No. 14-114

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 Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

REPLY BRIEF

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The Government's theory is that when the ACA limited subsidies to Exchanges "established by the State," it actually expanded them to Exchanges "established by HHS," because the former is a "term of art" that includes the latter. But the Government explains neither *why* Congress would adopt a "term of art" contrary to its plain English meaning nor *how* the Act transforms "A" into "B" without ever saying so in text (or even legislative history). These failures are amplified when the Act is read *as a whole*, since Congress elsewhere used *broader* formulations that do encompass both HHS and state Exchanges, and *expressly* equated territories with states. There is thus no basis in law, common sense, or any part of the ACA for the extraordinary notion that Congress went out of its way to limit "Exchange" in § 36B with the qualifier "established by the State," but secretly meant to include those "established by HHS."

That ends this case, because it is *undisputed* that § 36B's plain text is not objectively absurd. Yet the Government contends that this text should be disregarded because it produces bad policy effects, and so Congress must not have subjectively meant it. But it is irrelevant whether Congress *subjectively intended* to impose the condition; all that matters is that it *objectively* and *reasonably* did so. Moreover, the trumpeted negative effects stem not from § 36B's plain language, but from the IRS's *rewriting* of that language to eliminate states' incentive to establish Exchanges, predictably causing two-thirds to opt out. Anyway, the Government cites *nothing*, in legislative history or elsewhere, supporting the notion that Congress did not "intend" what its enacted language unambiguously said—nor rebuts the considerable contrary evidence.

I. THE ACA CLEARLY AND REASONABLY LIMITS § 36B SUBSIDIES TO EXCHANGES ESTABLISHED BY THE STATE.

Section 36B's text is unambiguous and consistent with the rest of the ACA, and concededly is not objectively absurd. It therefore controls.

A. An Exchange Established by HHS Is Not "Established by the State," Either in Reality or as a "Term of Art."

Compelled to admit that subsidies are limited to Exchanges "established by the State" and that HHS is not a "State," the Government invokes a *deus ex machina*: "Exchange established by the State," it claims, is a *term of art* that includes an Exchange established by HHS. (Govt.Br.20-23.)

1. It would certainly be convenient, for an agency seeking to rewrite a statute, if an English phrase can become a term of art on the Government's mere say-so. It cannot. Departure from ordinary meaning is appropriate only if Congress invoked a phrase with "a well-known meaning at common law or in the law of this country." *Standard Oil v. United States*, 221 U.S. 1, 59 (1911). Of course, "established by the State" has no such "well-known meaning" distinct from its plain-English one.

2. The Government's argument is thus that this phrase is a "term of art" only in *this Act*. But before concluding that Congress intended the *opposite* of what it said, there must at least be "some indication" in the text, *i.e.*, an "expres[s] defin[ition]" or objective absurdity that would arise from "any other reading." *Mohamad v. Palestinian Auth.*, 132 S.Ct. 1702, 1707 (2012). Notwithstanding the Government's efforts, "[t]here are no such indications" in the ACA. *Id.*

Its principal argument is that § 1321 provides "flexibility," by "furnish[ing] alternative means" for states to "fulfil[l]" § 1311's "requirement" to establish Exchanges—namely, by using HHS as a "surrogate." (Govt.Br.20, 22.) The Act, however, says exactly the opposite: HHS must act upon a state's "[f]ailure to establish" an Exchange. 42 U.S.C. § 18041(c). A "*failure*" to establish the Exchange obviously does not "*fulfil[l]*" the "requirement" to establish it; and an "Exchange established by the State" does not paradoxically result even when a state exercises its "flexibility" *not* to establish it. If anything, § 1321 therefore *refutes* the claim that an HHS Exchange is "established by the State." (And, even if HHS could somehow serve as surrogate for an *unwilling* state, § 36B does not authorize subsidies for "Exchanges established by surrogates of the State.")

The word "such" in § 1321 cannot fill this gaping hole. (Govt.Br.22.) "[S]uch Exchange" clarifies *what* HHS is establishing; it does not alter the reality that HHS, not the state, is establishing it. Further, plain text and common sense refute the notion that "such Exchange" necessarily connotes an Exchange where subsidies are available. (Govt.Br.24.) In describing a *territorial* Exchange, the ACA likewise cross-references § 1311 and refers to "such an Exchange," 42 U.S.C. § 18043(a)(1), but the Government *admits* that subsidies are *not* available on "such" Exchanges. (Govt.Br.23 n.7.) Whether established by the state, HHS, or a territory, the *Exchange itself* is the same; the only difference is that consumers who buy on state-established Exchanges will (sometimes) be reimbursed by Treasury under § 36B. The latter distinction controls only the *IRS*'s expenditures, not *HHS*'s operation of the Exchange. If a law told the

Transportation Secretary to build "such highway" if a state fails to, the "highway" is identical even if the state's failure decreases its federal highway funds.

