[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.*,

Appellants,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *et al.*,

Appellees.

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

BRIEF FOR AMICI CURIAE SENATOR JOHN CORNYN, SENATOR TED CRUZ, SENATOR ORRIN HATCH, SENATOR MIKE LEE, SENATOR MARCO RUBIO, REPRESENTATIVE DAVE CAMP, AND REPRESENTATIVE DARRELL ISSA IN SUPPORT OF APPELLANTS AND REVERSAL OF THE DECISION BELOW

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel certifies that:

(A) Parties and Amici: All parties and amici appearing before the district court and those that filed an appearance or notice of appearance in this Court at the panel stage are listed in the Appellants' Brief. As of this filing, the following amici have filed an appearance or notice of appearance in this Court at the en banc stage: Senator John Cornyn; Senator Ted Cruz; Senator Orrin Hatch; Senator Mike Lee; Senator Marco Rubio; Representative Dave Camp; Representative Darrell Issa; State of Kansas; State of Nebraska; Judicial Watch, Inc.; Pacific Research Institute; Cato Institute; Jonathan H. Adler; Michael F. Cannon; Galen Institute.

(B) Rulings Under Review: References to the ruling at issue appear in the Appellants' Brief.

(C) Related Cases: To the best of Counsel's knowledge, there are no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Dated: October 3, 2014

/s/ Charles J. Cooper
Counsel for Amici Curiae

CERTIFICATE IN SUPPORT OF SEPARATE BRIEF

It was impracticable for amici to join in any other amicus brief in support of the Appellants because, as Members of Congress, they have a distinct perspective on how courts should interpret the statutes they write. In particular, amici believe that it is especially important that courts honor the Constitution's allocation of the legislative and judicial functions by leaving to Congress the task of deciding whether to amend a statute's text. In light of their experience as elected representatives, amici are also concerned that the district court's decision upending a legislative compromise could make it more difficult for Congress to forge such compromises in the future. The Circuit's rules recognize that governmental officials such as members of Congress frequently have a separate interest and perspective on the legal questions before this Court. D.C. CIR. RULE 29(d) (requirement that amici on the same side join in a single brief "does not apply to a governmental entity").

Dated: October 3, 2014

/s/ Charles J. Cooper
Counsel for Amici Curiae

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GLOSSARY

ACA	Patient Protection and Affordable Care Act, 111 Pub. L. No. 148, 124 Stat. 119 (2010), as modified by the Health Care and Education Reconciliation Act, 111 Pub. L. No. 152, 124 Stat. 1029 (2010)
ASPE	Office of the Assistant Secretary for Planning and Evaluation of the United States Department of Health and Human Services
CBO	Congressional Budget Office
HHS	United States Department of Health and Human Services
IRS	Internal Revenue Service

PERTINENT STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Appellants' Brief.

INTEREST OF AMICI CURIAE[1]

Senator John Cornyn is the Senate Minority Whip. Senator Ted Cruz is the Ranking Member of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights. Senator Orrin Hatch is the Ranking Member of the Senate Finance Committee. Senator Mike Lee is the Ranking Member of the Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights. Senator Marco Rubio is the Ranking Member of the Senate Foreign Relations Subcommittee on East Asian and Pacific Affairs. Representative Dave Camp is the Chairman of the House Ways and Means Committee. Representative Darrell Issa is the Chairman of the House Oversight and Government Reform Committee.

As elected representatives, amici have a powerful interest in protecting the liberty of their millions of constituents. Amici have taken a strong interest in the implementing regulations of the Patient Protection and Affordable Care Act ("ACA") in general and the regulation at issue in this case in particular. Two amici were members of the Senate Republican caucus that originally united against the passage of the ACA. Another amicus, the Ranking Member of the Senate

[1] Pursuant to FED. R. APP. P. 29, amici certify that both parties, through their respective counsel, consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or its counsel made such a monetary contribution.

Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, released a report that outlines the current Presidential Administration's repeated attempts to ignore the ACA's statutory text, including by adopting the interpretation at issue in this case. *See* UNITED STATES SENATOR TED CRUZ, THE LEGAL LIMIT: THE OBAMA ADMINISTRATION'S ATTEMPTS TO EXPAND FEDERAL POWER – REPORT NO. 2 (Dec. 9, 2013), http://goo.gl/BX5oer (last visited September 30, 2014). Two amici are the Chairmen of the House Ways and Means and the House Oversight and Government Reform Committees, which recently released a joint report documenting the results of a year-long investigation that revealed that the IRS failed to seriously grapple with the plain meaning of section 36B before issuing its regulation. *See* JOINT STAFF REPORT OF HOUSE COMM. ON OVERSIGHT AND GOV'T REFORM & HOUSE COMM. ON WAYS AND MEANS, ADMINISTRATION CONDUCTED INADEQUATE REVIEW OF KEY ISSUES PRIOR TO EXPANDING HEALTH LAW'S TAXES AND SUBSIDIES (Feb. 5, 2014), http://goo.gl/5thZ4J (last visited September 30, 2014) ("Joint Report"). In connection with this investigation, the Oversight and Government Reform Committee recently issued a subpoena seeking to compel Treasury to produce documents that, to date, Treasury has only allowed the Committee to review *in camera*. *See* Letter from Darrell Issa, Chairman, House Comm. on Oversight and

Gov't Reform, to Jacob J. Lew, Sec'y, U.S. Dep't of Treasury (Sept. 23, 2014), http://goo.gl/JAKvmQ (last visited September 30, 2014).

SUMMARY OF ARGUMENT

The plain text of the ACA reflects a specific choice by Congress to make health insurance premium subsidies available only through "an Exchange established by the State." 26 U.S.C. § 36B(c)(2)(A)(i). The IRS has discarded this unambiguous statutory limitation and made subsidies available on exchanges established not only by the States but also on exchanges established by the federal government. The Court should vacate this executive overreach because, as a panel majority of this Court in this case correctly concluded, "the ACA unambiguously restricts the section 36B subsidy to insurance purchased on Exchanges 'established by the State' . . . ." *Halbig v. Burwell*, 758 F.3d 390, 394 (D.C. Cir. 2014).

Deference to the IRS's erroneous interpretation of the ACA is particularly unwarranted in this case. First, the executive branch's decision to rewrite the ACA and extend premium subsidies beyond State exchanges improperly encroaches upon Congress's lawmaking function. Second, that incursion has immediate, immense, and ongoing implications for the public purse. If the IRS's regulation is permitted to stand, projections indicate that it will result in tens of billions of dollars in unlawful spending over the next year, and hundreds of billions over the next decade. Third, the departure from the statutory text here is especially

improper given the nature of the compromises that were required in order to pass the ACA. The executive should not be able to accomplish through aggressive agency rulemaking what it could not accomplish in legislative negotiations. Finally, the IRS's decision to extend premium subsidies to federal exchanges violates the requirements of reasoned decisionmaking demanded of all agency action.

ARGUMENT

I. Congress Has Not Granted the IRS Any Authority To Extend Premium Subsidies to Health Plans Offered Through an Exchange Established by the Federal Government.

A. The Plain Text of the ACA Demonstrates that Premium Subsidies Are Available Only Through an Exchange Established by a State.

Because our Constitution grants the legislative power to Congress, the executive and judicial branches are bound to "give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Thus, when reviewing an executive agency's construction and implementation of a statute, a court must always begin by asking "whether Congress has directly spoken to the precise question at issue." *Id*. at 842. And if Congress has directly spoken to the question, that is also where the analysis must end, for both the courts and the agency must yield to Congress's clear directives.

The precise question at issue here is whether individuals who purchase health insurance on an exchange established by the federal government may be eligible for tax credits to offset the cost of their premiums. Congress has directly spoken to this question in the ACA, and the plain text of the statute unambiguously demonstrates that the answer is no.

