[EN BANC 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 M. 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. 1:13-cv-00623-PLF) (Hon. Paul L. Friedman)

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Plaintiffs-appellants are Jacqueline Halbig; David Klemencic; Carrie Lowery; Sarah Rumpf; Innovare Health Advocates; GC Restaurants SA, LLC; Olde England's Lion & Rose, LTD; Olde England's Lion & Rose at Castle Hills, LTD; Olde England's Lion & Rose Forum, LLC; Olde England's Lion & Rose at Sonterra, LTD; Olde England's Lion & Rose at Westlake, LLC; and Community National Bank.

Defendants-appellees are the U.S. Department of Health and Human Services (HHS); HHS Secretary Sylvia M. Burwell; the U.S. Department of the Treasury; Treasury Secretary Jacob J. Lew; the Internal Revenue Service (IRS), and IRS Commissioner John Koskinen.

The following *amici* filed briefs in support of plaintiffs in this en banc proceeding: Kansas; Nebraska; Judicial Watch; Cato Institute; Pacific Research Institute; Galen Institute; National Federation of Independent Business Legal Center; Jonathan Adler; Michael Cannon; Senator John Cornyn; Senator Ted Cruz, Senator Orrin G. Hatch, Senator Mike Lee, Senator Marco Rubio, Representative Dave Camp, and Representative Darrell Issa.

As of the filing of this brief, the following *amici* have filed briefs or notices of intent to file briefs in support of the government in this en banc proceeding:

- the following States: Virginia, Arkansas, California, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Mississippi, New Hampshire, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, and Washington;
- the following organizations, public health groups, and individuals: America's Health Insurance Plans; American Hospital Association; Federation of American Hospitals; Catholic Health Association of the United States; Association of American Medical Colleges; America's Essential Hospitals; American Cancer Society; American Cancer Society Cancer Action Network; American Diabetes Association; American Heart Association; Families USA; AARP; National Health Law Program; Southern Poverty Law Center; Harvard Law School Center for Health Law and Policy Innovation; AIDS Alabama; AIDS Institute; Association for Community Affiliated Plans; Community Catalyst; Duke AIDS Legal Project; HIV Medicine Association; National Alliance of State and Territorial AIDS Directors; National Minority AIDS Council; North Carolina AIDS Action Network; Texas One Voice; Southern HIV/AIDS Strategy Initiative; and certain individuals with preexisting conditions (Jared Blitz, Jennifer Causor, Steve Orofino, Aidan Robinson, Martha Robinson, David Tedrow, and Mary Tedrow);
- the following economic scholars: Henry J. Aaron, Ph.D.; Stuart Altman, Ph.D.; Susan Athey, Ph.D.; Linda Blumberg, Ph.D.; Barry Bosworth, Ph.D.; Gary Burtless, Ph.D.; Amitabh Chandra, Ph.D.; Philip J. Cook, Ph.D.; Janet Currie, Ph.D.;

David Cutler, Ph.D.; Karen Davis, Ph.D.; J. Bradford DeLong, Ph.D.; Peter Diamond, Ph.D.; Ezekiel Emanuel, M.D., Ph.D.; Austin Frakt, Ph.D.; Sherry Glied, Ph.D.; Paul B. Ginsburg, Ph.D.; Claudia Goldin, Ph.D.; Jonathan Gruber, Ph.D.; Genevieve M. Kenney, Ph.D.; Vivian Ho, Ph.D.; John Holahan, Ph.D.; Jill Horwitz, Ph.D.; Lawrence Katz, Ph.D.; Frank Levy, Ph.D.; Peter H. Lindert, Ph.D.; Eric S. Maskin, Ph.D.; Marilyn Moon, Ph.D.; Alan C. Monheit, Ph.D.; Joseph Newhouse, Ph.D.; Mark V. Pauly, Ph.D.; Harold Pollack, Ph.D.; Daniel Polsky, Ph.D.; James B. Rebitzer, Ph.D.; Michael Reich, Ph.D.; Robert D. Reischauer, Ph.D.; Thomas Rice, Ph.D.; Alice Rivlin, Ph.D.; Meredith Rosenthal, Ph.D.; Isabel Sawhill, Ph.D.; John B. Shoven, Ph.D.; Jonathan Skinner, Ph.D.; Lawrence Summers, Ph.D.; Katherine Swartz, Ph.D.; Kenneth Thorpe, Ph.D.; Laura Tyson, Ph.D.; Paul N. Van de Water, Ph.D.; Justin Wolfers, Ph.D.; and Stephen Zuckerman, Ph.D.;

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- the following Members of Congress: Former Senator Max Baucus (in his individual capacity); Senator Tom Harkin; Representative Sander M. Levin; Representative George Miller; Representative Nancy Pelosi; Senator Harry Reid; Representative Henry Waxman;
- and the following state legislators: Ajello, Edith, Representative of Rhode Island; Albis, James, Representative of Connecticut; Alexander, Kelly, Representative of North Carolina; Antonio, Nickie, Representative of Ohio; Barrett, Dick, Senator of Montana; Beavers, Roberta, Representative of Maine; Bennett, David, Representative of Rhode Island; Briggs, Sheryl, Representative of Maine; Briscoe, Joel, Representative of Utah; Bronson, Harry, Assemblymember of New York; Bullard, Dwight, Senator of Florida; Carey, Michael, Representative of Maine; Chase, Cynthia, Representative of New Hampshire; Chenette, Justin, Representative of Maine; Cody, Eileen, Representative of Washington; Coleman, Garnet, Representative of Texas; Cooper, Janice, Representative of Maine; Cunningham, Carla, Representative of North Carolina; Daley, Mary Jo,

Representative of Pennsylvania; Daughtry, Matthea, Representative of Maine; Dicks, Steph, Assemblymember of Pennsylvania; Dorney, Ann, Representative of Maine; Fahy, Patricia, Assemblymember of New York; Falk, Andrew, Representative of Minnesota; Farnsworth, Richard, Representative of Maine; Ferri, Frank, Representative of Rhode Island; Fisher, Susan, Representative of North Carolina; Fitzgibbon, Joe, Representative of Washington; Fludd, Virgil, Representative of Georgia; Fraser, Karen, Senator of Washington; Gardner, Pat, Representative of Georgia; Gattine, Drew, Representative of Maine; Gilbert, Paul, Representative of Maine; Gill, Rosa, Representative of North Carolina; Glassheim, Eliot, Representative of North Dakota; Glazier, Rick, Representative of North Carolina; Goode, Adam, Representative of Maine; Goodman, Neal, Representative of Pennsylvania; Gottfried, Richard N., Chair, Assembly of New York; Hamann, Scott, Representative of Maine; Harlow, Denise, Representative of Maine; Harrison, Pricey, Representative of North Carolina; Hatch, Jack, Senator of Iowa; Hunt, Sam, Representative of Washington; Insko, Verla, Representative of North Carolina; Johnson, Burt, Senator of Michigan; Johnson, Connie, Senator of Oklahoma; Jones, Brian, Representative of Maine; Keiser, Karen, Senator of Washington; King, Phylis, Representative of Idaho; Kline, Adam, Senator of Washington; Kloucek, Frank, former Representative of South Dakota; Kohl-Welles, Jeanne, Senator of Washington; Kruger, Chuck, Representative of Maine; Kumiega, Walter,

Representative of Maine; Kusiak, Karen, Representative of Maine; Lemar, Roland, Representative of Connecticut; Lesser, Matthew, Representative of Connecticut; Liebling, Tina, Representative of Minnesota; Liias, Marko, Senator of Washington; Longstaff, Thomas, Representative of Maine; Luedtke, Eric, Delegate of Maryland; MacDonald, Bruce, Representative of Maine; Madaleno, Jr., Richard, Senator of Maryland; Markey, Margaret, Assemblywoman of New York; Marzian, Mary Lou, Representative of Kentucky; Mason, Andrew, Representative of Maine; Mastraccio, Anne-Marie, Representative of Maine; Mathern, Tim, Senator of North Dakota Mcgowan, Paul, Representative of Maine; McLean, Andrew, Representative of Maine; McNamar, Jay, Representative of Minnesota; McSorley, Cisco, Senator of New Mexico; Molchany, Erin C., Representative of Pennsylvania; Moody, Marcia, Representative of New Hampshire; Moonen, Matthew, Representative of Maine; Morrison, Terry, Representative of Maine; Mundy, Phyllis, Representative of Pennsylvania; Nelson, Mary Pennell, Representative of Maine; Noon, Bill, Representative of Maine; Nordquist, Jeremy, Senator of Nebraska; O'Brien, Michael, Representative of Pennsylvania Orrock, Nan, Senator of Georgia; Ortiz y Pino, Gerald, Senator of New Mexico; Parker, Cherelle L., Representative of Pennsylvania; Paulin, Amy, Assemblymember of New York; Phillips, Mike, Senator of Montana; Porter, Marjorie, Representative of New Hampshire; Pringle, Jane, Representative of Maine; Richardson, Bobbie, Representative of North Carolina;

Ringo, Shirley, Representative of Idaho; Rivera, Gustavo, Senator of New York; Rochelo, Megan, Representative of Maine; Rosenbaum, Diane, Senator of Oregon; Rosenwald, Cindy, Representative of New Hampshire; Rykerson, Deane, Representative of Maine; Ryu, Cindy, Representative of Washington; Sanborn, Linda, Representative of Maine; Saucier, Robert, Representative of Maine; Schlossberg, Michael, Representative of Pennsylvania; Schneck, John, Representative of Maine; Sells, Mike, Representative of Washington; Sepulveda, Luis, Assemblyman of New York; Sims, Brian, Representative of Pennsylvania; Skindell, Michael, Senator of Ohio; Slocum, Linda, Representative of Minnesota; Stanford, Derek, Representative of Washington; Talabi, Alberta, Representative of Michigan; Tavares, Charleta B., Senator of Ohio; Till, George, Representative of Vermont; Tipping-Spitz, Ryan, Representative of Maine; Townsend, Charles, Representative of New Hampshire; Treat, Sharon, Representative of Maine; Vuckovich, Gene, Senator of Montana; Wanzenried, David E., Senator of Montana; Ward, JoAnn, Representative of Minnesota; Witt, Brad, Representative of Oregon; and Yantacka, Michael, Representative of Vermont.

B. Ruling Under Review

Plaintiffs have appealed the final judgment entered on January 15, 2014. The order (Docket Entry #66) and accompanying opinion (Docket Entry #67) were issued by the Honorable Paul L. Friedman in No. 1:13-cv-00623-PLF (D.D.C.).

C. Related Cases

This case was previously before a panel of this Court. *See* 758 F.3d 390 (D.C. Cir. 2014). The Fourth Circuit issued a contrary decision on the same day that the panel decision was issued in this case. *See King v. Burwell*, 759 F.3d 358 (4th Cir. 2014), *cert petition pending*, No. 14-114 (S. Ct.). The same statutory argument is made by the plaintiff in *State of Oklahoma ex rel. Scott Pruitt v. Burwell*, No. 14-7080 (10th Cir.), but there are threshold jurisdictional issues in *Oklahoma* that are not presented by this appeal.

/*s/ Alisa B. Klein*
Alisa B. Klein
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

*Authorities upon which we chiefly rely are marked with asterisks.

