No. 14-___

IN THE

Supreme Court of the United States

DAVID KING; DOUGLAS HURST;
BRENDA LEVY; and ROSE LUCK,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, as U.S. Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JACOB LEW, as U.S. Secretary of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE; and JOHN KOSKINEN, as Commissioner of Internal Revenue,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 36B of the Internal Revenue Code, which was enacted as part of the Patient Protection and Affordable Care Act ("ACA"), authorizes federal tax-credit subsidies for health insurance coverage that is purchased through an "Exchange established by the State under section 1311" of the ACA.

The question presented is whether the Internal Revenue Service ("IRS") may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government under section 1321 of the ACA.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellants in the court below, are four individuals: David King, Douglas Hurst, Brenda Levy, and Rose Luck.

Respondents, who were Defendants-Appellees in the court below, are Sylvia Mathews Burwell (as U.S. Secretary of Health and Human Services); the United States Department of Health and Human Services; Jacob Lew (as U.S. Secretary of the Treasury); the United States Department of the Treasury; the Internal Revenue Service; and John Koskinen (as Commissioner of Internal Revenue).

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Page(s)

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TABLE OF AUTHORITIES
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Page(s)

Carrie Budoff Brown, *Nelson: National Exchange a Dealbreaker*, POLITICO, Jan. 25, 2010. 4

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Robert Pear & Peter Baker, *Ex-Aide's Statements in 2012 Clash with Health Act Stance*, N.Y. TIMES, July 26, 2014, at A16..... 33

Robert Pear, *New Questions on Health Law as Courts Differ on Subsidies*, N.Y. TIMES, July 23, 2014, at A1 ..... 10, 18-19, 21

Robert Pear, *Public Sector Capping Part-Time Hours to Skirt Health Care Law*, N.Y. TIMES, Feb. 21, 2014, at A12 20

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Catherine Rampell, Mr. Health Care Mandate, N.Y. TIMES, Mar. 29, 2012, at B1 33

SENATE DEMOCRATIC POLICY COMM., *Fact Check: Responding to Opponents of Health Insurance Reform* (Sept. 21, 2009)..... 5

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The Fourth Circuit's opinion (Pet.App.1a) has not yet been published, but can be found at 2014 U.S. App. LEXIS 13902. The district court's opinion (Pet.App.42a) is at 2014 U.S. Dist. LEXIS 20019.

JURISDICTION

The Fourth Circuit entered judgment on July 22, 2014. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the Appendix (Pet.App.76a).

STATEMENT OF THE CASE

This is a challenge to the most consequential regulation promulgated under the Patient Protection and Affordable Care Act ("ACA"). Two Courts of Appeals have squarely divided over its facial validity. The resulting uncertainty over this major plank of ACA implementation means that millions of people have no idea if they may rely on the IRS's promise to subsidize their health coverage, or if that money will be clawed back. Employers in 36 states have no idea if they will be penalized under the ACA's employer mandate, or are effectively exempt from it. Insurers have no idea if their customers will pay for health coverage in which they enrolled, or if large numbers will default. And the Treasury has no idea if *billions* of dollars being spent each *month* were authorized by Congress, or if these expenditures are illegal. Only this Court can definitively resolve the matter; it is imperative that the Court do so as soon as possible.

A. For Constitutional Reasons, the ACA Encourages Rather Than Compels States To Establish Exchanges, And It Does So Principally by Limiting Subsidies to State-Established Exchanges.

The ACA regulates the individual health insurance market primarily through insurance "Exchanges." An Exchange is a means of organizing the insurance marketplace to help individuals and small businesses shop for coverage and compare available plans based on price, benefits, and services.

Section 1311(b)(1) of the ACA urges states, in the strongest possible terms, to establish Exchanges. It provides: "Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange … for the State." 42 U.S.C. § 18031(b)(1). Under the Constitution's core federalism commands, however, Congress cannot *compel* sovereign states to create Exchanges. *Printz v. United States*, 521 U.S. 898, 935 (1997). The Act therefore recognizes that some states may not be "electing State[s]," because they may choose not "to apply the requirements" for an Exchange or otherwise "fai[l] to establish [an] Exchange." ACA § 1321(b)-(c), *codified at* 42 U.S.C. § 18041(b)-(c). To address that scenario, the Act authorizes the Department of Health and Human Services ("HHS") to establish fallback Exchanges in states that do not establish their own. In such cases, the Secretary "shall … establish and operate such Exchange within the State." ACA § 1321(c), *codified at* 42 U.S.C. § 18041(c). Thus, if a state declines the role that the ACA urges it to accept, that obligation falls upon the federal government instead.

Congress used a variety of "carrots" and "sticks" to induce states to establish Exchanges voluntarily. For example, the Act authorizes federal grants to states for "activities … related to establishing an [Exchange]." ACA § 1311(a), *codified at* 42 U.S.C. § 18031(a). It also penalizes states that do not create Exchanges, such as by barring them from narrowing their state Medicaid programs until "an Exchange established by the State … is fully operational." ACA § 2001(b)(2), *codified at* 42 U.S.C. § 1396a(gg).

Most importantly, the Act authorizes subsidies for individual health coverage purchased through *state*-established Exchanges. These subsidies take the form of refundable tax credits, paid by the U.S. Treasury directly to the taxpayer's insurer as an offset against premiums. ACA § 1401(a), § 1412, *codified at* 26 U.S.C. § 36B; 42 U.S.C. § 18082.

Critically, the Act only subsidizes coverage through an Exchange *established by a state*. The Act provides that a credit "shall be allowed" in an "amount," 26 U.S.C. § 36B(a), based on the number of "coverage months of the taxpayer occurring during the taxable year," *id.* § 36B(b)(1). A "coverage month" is a month during which "the taxpayer … is covered by a qualified health plan … enrolled in through an Exchange *established by the State under section 1311* of the [ACA]." *Id.* § 36B(c)(2)(A)(i) (emphasis added). Unless the citizen buys coverage through a state-established Exchange, there are no "coverage months" and so no subsidy. Confirming that, the subsidy for any particular "coverage month" is based on premiums for coverage that was "enrolled in through an Exchange established by the State under [§] 1311 of the [ACA]," *id.* § 36B(b)(2)(A).