The ACA provides that an exchange operating in any particular State may be established either by the State itself or by the federal government. As an initial matter, section 1311 of the ACA provides that "[e]ach State shall, not later than January 1, 2014, establish an . . . Exchange . . . for the State . . . ." 42 U.S.C. § 18031(b)(1). Because Congress does not have the authority to compel a State to establish an exchange, this provision is precatory, not mandatory. In the event a State does not accept Congress's invitation to establish an exchange, section 1321 of the ACA directs the Secretary of Health and Human Services ("HHS") to "establish and operate such Exchange within the State." *Id*. § 18041(c)(1).

In addition to addressing how exchanges are established, the ACA also addresses the circumstances under which individuals purchasing insurance coverage from exchanges are eligible for premium subsidies. As relevant here, eligibility for such subsidies is expressly limited to individuals "covered by a qualified health plan . . . that was enrolled in through an Exchange *established by the State* under section 1311 . . . ." 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added).

The plain text of the ACA thus demonstrates (a) that an exchange may be established either by a State or by the federal government, and (b) that premium subsidies are available only for plans enrolled in through an exchange established by a State. Thus, as the panel majority correctly concluded, "the ACA unambiguously restricts the section 36B subsidy to insurance purchased on Exchanges 'established by the State' . . . ." *Halbig*, 758 F.3d at 394. The IRS's attempt to extend this subsidy to insurance purchased on an exchange established by the federal government is *ultra vires* and must be vacated.

While the panel dissent acknowledged that the meaning of section 36B "initially might appear plain," *id.* at 417 (Edwards, J., dissenting), it nevertheless strained to find an ambiguity in the statute's plain text in order to uphold the challenged IRS regulation. According to the dissent, section 1321 may be read as directing the federal government to establish an exchange "*on behalf of* the State" when the State elects not to establish an exchange itself. *Id.* (emphasis in original).

But contrary to the dissent's assertion, the ACA cannot reasonably be read as "permit[ting] a State to elect to allow HHS to establish [an] Exchange on behalf of the State." *Id.* The notion that a State's refusal to establish an exchange demonstrates that the State intended to appoint the federal government to act as its agent to establish an exchange on the State's behalf is difficult to take seriously. *Cf. Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666-67 (2013). To the contrary, a

State that declines to establish an exchange is perforce electing not to play any part in the implementation and operation of an exchange, either directly or through the agency of the federal government. The federal government, of course, remains free to establish *its own exchange* to serve such a State's citizens. But surely the federal government cannot *appoint itself* to serve as an unwilling State's agent to establish an exchange *on behalf of* the State. *See Printz v. United States*, 521 U.S. 898, 935 (1997).

Furthermore, nothing in the ACA supports the notion that Congress meant to create the legal fiction that the federal government acts on behalf of a State when it establishes an exchange. Indeed, Congress elsewhere expressly provided that a United States territory that establishes an exchange "shall be treated as a State" for certain purposes. 42 U.S.C. § 18043(a)(1). Congress could have used similar language if it intended an exchange established by the federal government to be treated as an exchange established by a State, but it did not.

Nor do the statutory provisions cited by the dissent provide support for the notion that Congress deemed the federal government to be acting on the State's behalf when establishing an exchange. The ACA, to be sure, defines the term "Exchange" to mean "an American Health Benefit Exchange established under section [1311]," 42 U.S.C. § 300gg-91(d)(21)—i.e., the section inviting States to establish their own exchanges. And section 1321 directs the federal government to

"establish and operate *such* Exchange within the State" if the State does not. *Id.* § 18041(c)(1) (emphasis added). But these provisions at most provide that federal exchanges should be deemed "Exchanges established under section 1311," *Halbig*, 758 F.3d at 400; they in no way suggest that federal exchanges are to be deemed to have been established under section 1311 *on behalf of the State*.