Statutes:

Regulations:

Legislative Materials:

Other Authorities:

GLOSSARY

ACA	Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010
CBO	Congressional Budget Office
CHIP	Children's Health Insurance Program
HCERA	Health Care and Education Reconciliation Act of 2010
HHS	U.S. Department of Health & Human Services
JA	Joint Appendix
JCT	Joint Committee on Taxation

STATUTORY REFERENCES

United States Code	Affordable Care Act
26 U.S.C. 36B	1401
26 U.S.C. 4980H	1513
26 U.S.C. 5000A	1501
26 U.S.C. 6055	1502
29 U.S.C. 218b	1512
42 U.S.C. 300gg to 300gg-4	1201
42 U.S.C. 300gg-91	1563
42 U.S.C. 1320b-23	6005
42 U.S.C. 1396a	2001
42 U.S.C. 1396w-3	2201
42 U.S.C. 1397ee	2101
42 U.S.C. 18021	1301
42 U.S.C. 18021	10104
42 U.S.C. 18031	1311
42 U.S.C. 18032	1312
42 U.S.C. 18041	1321
42 U.S.C. 18051	1331

42 U.S.C. 18052	1332
42 U.S.C. 18053	1333
42 U.S.C. 18071	1402
42 U.S.C. 18081	1411
42 U.S.C. 18082	1412
42 U.S.C. 18091	1501
42 U.S.C. 18111	1551

INTRODUCTION

When Congress enacted the Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124 Stat. 119,[1] it set forth its purposes in the text of the Act itself. Chief among them is the goal of ensuring "near-universal" access to affordable health insurance. 42 U.S.C. 18091(2)(D). To meet that goal, the Act enables the millions of Americans who do not receive health insurance from their employer or a government program (such as Medicare) to obtain affordable coverage, including those Americans whom insurance companies previously refused to cover or charged exorbitant rates because of pre-existing conditions such as diabetes or high blood pressure. The Act does so by establishing a marketplace called an "Exchange" in each State; offering tax credits to low- and moderate-income persons to subsidize their purchases on the Exchanges; and barring insurers from discriminating against persons with pre-existing conditions.

Working in tandem, these core features of the Act have been implemented successfully in precisely the manner that Congress intended. Exchanges are operating in every State, and millions of Americans have obtained affordable insurance on those Exchanges. Nearly 90% of the people who have purchased

[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (HCERA).

insurance on the Exchanges rely on tax credit subsidies, and the credits cover an average of 76% of their premiums.

Plaintiffs now seek to upend the Act's operation and deny insurance to millions of newly covered Americans. The theory they advance to achieve this destructive result is quite remarkable. Plaintiffs seize on a feature of the Act designed to respect federalism, and they contort it into a provision that punishes States and their citizens. The Act affords each State the choice of either setting up and operating an Exchange itself or instead relying on the federal government to do so. As one would expect, the Act's text and structure make clear that the two alternatives are legally equivalent in the assistance and protections they afford to individuals who use them to purchase insurance. Regardless of the type of Exchange any particular State chooses, the federal tax credits are available to lower the costs of insurance on Exchanges in every State.

Plaintiffs claim, however, that the two types of Exchanges are not legal equivalents. They insist that the "plain meaning" of a phrase in two subsections setting forth the formula for calculating the amount of the tax credits restricts those credits to persons who live in States that establish Exchanges for themselves, and categorically denies those credits to persons who live in States where the federal government has set up the Exchange.

Two consequences follow from Plaintiffs' reading of the Act. First, when a State opts to let the federal government set up the Exchange, the State deprives its own citizens of the tax credits that would allow them to obtain insurance at affordable rates—defeating the central purpose of establishing an Exchange in the first place. Second, a State that does not set up an Exchange itself risks massive disruption in its insurance market. If a State's otherwise-eligible residents are denied tax credits, most of them will no longer purchase insurance because they will not be able to afford to do so. The residents who continue to purchase insurance will be those who have an illness or condition that requires expensive treatment. Insurance companies thus will face the destabilizing coalescence of increasing costs and decreasing revenues, and the State's insurance market will be threatened with a "death spiral"— a result the Act was specifically designed to prevent.

Accepting plaintiffs' account of the Act requires accepting not merely that Congress would adopt this punitive, self-defeating scheme *at all,* but that Congress would do so exclusively through isolated phrases buried in the technical formula for calculating the size of an individual's tax credit, rather than forthrightly in provisions putting States and their citizens on notice of what Congress had done. To say that plaintiffs purport to have discovered an elephant hidden in a

mousehole, *see Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001), understates the audacity of their enterprise.

Although plaintiffs invoke fidelity to the statutory text, their approach is anything but faithful to that text or to fundamental principles of statutory interpretation. Plaintiffs' reading of the Act would "deny effect to the regulatory scheme" and pervert the manifest intent of the statutory design. *Abramski v. United States*, 134 S. Ct. 2259, 2269 (2014). But it is not wrong for that reason alone. It is wrong as an elemental *textual* matter because it rests entirely on a blinkered misreading of a single statutory phrase divorced from the text of the Act's operative and definitional provisions, and ignores a compelling alternative reading of that text that allows the Act to operate coherently and avoid the havoc plaintiffs' reading would wreak. It is wrong because it transforms the text and structure of the Act into a hash of internal contradictions, superfluities, and provisions that are impossible to apply—requiring, for example, the creation of Exchanges on which no individual could lawfully shop and no insurance plan could lawfully be sold. It is wrong because it disrespects principles of cooperative federalism and eviscerates the Act's promise of "State flexibility," 42 U.S.C. 18041, as a State may decline to establish an Exchange for itself only at the price of depriving its citizens of affordable insurance and crippling its insurance market. It is wrong because it rests on a fabricated version of the legislative history. And it

is wrong because it would deny tax credits to millions of people in 34 States who now depend on those credits to obtain insurance.

It is unfathomable that Congress would have imposed plaintiffs' regime in a law expressly designed to deliver "near-universal coverage." 42 U.S.C. 18091(2)(D). The Department of the Treasury correctly interpreted the Act to make tax credits available for all qualified individuals who purchase insurance on an Exchange, regardless of whether a State elects to create an Exchange for itself or allows the federal government to do so in its stead. The district court decision upholding that interpretation must be affirmed.

STATEMENT OF THE ISSUE

Whether the Department of the Treasury permissibly interprets 26 U.S.C. 36B to make the Affordable Care Act's federal tax credits available to individuals in every State.

STATUTES AND REGULATIONS

Pertinent provisions are reproduced in plaintiffs' addendum.

STATEMENT OF THE CASE

A. Statutory Background

Congress enacted the Affordable Care Act "to increase the number of Americans covered by health insurance and decrease the cost of health care." *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2680 (2012) (*NFIB*).

To achieve those goals, the Act relies on new federal tax credits that subsidize the purchase of insurance by low- and moderate-income Americans who previously lacked access to affordable health coverage.

1. Most Americans with private health coverage obtain it through an employer-sponsored health plan, a form of coverage not at issue here. *See* Congressional Budget Office (CBO), *Key Issues in Analyzing Major Health Insurance Proposals* xi (Dec. 2008) (*Key Issues*). Congress has long subsidized employer-sponsored coverage through favorable federal tax treatment. In 2007, for example, the federal tax subsidy for such coverage was $246 billion. *Id*. at xi, 31. Federal law also ensures broad access to employer-sponsored health plans by prohibiting them from denying coverage or charging higher premiums to employees or their families based on health status or medical history. *Id*. at 79-80.

Previously, however, Congress's efforts to make affordable health coverage widely available left a substantial gap in the "individual market." Insurance policies sold in that market cover individuals and families who do not receive coverage "through [an] employer, or from a government program such as Medicaid or Medicare." *NFIB*, 132 S. Ct. at 2580. Before the Affordable Care Act, insurance purchased in the individual market generally did not receive favorable tax treatment. *Key Issues* 9. Moreover, federal law generally did not prevent insurers in that market from increasing premiums, or denying coverage altogether,

based on health status or medical history. As a result, insurers routinely denied coverage or charged higher premiums to people with conditions as common as high blood pressure or asthma.[2]

Because of those restrictions on coverage and the high cost of policies in the individual market, participation in that market was very low. Of the 45 million people without access to coverage through an employer-sponsored plan or government program in 2009, only about 20% were covered by a policy purchased in the individual market. The other 80% were uninsured. *Key Issues* 46.

2. In Title I of the Affordable Care Act, titled "Quality, Affordable Health Care for All Americans," 124 Stat. 130, Congress sought to increase access to affordable health insurance in the individual market through the mutually reinforcing effect of three interdependent measures: (1) nondiscrimination requirements, which bar insurers from denying coverage or charging higher premiums based on medical condition or history, *see* 42 U.S.C. 300gg to 300gg-4; (2) the tax credits at issue here, which provide federal subsidies to help low- and moderate-income Americans purchase insurance, *see* 26 U.S.C. 36B; and (3) the individual-coverage provision (sometimes called the "individual mandate"), which

[2] *47 Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the Senate Comm. on Finance*, 110th Cong., 2d Sess. 52 (2008) (Statement of Professor Mark A. Hall).

requires most individuals to pay a tax penalty if they do not maintain health coverage, *see* 26 U.S.C. 5000A.

The nondiscrimination rules ensure that consumers in the individual market can obtain coverage regardless of their medical condition or history. But Congress recognized that if it had adopted those rules as stand-alone measures, people would have been encouraged to "wait to purchase health insurance until they needed care," secure in the knowledge that they could not later be denied coverage or charged higher rates. 42 U.S.C. 18091(2)(I). That "adverse selection" would have forced insurers to increase premiums to account for a risk pool skewed toward consumers most likely to need medical care, encouraging still greater numbers of healthy people to defer purchasing insurance until they had an immediate medical need and creating a self-reinforcing "death spiral" in the insurance market—a "disastrous" result that had played out in several States that had enacted stand-alone nondiscrimination requirements in the 1990s. *NFIB*, 132 S. Ct. at 2614 (Ginsburg, J., concurring in part and dissenting in part). Those States "suffered from skyrocketing insurance premium costs" and "reductions in individuals with coverage" as many insurers stopped offering coverage altogether. *Ibid*. (citation omitted).

Congress was well aware of the failure of stand-alone nondiscrimination requirements in the States. To "minimize this adverse selection and broaden the

health insurance risk pool," 42 U.S.C. 18091(2)(I), Congress coupled the Affordable Care Act's nondiscrimination rules with tax credits and the individual-coverage provision. The tax credits subsidize the purchase of individual-market insurance by eligible individuals with household incomes between 100% and 400% of the federal poverty level. 26 U.S.C. 36B.[3] In addition, for eligible recipients of the tax credit with incomes in the lower half of that range, the Act provides supplemental payments for cost-sharing expenses, such as deductibles. 42 U.S.C. 18071. The tax credits and cost-sharing payments provide "Affordable Coverage Choices for All Americans," ACA Tit. I, Subtit. E, 124 Stat. 213, by extending to the individual market federal subsidies parallel to those that have long been available to employer-sponsored health plans. And "[b]y significantly increasing health insurance coverage," the subsidies help prevent adverse selection and preserve the stability of the insurance markets. 42 U.S.C. 18091(2)(I).