These inducements for states to establish their own Exchanges were compelled by political realities. The House of Representatives initially enacted a bill under which the *federal government* would create a national Exchange, though individual states could affirmatively choose to establish their own. H.R. 3962, § 308, 111th Cong. (2009). That scheme, however, was unacceptable to the Senate. *See Halbig v. Sebelius*, No. 13-623, 2014 U.S. Dist. LEXIS 4853, at *61 (D.D.C. Jan. 15, 2014) ("[T]hese proposals proved politically untenable and doomed to failure in the Senate ...."). Senator Ben Nelson of Nebraska, whose vote was critical to passage, called the national Exchange a "dealbreaker," expressing concern that such federal involvement would "start us down the road of … a single-payer plan." Carrie Budoff Brown, *Nelson: National Exchange a Dealbreaker*, POLITICO, Jan. 25, 2010. For Nelson and other swing Senators, it was important to keep the federal government *out* of the process. It was thus insufficient to merely allow states the *option* to establish Exchanges, as the House bill did. Rather, states had to take the leading role, which, given the constitutional bar on compulsion, required serious incentives to induce state participation.

The robust incentives provided by the ACA—in particular, the conditioning of tax credits on state-run Exchanges—were thought sufficient to do so. As one of the Act's architects, Prof. Jonathan Gruber, later explained, "if you're a state and you don't set up an Exchange, that means your citizens don't get their tax credits. … I hope 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."

Jonathan Gruber at Noblis, at 32:00 (Jan. 18, 2012), https://www.youtube.com/watch?v=GtnEmPXEpr0&feature=youtu.be&t=31m25s.

Perhaps in light of that "political reality" deterring states from turning down billions of free federal dollars, "lawmakers assumed that every state would set up its own exchange." Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, N.Y. TIMES, Aug. 4, 2012, at A17. "Congress did not expect the states to turn down federal funds and fail to create and run their own Exchanges." Pet.App.70a. Accordingly, for example, Congress did not appropriate *any* funds in the ACA for HHS to build Exchanges, even as it appropriated unlimited funds to help states establish theirs. *See* ACA § 1311(a), *codified at* 42 U.S.C. § 18031(a). Indeed, ACA proponents emphasized that "[a]ll the health insurance exchanges … are run by states," to rebut charges that the Act was a federal "takeover." SENATE DEMOCRATIC POLICY COMM., *Fact Check: Responding to Opponents of Health Insurance Reform* (Sept. 21, 2009), http://dpc.senate.gov/reform/reform-factcheck-092109.pdf.

B. The IRS Promulgates Regulations That Nonetheless Extend the ACA's Subsidies to HHS-Established Exchanges.

Notwithstanding the ACA's text and purpose, the IRS in 2011 proposed, and in 2012 promulgated, regulations requiring the Treasury to grant subsidies for coverage purchases through *all* Exchanges—not only those established by states under § 1311 of the Act, but also those established by HHS under § 1321. 76 Fed. Reg. 50931, 50934 (Aug. 17, 2011); 77 Fed. Reg. 30,377, 30,378, 30,387 (May 23, 2012).

These regulations ("the IRS Rule") contradict the statutory text restricting subsidies to Exchanges "established by the State under section 1311." Specifically, the Rule states that subsidies shall be available to anyone "enrolled in one or more qualified health plans through an Exchange," and then adopts by cross-reference an HHS definition of "Exchange" that includes *any* Exchange, "regardless of whether the Exchange is established and operated by a State … or by HHS." 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20. Under the IRS Rule, federal subsidies are thus available in *all* states, even those states that failed to establish their own Exchanges. Put another way, the IRS Rule authorizes subsidies for coverage purchased through the federal Exchange colloquially known as HealthCare.Gov, not just for coverage purchased through state-established Exchanges.

Facing comments pointing out this facial inconsistency with the statute, the IRS offered only the following (77 Fed. Reg. at 30,378):

> The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.

C. 34 States Decline To Establish Their Own Exchanges, and Two Others Fail To Do So.

After the IRS announced that taxpayers would be eligible for subsidies whether or not their states established Exchanges, 34 states, including Virginia, declined to establish Exchanges. Pet.App.44a. Two states also failed to establish Exchanges in time for 2014. Pursuant to § 1321 of the ACA, HHS therefore established federal Exchanges to serve those states.

D. The IRS Rule Triggers Other ACA Mandates and Penalties.

By expanding subsidies to coverage on HHS Exchanges, the IRS Rule triggers ACA mandates and penalties for millions of individuals and thousands of employers in the states served by HealthCare.Gov. *Halbig v. Burwell*, No. 14-5018, 2014 U.S. App. LEXIS 13880, at *10-12 (D.C. Cir. July 22, 2014).

For individuals, eligibility for a subsidy triggers the Act's individual mandate penalty for many who would otherwise be exempt. The Act's penalty for violating the mandate does not apply to those "who cannot afford coverage" or who would suffer hardship if forced to buy it. *See* 26 U.S.C. § 5000A(e)(1), (5). Under regulations implementing these exemptions, an individual may obtain an advance exemption from the individual mandate penalty if the annual cost of coverage exceeds eight percent of his projected household income. *See* 45 C.F.R. § 155.605(g)(2); *see also* 26 U.S.C. § 5000A(e)(1)(A). For individuals only able to purchase coverage in the individual market, that cost is calculated as the annual premium for the cheapest insurance plan available to that person in the Exchange in that person's state, minus "the credit allowable under section 36B." 26

U.S.C. § 5000A(e)(1)(B)(ii). Thus, by purporting to make a credit "allowable" in states served by HealthCare.Gov, the IRS Rule reduces the number of people in those states exempt from the individual mandate penalty. Now ineligible for exemptions, those individuals are no longer free to forgo coverage, or to buy "catastrophic" coverage (otherwise limited to those under 30 years old, *see* ACA § 1302(e)(1)(A), (2), *codified at* 42 U.S.C. § 18022(e)(1)(A), (2)).

For employers, the availability of subsidies triggers the "assessable payments" used to enforce the Act's "employer mandate." The Act provides that large employers will be subject to such payments if they do not offer full-time employees the opportunity to enroll in affordable, employer-sponsored coverage. But the payment is only triggered if at least one employee enrolls in coverage for which "an applicable premium tax credit … is allowed or paid." 26 U.S.C. § 4980H. Thus, if no subsidies are available in a state because that state has not established an Exchange, employers in that state may offer their employees non-compliant coverage, or no coverage at all, without being threatened with this liability. Since the IRS Rule authorizes subsidies nationwide, however, it exposes businesses in those states to the employer mandate and its assessable payments.