The dissent also erred in interpreting section 1311(d)(1)'s directive that "[a]n Exchange shall be a governmental agency or nonprofit entity that is established by a State," 42 U.S.C. § 18031(d)(1), as *definitional*, i.e., as "defin[ing] *every* 'Exchange' under the Act as a governmental agency or nonprofit entity that is *established by a State*." *Halbig*, 758 F.3d at 417 (Edwards, J., dissenting) (emphases in original) (quotation marks omitted). Section 1311(d)(1) is *operational*, not definitional. It and "[t]he other provisions of section 1311(d) are operational requirements, setting forth what Exchanges must (or, in some cases, may) do. Read in keeping with that theme, (d)(1) would simply require that an Exchange operate as either a governmental agency or nonprofit entity." *Halbig*, 758 F.3d at 400 (footnote and citation omitted). Furthermore, Congress elsewhere expressly defined the term "Exchange," *see* 42 U.S.C. § 300gg-91(d)(21), making even less plausible the dissent's suggestion that section 1311(d) is a second, *implicit* definition of the term. *See Halbig*, 758 F.3d at 400-01. Finally, section 1311(d)(1) is directed at the *States*, and it naturally requires a State-established

exchange to "be a governmental agency or nonprofit entity that is established by a State." 42 U.S.C. § 18031(d)(1). Section 1321, by contrast, is directed at the federal government, and it requires the federal government to establish and operate an exchange "directly or through agreement with a not-for-profit entity," *id.* § 18041(c)(1); it says nothing to suggest these activities are to be deemed to be the actions of a State. In sum, as the panel majority concluded, "[t]he premise that (d)(1) is definitional . . . does not survive examination of (d)(1)'s context and the ACA's structure." *Halbig*, 758 F.3d at 400. The dissent erred by concluding otherwise.

B. The ACA Should Not Be Interpreted To Delegate to the Executive a Decision with Such Broad-Ranging Consequences in So Cryptic a Fashion.

"The importance of the issue" presented by this case to Congress's legislative authority and to the Nation's finances "makes the oblique form of the claimed delegation all the more suspect." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). The Court should "hesitate before concluding that Congress has intended such an implicit delegation" in this case, *id.*, because the Supreme Court "expect[s] Congress to

speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quotation marks omitted). And this expectation that Congress speak clearly should be heightened when, as here, the agency does not have any particular expertise in the subject-matter in question, because "practical agency expertise is one of the principal justifications behind *Chevron* deference." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990). In sum, "Congress could not have intended to delegate a decision of such economic and political significance" as the one at issue in this case "to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160.

1. The Constitution vests Congress with the authority to make laws, and it imposes upon the President the duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. This division of authority is not "merely an end unto itself." *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014). Rather, "the constitutional structure of our Government is designed first and foremost not to look after the interests of the respective branches, but to protect individual liberty." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2593 (2014) (Scalia, J., concurring in judgment) (brackets and quotation marks omitted). In fact, "[s]o convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary." *Clinton v. City of New York*, 524 U.S. 417,

450 (1998) (Kennedy, J., concurring). As relevant here, "the Constitution diffuses power the better to secure liberty . . . ." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). This diffusion of power reflects the founding generation's belief "that checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

The IRS's decision to extend premium subsidies to health plans available on exchanges established by the federal government rewrites the law and encroaches on Congress's constitutional authority. Again, the ACA restricts premium subsidies to individuals "covered by a qualified health plan . . . that was enrolled in through an Exchange established by the State . . . ." 26 U.S.C. 36B(c)(2)(A)(i). The IRS's regulation, by contrast, makes subsidies available "regardless of whether the Exchange is established and operated by a State . . . or by HHS." 26 C.F.R. § 1.36B-1(k); 45 C.F.R. § 155.20. The executive branch, in other words, effectively has struck the words "established by the State" from section 36B, thus amending it to read that subsidies are available to individuals "covered by a qualified health plan . . . that was enrolled in through an Exchange ~~established by the State~~ . . . ." But as the Supreme Court emphasized in *Clinton*: "There is no provision in the Constitution that authorizes the President . . . to amend . . . statutes." 524 U.S. at 438; *see also Utility Air Regulatory Grp.*, 134 S. Ct. at 2446

("The power of executing the laws . . . does not include a power to revise clear statutory terms that turn out not to work in practice.").