The individual-coverage provision provides a further safeguard against adverse selection by requiring most people to pay a tax penalty if they do not maintain health coverage. Congress deemed this requirement "essential to creating effective health insurance markets" under the nondiscrimination rules. 42 U.S.C. 18091(2)(I); *see NFIB*, 132 S. Ct. at 2580, 2600 & n.11. "But recognizing that

[3] In the continental United States, the federal poverty level is currently $11,670 for an individual and $23,850 for a family of four. 79 Fed. Reg. 3593 (Jan. 22, 2014).

individuals cannot be made to purchase what they cannot afford," Congress created an unaffordability exemption from the individual-coverage provision "if the cost of insurance exceeds eight percent" of a person's household income. *Halbig v. Burwell*, 758 F.3d 390, 419 (D.C. Cir. 2014) (Edwards, J., dissenting); *see* 26 U.S.C. 5000A(e)(1)(A). The Act creates a direct link between that unaffordability exemption and the tax credits by providing that the exemption is based on the cost of insurance "reduced by the amount of the credit allowable under section 36B." 26 U.S.C. 5000A(e)(1)(B)(ii). Accordingly, the tax credits are essential not only to making coverage affordable, but also to the effective operation of the individual-coverage provision. Without subsidies, "millions" of low- and moderate-income Americans would have fallen within the unaffordability exemption because they would have lacked access to affordable insurance. *Halbig*, 758 F.3d at 395. Such a broad exemption would have undermined the individual-coverage provision's "essential" safeguard against adverse selection, 42 U.S.C. 18091(2)(I), risking the death spirals that plagued earlier state efforts at reform.

Thus, the tax credits, non-discrimination rules, and individual-coverage provision work together to achieve the Act's fundamental goals of expanding health-insurance coverage and preserving a functioning individual insurance market in each State. Because of that interdependence, Congress provided that all three sets of provisions would take effect on the same date, January 1, 2014. *See*

ACA §§ 1255, 1401(e), 1501(d), 124 Stat. 162, 220, 249; ACA § 10103(f)(1), 124 Stat. 895 (redesignating Section 1253 as Section 1255).

3. The Affordable Care Act implements its reforms to the individual market by providing for the creation of "Exchanges," which are state-specific marketplaces where consumers can compare and purchase health plans offered in their State by private insurers. 42 U.S.C. 18031(d). Only individuals who purchase insurance through the Exchange in their State are eligible for tax credits and cost-sharing subsidies. 26 U.S.C. 36B; 42 U.S.C. 18071. The Exchange facilitates determinations regarding eligibility for those payments, 42 U.S.C. 18081, and facilitates the payment of subsidies and the advance payment of tax credits directly to an eligible individual's insurer each month, 42 U.S.C. 18082. Before Congress passed the Act, the CBO projected that 78% of the individuals who would buy insurance through the Exchanges would receive tax credits, and that those credits would cover an average of nearly two-thirds of the recipients' premiums. CBO, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act* 24 (Nov. 30, 2009) (*Premium Analysis*).

The Act provides that "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an 'Exchange')." 42 U.S.C. 18031(b)(1). To afford "State flexibility," however, the Act furnishes alternative ways for that requirement to be fulfilled. 42 U.S.C.

18041. First, a State can "elect[]" to set up the Exchange for itself. 42 U.S.C. 18041(b). Second, if a State does not elect to create the "required Exchange" for itself, or fails to have its Exchange "operational by January 1, 2014," then the Department of Health and Human Services (HHS) "shall establish and operate such Exchange within the State." 42 U.S.C. 18041(c)(1).

An Exchange operated by HHS is known as a "[f]ederally-facilitated Exchange." 45 C.F.R. 155.20. Though run by HHS, each federally-facilitated Exchange is a state-specific marketplace offering state-specific health insurance plans. Insurers offering coverage on an Exchange are regulated by the State in which the Exchange is located, *see, e.g.*, 42 U.S.C. 18021(a)(1)(C)(i), and premiums are based on rating areas and risk pools unique to the State, *see* 42 U.S.C. 18021(a)(4), 18032(c).

4. The Department of the Treasury is responsible for implementing 26 U.S.C. 36B, the provision authorizing tax credits for qualifying individuals who purchase insurance on the Exchanges. Section 36B(a) provides that a tax credit "shall be allowed" for any "applicable taxpayer." The term "applicable taxpayer" is defined as "a taxpayer whose household income for the taxable year equals or exceeds 100 percent but does not exceed 400 percent" of the federal poverty line. 26 U.S.C. 36B(c)(1)(A). Section 36B(b) then provides that the amount of the credit available is based in part on the premiums paid for qualified health plans

"offered in the individual market within a State" that the taxpayer "enrolled in through an Exchange established by the State under [42 U.S.C. 18031]." 26 U.S.C. 36B(b)(2)(A). Another subparagraph of Section 36B cross-references this provision and uses a similar formulation in defining a "coverage month" for which a credit is available. 26 U.S.C. 36B(c)(2)(A)(i).

Treasury, through notice-and-comment rulemaking, has interpreted Section 36B to make credits available to all eligible individuals who purchase insurance on an Exchange—both in States that establish the Exchange for themselves and in States that are unable to do so or that opt to allow HHS to establish the Exchange in the State's stead. 26 C.F.R. 1.36B-1(k), 1.36B-2(a); *see* 77 Fed. Reg. 30,377 (May 23, 2012).

5. Thus far, 16 States and the District of Columbia have established Exchanges for themselves, while 34 States have opted to allow HHS to do so. JA328. Approximately 7.3 million people have obtained insurance through the Exchanges. Sylvia M. Burwell, Secretary, HHS, The Affordable Care Act is Working (Sept. 23, 2014), http://www.hhs.gov/secretary/about/speeches/sp20140923.html. Roughly 5.4 million of them secured coverage through a federally-facilitated Exchange. Amy Burke et al., *ASPE Research Brief: Premium Affordability, Competition, and Choice in the Health Insurance Marketplace, 2014*, at 3 (June 18, 2014) (*Premium Affordability*).

Nearly 90% of the people who have purchased insurance on the Exchanges rely on tax credits, and the credits cover the lion's share of premiums for most recipients—an average of 76%. *Premium Affordability* 3. In 2014, the average subsidy from the tax credits and accompanying cost-sharing payments is expected to be $4,700. CBO, *The Budget and Economic Outlook: 2014 to 2024*, at 108 Tbl. B-2 (Feb. 2014).

B. Plaintiffs' Suit

The lead plaintiff is David Klemencic, who was also a plaintiff in *NFIB*. He lives in West Virginia, which opted to allow HHS to establish the Exchange for that State and which has partnered with HHS in operating the Exchange. *Halbig*, 758 F.3d at 396. Klemencic alleges that he does not have health insurance and that, absent the tax credits, he would fall within the individual-coverage provision's unaffordability exemption. *Ibid.* But, he continues, the availability of tax credits means he can obtain affordable coverage on the West Virginia Exchange for just a few dollars per month, and the individual-coverage provision therefore requires him to either purchase insurance or pay a tax penalty. *Ibid*. Seeking to avoid that result, Klemencic and others filed this suit, asserting that Congress precluded Treasury from providing tax credits not only to them, but also to the millions of residents of States with federally-facilitated Exchanges who are relying on credits to make their health coverage affordable.

On cross-motions for summary judgment, the district court upheld the Treasury regulation. The court explained that "the plain text of the statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges." JA361. At a minimum, the court held, Treasury's interpretation is "a reasonable one" entitled to *Chevron* deference. JA362 n.14.

A divided panel of this Court reversed, and the Court then granted the government's petition for rehearing en banc.[4]

SUMMARY OF ARGUMENT

I. The Affordable Care Act directs that tax credits "shall be allowed" to low- and moderate-income consumers who purchase health insurance through Exchanges. 26 U.S.C. 36B(a). These tax credits are indispensable to the coherent functioning of the Act's Exchange-based system. "Without the federal subsidies, … the exchanges would not operate as Congress intended and may not operate at all." *NFIB*, 132 S. Ct. at 2674 (Scalia, Kennedy, Thomas, and Alito, JJ.,

[4] The district court held that Klemencic has standing to sue and a cause of action under the Administrative Procedure Act. JA334-340; *see Halbig*, 758 F.3d at 396-398. The government no longer challenges those rulings. The other individual plaintiffs did not submit declarations and the district court did not address their standing. JA334 n.4. The district court held that the claims of the employer plaintiffs are barred by the Anti-Injunction Act, 26 U.S.C. 7421(a). JA340-345. Plaintiffs forfeited any challenge to that ruling "by failing to make it in their opening brief." *Southwest Airlines Co. v. TSA*, 554 F.3d 1065, 1072 (D.C. Cir. 2009).

dissenting). Unsurprisingly, the Act's text and structure demonstrate that those federal tax credits are available to Americans in *every* State.

A. The text of the Act's operative provisions makes clear that tax credits are available on *all* Exchanges. The Affordable Care Act directs that "[e]ach State shall … establish an … Exchange." 42 U.S.C. 18031(b)(1). But the Act then furnishes two means by which that requirement may be fulfilled. A State may "elect[]" to set up the Exchange for itself. 42 U.S.C. 18041(b). Alternatively, if a State does not elect to create the "*required Exchange*" or is unable to do so, then HHS "shall … establish and operate *such Exchange* within the State." 42 U.S.C 18041(c)(1) (emphasis added). The use of the phrase "such Exchange" conveys that an Exchange established by HHS for a particular State satisfies Section 18031's requirement that "[e]ach State" establish an Exchange because it *is*, as a matter of law, "an Exchange established by the State." The statutory definition of "Exchange" underscores that conclusion by defining that term to mean "an American Health Benefit Exchange established under [42 U.S.C. 18031]"—the provision directing "[e]ach State" to establish an Exchange. 42 U.S.C. 300gg-91(d)(21).

Because the phrase "Exchange established by the State under [Section 18031]" is a statutorily created term of art that includes federally-facilitated Exchanges, the use of that phrase in Section 36B's formula for calculating tax

credits does not restrict those credits to people living in States that set up and run Exchanges themselves. That conclusion is confirmed by the other provisions of the Act in which the phrase "Exchange established by the State" or its equivalent appears. Under Treasury's interpretation, those provisions constitute a comprehensive, coherent, and consistent regulatory scheme that achieves Congress's purposes not only with respect to tax credits, but also with respect to other critical matters such as who can shop on Exchanges and what plans can be sold there. Plaintiffs' reading, in contrast, renders virtually all of those provisions inconsistent, superfluous, or impossible to apply. For example, under plaintiffs' interpretation, no one would be legally permitted to shop on any of the 34 federally-facilitated Exchanges because the Act defines a "qualified individual" eligible to purchase coverage on an Exchange as a person who, among other things, "resides in the State that established the Exchange." 42 U.S.C. 18032(f)(1)(A)(ii).

B. The provisions of the Act that directly address tax credits likewise demonstrate that those credits are available in every State. Section 36B itself—the very provision plaintiffs point to as excluding tax credits on federally-facilitated Exchanges—requires federally-facilitated Exchanges to report information to Treasury for the express purpose of "[r]econcil[ing]" "[t]he amount of the credit allowed" to an eligible individual at the end of the tax year with "the amount of

any advance payment of such credit" to the individual's insurer over the course of the year. 26 U.S.C. 36B(f)(1) and (3). It would make no sense to require federally-facilitated Exchanges to submit those reports if tax credits were categorically unavailable to their customers.