E. Injured Individuals and Employers Bring Suit To Challenge the IRS Rule.

Petitioners in this case are individuals residing in Virginia, which has declined to establish its own Exchanges and thus is served by HealthCare.Gov. They do not want to comply with the individual mandate, and, given their low incomes, would not be subject to penalties for failing to do so but for the IRS

Rule. The Rule renders them eligible for subsidies that would reduce the net cost of their coverage to below 8% of projected income and so disqualify them from the hardship exemption. Pet.App.47a-50a. Thus, as the district court recognized, "as a result of the IRS Rule, they will incur some financial cost because they will be forced to buy insurance or pay the [individual mandate] penalty." Pet.App.52a-53a.

In at least three other cases, other individuals and businesses injured by the IRS Rule also sued. A group of individuals and employers brought suit in the District of Columbia. *See Halbig*, 2014 U.S. App. LEXIS 13880. The State of Oklahoma filed *Pruitt v. Burwell* (No. 6:11-cv-00030, E.D. Okla.). And the State of Indiana, along with a number of school corporation employers, filed *Indiana v. IRS* (No. 1:13-cv-01612, S.D. Ind.).

F. The Courts Below Uphold the IRS Rule on the Merits, While the D.C. Circuit Finds the Rule Illegal and Orders Its Vacatur.

The district court ruled for the Government on February 18, 2014. It concluded that Petitioners had Article III standing because "their economic injury is real and traceable to the IRS Rule." Pet.App.53a. It also agreed that Petitioners could challenge the IRS Rule under the APA, and that such a challenge was ripe given the purely legal nature of the suit and the hardship that delay would cause. Pet.App.55a-60a.

On the merits, the district court recognized that Petitioners' "plain meaning interpretation of section 36B has a certain common sense appeal." Pet.App.71a. The court, nonetheless, concluded that Congress *unambiguously* intended just the contrary of that "plain meaning." The court inferred that

counter-textual intent from (i) Congress's policy goal "to ensure broad access to affordable health care for all" (Pet.App.71a); (ii) the absence of "direct support in the legislative history" confirming the plain text (Pet.App.70a); and (iii) supposed "anomalous results" under some of the Act's other provisions, were the text given its plain meaning (Pet.App.64a).

The Fourth Circuit granted Petitioners' motion to expedite (which the Government did not oppose). Dozens of *amici* weighed in at the merits stage on behalf of each side, including eight States, many Members of Congress, and industry groups such as the American Hospital Association and America's Health Insurance Plans. On July 22, 2014, the court affirmed on alternative grounds, holding the ACA to be *ambiguous* on whether an HHS Exchange is one "established by the State." Judge Gregory wrote the opinion, which Judges Davis and Thacker joined.

Two hours before the Fourth Circuit issued its opinion, the D.C. Circuit released its own opinion in *Halbig*, another case challenging the same IRS Rule on the same grounds. In *Halbig*, Judge Griffith authored a majority opinion on behalf of himself and Judge Randolph, over a dissent by Judge Edwards. *Halbig*, 2014 U.S. App. LEXIS 13880. The majority held that the IRS Rule was directly contrary to the unambiguous text of the ACA, and ordered that the Rule be vacated. *See id.* at *6.

The two conflicting decisions "inject uncertainty, confusion and turmoil into health insurance markets as the administration firms up plans for another open enrollment season …." Robert Pear, *New Questions on Health Law as Courts Differ on Subsidies*, N.Y. TIMES, July 23, 2014, at A1.

REASONS FOR GRANTING THE PETITION

The reasons for granting the petition are simple and compelling. Two federal Circuits have divided over whether the IRS has authority to spend tens of billions of dollars per year to subsidize health coverage in 36 states. If the ACA means what it says, as the D.C. Circuit held, the consequences are profound: It means millions of people are ineligible for subsidies and exempt from the ACA's individual mandate penalty. It means hundreds of thousands of employers are free of the Act's employer mandate. It means a fundamental change in the health insurance market in two-thirds of the country. And it means that the IRS is illegally spending billions of taxpayer dollars every month without congressional authority. Uncertainty over this issue is simply not tenable. That is why each Circuit expedited its proceedings, and it is why this Court should grant review now and resolve the matter this Term, regardless of whether the D.C. Circuit grants en banc review of *Halbig*.

I. THE FOURTH CIRCUIT AND D.C. CIRCUIT HAVE REACHED OPPOSITE CONCLUSIONS ABOUT THE VALIDITY OF THE IRS RULE.

There is a plain conflict between two federal Courts of Appeals over the validity of the IRS Rule. The D.C. Circuit in *Halbig* ruled that an Exchange established by *HHS* is plainly not "established by the *State*," and therefore ordered the Rule vacated. The court below, however, believed that the statute was ambiguous on this question, and so upheld the Rule as a permissible exercise of agency discretion. The disagreement is clear and all of the arguments on both sides have been thoroughly aired. Only this Court can ultimately resolve the issue.

A. Although they reached contrary conclusions, the *Halbig* and *King* panels actually agreed on a number of important points.

First, both courts agreed that the plain language of § 36B—which is the specific provision authorizing subsidies—indicates that subsidies are limited to Exchanges established by states. *See Halbig*, 2014 U.S. App. LEXIS 13880, at *4 (observing that § 36B, "[o]n its face," allows subsidies only "for insurance purchased on an Exchange established by one of the fifty states or the District of Columbia"); Pet.App.16a & 18a (*King* panel op.) (conceding "common-sense appeal of [Petitioners'] argument," *i.e.*, that "the language says what it says, and that it clearly mentions state-run Exchanges under § 1311," which it would not have done had Congress actually "meant to include federally-run Exchanges"). Indeed, as the court below noted, "[i]f Congress did in fact intend to make the tax credits available to consumers on both state and federal Exchanges, it would have been easy to write in broader language, as it did in other places in the statute." Pet.App.16a-17a (citing reference elsewhere to "Exchange established under this Act").