Nor does the Act's definition of "Exchange" help. The Government says that § 1321 instructs HHS to establish an "Exchange"; "Exchange" is defined as one established "under § 1311"; and § 1311 directs *states* to establish Exchanges, so this somehow means that an HHS Exchange is "established by the State." (Govt.Br.23.) That is pure sophistry: Under § 1321 and in reality, it is the "Secretary" who establishes the HHS Exchange—not the state that "fail[ed]" to. 42 U.S.C. § 18041(c). Accordingly, even if § 1321 directly told HHS to establish an Exchange "under § 1311," it would nonetheless be established by HHS, not the state. In other words, a cross-reference to § 1311 in the fallback provision cannot mean that, in the fallback scenario, the state is still establishing an Exchange, as the fallback provision's *premise* is the *opposite*. And, as the Government does not dispute, any doubt over whether HHS Exchanges are "§ 1311" Exchanges is irrelevant, since § 36B further limits subsidies to Exchanges "established *by the State* under section 1311."

3. It is particularly clear that "established by the State" has its ordinary meaning under the Act because, when the ACA Congress wanted to depart from normal usage, it did so directly and expressly. 42 U.S.C. § 18043(a)(1) (territory that establishes Exchange "shall be treated as a State"); H.R. 3962, § 308(e), 111th Cong. (2009) (national Exchange in House bill "shall be deemed" to include state-run Exchanges if states opt in). Again, the Government offers no hint why the Act did not apply the same direct approach in § 1321. While Congress was not "required to use petitioners' preferred formulations" (Govt.Br.23 n.7), it had to use *some* formulation if it wanted to substitute a "term of art" for the ordinary meaning of "established by the State." Comparing the direct formulations Congress used elsewhere in the same Act (and its drafts) with the roundabout cross-references, leaps of logic, and question-begging assertions offered here further exposes the Government's "term of art" theory as merely a *post hoc* invention to defend its policy preference.[1]

Moreover, had Congress intended "Exchange established by the State" as a "term of art" referring to *all* Exchanges, it would have used that phrase consistently. Yet the ACA often refers to "Exchange" standing alone, and also uses broader formulations such as "Exchange established under this Act." 42 U.S.C. § 18032(d)(3)(D)(i)(II). On the Government's view, all of these mean the same thing as "Exchange established by the State." But construing these "disparate" phrases to "mean the same thing" is to "abandon all pretense at precise communication." *Dep't of Homeland Sec. v. MacLean*, 135 S.Ct. 913, 920 (2015).

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[1] The Government also objects that § 1323 is inapt because that state-territory equivalence "serves a different function." (Govt.Br.23 n.7.) So what? When Congress wanted to treat territories as states for one purpose, it knew how to say so and did not treat a cross-reference to § 1311 or the word "such" as sufficient. 42 U.S.C. § 18043(a)(1). Yet Congress did not do the same when it sought, supposedly, to treat *HHS* as a state for another purpose.

4. Finally, perhaps the most glaring problem with the Government's "term of art" theory is: Why? Why would Congress say "Exchange established by the State" when *fewer* words would *better* convey its supposed intent *without* the confusion arising from a counterintuitive "term of art"?

The Government's effort to explain is laughably unpersuasive. Congress had to use this phrase, it argues, because of "style and grammar," to "identify the Exchange in a particular State." (Govt.Br.33.) That is, because the same sentence of § 36B begins by authorizing subsidies for plans "in the individual market *within a State*," its subsequent reference to an Exchange had to make clear that it was "referring to the Exchange in the specific State mentioned," not some other Exchange. (Govt.Br.33-34.) "Established by the State" was supposedly how it did so.

If anything, however, § 36B's switch from "*within* a State" to "*established by* the State" confirms that the latter restrictive formulation means what it says. Had Congress merely wanted to refer back to the "specific State mentioned earlier," it would have just changed the article from "a" to "the"—specifying the "Exchange within *the* State." That would have avoided any (unlikely) confusion over which state was intended, and clearly swept in HHS Exchanges. It is also what Congress did elsewhere. 42 U.S.C. § 18032(e)(1) (authorizing "a State" to allow brokers to enroll people "through an Exchange in the State"). By contrast, § 36B focuses on *who established* the Exchange in the state.