2. The Constitution assigns Congress to be "the custodian of the national purse." *United States v. Standard Oil Co.*, 332 U.S. 301, 314 (1947). The Constitution thus establishes that "no money can be expended, but for an object, to an extent, and out of a fund, which the laws have prescribed." 7 THE WORKS OF ALEXANDER HAMILTON 532 (John C. Hamilton ed., 1851) (emphases omitted). *See* U.S. CONST. art. I, § 9, cl. 7. Like the separation of powers generally, this structural provision of the Constitution is intended to secure liberty.

> [I]t is highly proper, that congress should possess the power to decide, how and when any money should be applied for [the engagements of the government]. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1342 (1st ed. 1833). The Constitution thus seeks "to assure that public funds will be spent *according to the letter* of the difficult judgments reached *by Congress* as to the common good . . . ." *OPM v. Richmond*, 496 U.S. 414, 428 (1990) (emphases added).

In June of this year, the Office of the Assistant Secretary for Planning and Evaluation ("ASPE") of HHS released a report that provides some insight into the magnitude of unlawful spending that is occurring as a result of the IRS regulation

at issue here. *See* AMY BURKE ET AL., PREMIUM AFFORDABILITY, COMPETITION, AND CHOICE IN THE HEALTH INSURANCE MARKETPLACE, 2014 (ASPE Research Brief) (June 18, 2014), http://goo.gl/e9zgzh (last visited September 30, 2014). HHS reported that more than 5.4 million people enrolled in health plans through exchanges established by the federal government during the initial open enrollment period. *Id*. at 3. Of the individuals who enrolled through a federal exchange, 87% selected a plan with premium tax credits, with an average tax credit of $264 per month. *Id*. at 5. These figures indicate that the government is spending over $1.2 billion unlawfully each and every month on premium subsidies. (5.4 million enrollees × .87 with credits × $264 average credit per month = $1,240,272,000 per month.)

The HHS report, however, understates the fiscal effects of the IRS's regulation, both because the number of individuals enrolling in plans through exchanges is expected to increase and because the report does not include cost-sharing subsidies available to a subset of individuals receiving premium subsidies. *See* 42 U.S.C. § 18071(f)(2). A recent Congressional Budget Office report helps to fill out the picture. *See* CBO, UPDATED ESTIMATES OF THE EFFECTS OF THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT, APRIL 2014, http://goo.gl/iEeX0b (last visited September 30, 2014). The CBO

> anticipate[s] that coverage through the exchanges will increase substantially over time as more people respond to subsidies and to

> penalties for failure to obtain coverage. Coverage through the exchanges is projected to increase to an average of 13 million people in 2015, 24 million in 2016, and 25 million in each year between 2017 and 2024. Roughly three-quarters of those enrollees are expected to receive exchange subsidies.

Id. at 6.

The cost of these subsidies is expected to be steep. In fiscal year 2015 alone (beginning October 1, 2014), the CBO projects outlays of $23 billion for premium subsidies and $7 billion for cost-sharing subsidies, along with a $5 billion reduction in tax revenue as a result of premium subsidies, for a total budgetary effect of $35 billion. *Id*. at 10 tbl.3. This number increases to $74 billion in 2016, $93 billion in 2017, and $101 billion in 2018. *Id*. All told, outlays and reductions in revenue from premium tax credits and cost-sharing subsidies are projected to amount to over $1 trillion over the next 10 years. *Id*. These costs are expected to be a major driver of the federal deficit. Over the next 10 years, the CBO forecasts that "deficits would become notably larger under current law. The pressures stemming from an aging population, rising health care costs, and an expansion of federal subsidies for health insurance would cause spending for some of the largest federal programs to increase relative to GDP." CBO, THE LONG-TERM BUDGET OUTLOOK 1 (July 2014), http://goo.gl/VaiPNw (last visited September 30, 2014).

