Inc. filed notice of its intent to participate as an *amicus curiae* on October 1, 2014.

Pursuant to D.C. Circuit Rule 29(d), Judicial Watch, Inc. certifies that a separate brief is necessary because it is not aware of any other *amicus curiae* brief that will address the arguments raised in this brief. Specifically, this brief will focus on this Court's recent ruling in *In Re: Aiken* County, 725 F.3d 255 (D.C. Cir. 2013). To date, neither the parties nor the other *amici curiae* have applied it to the facts in this case. Nor have they addressed the significant questions concerning the Executive's authority to disregard clear and unambiguous laws passed by the Legislative Branch.

/s/ Michael Bekesha

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* Authorities upon which Judicial Watch, Inc. chiefly relies are marked with asterisks.

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INTEREST OF JUDICIAL WATCH, INC.

Judicial Watch, Inc. ("Judicial Watch") is a not-for-profit, educational organization that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly monitors significant developments in the court systems and the law, pursues public interest litigation, and files *amicus curiae* briefs on issues of public concern. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

Judicial Watch has an interest in promoting the rule of law and is concerned that the Government's expansion of Section 36B of the Patient Protection and Affordable Care Act ("ACA") to authorize the availability of refundable tax credits beyond the clear and unambiguous language of the statute disrupts the deliberate balance of powers intended by the Framers. In addition, Judicial Watch seeks to highlight a recent case decided by this Court.

In *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013) ("*Aiken County*"), this Court addressed the importance of the constitutional system of separation of powers. Yet, to date, neither the parties nor the other *amici curiae* have applied *Aiken County* to the facts in this case. Nor have they addressed the significant

questions concerning the Executive's authority to disregard clear and unambiguous laws passed by the Legislative Branch.

In light of *Aiken County*, it is clear that the issue before this Court is of great importance because it unquestionably implicates the scope of the Executive's authority. Specifically, Appellants ask this Court to reaffirm the basic principle that the Executive Branch cannot disregard federal statutes in favor of its own policy choices and to reverse the District Court's ruling. If the lower court's ruling were to stand, the constitutional system of separation of powers would be significantly altered.

SUMMARY OF THE ARGUMENT

The plain language of Section 36B of the ACA is clear and unambiguous. Congress made an unequivocal policy decision to provide refundable tax credits to individuals who purchase health insurance coverage through an Exchange established by one of the states. Yet, the Executive Branch interpreted Section 36B to authorize the receipt of refundable tax credits to individuals who purchase health insurance coverage through an Exchange established by the federal government. Because the text of the statute is clear, the interpretation of the Internal Revenue Service ("IRS") is not entitled to deference. Even if it were entitled to deference, the IRS's interpretation does not harmonize with the clear purpose of Congress. Because the IRS's interpretation is contrary to the plain

language and the express purpose of the statute, Section 36B must be applied as written. The District Court's ruling should be reversed.

ARGUMENT

Appellants brought this action under the Administrative Procedure Act ("APA") challenging the IRS Rule authorizing the receipt of refundable tax credits to individuals who purchase insurance on an Exchange established by one of the states ***as well as*** to individuals who purchase insurance on an Exchange established by the federal government. Under the APA, the Court shall "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (B), (C).

I. This Court's Ruling in *Aiken County* Is Highly Probative.

In *Aiken County*, a case that "raise[d] significant questions about the scope of the Executive's authority to disregard federal statutes," this Court declared that "[u]nder Article II of the Constitution and relevant Supreme Court precedents, the President must follow statutory mandates so long as there is appropriated money available and the President has no constitutional objection to the statute." 725 F.3d at 257, 259. At issue in *Aiken County* was a petition for a writ of mandamus that

sought to compel the Nuclear Regulatory Commission to adhere to a statutory deadline for completing the licensing process for approving or disapproving an application to store nuclear waste at Yucca Mountain in Nevada. As the Court explained,

> [i]f the President has a constitutional objection to a statutory mandate . . . the President may decline to follow the law unless and until a final Court order dictates otherwise. But the President may not decline to follow a statutory mandate . . . simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates. These basic constitutional privileges apply to the President and subordinate executive agencies.

In re Aiken County, 725 F.3d at 259. In granting the petition, the Court concluded:

> It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case by the Nuclear Regulatory Commission. Our decision today rests on the constitutional authority of Congress and the respect that the Executive and the Judiciary properly owe to Congress in the circumstances here.

Id. at 267.

The same is true here. There are no constitutional concerns with limiting the receipt of refundable tax credits to only individuals who purchase health insurance coverage through an Exchange established by one of the states. The Executive Branch simply seeks to replace Congress' policy choice about who is eligible to

receive refundable tax credits with its own. As will be addressed below, the plain language and express purpose of Section 36B make clear Congress' policy choice. The Constitutional authority of Congress – as well as the respect that the Executive and the Judiciary owe to Congress – demands that Congress' policy choice prevails. Section 36B should be applied as written.

II. Both the Plain Language and the Congressional Purpose of Section 36B Are Clear and Unambiguous.

In considering the legality of an agency action, a court must measure an agency's action against the statutory directive. "If the statute is clear and unambiguous '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.'" *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986). In addition, as this Court has reiterated, if an agency has exceeded a statute's clear and unambiguous boundaries, the agency's interpretation is unlawful. *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011).