Moreover, the Government's "explanation" only applies to *one* of § 36B's uses of "established by the State." The Act uses the same phrase to limit the definition of a "coverage month" triggering a subsidy. 26 U.S.C. § 36B(c)(2)(A)(i). That definition does *not* previously refer to "a State," and Congress therefore had no need to identify a previously referenced state.

B. No *Other* Provision Extends Subsidies to HHS Exchanges or Requires Ignoring § 36B.

Unable to explain § 36B's text, the Government urges reading the "whole statute." (Govt.Br.20.) But reading the ACA cover-to-cover reveals no authority to subsidize HHS Exchanges. To the contrary, as noted, other provisions *confirm* that HHS Exchanges are not "established by the State." Nor is departure from § 36B's plain text required to avoid creating any "anomalies" elsewhere. The supposed anomalies are unrelated to § 36B, and anyway do not exist.

1. The Government suggests that the only limit on subsidy recipients is the *income* range in § 36B's definition of "applicable taxpayer." (Govt.Br.19.) But an "applicable taxpayer" is *who* is eligible, not *what purchases* are subsidized; there are far more limits on an eligible purchase than one's income. For example, if an "applicable taxpayer" buys coverage but not through an Exchange, there is no subsidy. Indeed, even if an "applicable taxpayer" *does* buy coverage on an Exchange, he obtains no subsidy if he was eligible for employer coverage or Medicaid. All these limits arise from § 36B's definition of "coverage month," which further requires coverage through "an Exchange *established by the State*." 26 U.S.C. § 36B(c)(2)(A) (emphasis added).

It is thus hardly "astonishing" that this "complex and technical statute" limits subsidies to state-run Exchanges in "technical" "subclauses" defining those subsidies. (Govt.Br.18, 20.) These subclauses are the only provisions where subsidies are authorized and where all other limits on subsidies are found. It would thus be "astonishing" had some *other* provision limited them. And this limit is far more natural in *the Tax Code* than in § 1321, which has nothing to do with the IRS or subsidies.

2. The Government also observes that other parts of the Act refer to subsidies in the context of Exchanges without including the "established by the State" caveat. (Govt.Br.34.) But, of course, once this limitation is established in § 36B, there is no need to gratuitously repeat it in every section *referring* to subsidies (but not *defining* or *limiting* them). This disparity thus proves *Petitioners'* point: Inclusion of "established by the State" in § 36B was deliberate, not rote, meaningless repetition of a "term of art."

3. Because the Act requires both state and HHS Exchanges to report information regarding subsidies, the Government infers that they must be available on HHS Exchanges. At the outset, this reporting requirement *refutes* the Government's "term of art" theory, since Congress did *not* use its supposed "term of art" to subject all Exchanges to the reporting rule. (Pet.Br.28 & n.3.) Anyway, requiring all Exchanges to report on information *including* subsidies hardly implies subsidies are available on all Exchanges. As the Government concedes, the reported information can be "put to other uses" beyond "administering the credits" (Govt.Br. 25, 26 n.9). Reporting thus plainly serves a reasonable purpose even absent subsidies.

Seeking to undo this concession, the Government contends, based on the general section heading, that the one *true* purpose of reporting is to allow Treasury to "reconcile" advance payment of the subsidy with its final value. (Govt.Br.26.) (The "reconciliation" language comes from the general heading of § 36B(f), while the reporting rule appears in a subsection with a subheading "Information requirement," 26 U.S.C. § 36B(f)(3).) But a section heading cannot change the fact that the reported information serves purposes beyond reconciling subsidies. And, to quote the Government, this Court has recognized that headings can be "especially poor guides to meaning." Br. for U.S. at 41, *Yates v. United States*, No. 13-7451 (2014). Here it is an even worse guide than usual, since the reporting rule was not part of § 36B(f) in the originally enacted ACA. Rather, it was spliced in *later*, by HCERA, Pub. L. No. 111-152, 124 Stat. 1035, § 1004(c); a pre-existing heading thus cannot possibly identify its purpose. Indeed, this amendment was contained in a HCERA section titled "*Income Definitions*," proving that headings had little if any connection to purpose in this last-minute package.

4. The Government argues that, on Petitioners' reading of § 36B, nobody in a state served by an HHS Exchange would be a "qualified individual" since nobody "resides in the State that established the Exchange," 42 U.S.C. § 18032(f)(1)(A)(ii), and so HHS Exchanges "will have no customers" (Govt.Br. 27-29).

At the threshold, this is a red herring, because it is unrelated to the differing interpretations of § 36B. *Petitioners'* interpretation does not *cause* any "qualified individuals" problem: If Petitioners prevail here, the Government obviously will not shut down HHS Exchanges, as it (yet again) refuses to dispute. *See* 45 C.F.R. 155.305(a)(3) (allowing enrollment by anyone who lives in Exchange's "service area").