The totals described in the previous paragraph are for all exchanges, not just exchanges established by the federal government. But if present circumstances

persist, it can be expected that a majority of these costs will be incurred for plans enrolled in through federal exchanges. The federal government has established exchanges for 36 of the States. And HHS's figures indicate that over two-thirds of individuals enrolling in health plans through exchanges have done so through exchanges established by the federal government. *See* ASPE, HEALTH INSURANCE MARKETPLACE: SUMMARY ENROLLMENT REPORT FOR THE INITIAL ANNUAL OPEN ENROLLMENT PERIOD 4 tbl.1 (May 1, 2014), http://goo.gl/qmr9Ph (last visited September 30, 2014) (noting approximately 5.4 million federal exchange enrollees out of approximately 8 million total exchange enrollees).

In sum, the IRS's decision to extend subsidies to federal exchanges has serious implications for Congress's legislative authority and this Nation's finances. Again, it is doubtful that "Congress [would] have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160. As the text of the ACA demonstrates, "Congress is more likely to have focused upon, and answered, major questions" such as the one at issue here, "while leaving interstitial matters to answer themselves in the course of the statute's daily administration." *Id*. at 159 (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)).

3. Of course, it is not necessarily the case that long-term federal spending will decrease if the IRS's regulation is vacated. States facing the loss of billions of dollars for their citizens may reconsider their decisions not to establish their own exchanges. But even if every State were to establish its own exchange, vacatur of the IRS's regulation would put to a halt the massive amount of *illegal* spending that is occurring now. And it would also mean that the States, rather than the federal government, would take the lead in establishing exchanges. That result would plainly be in keeping with the ACA's structure, which exhorts States to establish their own exchanges and directs the federal government to step in only if States fail to do so. Indeed, it is doubtful that the ACA could have passed if Congress expected the vast majority of the States to take a pass on setting up an exchange. *See infra*. at 17-21. And absent practical consequences for States failing to establish exchanges, it should have been easy to anticipate that many States would take a pass.

C. The Circumstances Surrounding the ACA's Passage Make It Particularly Important To Insist upon Fidelity to the Statute's Plain Language.

A bill as massive and controversial as the ACA is bound to reflect many competing policy considerations and legislative compromises. It is particularly important to hew closely to the statutory text of such a law rather than trying to force it to fit any single overarching policy goal. The words of a statute, of course,

are the best guide to Congress's purposes in enacting the statute. "[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires [the assumption] that the legislative purpose is expressed by the ordinary meaning of the words used." *United States v. Locke*, 471 U.S. 84, 95 (1985) (quotation marks omitted). And given the manner in which the ACA was enacted, it is particularly important to interpret the words "an Exchange established by the State" to mean what they say.

The ACA was the product of contentious political compromise that any administrative or judicial amendment would be certain to upset. The relative roles that would be played under the Act by the States and the federal government were highly controversial and hotly contested. The ACA's supporters did not have the votes to establish a single-payer system or even to take what many feared to be a significant first step towards such a system: the establishment of a national exchange providing federal subsidies to low-income participants.

For example, supporters of healthcare legislation needed 60 votes in the Senate to overcome a filibuster, and because there was not a single vote to spare, compromise within the Democratic caucus was necessary to ensure passage of any bill. Senator Ben Nelson, essential to the 60-vote majority, made clear his objection to a federal exchange, describing it as a "dealbreaker" because it would "start us down the road of . . . a single-payer plan." Carrie Budoff Brown, *Nelson:*

National Exchange a Dealbreaker, POLITICO (Jan. 25, 2010, 7:59 PM), http://goo.gl/BloeHy (last visited September 30, 2014). Senator Nelson was ultimately able to leverage his opposition to "scrub[ ] dozens of . . . things out of it that federalized the bill." Interview with United States Senator Ben Nelson by LifeSiteNews.com (Jan. 26, 2010), *see* http://goo.gl/2fDY1J (last visited September 30, 2014). Like much of the ACA's drafting, those changes were made behind closed doors, and it is not known which amendments were inserted for what reason. What *is* known is that the statutory language that emerged was the product of lengthy negotiations.