C. More broadly, plaintiffs' reading would thwart the operation of the Act's central provisions and undermine the objectives Congress set forth in the text of the Act itself. It would gut the federally-facilitated Exchanges Congress required HHS to create. It would deprive millions of Americans of insurance and create a gaping hole in the individual-coverage provision. The loss of customers would have disastrous consequences for the insurance markets in the affected States, which would remain subject to the Act's nondiscrimination requirements but without the safeguards that Congress found essential to preventing adverse selection. The result would be the very death spirals the Act was crafted to avoid.

D. The Act's legislative history further confirms that tax credits are available in every State and contains nothing that supports plaintiffs' counter-intuitive reading of the statute. Although the language on which plaintiffs now rely was in the draft bill for months before the Act was passed, the extensive legislative debate reflects a universal understanding that tax credits would be available in every State—including States with federally-facilitated Exchanges.

E. Plaintiffs appear to concede that Congress intended tax credits to be available in every State, and that the denial of credits in 34 States would yield disastrous results and undermine the Act's goals. Hard-pressed to explain why Congress would have written such a self-defeating statute, plaintiffs posit that Congress sought to pressure States to establish their own Exchanges by threatening to deny credits to their residents and to destroy their insurance markets if they refused to do so, and that Congress assumed that every State would comply rather than face those disastrous consequences.

The coercive design that plaintiffs would ascribe to Congress is "made up out of whole cloth." *Halbig*, 758 F.3d at 414 (Edwards, J., dissenting). The Act's express promise of "State flexibility," 42 U.S.C. 18041, confirms that Congress offered States a genuine choice—not, as plaintiffs would have it, an offer too threatening to refuse. It was well-known when the Act was passed that some States would not set up their own Exchanges, and the fact that the Act "provided a backup scheme" in the form of federally-facilitated Exchanges demonstrates that "Congress thought that some States might … decline[] to participate in the operation of an exchange." *NFIB*, 132 S. Ct. at 2665 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

II. In interpreting Section 36B to make tax credits available to eligible individuals in every State, Treasury heeded the "cardinal rule that a statute is to be

read as a whole" because "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). That interpretation is unambiguously correct. But if any uncertainty remained, Treasury's interpretation would at a minimum be a permissible one meriting deference under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

ARGUMENT

I. The Affordable Care Act Makes Federal Premium Tax Credits Available To Taxpayers In Every State.

A. The Act's Text And Structure Demonstrate That Tax Credits Are Available In Every State Because An Exchange Established By HHS For A Particular State Is, As A Matter Of Law, "An Exchange Established By The State."

In 26 U.S.C. 36B(a), the Affordable Care Act directs that a premium tax credit "shall be allowed" to any "applicable taxpayer," a term defined based solely on income level and without regard to the taxpayer's State of residence. 26 U.S.C. 36B(a); *see* 26 U.S.C. 36B(c)(1)(A). Succeeding subsections of Section 36B then set forth the formula for calculating the amount of the credit to which an individual specified in Section 36B(a) is entitled. That formula is based in part on the cost of insurance "offered in the individual market within a State" that was "enrolled in through an Exchange established by the State under [42 U.S.C. 18031]." 26 U.S.C. 36B(b)(2)(A); *see* 26 U.S.C. 36B(c)(2)(A)(i).

Plaintiffs assert that because HHS is not a "State," the amount of the credit for a person who buys insurance on a federally-facilitated Exchange is always zero—in other words, that the language in the formula for calculating tax credits creates a categorical geographical restriction on the availability of tax credits, denying credits to all residents of all States with federally-facilitated Exchanges. That reading is wrong in every respect. It would "deny effect to the regulatory scheme" and prevent it from accomplishing its "manifest objects." *Abramski*, 134 S. Ct. at 2269. Although "[t]hat alone provides more than sufficient reason" to reject plaintiffs' position, *ibid.*, their interpretation is wrong for the more basic reason that it is not faithful to the statute's text. Instead, it misreads that text in a manner that is divorced from statutory context and creates a statute at war with itself.

Focusing first on the specific language in 26 U.S.C. 36B(b)(2)(A) and (c)(2)(A)(i) on which plaintiffs rest their entire argument, the directly applicable provisions of the Act make clear that when HHS establishes the Exchange for a particular State, that Exchange is, as a matter of law, an "Exchange established by the State under [Section 18031]." The Act's other provisions using the phrase "Exchange established by the State" or its equivalent confirm that an Exchange set up by a State and a federally-facilitated Exchange are legal equivalents for statutory purposes.

1. Section 18031(b)(1) directs that "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an 'Exchange')." The statutory text thus prescribes that there must be an Exchange established by the State in every State. But Section 18041, which expressly affords "State flexibility," furnishes alternative means by which that requirement may be fulfilled. First, a State may "elect[]" to establish the Exchange itself. 42 U.S.C. 18041(b). Second, if a State opts not to create the "*required Exchange*" or is unable to do so, then HHS "shall … establish and operate *such Exchange* within the State." 42 U.S.C. 18041(c)(1) (emphasis added).

The use of the phrase "such Exchange" conveys that the Exchange to be established by HHS *is* the "required Exchange" referenced earlier in the same sentence—that is (in the terms 26 U.S.C. 36B(b)(2)(A) and (c)(2)(A)(i) employ) "an Exchange established by the State under [Section 18031]." *See Black's Law Dictionary* 1570 (9th ed. 2009) ("such" means "[t]hat or those; having just been mentioned"). And because a federally-facilitated Exchange fulfills Section 18031's requirement that "[e]ach State shall … establish an [Exchange]," the Act's text makes clear that an Exchange created by HHS is the legal equivalent of an Exchange a State establishes for itself.

The Act's definition of "Exchange" confirms this reading. For purposes of Title I of the Act, the term "Exchange" is defined to mean "an American Health

Benefit Exchange *established under [Section 18031]*." 42 U.S.C. 300gg-91(d)(21) (emphasis added); *see* 42 U.S.C. 18111 (incorporating this definition into Title I). That definition supplies the meaning of "Exchange" every time it appears in Title I, including in Section 18041(c)(1)'s direction that HHS shall establish the "Exchange" for a State that does not to do so for itself. Accordingly, a federally-facilitated Exchange is—"by definition under the statute," JA352—deemed to be "established under [Section 18031]," the provision directing that "*[e]ach State* shall … establish an [Exchange]." 42 U.S.C. 18031(b)(1) (emphasis added).[5]

2. Plaintiffs insist (Br. 19) that the "plain and unambiguous text" of 26 U.S.C. 36B(b)(2) and (c)(2)(A)(i) limits the availability of tax credits to individuals in States that establish Exchanges for themselves because "HHS is not a 'State.'" The relevant question, however, is not whether HHS is a State, but

[5] *See also* 42 U.S.C. 18031(d)(1) ("An Exchange shall be a governmental agency or nonprofit entity *that is established by a State*." (emphasis added)).

The panel majority acknowledged that the definition of "Exchange" means that when HHS establishes the Exchange for a particular State, it "acts under [Section 18031], even though [its] authority appears in [Section 18041]." *Halbig*, 758 F.3d at 399-400. Having come that far, however, the majority stopped too soon: If the definition deems an Exchange created by HHS to be an Exchange "established under [Section 18031]," then such an Exchange necessarily also qualifies as an Exchange "established by the State" because Section 18031 requires "[e]ach State" to establish an Exchange and does not in itself provide for any other type of Exchange. Plaintiffs, in contrast to the panel majority, assert (Br. 26-27, 39-40) that the Act's definition of "Exchange" does not apply when that term is used in Section 18041(c)(1). But it is "axiomatic that the statutory definition of [a] term excludes unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465, 484-485 (1987).

whether the statutory phrase "Exchange established by the State under [Section 18031]" includes a federally-facilitated Exchange. Sections 18031 and 18041, together with the statutory definition of Exchange, answer that question. An Exchange established by HHS for a particular State is, as a matter of law, "an Exchange established by the State under [Section 18031]"—the phrase is a statutorily defined term of art. Congress is "always" free to create such a term of art or to give words used in a particular statute a "broader or different meaning" than they would otherwise have. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707 (2012).

In all of the other provisions of the Act that use the phrase "Exchange established by the State" or its equivalent, the statutory phrase includes both state-operated and federally-facilitated Exchanges, consistent with Congress's requirement in Section 18031(b)(1) that there be "an Exchange established by the State" in every State. Read in that manner, those provisions yield a nationwide statutory scheme that is comprehensive, coherent, and consistent—not only with respect to tax credits, but also with respect to such other core matters as who can purchase insurance on an Exchange, what plans can be sold on an Exchange, and the interactions of an Exchange with state Medicaid and children's health programs. In contrast, plaintiffs' reading would create a series of internal statutory contradictions, superfluities, and impossibilities.

a. Qualified individuals and qualified plans. The Act restricts access to individual-market policies sold on an Exchange to "qualified individuals." 42 U.S.C. 18031(d)(2)(A), 18032(f). A "qualified individual" is defined as a person who, among other things, "*resides in the State that established the Exchange*." 42 U.S.C. 18032(f)(1)(A)(ii) (emphasis added). The emphasized phrase obviously includes individuals who reside in States with federally-facilitated Exchanges, because Section 18041(c) expressly requires such Exchanges to serve individuals in States that do not operate the "required Exchange" for themselves. Under plaintiffs' interpretation, however, there would be no "qualified individuals" eligible to purchase coverage in the 34 States with federally-facilitated Exchanges. Those Exchanges "would have no customers, and no purpose." JA355.

Plaintiffs acknowledge the implausibility of reading the statute this way. They contend (Br. 38) that, if their reading renders the definition of "qualified individual" absurd, "the complete—and only permissible—solution is to excise the words causing the absurdity" by reading the definition to include individuals who "'reside in the State [containing] the Exchange.'" In other words, plaintiffs maintain that the language on which they rely to deny tax credits to residents of States with federally-facilitated Exchanges can simply be ignored when equivalent language defines which individuals are qualified to shop on those federally-facilitated Exchanges. Treasury's interpretation, by contrast, avoids the untenable

results entailed by plaintiffs' reading *without* the need to "excise" words from the statute.[6]

The panel majority sought to avoid the conclusion that its interpretation would deprive federally-facilitated Exchanges of any customers by declaring that Exchanges are open to all comers, "qualified" or not, and that the Act's references to "qualified individuals" are merely "non-discrimination" provisions guaranteeing qualified individuals the right to enroll in plans of their choosing. *Halbig*, 758 F.3d at 405 & n.8. That reading fails for multiple reasons. It ignores the obvious limiting function of the word "qualified." It contradicts provisions of the Act equating "a qualified individual" with a person "eligible for enrollment in a qualified health plan through an Exchange." 42 U.S.C. 18051(e)(1) and (2); *see also* 42 U.S.C. 18031(d)(2)(A). And it would render the qualified-individual provisions superfluous, because the Act's non-discrimination provisions already

[6] Alternatively, plaintiffs invite the Court (Br. 39-40 & n.2) to avoid the absurdity by rewriting the statutory text to make the Act's qualified-individual provisions inapplicable to federally-facilitated Exchanges. Plaintiffs' "insistence that the Court should read [these provisions] out of the [Act] or not apply [them] to federally-facilitated Exchanges is a telltale sign that their reading of section 36B is wrong." *King v. Sebelius*, 997 F. Supp. 2d 415, 428 (E.D. Va. 2014). Plaintiffs incorrectly assert (Br. 40) that "the Government *does not contest*" their claim that the qualified-individual requirement applies only to state-run Exchanges. To the contrary, the applicable HHS regulations define "qualified individual" to mean, with respect to *all* Exchanges, "an individual who has been determined eligible to enroll through the Exchange." 45 C.F.R. 155.20.