"Congress speaks through the laws it enacts" (*Aiken County*, 725 F.3d at 260) and the text of Section 36B is clear and unambiguous. Section 36B plainly states that only an individual who purchases health insurance coverage "through an Exchange established by the State under section 1311 of the [ACA]" is eligible to receive refundable tax credits. 26 U.S.C. § 36B(c)(2)(A)(i). It is without question

that Congress intended for ***only*** individuals who purchase health insurance coverage through an Exchange established by one of the states to be eligible to receive refundable tax credits. Yet, the IRS interpreted Section 36B more broadly. It has authorized the receipt of refundable tax credits also to individuals who purchase health insurance coverage through an Exchange established by the federal government. By expanding the availability of refundable tax credits beyond its statutory authority, the IRS "fail[ed] to respect the unambiguous textual limitations" of Section 36B. *Fin. Planning Ass'n v. Sec. and Exch. Comm'n*, 482 F.3d 481, 490 (D.C. Cir. 2007).

The IRS's interpretation also is not entitled to *Chevron* deference. Where, as here, Congress has "unambiguously expressed [its] intent" through the plain language of a statute, no deference is afforded to an agency. *Chevron U.S.A. Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Dimension Fin. Corp*, 474 U.S. at 368 ("[T]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress"). To determine whether Congress' intent is clear, courts employ the traditional tools of statutory construction. *Silva-Hernandez v. U.S. Bureau of Citizenship & Immigration Servs.*, 701 F.3d 356, 361 (11th Cir. 2012). Courts must "begin by examining the text of the statute to determine whether its meaning is clear." *Harry v. Marchant*, 291 F.3d 767, 770 (11th Cir. 2002). They must also

"presume that Congress said what it meant and meant what it said." *Id*. The plain language of Section 36B is clear and unambiguous. Section 36B must be applied as written.

Even if the IRS's interpretation were entitled to *Chevron* deference – which it is not because Section 36B is clear and unambiguous – the IRS has impermissibly authorized an extension to the law which does not harmonize with the clear purpose of Congress. *See Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (noting that a permissible agency interpretation of the statute is one that "reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent"); *Meriden Trust and Safe Deposit Co. v. Fed. Deposit Ins. Corp.*, 62 F.3d 449, 453 (2d Cir. 1995) (stating that an agency's interpretation of a statute will be reversed "if it appears from the statute or its legislative history that the [agency's] interpretation is contrary to Congress' intent").

When it enacted Section 36B, Congress made a deliberate policy choice to provide refundable tax credits only to individuals who purchase health insurance coverage through an Exchange established by one of the states. Congress heard extensive testimony criticizing a healthcare system operated by the federal government. Also because Congress generally cannot require states to implement federal laws (*Printz v. United States*, 521 U.S. 898 (1997)), its policy decision to

provide refundable tax credits ***only*** to individuals who purchase health insurance coverage through an Exchange established by one of the states was Congress' attempt to *strongly* encourage states to establish Exchanges. Therefore, Congress chose not to create a nationalized healthcare system. Instead, it chose for the federal government to establish an Exchange only if a state failed to do so. Authorizing the receipt of refundable tax credits to individuals who purchase health insurance through an Exchange established by the federal government would not incentivize the states to create Exchanges. It may even encourage some of the States not to create an Exchange. The IRS Rule therefore directly contradicts Congress' policy choice.

Similarly, an agency's interpretation must be based on a permissible construction of the statute. The court must therefore determine whether the agency's interpretation is "manifestly contrary to the statute." *See Chevron*, 467 U.S. at 843-44; s*ee also Mayo Found. For Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011) (finding that deference to the agency's interpretation was appropriate because the statute did not speak with "the precision necessary" to definitively answer the question and the agency's interpretation was not "manifestly contrary to the statute"). Unlike the statute in *Mayo*, Section 36B provides all of the information needed to definitively answer the question of who is eligible to receive refundable tax credits. It specifically authorizes the receipt of

refundable tax credits to individuals who purchase health insurance coverage through "Exchanges established by the State." 26 U.S.C. § 36B(c)(2)(A)(i). The federal government is not a state, and an Exchange established by the federal government is not an Exchange established by a state. Congress spoke with "the precision necessary" to leave no doubt what it sought accomplish, so any extension by the IRS is a contradictory interpretation and is in excess of its authority. *Chevron*, 467 U.S. at 843-44.

CONCLUSION

The plain language of Section 36B is clear and unambiguous. Congress made an unequivocal policy decision to provide refundable tax credits to individuals who purchase health insurance coverage through an Exchange established by one of the states. The IRS impermissibly interpreted Section 36B to authorize the receipt of refundable tax credits to individuals who purchase health insurance coverage through an Exchange established by the federal government. Because the IRS Rule is contrary to the plain language and the express purpose of Section 36B, it is "in excess of statutory jurisdiction, authority, or limitations," is contrary to its "constitutional right, power, [or] privilege," and is "not in accordance with law." 5 U.S.C. § 706(2)(A), (B), and (C). For the foregoing reasons, Judicial Watch respectfully requests that this Court reaffirm the basic

principle that the Executive Branch cannot disregard federal statutes in favor of its own policy choices and reverse the lower court's ruling.

Dated: October 3, 2014

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) and Circuit Rule 32(a)(2). The brief, excluding exempted portions, contains 2,111 words (using Microsoft Word 2010), and has been prepared in a proportional Times New Roman, 14-point font.

/s/ Michael Bekesha

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October 2014, I filed via the CM/ECF system and by hand 30 copies of the foregoing with the Court and served via the CM/ECF system all counsel who are registered CM/ECF users.

/s/ Michael Bekesha