What is more, statements by Professor Jonathan Gruber support the inference drawn from the statute's plain text that Congress limited the availability of subsidies to encourage the States to establish their own exchanges. According to press reports, "Mr. Gruber helped the administration put together the basic principles of the [health care] proposal," and the White House thereafter "lent him to Capitol Hill to help Congressional staff members draft the specifics of the legislation." Catherine Rampell, *Academic Built Case for Mandate in Health Care Law*, N.Y. TIMES, Mar. 29, 2012, http://goo.gl/zht5UU (last visited September 30, 2014). Speaking in January 2012, Professor Gruber emphasized:

> [I]f you're a state and you don't set up an Exchange, *that means your citizens don't get their tax credits*. But your citizens still pay the taxes that support this bill. So you're essentially saying to your citizens, you're going to pay all the taxes to help all the other states in the

> country. *I hope that that's a blatant enough political reality that states will get their act together and realize there are billions of dollars at stake here in setting up these Exchanges, and that they'll do it.*

Video: Jonathan Gruber at Noblis, at 32:00 (Jan. 18, 2012), YOUTUBE.COM, http://goo.gl/QRFnL4 (last visited September 30, 2014).

During another speech in January 2012, Professor Gruber, in discussing threats to the ACA, expressly tied this feature of the Act to political compromise regarding the role of the States:

> *Through a political compromise, the decision was made that states should play a critical role in running these health insurance exchanges*. . . . I guess I'm enough of a believer in democracy to think that when the voters in states see that by not setting up an exchange the politicians of a state *are costing state residents hundreds and millions and billions of dollars*, that they'll eventually throw the guys out. But I don't know that for sure. And that is really the ultimate threat, is, will . . . people understand that, gee, *if your governor doesn't set up an exchange, you're losing hundreds of millions of dollars of tax credits to be delivered to your citizens*.

Video: Jonathan Gruber at Jewish Community Center of San Francisco, at 32:55 (Jan. 10, 2012), JCCSF.ORG, http://goo.gl/Vebg4v (last visited September 30, 2014) (emphases added).

Evidence of such political compromise makes faithful adherence to the plain meaning of the statutory text especially important, lest the Court undo the agreement that made the Act's enactment possible. "Dissatisfaction . . . is often the cost of legislative compromise," and to ignore a provision's "delicate crafting" could undo a negotiated political compromise that was critical to passage.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461 (2002); *see also Artuz v. Bennett*, 531 U.S. 4, 10 (2000) ("We hold as we do because respondent's view seems to us the only permissible interpretation of the text—which may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted."); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2417 (2003) ("The reality is that a statutory turn of phrase, however awkward its results, may well reflect an unrecorded compromise or the need to craft language broadly or narrowly to clear the varied veto gates encountered along the way to enactment."). In an era when Congress is often criticized for its inability to forge consensus and enact major legislation, the judiciary should take special care not to upset the legislative compromises that enabled passage of laws that come before it.

More fundamentally, the Administration's attempt to upset the legislative compromise embodied in the unambiguous text of the ACA would effectively strike a new and different compromise, one the Congress demonstrably could not and did not pass itself. To cast aside the compromise that resulted in the unambiguous language of section 36B in the name of the Act's purported purposes would effectively amend the Act by handing its most enthusiastic supporters a victory that they were unable to achieve through the political process. Any "anxiety to effectuate the congressional purpose" behind enacting a statute "must

take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *Brown & Williamson*, 529 U.S. at 161. Here, Congress plainly indicated that the availability of premium subsidies would stop at State exchanges and not extend to exchanges established by the federal government. The executive branch, and the courts, are required to honor that choice.