require issuers to "accept every … individual in the State that applies for such coverage." 42 U.S.C. 300gg-1(a).[7]

Moreover, the panel majority's conclusion that individuals need not be "qualified" to shop on an Exchange would vitiate the requirement that an individual be a resident of a State to shop on that State's Exchange. *See* 42 U.S.C. 18032(f)(1)(A)(ii) and (B). That is no mere technicality, as the panel's reading would judicially countermand a considered congressional policy judgment. Congress rejected broad proposals to authorize cross-state sales of insurance. *See*, *e.g.*, 155 Cong. Rec. S13,490 (Dec. 19, 2009) (amendment offered by Sen. Coburn); *see also, e.g.*, 155 Cong. Rec. S14,126 (Sen. Ensign) (Dec. 24, 2009)

[7] The panel majority suggested that its interpretation was supported by 42 U.S.C. 18032(d)(3), which provides that "[n]othing in this title shall be construed to restrict the choice of a qualified individual to enroll or not to enroll in a qualified health plan or to participate in an Exchange" and that "[n]othing in this title shall be construed to compel an individual to enroll in a qualified health plan or to participate in an Exchange." *See* 758 F.3d at 405. The panel majority concluded that the second provision, addressing "individuals" in general, "would be wholly unnecessary if only 'qualified individuals' were eligible to participate in the Exchanges." *Ibid.* But Section 18032(d)(3)'s broad disclaimers contain considerable redundancy under any reading. Moreover, the difference between the two disclaimers undermines the panel majority's interpretation. The provision addressing "qualified individuals" guarantees *both* the freedom "not to enroll" in a plan offered on an Exchange *and* the freedom to "enroll" in such a plan. 42 U.S.C. 18032(d)(3)(A). The provision addressing "individuals" is narrower. It provides that no individual may be "compel[led]" to participate in an Exchange, 42 U.S.C. 18032(d)(3)(B), but, precisely because access to Exchanges is limited to *qualified* individuals, that provision does not guarantee all individuals a right to enroll in a plan on an Exchange.

(criticizing failure to authorize cross-state sales). Instead, Congress adopted a narrow provision permitting the purchase of qualified health plans across state lines only pursuant to "health care choice compacts" approved by HHS. 42 U.S.C. 18053(a). The panel majority's reading would eliminate that restriction. It would also eliminate the statute's exclusion of incarcerated persons from Exchanges. *See* 42 U.S.C. 18032(f)(1)(B) ("An individual shall not be treated as a qualified individual if, at the time of enrollment, the individual is incarcerated.").[8]

Finally, even if the panel majority were correct that federally-facilitated Exchanges "would still have customers" under its reading, 758 F.3d at 405, there would be no qualified health plans for those customers to buy. An Exchange may not certify an insurance plan as a "qualified health plan" eligible to be offered for purchase on the Exchange unless "the Exchange determines that making available such health plan through such Exchange is in the interests of *qualified individuals* and qualified employers in the State." 42 U.S.C. 18031(e)(1)(B) (emphasis

[8] The panel majority thought that Section 18032(f)(1)(B) "impl[ies] that an incarcerated individual may enroll in coverage through an Exchange despite not being a 'qualified individual'" because it refers to the person's status "at the time of enrollment." 758 F.3d at 405. In context, however, it is clear that the statutory reference to "at the time of enrollment" refers to the time at which the person *attempts* to enroll in coverage. Any other reading would deprive the exclusion of incarcerated persons from qualified-individual status of any function even under the panel majority's reading, which treats the Act's qualified-individual provisions as establishing a "right to enroll" in coverage of the individual's choosing. *Ibid.*

added).[9] Under the panel majority's interpretation, a federally-facilitated Exchange could not certify any individual-market plans to be sold on the Exchange because, by definition, there would be no "qualified individuals" in the State whose interests would be served by making such plans available.

b. Coordination with Medicaid and CHIP programs. The Act requires each State, as a condition of continued participation in Medicaid, to ensure coordination between the State's Medicaid program, its Children's Health Insurance Program (CHIP), and "an Exchange established by the State under [42 U.S.C. 18031]." 42 U.S.C. 1396w-3(b)(1)(B), (1)(D), (2) and (4). Under plaintiffs' interpretation, a State with a federally-facilitated Exchange could not comply because no "Exchange established by the State" would exist.

c. Enrolling CHIP-eligible children through the Exchanges. The Act provides that, if federal funding is insufficient to cover all children eligible for coverage under a State's CHIP program, the State must establish procedures to ensure that eligible children are enrolled in coverage "offered through an Exchange established by the State under [Section 18031]." 42 U.S.C. 1397ee(d)(3)(B). The same provision makes those children eligible for Section 36B tax credits, *ibid.*, even though CHIP-eligible children ordinarily are ineligible, 26 U.S.C.

[9] The reference to "qualified employers" refers to employers eligible to purchase group coverage through a "SHOP Exchange," a distinct type of Exchange not at issue here. *See* 42 U.S.C. 18031(b)(1)(B).

36B(c)(2)(b). Under plaintiffs' reading, a State with a federally-facilitated Exchange could not comply with the directive to enroll those children through the "Exchange established by the State" because no such Exchange would exist.

The panel majority acknowledged this "oddity," but declared that "the federal government could … step in and perform the same service for uninsured children." 758 F.3d at 406 n.10. As plaintiffs acknowledge (Br. 41 n.3), however, the point of this provision is to provide *subsidized* coverage for children. HHS could not "step in" and enroll them in insurance through a federally-facilitated Exchange if, as plaintiffs maintain, there were no tax credits available to pay for their coverage. Moreover, Congress directed that, "[w]ith respect to *each State*," HHS must review the "plans offered through an Exchange established by the State" and certify those that are suitable for enrollment of CHIP beneficiaries. 42 U.S.C. 1397ee(d)(3)(C) (emphasis added). HHS can comply with that obligation because the Exchange in each State is, as a matter of law, "an Exchange established by the State."

d. Maintenance of Medicaid eligibility standards. The Act provides that, as a condition of receiving federal Medicaid funds, a State must maintain its Medicaid eligibility standards for adults for a limited period of time. That condition applies between the date of the Act's passage and the date when "an Exchange established by the State under [Section 18031] is fully operational." 42 U.S.C. 1396a(gg)(1).

That measure was a temporary provision, as illustrated by the fact that an accompanying exception for States with budget deficits "end[ed] on December 31, 2013"—the day before the Exchanges become operational. 42 U.S.C. 1396a(gg)(3); *see* 42 U.S.C. 18031(b)(1). Plaintiffs' reading would transform this funding condition into a permanent freeze in States that opt for federally-facilitated Exchanges, and would mean that several States violated the condition when they tightened their Medicaid eligibility standards after their federally-facilitated Exchanges began operations.

3. In each of the foregoing places in the Act where the statutory term of art "Exchange established by the State" or its equivalent is used, that phrase includes federally-facilitated Exchanges. Plaintiffs assert (Br. 32) that the anomalies and inconsistencies resulting from their contrary reading of that phrase cannot support Treasury's interpretation unless they rise to the level of "absurdity." As shown above, plaintiffs' reading *does* yield one absurd result after another. But absurdity is the wrong standard. An absurdity is required to justify a departure from a statute's "plain meaning." *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004). Here, no such departure is needed to justify Treasury's interpretation. The text of Sections 18031 and 18041 and the statutory definition of "Exchange" plainly demonstrate that the phrase "an Exchange established by the State [under Section 18031]" includes federally-facilitated Exchanges, and numerous other

provisions of the Act confirm that reading. "The plain meaning that [courts] seek to discern is the plain meaning of the whole statute, not of isolated sentences." *Beecham v. United States*, 511 U.S. 368, 372 (1994); *see also Maracich v. Spears*, 133 S. Ct. 2191, 2203, 2209 (2013); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The inconsistencies, contradictions, superfluities, and anomalies entailed by plaintiffs' reading—particularly in combination—confirm that their reading of "Exchange established by the State" cannot be correct.

4. The panel majority did not dispute that Congress could treat an Exchange established for a State by HHS as an "Exchange established by the State." 758 F.3d at 402. It mistakenly believed, however, that a provision of the Act addressing Exchanges established by federal territories showed that Congress used a particular formulation when it wanted "to provide that a non-state entity should be treated as if it were a state when it sets up an Exchange." *Id.* at 400.

The Act provides that a territory that establishes an Exchange "shall be treated as a State" for certain purposes. 42 U.S.C. 18043(a)(1). The panel majority erred in drawing an inference from "[t]he absence of similar language in [Section 18041]," because the two provisions serve different functions. Section 18043 allows a territory to be "treated as a State for purposes of [42 U.S.C. 18031, 18032, and 18033]." 42 U.S.C. 18043(a)(1). As Section 18043's title confirms, its function is to provide "[f]unding for the territories" by allowing a territory to

receive the federal grants made available to "States" in Section 18031(a)(1), if the territory's Exchange meets the Act's standards. But Section 18043(a)(1) does not make territorial Exchanges equivalent to state Exchanges for all purposes. For example, residents of the territories (who generally do not pay taxes) are not eligible for tax credits under Section 36B. *See* 42 U.S.C. 18043(a)(1), (b)(2) and (c) (providing a different funding mechanism). Section 18041, in contrast, does not require that HHS be "treated as a State" for purposes of the Act, and HHS is not eligible for the grants provided to States (and territories) under Section 18031(a). Rather, the Act establishes a legal equivalence between federally-facilitated *Exchanges* and their state-operated counterparts. It is unsurprising that Congress used a different formulation to accomplish that distinct result.[10]

5. Plaintiffs err in arguing (Br. 19) that Treasury's reading renders the statutory modifier "established by the State" in Section 36B(b)(2)(A) superfluous. An Exchange is a state-specific marketplace. Section 36B(b)(2)(A) uses the phrase "an Exchange established by the State under [Section 18031]" because it is referring to the Exchange in the specific State mentioned earlier in the same

[10] Plaintiffs object (Br. 24) that the Act does not expressly say that an Exchange created by HHS is "deemed" to be an Exchange established by the State. But Congress was not required to use plaintiffs' preferred formulation, and the fact that it "could have accomplished the same result by phrasing the statute differently" is not reason to disregard "the statute *as written*." *United States v. Aguilar*, 515 U.S. 593, 604 (1995) (emphasis in original).

sentence. The formula for tax credits depends on "the monthly premiums … for 1 or more qualified health plans offered in the individual market within *a State* … which were enrolled in through an Exchange established by *the State* under [42 U.S.C. 18031]." 26 U.S.C. 36B(b)(2)(A) (emphasis added); *see also* 26 U.S.C. 36B(c)(2)(A) (cross-referencing Section 36B(b)(2)(A)). The Act's other references to an "Exchange established by the State" likewise serve to refer to the Exchange in a specific State, typically identified elsewhere in the same provision.[11]

In contrast, the provisions of Section 36B that discuss Exchanges as a general matter (rather than the Exchange in a particular State) do not contain the same language. *See* 26 U.S.C. 36B(d)(3), (e)(3) and (f)(3). Those provisions also concern the administration of the tax credits, and if plaintiffs were correct that the

[11] *See* 42 U.S.C. 1396a(gg)(1) (providing that certain requirements apply to a Medicaid program adopted by "*a State*" until HHS determines that "an Exchange established by *the State*" is "fully operational"); 42 U.S.C. 1396w-3(b) (providing that "*[a] State* shall establish procedures" for coordinating between certain state programs and "an Exchange established by *the State*"); 42 U.S.C. 1397ee(d)(3)(B) and (C) (providing that "[w]ith respect to *each State*," HHS must make specified certifications with respect to health plans "offered through an Exchange established by *the State*" and requiring "*the State*" to establish procedures for enrolling eligible children in such plans); 42 U.S.C. 18031(f)(3)(A) (providing that "*[a] State* may elect to authorize an Exchange established by *the State*" to contract with eligible third parties to carry out Exchange functions); 42 U.S.C. 18032(f)(1)(A) (defining a "qualified individual" as a person who, among other requirements, "resides in *the State* that established the Exchange") (all emphases added). One provision in Title VI of the Act, § 6005, 124 Stat. 698, which is otherwise unrelated to Exchanges, refers more generally to "an exchange established by *a* State under [42 U.S.C. 18031]." 42 U.S.C. 1320b-23(a)(2) (emphasis added).

modifier "established by the State" serves to restrict credits to residents of States that established Exchanges for themselves, the same limitation would have been repeated throughout Section 36B. But no such restriction appears: All of Section 36B's generic references to Exchanges simply refer to "an Exchange."