Second, both courts rejected the Government's claims that giving § 36B its plain meaning would somehow cause "anomalies" in other parts of the Act. The Fourth Circuit below was "unpersuaded" as to the alleged anomalies. Pet.App.22a. "Both parties offer reasonable arguments and counterarguments that make discerning Congress's intent [from these provisions] difficult." *Id.* Additionally, the panel recognized that this Court just admonished courts to avoid "revising" legislation "out of an effort to avoid 'apparent anomal[ies]' within a statute." *Id.* (quoting

Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2033 (2014)). As such, it "decline[d] to accept [the Government's] arguments as dispositive of Congress's intent." Pet.App.22a. *Halbig*, too, found that the supposed anomalies did not reach the "'high threshold' of unreasonableness" necessary to allow a court to "conclude that a statute does not mean what it says." 2014 U.S. App. LEXIS 13880, at *32-33. *Accord Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005) ("[I]t is up to Congress rather than the courts to fix" even "unintentional drafting gap[s]."). Indeed, as to one of the supposed anomalies, *Halbig* determined that it "creates no difficulty, let alone absurdity"; as to the other, the results "seem sensible, not absurd." 2014 U.S. App. LEXIS 13880, at *39, *42. Accordingly, "[n]othing about the imperative to read section 36B in harmony with the rest of the ACA requires interpreting 'established by the State' to mean anything other than what it plainly says." *Id.* at *43.

Third, both courts agreed that nothing in the Act's legislative history contradicted § 36B's text. As the panel below noted, the history is "not particularly illuminating on the issue." Pet.App.22a. *Accord Halbig*, 2014 U.S. App. LEXIS 13880, at *47 ("[T]he scant legislative history sheds little light on the precise question of the availability of subsidies on federal Exchanges."). Congress seemed to assume that subsidies would be available nationwide, but "it is possible that such statements were made under the assumption that every state would in fact establish its own Exchange." Pet.App.23a-24a. After all, "Congress did not expect the states to turn down federal funds and fail to create and run their own Exchanges." *Id.* As *Halbig* similarly observed, the

assumption of nationwide subsidies is "as consistent with an expectation that all states would cooperate (*i.e.*, establish their own Exchanges) as with an understanding that subsidies would be available on federal Exchanges as well." 2014 U.S. App. LEXIS 13880, at *47-48. Of course, the legislative history did not itself prove that Congress meant what it said in § 36B, but "clear text speaks for itself and requires no 'amen' in the historical record." *Id.* at *46. *Accord Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute.").

Fourth, both courts recognized that there was a "plausible" reason why Congress might have wanted to condition subsidies on the establishment of state Exchanges—an account that would "comport with a literal reading" of § 36B. Pet.App.25a. Namely, Congress could quite reasonably have intended subsidies as an *incentive*, so that states—not the federal government—would bear this burden. *Id.*; *accord Halbig*, 2014 U.S. App. LEXIS 13880, at *52 n.11. After all, "Congress has conditioned federal benefits on state cooperation in other contexts," including in the ACA's own Medicaid expansion, and a Senate committee "proposed a bill that specifically contemplated penalizing states that refused to participate in establishing" Exchanges. *Id.* at *48-49, *52 n.11; *see also* S. 1679, § 3104(a), (d), 111th Cong. (2009). Since it seemed clear that "no state would refuse so good an offer," *Halbig*, 2014 U.S. App. LEXIS 13880, at *52 n.11, using subsidies as an incentive would allow Congress to achieve *both* goals: state-run Exchanges *and* subsidies nationwide.

B. Although *King* and *Halbig* thus both agreed that (i) § 36B limits subsidies to Exchanges that are established by states; (ii) such a reading would not create any anomalous or absurd results in the rest of the statute; (iii) the legislative history did not refute this plain reading of the law; and (iv) Congress had a very plausible basis for meaning precisely what it said, the two courts nonetheless diverged on whether the IRS Rule was legally valid.

The panel below, for its part, rested its result on the notion that, although § 36B limits subsidies to coverage purchased through Exchanges "established by the State," other provisions of the ACA create ambiguity as to whether an Exchange established by HHS is somehow actually "established by the State." Pet.App.17a-18a. In particular, the court reasoned that while § 1311 directs states to create Exchanges, § 1321 clarifies that states may decline to do so—in which case, HHS shall establish "*such* Exchange within the State." ACA § 1321(c)(1), *codified at* 42 U.S.C. § 18041(c)(1) (emphasis added). According to the panel, this may imply a legal fiction under which HHS "acts on behalf of the state when it establishes its own Exchange," which therefore, in some sense, could be described as "established by the State." Pet.App.18a. While the court admitted this does not accord as closely with a "literal reading" of the Act, it found it sufficient to create ambiguity. *Id.*

To resolve this supposed ambiguity, the court applied deference. It reasoned that "the importance of the tax credits to the overall statutory scheme" makes it "reasonable to assume that Congress created the ambiguity" intentionally, so that the IRS could resolve it. Pet.App.27a n.4. The court rejected

Petitioners' argument that a venerable canon of construction—tax credits must be expressed in "clear and unambiguous language," *Yazoo & Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 186 (1889)—had displaced *Chevron* as the way to resolve ambiguity in § 36B. Pet.App.32a-33a. The court further held that deference to the IRS was proper even though the "ambiguity" arose in § 1321 of the Act, administered by *HHS*—not in the Internal Revenue Code. Pet.App.32a. Ultimately, because the Rule advanced "the broad policy goals of the Act," the panel upheld it under *Chevron* Step Two. Pet.App.27a.

By contrast, the *Halbig* panel squarely rejected the argument that § 1321 of the ACA, and use of the word "such," created relevant "equivalence" between state and HHS Exchanges. *Halbig*, 2014 U.S. App. LEXIS 13880, at *22-25. As the court recognized, use of the word "such" directs HHS to establish the same *type* of Exchange as "a state would have established had it elected to do so," which would not otherwise have been clear. *Id.* at *23. Critically, though, that could not change the fact that subsidies under § 36B turn on "*who* established" the Exchange; a federal Exchange is not "established *by the State*." *Id.* at *24 (emphases added). It is established when a state *refuses* to establish an Exchange. Further, § 1321 does not expresly *deem* HHS Exchanges to be "established by the State"—a "significant" omission given that Congress did expressly provide that a U.S. territory "shall be treated as a State" if it elects to establish an Exchange. *Id.* (quoting 42 U.S.C. § 18043(a)). *Halbig* thus found "no textual basis—in sections 1311 and 1321 or elsewhere—for concluding that a federally-established Exchange is, in fact or legal fiction, established by a state." *Id.* at *31.