II. The IRS's Regulation Was Not the Product of the Reasoned Decisionmaking Required of All Agency Action.

For the foregoing reasons, the IRS's attempt to extend premium subsidies through federal exchanges fails at *Chevron* step one. But even if the agency could get to step two, its regulation "would still fail for want of reasoned decisionmaking." *Fox v. Clinton*, 684 F.3d 67, 77 (D.C. Cir. 2012). Under *Chevron* step two, agency "regulations are given controlling weight unless they are *arbitrary, capricious*, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844 (emphasis added). Arbitrary and capricious review "demands evidence of reasoned decisionmaking at the agency level," and this requirement applies with full force when reviewing an agency's "statutory interpretation[] under the second prong of *Chevron*." *City of Kansas City, Mo. v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 192 (D.C. Cir. 1991) (emphasis omitted). In other words, whether or not an agency's interpretation of a statute would be considered *substantively* reasonable under *Chevron*, the interpretation is *procedurally* invalid if not the product of reasoned decisionmaking.

The Joint Report prepared by the House Committees on Ways and Means and Oversight and Government Reform indicates that the IRS's regulation was not the product of reasoned decisionmaking. Joint Report, http://goo.gl/5thZ4J.

> The Committees' investigation, which focused on the rulemaking process and not the merits of IRS and Treasury's interpretation, . . . concluded that . . . neither IRS nor Treasury engaged in reasoned decision-making of this important issue prior to issuing the final rule that extended [ACA's] premium subsidies to federal exchanges.

Id. at 35.

The Joint Report found that "IRS failed to conduct a thorough or serious analysis of the issue prior to the release of the proposed rule" in August 2011. *Id*. at 19. Indeed, "[t]he only written analysis explaining IRS's decision to extend [ACA's] subsidies to individuals who purchase coverage in federal exchanges was [a] single memo produced by IRS's Office of Chief Counsel with a single paragraph with a single reason to support their interpretation." *Id*. The failure to conduct a thorough analysis was not the result of ignorance about the problem. To the contrary, an early draft of the proposed rule "*included* the language 'Exchange established by the State' in the section entitled 'Eligibility for Premium Tax Credit.' " *Id*. at 17 (emphasis added). And internal documents reviewed by the committees indicate that "Treasury department employees expressed concern that there was no direct statutory authority to interpret an HHS exchange as an

'Exchange established by the State.' " *Id*. at 18. IRS and Treasury nevertheless proposed extending premium subsidies to federal exchanges.

Numerous commenters opposed the proposed rule extending premium subsidies to federal exchanges as counter to the ACA's plain text, but "the Committees . . . learned that neither IRS, nor Treasury, took the issue seriously and that a thorough and complete review of this important issue was not conducted prior to the Administration's final rule." *Id*. at 20. For example, "IRS and Treasury have been unable to provide any evidence that they reviewed each section in [ACA] that referenced 'Exchange established by the State' before concluding that there was no discernible pattern in the way that Congress used Exchange." *Id*. at 27.

> [N]one of the seven IRS and Treasury employees interviewed by the Committees were aware of any internal discussion within IRS or Treasury, prior to the issuance of the final rule, that making tax credits conditional on state exchanges might be an incentive put in the law for states to create their own exchanges.

Id. at 29. And the employees also "stated they did not consider the Senate's preference for state exchanges during the development of the rule." *Id*. at 32.

In short, "[t]he evidence gathered by the Committees indicates that neither IRS nor the Treasury Department conducted a serious or thorough analysis of the [ACA] statute or the law's legislative history with respect to the government's

authority to provide premium subsidies in exchanges established by the federal government." *Id*. at 3.

CONCLUSION

The district court's judgment should be reversed and the IRS rule should be vacated.

October 3, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 5,707 words, excluding the parts exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and D.C. CIR. RULE 32(a)(1).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

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Dated: October 3, 2014

CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of October, 2014, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I will also cause to be filed on this date thirty copies of the foregoing document, by hand delivery, with the clerk of this Court.

October 3, 2014

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