In any event, "the canon against surplusage 'assists only where a competing interpretation gives effect to every clause and word of a statute.'" *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) (citation omitted). It provides no help to plaintiffs because their interpretation does not "give[] effect to every word" of the relevant provisions of Section 36B. *Ibid*. Those provisions refer to "an Exchange established by the State under [Section] 1311 [42 U.S.C. 18031]." 26 U.S.C. 36B(b)(2)(A) and (c)(2)(A)(i). But the Act defines "Exchange" to mean an "American Health Benefit Exchange established under section 1311." 42 U.S.C. 300gg-91(d)(21). Because that definition already includes the phrase "established under section 1311," the modifier "under [Section] 1311" is surplusage even under plaintiffs' reading.[12]

[12] For similar reasons, plaintiffs are not aided by their invocation (Br. 20) of the proposition that a court should not give the "same meaning" to "differing language" in two statutory provisions. *Russello v. United States*, 464 U.S. 16, 23 (1983). No interpretation of the Act's various references to Exchanges comports with that maxim because Congress used many different formulations with same meaning. *See, e.g.*, 42 U.S.C. 18031 ("Exchange"); 42 U.S.C. 18032(d)(3)(D)(i)(II) ("Exchange established under this Act"); 42 U.S.C.

B. The Affordable Care Act's Provisions Addressing Tax Credits Confirm That Those Credits Are Available In Every State.

The provisions of the Act that directly address premium tax credits—including Section 36B itself—further confirm that those credits are available to taxpayers in every State.

1. Section 36B(f)—titled "Reconciliation of credit and advance credit"—requires Treasury to reduce a taxpayer's end-of-year credit by the amount of the advance payments of the credit to the taxpayer's insurer made over the course of the year. To make that reconciliation possible, Section 36B(f)(3) requires "each Exchange" and "any person carrying out 1 or more responsibilities of an Exchange" to report information related to the credits to Treasury and to persons enrolled in coverage. It is undisputed that this reporting requirement applies to federally-facilitated Exchanges. *See Halbig*, 758 F.3d at 403; Pl. Br. 35.[13]

18051(d)(3)(A)(i) ("Exchange established under this subtitle"); 42 U.S.C. 18051(e)(2) ("Exchange established under [Section 18031]").

[13] Plaintiffs state that Section 36B(f)(3) shows that "when Congress wanted to refer to both state *and* HHS Exchanges, it knew how to do so." Br. 20 (citation and internal quotation marks omitted). But plaintiffs can draw that inference only by eliding statutory text that forecloses it. They assert (Br. 20) that Section 36B(f)(3) "applies to an 'Exchange under Section 1311(f)(3) or 1321(c).'" But that is not what the provision says. It requires reports by "[e]ach Exchange (or any person carrying out 1 or more responsibilities of an Exchange under section 1311(f)(3) or 1321(c))." 26 U.S.C. 36B(f)(3). Section 36B(f)(3) thus does not distinguish between state-run and federally-facilitated *Exchanges*—both are covered by the requirement that "[e]ach Exchange" make reports. Instead, it distinguishes between entities carrying out the responsibilities of an Exchange

There would have been no reason to require federally-facilitated Exchanges to make reports for the reconciliation of tax credits if those credits were available only on state-run Exchanges. Contrary to plaintiffs' assertion (Br. 36), each of the six categories of information required to be reported by Section 36(f)(3) is used in administering the tax credits and accompanying cost-sharing subsidies. *Compare* 26 U.S.C. 36B(f)(3)(A)-(F), *with* 26 U.S.C. 36B(a)-(c) *and* 42 U.S.C. 18071(a)-(c). And as to several of the required categories—including "[t]he aggregate amount of any advance payment of [the] credit" and "[i]nformation necessary to determine whether a taxpayer has received excess advance payments," 26 U.S.C. 36B(f)(3)(C) and (F)—a federally-facilitated Exchange would never have anything to report if credits were unavailable there.

The panel majority posited that federally-facilitated Exchanges were included because some of the information required by Section 36B(f)(3) could be used for purposes other than administering the tax credit, including enforcing the individual-coverage provision. 758 F.3d at 403-404; *see* Pl. Br. 35-36. But Congress separately required insurers to provide the information necessary to enforce the individual-coverage provision in 26 U.S.C. 6055. Moreover, any use of information furnished under Section 36B(f)(3) for other purposes is incidental to

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under Section 18031(f)(3) (which permits *a State* to contract with an eligible entity to carry out Exchange functions), and Section 18041(c) (which allows *HHS* to operate a federally-facilitated Exchange through a nonprofit entity).

the provision's stated reason for requiring the reports: to enable the "[r]econciliation of credit and advance credit." 26 U.S.C. 36B(f).

The panel majority also erred in opining that Section 36B(f)(3) would be over-inclusive even under Treasury's interpretation because the statute "mandates reporting 'with respect to *any* health plan provided through the Exchange,' even though only plans purchased by taxpayers with incomes between 100 and 400 percent of the federal poverty line may be subsidized." 758 F.3d at 404. There would be no way to limit the reporting obligation to individuals who actually turn out to be eligible for credits at the end of the year, because the report is part of the very process by which those individuals are identified.

2. Provisions other than Section 36B further confirm that tax credits are available on all Exchanges. For example, the Act provides for Exchanges to facilitate determinations regarding eligibility for tax credits, 42 U.S.C. 18081(b), (c), and (e), and to facilitate the advance payment of the credits and cost-sharing subsidies, 42 U.S.C. 18082. On plaintiffs' reading, those provisions would apply only to state-created Exchanges. Yet they all simply refer to "Exchanges"—a category that, by definition, includes "Exchanges" created by HHS. Similarly, all Exchanges must make available "a calculator" that allows consumers "to determine the actual cost of coverage [under available insurance plans] after the application of any premium tax credit" for which they are eligible. 42 U.S.C.

18031(d)(4)(G). Creating such a calculator would be an empty exercise for a federally-facilitated Exchange if credits were categorically unavailable.

Two other provisions allow States, with HHS's approval, to implement alternative health-coverage programs using the federal funds their residents otherwise would have received in the form of tax credits and subsidies. *See* 42 U.S.C. 18051(d)(3), 18052(a)(3). These provisions refer to the credits and subsidies that would have been available "through an Exchange established under [Subtitle D of Title I of the Act]," 42 U.S.C. 18051(d)(3), or "established under [Title I of the Act]," 42 U.S.C. 18052(a)(3). Plaintiffs describe such formulations (Br. 20) as instances in which "Congress … used broader phrases … that clearly do include HHS-established Exchanges." But plaintiffs cannot explain why Congress used formulations that indisputably include federally-facilitated Exchanges in provisions that expressly assume the availability of tax credits.

C. Plaintiffs' Reading Would Thwart The Operation Of The Act's Central And Interdependent Provisions.

1. By making tax credits available to Americans in every State, Congress gave effect to the Act's interdependent provisions, "allowing them to accomplish their manifest objects." *Abramski*, 134 S. Ct. 2269. Plaintiffs' reading, in contrast, would "deny effect to the regulatory scheme," *ibid.*, by thwarting the operation of the Act's critical provisions.

By eliminating tax credits on federally-facilitated Exchanges, plaintiffs' interpretation would render the creation of these Exchanges a futile gesture. Nearly 90% of the 5.4 million people who have obtained coverage through federally-facilitated Exchanges are relying on tax credits, and the tax credits are covering an average of 76% of the recipients' premium costs. *Premium Affordability* 3. "Without [those] federal subsidies, individuals would lose the main incentive to purchase insurance inside the exchanges, and some insurers may be unwilling to offer insurance inside the exchanges. With fewer buyers and even fewer sellers, the exchanges would not operate as Congress intended and may not operate at all." *NFIB*, 132 S. Ct. at 2674 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).[14]

The denial of tax credits to millions of individuals would frustrate the operation of the Act's interdependent provisions intended to provide "Affordable Coverage Choices for *All* Americans." ACA, Tit. I, Subtit. E, 124 Stat. 213 (emphasis added). Some of those individuals would remain subject to the individual-coverage provision despite the loss of credits and would be forced to

[14] Those Justices accepted the position advanced by Klemencic, through the same counsel representing him here. *See* Brief for Private Petitioners on Severability, *NFIB v. Sebelius*, Nos. 11-393 & 11-400 (S. Ct.), 2012 WL 72440, *51-*52 ("Without the subsidies driving demand within the exchanges, insurance companies would have absolutely no reason to offer their products through exchanges….").

purchase unsubsidized coverage or to pay a tax penalty. But "millions" of others would be exempted from the individual-coverage provision because, without credits, insurance would be unaffordable for them. *Halbig*, 758 F.3d at 395.

As a result, the denial of tax credits would have devastating consequences extending far beyond the millions of people who would lose access to subsidized coverage. As the panel majority recognized, the loss of those participants would "bode[] ill for individual insurance markets" in the affected States. 758 F.3d at 410 n.12. Those markets would remain subject to the Act's nondiscrimination requirements, but would lack both subsidies and an effective individual-coverage provision—the safeguard Congress deemed "essential" to preventing "adverse selection" and "creating effective health insurance markets." 42 U.S.C. 18091(2)(I).

The result would be the same "disastrous" outcome experienced by States that enacted stand-alone nondiscrimination rules in the 1990s. *NFIB*, 132 S. Ct. at 2614 2614 (Ginsburg, J., concurring in part and dissenting in part). Indeed, a recent study confirmed that the consequence of eliminating the credits would be "a near death spiral" of the individual market for insurance—the very result the Act was crafted to avoid. Christine Eibner & Evan Saltzman, Rand Corp., *Assessing Alternative Modifications to the Affordable Care Act* 25 (October 2014); *see id.* at 19 (predicting a 43% increase in premiums and a 68% decline in enrollment).