Given that conclusion, *Halbig* refused to "ignore the best evidence of Congress's intent—the text of section 36B—in favor of assumptions about the risks that Congress would or would not tolerate." *Id.* at *59. It therefore vacated the Rule as contrary to the unambiguous statutory text. After all, "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). "And," the court continued, "neither may we." *Halbig*, 2014 U.S. App. LEXIS 13880, at *59.

C. Thus, while the Fourth and D.C. Circuits agreed on a great number of points, they diverged on the critical issue: Is there ambiguity over whether an Exchange established by the federal government under § 1321 is somehow "established by the State under section 1311"? And that divergence led one court to vacate the Rule and the other to uphold it.

Notably, this Circuit split is especially troubling given uncertainty over how the competing rulings would apply even in the Fourth Circuit's territorial jurisdiction. On one hand, the decision below would ordinarily be thought to resolve the validity of subsidies within the states comprising the Fourth Circuit: Virginia, Maryland, North Carolina, South Carolina, and West Virginia. Yet, on the other hand, one of the *Halbig* plaintiffs resides in West Virginia. Further, the D.C. Circuit has long held that when it vacates a rule under the APA, such a decision has "nationwide" effect. *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998). This division therefore not only has the usual effect of regional disuniformity, but also creates a special sort of nationwide confusion and conflict.

II. PROFOUND CONSEQUENCES OF DELAY MEAN THAT THIS COURT'S DEFINITIVE RESOLUTION IS URGENTLY NEEDED.

The monumental significance of this legal issue requires this Court's immediate, urgent attention. The two conflicting Circuit decisions have created intolerable uncertainty over a major component of the ACA's implementation. If this Court ultimately agrees with the D.C. Circuit that the IRS Rule is contrary to law, as is highly likely, the consequences for individuals, employers, insurers, states, and federal spending will be vast—and the longer that the lawless IRS Rule is in effect, the greater the upheaval when it is ultimately vacated. As both Courts of Appeals recognized by expediting their own proceedings, it is in everyone's interest to obtain final resolution as soon as possible. Only this Court can provide that resolution, and this petition is the only vehicle by which it could do so this Term.

A. Given the self-evident enormous importance of the IRS Rule to the *ongoing* implementation of the ACA, to the *immediate* economic decisions of millions of Americans and thousands of businesses, and to the *currently flowing* billions of dollars in expenditures that the D.C. Circuit ruled illegal, the need for this Court's review is plainly and uniquely urgent.

As to *individuals*, the *Halbig* court recognized that its ruling would have "significant consequences" for the "millions of individuals receiving tax credits through federal Exchanges." *Halbig*, 2014 U.S. App. LEXIS 13880, at *61-62. Estimates show that nearly 5 million individuals have been receiving subsidies through HHS Exchanges. *See* Pear, *New Questions on Health Law*, *supra* (noting that "more than 4.5

million people … were found eligible for subsidized insurance in the federal exchange"). In the wake of the conflicting Circuit decisions, these millions of Americans who have been relying on subsidies do not know whether they can continue to count on them or need to make other arrangements for health care. Importantly, these consequences become more severe the longer it takes to finally vacate the IRS Rule. Indeed, under the ACA as written, if the Treasury improperly pays for part of an individual's premium, but it later turns out that the individual is not entitled to a subsidy, it is the low- or middle-income American who may be on the hook to repay the improper payments (subject to certain caps). *See* 26 U.S.C. § 36B(f)(2). Every month that subsidies are paid on the authority of the IRS Rule, its millions of beneficiaries thus not only detrimentally rely on its validity to make important economic decisions, but are potentially incurring thousands of dollars of potential debt—owed to the IRS as back taxes. This is grossly unfair, and only prompt resolution of the legal dispute can curtail that unfairness.

Further, millions of Americans are in the same position as Petitioners here—namely, subject to the Act's individual mandate only if the IRS Rule stands. In light of the conflicting rulings, these individuals have no idea whether they are required to purchase comprehensive health coverage (which they may well not want) or are free instead to forgo coverage or buy only catastrophic coverage. Nor do they know if they will be subject to fines if they fail to purchase ACA-compliant coverage. *Cf. Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967) (citing "dilemma" of either "comply[ing] … and incur[ring] the costs" of doing so or violating law "and risk[ing]" penalties if challenge

fails). This uncertainty, affecting the economic decisions of an untold number of Americans, can be resolved only through this Court's immediate review.

As to *employers*, the ACA's employer mandate is scheduled to take effect January 1, 2015 (after delays imposed unilaterally by the Administration). Under that provision, many employers must either sponsor affordable coverage for their full-time employees or else pay large penalties. But penalties are triggered only if "at least one full-time employee enrolls in a health plan and qualifies for a subsidy" under the Act. *Burwell v. Hobby Lobby Stores, Inc.*, Nos. 13-354, 13-356, 2014 U.S. LEXIS 4505, at *22-23 (2014). Thus, in the 36 states served by HealthCare.Gov, employers will be exposed to these penalties only if the IRS Rule is upheld. *See* Dan Eaton, *Who Gets the Last Word on Obamacare?*, CNBC.com, July 23, 2014 ("The answer matters to the estimated 250,000 employers in the 36 states with federally facilitated exchanges ...."). Again, therefore, in light of the conflicting Circuit decisions, hundreds of thousands of businesses in three dozen states have no idea whether they are required to provide ACA-compliant coverage to employees next year. That uncertainty also threatens many *employees*, because employers worried by potential penalties may lay off workers or reduce their hours to evade the employer mandate. *See, e.g.*, Robert Pear, *Public Sector Capping Part-Time Hours to Skirt Health Care Law*, N.Y. TIMES, Feb. 21, 2014, at A12. This damaging uncertainty can be lifted only by this Court's final review.