Plaintiffs and their amici do not dispute that "denying tax credits to individuals shopping on federal Exchanges would throw a debilitating wrench into the Act's internal economic machinery." *King v. Burwell*, 759 F.3d 358, 374 (4th Cir. 2014). To the contrary, that is the result they seek: One of plaintiffs' amici boasted that if their position is adopted, "the structure of the [Act] will crumble." Scott Pruitt, *ObamaCare's Next Legal Challenge*, Wall St. J., Dec. 2, 2013, at A17. But this Court should be deeply skeptical of plaintiffs' claim that Congress undermined the operation of the Act's central provisions and destroyed the workability of the Exchanges created pursuant to the Act. "[N]o legitimate method of statutory interpretation ascribes to Congress the aim of tearing down the very thing it attempted to construct." *Halbig*, 758 F.3d at 416 (Edwards, J., dissenting); *accord Sullivan v. Hudson*, 490 U.S. 877, 890 (1989) ("Congress cannot lightly be assumed to have intended" a result that would "frustrat[e] … the very purposes" of the statute).[15]

[15] Plaintiffs do not adopt the panel majority's suggestion that the adverse-selection risk created by their interpretation should be discounted because, in the panel majority's view, Congress was willing to tolerate adverse-selection risk in federal territories and in a government-run long-term care insurance program created in another Title of the Act. *See* 758 F.3d at 410. As Judge Edwards explained, the "peripheral statutory provisions" on which the panel majority relied "say nothing about the core provisions of the [Act] at issue here." 758 F.3d at 421. Moreover, with respect to the territories, the panel majority relied on an administrative interpretation of the Act that HHS had reversed shortly before the panel issued its decision. *See* Letter from Marilyn Tavenner to Commissioner

2. Plaintiffs' interpretation would also turn the Act's model of cooperative federalism on its head. The Act provides grants and other "[a]ssistance to States" to encourage them to establish Exchanges for themselves. 42 U.S.C. 18031(a). And in a provision expressly designated as affording "State flexibility," the Act directs HHS to establish Exchanges in States that do not opt or are unable to do so. 42 U.S.C. 18041. Plaintiffs' reading would transform that "flexibility"—which allows States to choose between equivalent alternatives—into a threat that a State may forgo establishing an Exchange for itself only at the price of depriving its citizens of the tax credits at the heart of the Act and crippling its insurance market. And plaintiffs seek to impose that drastic result even on a State that sought to establish an Exchange for itself but was unable to have the Exchange "operational" by the statutory deadline. *Ibid.*

If Congress actually had intended such a threat, "one would expect to find this limit set forth in terms as clear as day." *Halbig*, 758 F.3d at 420 (Edwards, J., dissenting). Congress would have spoken "with a clear voice" to "enable the States to exercise their choice knowingly." Amicus Brief of Virginia et al. 12 (quoting *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 17 (1981)). It would not have buried the disastrous ramifications of a *State's* election in

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Gregory R. Francis (July 16, 2014), http://www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-Francis.pdf.

subparagraphs setting forth the technical formula for calculating the amount of an eligible *individual's* tax credit.

3. Plaintiffs' reading likewise disregards the principle that Congress "does not alter the fundamental details of a regulatory scheme in … ancillary provisions." *Whitman*, 531 U.S. at 468. On plaintiffs' view (Br. 3), the purported categorical denial of tax credits to *all* residents of States with federally-facilitated Exchanges is a "[c]ritical[]" feature of the Act with tremendous consequences for States, individuals, and the insurance markets. But plaintiffs maintain that Congress imposed that fundamental limitation only indirectly, in subparagraphs setting forth the amount of the credit that Section 36B(a) expressly directs "shall be allowed" to "applicable taxpayer[s]" without regard to the taxpayer's State of residence or the entity operating that State's Exchange. It is implausible that Congress would have adopted such a sweeping prohibition—and one so at odds with the text, structure, and design of the Act—in such an obscure fashion. Congress "does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.

The panel majority believed that even under Treasury's interpretation, the formula in Section 36B "houses an elephant: namely, the rule that subsidies are only available for plans purchased through Exchanges." 758 F.3d at 401 n.4. But the condition that tax credits are available only to subsidize insurance purchased through an Exchange has nothing like the radical restrictions plaintiffs would read

into Section 36B. It is not a State-by-State *geographic* restriction on tax credits, and it has no effect on *who* is eligible to receive them. It simply sets forth the *manner* in which an individual can obtain the tax credits for which he is eligible—by purchasing insurance on the Exchange in his home State. Moreover, the fact that tax credits are available only for coverage obtained through an Exchange is not buried solely in Section 36B's subparagraphs—it is reflected in numerous provisions throughout the Act. *See*, *e.g.*, 26 U.S.C. 36B(f); 29 U.S.C. 218b(a)(2); 42 U.S.C. 18032(e)(2), 18051(d)(3), 18052(a)(3), 18082(a)(1). By contrast, plaintiffs locate their purported categorical geographic limitation on the availability of the tax credits *exclusively* in isolated phrases in subparagraphs of Section 36B.

D. Plaintiffs' Interpretation Is Contrary To The Legislative Record.

If Congress had intended to deny affordable health insurance to millions of Americans and to wreak havoc in the insurance markets in States with federally-facilitated Exchanges, the legislative record surely would reflect some contemporaneous recognition of that critical and controversial feature. But the legislative record actually demonstrates that Congress understood tax credits would be available on *every* Exchange.

The language in Section 36B on which plaintiffs rely originated in the Senate Finance Committee. The earliest draft of the bill, a detailed narrative summary used for the Committee's markup, provided that "States must establish

an exchange" consistent with the bill. *Chairman's Mark: America's Healthy Future Act of 2009*, at 11 (Sept. 16, 2009), http://finance.senate.gov/download/?id=a2b7dd18-544f-4798-917e-2b1251f92abb. The draft then provided for a tax credit subsidizing insurance purchased "through the state exchanges." *Id.* at 20. And, consistent with the law that was ultimately enacted, the draft provided for HHS to establish the required Exchange if a State elected not to do so for itself. *Id.* at 11. Critically, the draft made clear that when HHS did so, it was stepping into the State's shoes and creating a "state exchange" on which credits would be available, directing HHS to "contract with a non-governmental entity to establish a *state exchange*." *Ibid.* (emphasis added).

Those basic features were preserved when the draft was translated into bill language and approved by the Committee in October 2009. The bill continued to provide that "[e]ach State shall … establish … an exchange." S. 1796, 111th Cong., 1st Sess. § 1101 (2009) (proposing to add Section 2235 to the Social Security Act, 42 U.S.C. 301 *et seq.*). The formula for tax credits introduced language materially identical to the language on which plaintiffs now rely, providing that the amount of the credit was based on the cost of insurance coverage "offered in the individual market within a State" that was "enrolled in through an exchange established by the State." *Id.* § 1205 (proposing to add 26 U.S.C. 36B(b)(2)(A)(i)). And the bill preserved the direction to HHS to "enter into a

contract with a nongovernmental entity to establish and operate the exchanges within the State" if a State elected not to do so itself. *Id.* § 1001 (proposing to add Section 2225(b)(1)(B) to the Social Security Act). Similar provisions appeared in the bill introduced by Majority Leader Reid that ultimately became the Affordable Care Act in March 2010. *See* H.R. 3590, 111th Cong., 1st Sess. §§ 1311(b)(1), 1321(c)(1), 1401 (2009).

The legislative record thus refutes plaintiffs' speculation (Br. 4, 49) that Congress limited tax credits to state Exchanges as part of a secret deal with Senator Ben Nelson while the bill was on the Senate floor. The key language on which plaintiffs rely had been in the bill since October 2009, months before negotiations with Senator Nelson took place. And during the five-month interval between the introduction of that language and the ultimate enactment of the Affordable Care Act, there is no indication that any Member of Congress even suggested that the language limited tax credits to States that established Exchanges for themselves. "To the contrary, Congress assumed that tax credits would be available nationwide." JA361; *see Halbig*, 758 F.3d at 425 (Edwards, J., dissenting) (citing sources).[16] That was the basis on which both the CBO and the Joint Committee on

[16] Plaintiffs' amici Adler and Cannon claim (Br. 22) that eleven House members from Texas recognized that the proposed legislation "conditioned subsidies on states creating Exchanges." The letter on which amici rely advocated a "single, national health insurance exchange" and expressed concerns about

Taxation (JCT) assessed the Act's tax and budgetary consequences. *See* CBO, *Premium Analysis* 3-4, 19-20; JCT, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Care Act"* 12 (Mar. 21, 2010) (JA302). Those assessments were critical to the Act's framing and passage. *See* David M. Herszenhorn, *The Numbers Come Out Just Where Obama Wanted, With No Magic Involved*, N.Y. Times, Mar. 19, 2010, at A16. And the head of the CBO later confirmed that the assessments were prepared on the understanding that credits "would be available in every state, including states where the insurance exchanges would be established by the federal government." Letter from Douglas W. Elmendorf, Dir., CBO, to Rep. Darrell E. Issa, Chairman, Comm. on Oversight & Gov't Reform (Dec. 6, 2012) (JA275).

The legislative record also shows that Congress understood that when HHS establishes the Exchange for a particular State, it effectively steps into the State's shoes. As the district court observed, the Senate Finance Committee's Report "expressly contemplated that the federal government could 'establish state exchanges.'" JA360 (quoting S. Rep. No. 89, 111th Cong., 1st Sess., at 19 (Oct. 19, 2009)). One of plaintiffs' amici was even more explicit, explaining on the

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States' ability and willingness "to administer and properly regulate a health insurance marketplace." JA316-317. The letter did not suggest that tax credits would be unavailable on federally-facilitated Exchanges.

Senate floor that the Act's provision for federally-facilitated Exchanges meant that "the Secretary [of HHS] will literally step into each state and establish and operate th[e] exchange for them." 155 Cong. Rec. S13,726 (Dec. 22, 2009) (statement of Sen. Hatch).

Lacking evidence that any Member of Congress shared their view of the Act when it was passed, plaintiffs point to (Br. 47) the text of an unenacted Senate bill. Insofar as it is relevant at all, that bill further undermines plaintiffs' position. The bill did not, as the panel majority believed, *see* 758 F.3d at 408, propose to condition the availability of subsidies on a State's establishment of an Exchange for itself. Instead, the bill would have allowed States to decide to adopt market reforms even before they became effective as a matter of federal law, and it provided that tax credits would be available in a State that elected to enact such requirements whether the State established its own Exchange or allowed HHS to do so in its stead. S. 1679, 111th Cong., 1st Sess. § 135(b) (2009); *id*. § 142 (proposing to add Section 3104 to the Public Health Service Act, 42 U.S.C. 201 *et seq.*).[17]

[17] Plaintiffs also rely (Br. 5, 48) on statements made in 2012 by Jonathan Gruber, an economics professor and supporter of the Act, but post-enactment statements by a non-legislator are entitled to no weight. *See Doe v. Chao*, 540 U.S. 614, 626-627 (2004). In any event, Professor Gruber has since clarified that the remarks on which plaintiffs rely were mistaken. Jonathan Cohn, *Jonathan Gruber: 'It Was Just A Mistake,'* New Republic (July 25, 2014).