As to *insurers*, the validity *vel non* of the IRS Rule is crucial to their budgeting, planning, and rate-setting for future coverage. If the Rule is invalid as

the D.C. Circuit held, that will have a substantial effect on the makeup and revenue of the insurance pool going forward. Pear, *New Questions on Health Law*, *supra* ("The contradictory rulings … could inject uncertainty, confusion and turmoil into health insurance markets …."). Delay in resolving the matter is thus likely to impose even heavier logistical and financial stresses on insurance markets. *Cf. Halbig*, 2014 U.S. App. LEXIS 13880, at *61-62 (acknowledging decision's "significant consequences" for "health insurance markets more broadly").

As to *states*, the resolution of this issue will have a dramatic impact on incentives regarding whether to establish their own Exchanges prospectively (or, as some states are now considering, shutting down their Exchanges in favor of HealthCare.Gov). States are likely to act very differently if establishing an Exchange will determine whether state residents are entitled to billions in tax credits. *See, e.g.*, Louise Radnofsky, *States Try To Protect Health Exchanges from Court Ruling*, WALL ST. J., July 25, 2014 ("A leading proponent of a fully state-run exchange [in Illinois] said he believed legislators would back his position if the D.C. panel's decision is upheld."). Indeed, as a group of state legislator *amici* told the court below, had they known "that their constituents would lose access to these tax credits unless the State established its own Exchange, they would have vigorously advocated for a state-run Exchange citing this potential consequence." Amici Br. of Members of Cong. et al. 5. Immediate review by this Court would allow states more time to make this decision with a full understanding of its legal consequences, whereas delay would potentially preclude them from timely "opting-in" to the ACA for subsequent years.

Finally, and perhaps most importantly, billions of taxpayer dollars are *right now* streaming out of the federal Treasury under the authority of the IRS Rule. (The Government estimated below that the cost of the subsidies would eventually amount to approximately $150 billion per year. Govt. C.A. Br. 5.) These funds will continue to be spent *every month* until vacatur of the IRS Rule takes effect. *See* Editorial, *Fast-Tracking ObamaCare to the Supreme Court*, WALL ST. J., July 23, 2014 ("The subsidies will continue to flow as long as the litigation is ongoing, which means that tens of billions of dollars are being distributed illegally."). Because "the protection of the public fisc is a matter that is of interest to every citizen," *Brock v. Pierce Cnty.*, 476 U.S. 253, 262 (1986), there is thus an enormous public interest in ensuring that these funds are not illegally disbursed. The longer this litigation drags on, the more money is unlawfully spent without congressional approval—a very serious matter indeed. *Cf.* 31 U.S.C. § 1341 (criminalizing payments from U.S. Treasury not "authorized by law"). This is yet another powerful reason why this Court should strive to provide a definitive resolution as quickly as possible.

B. Both of the Circuits to have considered this issue recognized the important public interest served by prompt disposition. The D.C. Circuit granted the *Halbig* plaintiffs' motion to expedite—and, indeed, ordered expedition even more drastic than requested, allowing them only seven days to file their opening brief. After that ruling, the Government chose not to oppose Petitioners' motion asking the Fourth Circuit to similarly expedite this case—which that court also granted.

C. This petition is the only vehicle that would allow this Court to resolve this matter within the October 2014 Term. The cases filed by Oklahoma and Indiana have not yet been decided by district courts, and the Government has announced its intent to seek *en banc* review of *Halbig*, rather than proceed directly to this Court as it did when the Eleventh Circuit invalidated the individual mandate in 2011. *DOJ To Appeal "Incorrect' Halbig Ruling*, POLITICO, July 22, 2014 ("The government will seek an en banc review from the full D.C. court of appeals, a Justice official said."). If the D.C. Circuit grants rehearing, *Halbig* would not reach the Court this Term.

Importantly, even *en banc* reversal of *Halbig* would by no means reduce the pressing need for this Court's review. The issue is obviously exceptionally important, and the *Halbig* panel opinion proved that Petitioners' challenge is sufficiently compelling to require the Court's attention. *Accord* Tom Goldstein, *The Fate of the Obamacare Subsidies in the Supreme Court*, SCOTUSBLOG.COM, July 23, 2014 ("But even if [*en banc* reversal] happens, the case seems too close and too important for the Supreme Court to pass it up."). Untenable uncertainty will persist until this Court supplies a definitive answer, especially since other challenges are already working their way to the Seventh and Tenth Circuits, and challenges in other Circuits are very likely. Indeed, given the IRS Rule's irreconcilable conflict with the ACA's plain language, it is quite probable that the Rule will be invalidated at some point by another court. It is far better for this Court to resolve this question now, to both preclude further detrimental reliance and to eliminate the Sword of Damocles that will inevitably hang over the IRS Rule otherwise.

III. THE FOURTH CIRCUIT PLAINLY ERRED BY FINDING AMBIGUITY IN § 36B AND BY DEFERRING TO THE IRS TO RESOLVE IT.

If it were clear that *Halbig* was plainly wrong in construing § 36B as it did, perhaps this Court could safely assume that the *en banc* court would correct its error and no other court would follow its lead. But, to the contrary, it is the court below that plainly erred, both in finding ambiguity despite clear text, and by deferring to the IRS as a means to resolve that supposed ambiguity. Those errors make this Court's intervention all the more inevitable.

A. As explained, the Fourth Circuit did not accept the Government's arguments that § 36B's plain text would create absurd results, or that the legislative history refuted that text, or that Congress could not possibly have meant to condition subsidies on state Exchanges. Rather, it acknowledged the "common-sense appeal of the plaintiffs' argument" and admitted that it was "at least plausible" that Congress meant what it said in § 36B. Pet.App.18a, 25a. The panel nonetheless found the Act ambiguous by claiming that the provision directing HHS to establish Exchanges in states that failed to do so could be read as creating a legal fiction under which even Exchanges established by HHS are "established by the State." That reading is obviously wrong.

First, ambiguity exists for *Chevron* purposes only if it remains after the court "employ[s] traditional tools of statutory construction." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Yet every canon of construction confirms that "established by the State" *cannot* be read to include *all* Exchanges, even those created by HHS.