E. Plaintiffs' Alternative Account Of The Act's Design And History Is Baseless.

1. In the end, plaintiffs recognize that they cannot plausibly contend that Congress actually intended to deny tax credits to millions of Americans who need them to be able to afford health coverage, or to inflict death spirals on the insurance markets of 34 States. And unlike some of their amici, plaintiffs do not suggest that the language in Section 36B on which they rely is a "drafting error" (Pacific Research Inst. Br. 4, 23-29), or a "glitch," Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation*, 23 Health Matrix 119, 123 (2013). Instead, plaintiffs assert (Br. 15) that Congress made an affirmative choice to deny tax credits to induce (or threaten) States to establish Exchanges themselves, and that it assumed that "no state" would reject "a deal too good to refuse." That account is "nonsense, made up out of whole cloth." *Halbig*, 758 F.3d at 414 (Edwards, J., dissenting).

When the Act was under consideration, it was well known that many States might opt not to set up their own Exchanges. *See, e.g.*, 156 Cong. Rec. H2207 (Mar. 22, 2010) (Rep. Burgess) (indicating that as many as 37 States "may not set up the State-based exchange"); 155 Cong. Rec. S12,543-S12,544 (Dec. 6, 2009) (Sen. Coburn) (submitting letter from Oklahoma official stating that the State was unlikely to create an Exchange); David D. Kirkpatrick, *Health Lobby Takes Fight to the States*, N.Y. Times, Dec. 28, 2009, at A1 (JA287-289) (describing state

proposals to "opt out" of health insurance marketplaces); *Don't Trust States To Create Health Care Exchanges*, USA Today, Jan. 4, 2010, at 8A (JA296-297) ("Some state officials hostile to reform are already trying to block implementation."). The very fact that "Congress provided a backup scheme" in the form of a federally-facilitated Exchange confirms that it understood that "some States might decline … to participate in the operation of an exchange." *NFIB*, 132 S. Ct. at 2665 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).[18]

The Act's treatment of Exchanges thus differs markedly from its treatment of the Medicaid expansion, to which plaintiffs attempt (Br. 29-30, 47) to draw an analogy. Congress required States participating in Medicaid to expand eligibility, and Congress provided no alternative mechanism in the event that a State elected not to comply. Accordingly, the 26 States that successfully argued to the Supreme Court that the Medicaid expansion's conditional funding was unconstitutionally coercive—including plaintiffs' amici Kansas and Nebraska—contrasted that Medicaid provision with "the real choice that the [Act] offers States to create exchanges or have the federal government do so." Brief of State Petitioners on

[18] Plaintiffs incorrectly assert (Br. 5) that Congress must not have planned for federally-facilitated Exchanges because it "did not appropriate *any* funds for HHS to build Exchanges." Congress appropriated $1 billion "for Federal administrative expenses to carry out" the Affordable Care Act, a function that includes the establishment of federally-facilitated Exchanges. HCERA § 1101, 124 Stat. 1029.

Medicaid, *Florida v. HHS*, No. 11-400, 2012 WL 105551, *51; *see id.* at *22 ("Because States were given a meaningful choice whether to operate the health benefit exchanges created by the Act, there is a plan B. The federal government will step in if States decline.").

The Act should be interpreted in a manner that advances the principle of cooperative federalism and respect for state sovereignty reflected in the Act's "State flexibility" provisions. When interpreting statutes that are "designed to advance cooperative federalism," the Supreme Court "ha[s] not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims." *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002). Plaintiffs' coercive reading would deny States any such choice. There are many reasons why a State may opt for a federally facilitated Exchange rather than operating its own exchange, including, for example, administrative costs. This Court should interpret the Act to give States true freedom to establish an Exchange or to allow the federal government to create one in their stead, rather than as a threat to deprive their citizens of tax credits and risk a destabilization of their insurance markets. *See New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 539 n.31 (1979) ("presumption in favor of 'cooperative federalism'" in interpreting statutes); *Batterton v. Francis*, 432 U.S. 416, 431-432 (1977)

(same). Likewise, rejecting plaintiffs' coercive reading would avoid questions under the Tenth Amendment—a point that Virginia and 17 other States have presented to this Court in their amicus brief in support of the judgment below. But there is no need to address that constitutional issue here because plaintiffs' interpretation fails for multiple other reasons already discussed.

2. Plaintiffs' amici Kansas and Nebraska offer a diametrically opposed rationale for the Act's purported denial of tax credits to residents of States with federally-facilitated Exchanges. They view (Br. 2-3, 14-18) the purported denial of tax credits to the citizens of a State that declines to establish an Exchange for itself as a *benefit* rather than a burden to the State because it would allow the State to "avoid extending the individual mandate to otherwise-exempt individuals"—that is, to people who would be exempt from the mandate in the absence of credits because they would not be able to afford coverage. Indeed, Kansas and Nebraska go further, asserting (Br. 16) that Congress also intended to give States the ability to "avoid" the Act's employer-responsibility provision, 26 U.S.C. 4980H, which imposes a tax on large employers that fail to offer affordable coverage to their employees, and which is triggered when one or more full-time employees receive a tax credit through an Exchange. 26 U.S.C. 4980H(a)(2) and (b)(1)(B).

These amici States thus extend plaintiffs' general theme beyond tax credits, attributing to isolated phrases in 26 U.S.C. 36B(b)(2)(A) and (c)(2)(A)(i)

concerning the amount of an individual's tax credit yet other sweeping powers of negation for States that would undermine the larger statutory scheme. Congress, however, did not give States blanket authority to nullify the individual-coverage and employer-responsibility provisions, or to divorce those key provisions from the Act's other market reforms. Instead, Congress provided a specific mechanism to allow a State to obtain a waiver of key provisions of the Act—including the tax credits, the individual-coverage provision, and the employer-responsibility provision. 42 U.S.C. 18052(a)(1) and (2). Such waivers are not available until 2017, and may be granted only if a State demonstrates, among other things, that it has adopted an alternative system that achieves comprehensive, affordable coverage for its residents. 42 U.S.C. 18052(a)(1) and (b)(1). "It is unfathomable that Congress intended to allow States to effectively nullify the individual mandate" and the employer-responsibility provision, 758 F.3d at 420 (Edwards, J., dissenting), without these other crucial protections in place.[19]

[19] Kansas and Nebraska are also mistaken to suggest that plaintiffs' reading would allow a State to "avoid the employer mandate altogether." Amicus Br. 16. Even under plaintiffs' reading, employers in a State would be subject to the employer-responsibility provision's tax if one or more of their employees lived in a neighboring state that established an Exchange for itself and received tax credits through that State's Exchange.

II. At A Minimum, Treasury's Interpretation Is A Reasonable One Entitled To *Chevron* Deference.

For the foregoing reasons, the Act unambiguously forecloses plaintiffs' reading. But at a minimum, Treasury's interpretation is a permissible one meriting deference under *Chevron*. *See King*, 759 F.3d at 372-376. Section 36B authorizes Treasury to "prescribe such regulations as may be necessary" to implement the tax credits. 26 U.S.C. 36B(g); *see* 26 U.S.C. 7805(a). A notice-and-comment regulation promulgated pursuant to that authority "falls squarely within the bounds of, and is properly analyzed under, *Chevron*." *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011). Even if the phrase "established by the State" in Sections 36B(b)(2)(A) and (c)(2)(A)(i) could plausibly be given the restrictive meaning plaintiffs ascribe to it, that clearly is not the only reasonable reading, as the analysis above demonstrates. Indeed, even where—unlike here—a statute contains "internal tension" because different provisions point "in divergent ways," "*Chevron* dictates that a court defer … to the [agency's] expert judgment about which interpretation fits best with, and makes most sense of, the statutory scheme." *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality); *accord id.* at 2219-2220 & n.3 (Sotomayor, J., dissenting).

Plaintiffs maintain that the *Chevron* framework is inapplicable in this case for three reasons. All lack merit.

A. Plaintiffs first contend (Br. 51) that the question whether federal tax credits are available nationwide is too important to be left to an administrative agency. But the Supreme Court has emphasized that *Chevron* applies as much to "big, important" matters as to "humdrum, run-of-the-mill stuff." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). Moreover, unlike the cases on which plaintiffs rely, this is not a circumstance in which only one interpretation of the statute would invest an agency's regulations with broad impact. *Cf. Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). On plaintiffs' logic, if Treasury had adopted their reading of the Act, another challenger could just as easily have argued that the question whether the Act threatens States that do not set up their own Exchanges with the destruction of their insurance markets and the denial of millions of dollars of tax credits has too much "economic and political significance" (Br. 51) to be left to an agency. The agency, not the courts, should interpret the Act in the first instance.

B. Plaintiffs next assert (Br. 21, 53-54 & n.6) that *Chevron* is displaced in tax law by the canon that "exemptions from taxation are to be construed narrowly," *Mayo Found.*, 131 S. Ct. at 715 (citation omitted). But the Supreme Court has held that "*Chevron* appl[ies] with full force in the tax context," finding "no reason why … review of tax regulations should not be guided by agency expertise pursuant to

Chevron to the same extent as … review of other regulations." *Mayo Found.*, 131 S. Ct. at 713.

It would be especially anomalous to allow the canon plaintiffs invoke to trump *Chevron* in this case. The canon does not actually favor plaintiffs' position because their interpretation would expand exceptions to tax provisions. *See* 26 U.S.C. 4980H, 5000A(e)(1); *see also* Pl. Br. 7-8. And Treasury's interpretation is the only one consistent with the equally fundamental canon that federal tax laws are "to be interpreted so as to give a uniform application to a nation-wide scheme of taxation" rather than in a manner that is "dependent upon state law." *Burnet v. Harmel*, 287 U.S. 103, 110 (1932); *accord United States v. Irvine*, 511 U.S. 224, 238 (1994); *Lyeth v. Hoey*, 305 U.S. 188, 194 (1938).

C. Finally, plaintiffs argue (Br. 55-56) that Treasury's interpretation of Section 36B is not entitled to deference because HHS has authority to implement the provisions of the Act governing the establishment of Exchanges. But in contrast to the situation addressed in *American Federation of Government Employees v. Shinseki*, 709 F.3d 29 (D.C. Cir. 2013), on which plaintiffs rely, Treasury's regulation constitutes an exercise of its authority to interpret Section 36B of the Internal Revenue Code.

In any event, *Chevron* applies where two agencies jointly charged with implementing a statute adopt a common interpretation. *See Coeur Alaska, Inc. v.*

Southeast Alaska Conservation Council, 557 U.S. 261, 277-278 (2009); *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664-666 (2007); *Trans Union LLC v. FTC*, 295 F.3d 42, 50 (D.C. Cir. 2002). Congress contemplated that Treasury and HHS would coordinate their implementation of the Act, *see, e.g.*, 26 U.S.C. 36B(g)(1) (authorizing Treasury to make regulations for "coordination" of tax credits with the "program for advance payment of the credit" administered by HHS), and HHS has likewise concluded after notice-and-comment rulemaking that tax credits are available on all Exchanges.[20]

[20] *See* 45 C.F.R. 155.20 (defining "Exchange" to include federally-facilitated Exchanges); 45 C.F.R. 155.340 (providing for all Exchanges to administer tax credits); *see also* 45 C.F.R. 155.340(f) (specifically addressing treatment of advance payments of credits through "a Federally-facilitated Exchange").

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,876 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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