On such a reading, the modifier "established by the State" in § 36B would serve no purpose, violating the "cardinal principle" that "no clause … shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). More to the point, the problem here is not *redundancy*, but that § 36B specifically answers the precise question at issue; on the Government's view, Congress added superfluous words that *directly contradict* its own intent. Moreover, Congress elsewhere used the broader phrase "Exchange established under this Act," Pet.App.17a, which clearly includes HHS-established Exchanges. Giving that broader meaning to § 36B's narrower words violates the canon that "differing language" in "two subsections" of a statute should not be given "the same meaning." *Russello v. United States*, 464 U.S. 16, 23 (1983). Further, § 36B itself elsewhere refers expressly to *both* state- and HHS-established Exchanges distinctly, proving that the Act does not equate them: A subsection of § 36B requiring information reporting by Exchanges applies to an "Exchange under Section 1311(f)(3) or 1321(c)." 26 U.S.C. § 36B(f)(3). This proves that when Congress wanted to encompass both state- and HHS-established Exchanges, it "knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994).

Second, the panel's notion that HHS acts *on the state's behalf* in establishing a fallback Exchange is neither correct nor relevant. The ACA does *not* say that HHS should establish Exchanges "on behalf of" declining states. It says that HHS should establish Exchanges "within" them. ACA § 1321(c), *codified at* 42 U.S.C. § 18041(c). That is language of *geography*, not *agency*. And even if the Act had said that HHS should act "on the State's behalf," that Exchange

would still be established *by HHS for the state*, not *by the state*. Finally, the crucial premise allowing HHS to act in the first place is the state's *failure* to. HHS thus cannot be acting "on behalf of the state," Pet.App.18a, because the state has clearly decided that it does *not* want to establish an Exchange. HHS is acting *instead of* the state.

Third, because § 1321 describes only when and how HHS Exchanges come into *existence*, but says nothing about whether they may grant subsidies, Congress could have extended subsidies to those Exchanges only by "deeming" Exchanges established by HHS to be "established by the State." Congress did just that for Exchanges established by *territories*: Section 1323 provides that if a territory creates an Exchange, it "shall be treated as a State" for such purposes. 42 U.S.C. § 18043(a)(1). Likewise, a House version of the ACA—which created a national Exchange but allowed states to choose to run their own—said that, if a state did so, "any references in this subtitle to the Health Insurance Exchange … shall be deemed a reference to the State-based Health Insurance Exchange." H.R. 3962, § 308(e), 111th Cong. (2009). No equivalent language about HHS Exchanges appears in the enacted ACA; as noted, § 1321's language comes nowhere close.

The panel below apparently believed, incorrectly, that "Congress defined 'Exchange' as an Exchange established by the state," supposedly bolstering the claim that § 1321 somehow commands the literally nonsensical: "state-established" Exchanges established by HHS. Pet.App.18a. In fact, the Act defines "Exchange" as "an American Health Benefit Exchange established under section 1311." ACA

§ 1563(b)(21), *codified at* 42 U.S.C. § 300gg-91(d)(21). At most, that definition could sow doubt over the metaphysical question whether Exchanges created by HHS *pursuant to* § 1321 are created "under" that section or "under" § 1311. Either way, however, they are established *by HHS*, not the state. Indeed, this potential confusion is presumably why § 36B specifically limits the subsidies to Exchanges "established *by the State* under section 1311."

Beyond the Act's global definition of "Exchange," the panel also cited § 1311(d)(1) of the ACA, which explains that an Exchange "shall be a governmental agency or nonprofit entity that is established by a State." 42 U.S.C. § 18031(d)(1). The panel thought that this "narrow[s] the definition of 'Exchange' to encompass only state-created Exchanges," and that a narrow focus on "state-created Exchanges" somehow *supports* inclusion of "HHS-created Exchanges" in § 36B. Pet.App.17a. Even the Government did not make that argument—for good reason: Section 1311 is the provision directing *states* to establish Exchanges. Section 1311(d)(1) simply specifies that states may do so through a state agency or nonprofit. This is not a "definition" of "Exchange," much less one that somehow transmogrifies HHS Exchanges into Exchanges that are "established by the State." *See Halbig*, 2014 U.S. App. LEXIS 13880, at *25-30.

B. The panel below erred again by deferring to the IRS Rule to resolve this supposed "ambiguity." For four distinct reasons, deference is inapplicable.

First, for the reasons discussed, the Act's text is unambiguous. Where Congress has "unambiguously expressed [its] intent" in the law, "that is the end of the matter." *Chevron*, 467 U.S. at 842-43.

Second, as this Court just reiterated, "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air*, 134 S. Ct. at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). Few decisions will have greater economic or political significance than one triggering hundreds of billions of dollars per year in spending and expanding major components of the ACA to more than two-thirds of the states. The panel below recognized as much, but backwardly argued that "the importance of the tax credits" makes it *more* "reasonable to assume that Congress created the ambiguity." Pet.App.27a n.4. As this Court's cases make clear, however, the opposite is true: It is inherently implausible that Congress wanted *the IRS* to decide on the expenditure of this huge sum of money, or on how far the ACA's mandates should extend. The IRS Rule is thus a major policy in search of ambiguity—not a mere detail that Congress intended the IRS to fill. Indeed, that is why § 36B "directly spok[e] to the precise question" at issue, rather than leave the answer ambiguous. *Chevron*, 467 U.S. at 842.

Third, ambiguity may be resolved by an agency only if it remains after "employing traditional tools of statutory construction," including presumptions that resolve ambiguity. *Id.* at 843 n.9. Thus, where established canons require a clear statement of Congress's intent to infer certain results, an agency cannot impose those results through ambiguous text. *See, e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 250, 258 (1991) (deference cannot "overcome the presumption against extraterritorial application"); *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) ("[A]

statute that is ambiguous with respect to retroactive application is construed … to be unambiguously prospective," so that "there is, for *Chevron* purposes, no ambiguity."); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444-45 & n.8 (D.C. Cir. 1988) (refusing to defer because if law "can reasonably be construed" in Indian tribe's favor, "it *must* be").

To protect *Congress's* exclusive authority over the federal purse, this Court has long held that tax credits must be expressed in "clear and unambiguous language" in statutes. *Yazoo*, 132 U.S. at 186. Such benefits "must rest … on more than a doubt or ambiguity." *United States v. Stewart*, 311 U.S. 60, 71 (1940). If "doubts are nicely balanced," that defeats the claimed tax benefit. *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933). In light of this venerable rule allowing money to be drawn from the Treasury only when the congressional custodian of the federal purse has unambiguously authorized it, deference cannot apply to the proper interpretation of § 36B. The IRS cannot by regulation extend or expand the credits by resting on "doubt or ambiguity" in the ACA. *Stewart*, 311 U.S. at 71.

The court below contended, based on *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011), that this canon does not displace *Chevron* deference. Pet.App.33a. Actually, *Mayo* expressly *confirmed* that tax exemptions must be "construed narrowly." *Id.* at 715. Because the Government construed the exemption narrowly there, *Chevron* and the tax-credit canon reinforced one another. Here, however, the canon has the effect of eliminating any ambiguity, giving *Chevron* deference no room to operate.

Fourth, there is no basis for *Chevron* deference to the IRS, because § 36B—the only relevant provision that falls within the Internal Revenue Code—is not ambiguous on its own. Pet.App.16a-17a. Rather, it is only the distinct ACA provisions allowing for state and federal Exchanges that purportedly make it plausible to construe the Act as extending subsidies to the latter. *See* Pet.App.18a. Yet those provisions are codified in a chapter of *Title 42* of the U.S. Code—the domain of *HHS*, not the IRS. *See* 42 U.S.C. §§ 18031, 18041. Thus, the fact that the IRS has "authority to resolve ambiguities in 26 U.S.C. § 36B," Pet.App.32a, does not save the IRS Rule—because § 36B is not the arguably ambiguous provision. *Cf. Cheney R.R. Co. v. R.R. Ret. Bd.*, 50 F.3d 1071, 1073-74 (D.C. Cir. 1995) (no deference to agency where issue "turn[ed] on the interpretation" of laws "not the Board's governing statutes").

C. Although the panel did not rely on them, Judge Davis's concurrence (and Judge Edwards's *Halbig* dissent) made other arguments for why HHS Exchanges are supposedly "established by the State." These turn statutory interpretation on its head.

First, both judges emphasized the need to read statutory language "in context," as if that somehow supports the IRS Rule. *See* Pet.App.36a; *Halbig*, 2014 U.S. App. LEXIS 13880, at *65 (Edwards, J., dissenting). To the contrary, all that a "contextual" reading demonstrates is that § 36B is the *only* provision that addresses subsidies. Yet that is the provision these judges ignore. They cite § 1321, but the fact that the Act *envisions* HHS Exchanges when states default cannot suggest that the subsidy provision's reference to "Exchange established by the

State" somehow connotes an HHS Exchange. To the contrary, precisely *because* the ACA calls for two distinct entities to establish Exchanges, the phrase "Exchange established by the State" cannot include one established by HHS. And reading the statute "as a whole" *confirms* that Congress knew how to deem non-state entities to be states when it intended to. *See* p.26, *supra* (U.S. territories).

Second, both judges objected that if Congress had sought to limit subsidies to state Exchanges, it would not have done so by "tinkering with the formula" for how to compute the subsidy's value. Pet.App.39a; *see also Halbig*, 2014 U.S. App. LEXIS 13880, at *78 (Edwards, J., dissenting). But the formula is the *only* provision that defines the transactions eligible for subsidies. Even the Government agrees that only coverage purchased through an *Exchange* can be subsidized; that limit is found only in the same clause that these judges object is too obscure to take seriously. Moreover, it is not at all unusual for Congress to put conditions on eligibility for tax credits into the formula for calculating them—even if the conditions require states to take action to render their citizens eligible. *See, e.g.*, 26 U.S.C. § 35(a), (b), (e); *Halbig*, 2014 U.S. App. LEXIS 13880, at *27 n.4.

Third, lacking any serious textual argument, Judges Davis and Edwards fall back on the supposed broad "purposes" of the ACA. Subsidies are "critical" to proper operation of the Act, because they make coverage more affordable, Pet.App.40a, and are purportedly intended to counteract upward pressure on premiums caused by the Act's regulatory provisions, *Halbig*, 2014 U.S. App. LEXIS 13880, at *80-93 (Edwards, J., dissenting). Yet, as this Court

has often repeated, "vague notions of a statute's 'basic purpose' are … inadequate to overcome the words of its text." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). Particularly with a law as complex as the ACA, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam).

In any case, as both the *King* and *Halbig* panels agreed, it is entirely plausible that Congress used subsidies as an incentive to induce states to establish their own Exchanges. Indeed, Congress in the ACA did the same thing by conditioning Medicaid grants on states' expansion of their Medicaid programs. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601 (2012). Only by promising states the "quid" of subsidies without demanding the "quo" of state Exchanges did the IRS Rule eliminate the incentive, depriving Congress of the opportunity to satisfy *both* of its policy "purposes"—universal subsidies *and* state-established Exchanges.

Judges Davis and Edwards scoff that there is no support for this theory. *See* Pet.App.37a; *Halbig*, 2014 U.S. App. LEXIS 13880, at *101 (Edwards, J., dissenting). But the support is the clear statutory *text*, which would govern even in the face of *contradictory* legislative history. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). It is thus outrageous to suggest that legislative history must *confirm* plain text that is consistent with plausible, non-absurd purposes. "[C]lear text speaks for itself and requires no 'amen' in the historical record." *Halbig*, 2014 U.S. App. LEXIS 13880, at *46.

Moreover, it is simply false that the "incentive" purpose is "made up out of whole cloth." *Halbig*, 2014 U.S. App. LEXIS 13880, at *67 (Edwards, J., dissenting). The subsidy incentive mirrors the ACA's own Medicaid incentive. Also, a Senate committee version of the ACA conditioned subsidies on the state's adoption of, *inter alia*, "insurance reform provisions." S. 1679, § 3104, 111th Cong. (2009). Moreover, the incentive was well understood by, among others, Prof. Jonathan Gruber, a leading architect of the ACA who helped "draft the specifics of the legislation," Catherine Rampell, *Mr. Health Care Mandate*, N.Y. TIMES, Mar. 29, 2012, at B1, and later explained that "if you're a state and you don't set up an Exchange, that means your citizens don't get their tax credits." Robert Pear & Peter Baker, *Ex-Aide's Statements in 2012 Clash with Health Act Stance*, N.Y. TIMES, July 26, 2014, at A16.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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