Conversely, the *Government's* § 36B interpretation does not *solve* any such problem: It is not making the reality-defying argument that the state in which people reside *actually* establishes the Exchange when HHS does so (Govt.Br.20). Rather, its theory is that HHS establishes Exchanges as a "surrogate" for states. (*Id.*) Thus, even under its view of § 36B, no one resides in the "State that established the Exchange," only in the "State [where HHS has] established the Exchange [as the state's surrogate.]" Thus, if a plain-meaning reading of the qualified-individual definition actually did absurdly preclude enrollment on HHS Exchanges, the definition would need to be revised *regardless* of which interpretation of § 36B is adopted (and any such revision could not be *imported* into the *non-absurd* § 36B anyway).

In any case, such a plain-meaning interpretation does not empty out HHS Exchanges. As previously explained, the residency limit is "with respect to an Exchange." 42 U.S.C. § 18032(f)(1)(A). Thus, it does not apply to HHS Exchanges because "Exchange," when it stands alone, is construed in accord with its context and the definition of "Exchange" to refer only to *state* Exchanges. (HHS can apply an analogous residency limit by regulation. (Pet.Br.48 & n.6.)) Far from "contradict[ing] … the [Act's] definition of Exchange" (Govt.Br.52), this precisely reflects its language. Moreover and in any event, enrollment is not restricted to "qualified individuals." (Pet.Br.49-50.) The Act never "equates" (Govt.Br.52) eligibility to enroll with "qualified" status; it actually treats them *separately*, referring to those who are *neither* "qualified" *nor* eligible, 42 U.S.C. § 18032(f)(3) (illegal aliens), as well as those who are *both* "qualified" *and* "eligible," *id.* § 18051(e) (individuals covered by state basic health program). (Prisoners are not "qualified" but may be permitted to enroll for the obvious reason, among others, that they will need insurance if released. (Pet.Br.49 & n.7.))[2]

5. The Government says that a maintenance-of-effort restriction on state Medicaid programs, which expressly expires when "an Exchange established by the State … is fully operational," 42 U.S.C. § 1396a(gg)(1), really expires "on January 1, 2014" (Govt.Br.29). That is wholly invented, contrary to the Act's plain text. Moreover, the provision includes an *exception*, for states with deficits, which *does* end on "December 31, 2013." 42 U.S.C. § 1396a(gg)(3). That proves both that Congress used dates certain when it wanted to, and that the maintenance-of-effort *rule* must extend beyond 2013 (otherwise there was no need to specify an end date for the *exception*).

There is therefore every reason to believe that Congress meant what it said here too. HHS's refusal to enforce this provision (Govt.Br.29) hardly justifies the IRS's disregard for the same language in § 36B.

6. The Government next cites two provisions requiring states to take certain actions in relation to "an Exchange established by the State." (Govt.Br.30-31.) These provisions, however, would be absurd on the *Government*'s reading of that phrase.

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[2] None of this means HHS Exchanges cannot certify any plans for sale. (Govt.Br.29.) The requirement to certify plans as in "the interests of qualified individuals" comes from § *1311*, *i.e.*, the *state* Exchange provision. 42 U.S.C. § 18031(e)(1)(B). It does not directly apply to HHS Exchanges (though HHS can impose an analogous requirement by regulation, *id.* § 18041(c)).

First, the "State" must "establish procedures" to enroll in Medicaid or CHIP anyone identified by the "Exchange established by the State" as eligible for such—and vice versa—and also "ensur[e]" that the "Exchange established by the State" communicates to other entities using a "secure electronic interface." 42 U.S.C. § 1396w-3(b)(1). *Second*, the "State" must "establish procedures" to enroll children affected by CHIP funding shortfalls in "an Exchange established by the State." *Id.* § 1397ee(d)(3)(B). If there is no "Exchange established by the State" in a state, these provisions are necessarily inapplicable, as a matter of ordinary English usage.[3]

Under the Government's "term of art" theory, however, the Act would impose those obligations on *states* even though they would be *incapable* of complying. If an HHS Exchange is "established by the State," these provisions would obligate "the State"—on pain of losing all its Medicaid funds—to direct an Exchange *over which it has no control*. The state would be compelled to somehow "ensur[e]" that *HHS* uses a "secure electronic interface"; to establish procedures to automatically enroll people in an *HHS* Exchange; and to act on enrollment information known only to the *HHS* Exchange. Instead of being

[3] That makes perfect sense, because their main objective is to ensure that people not covered by Medicaid or CHIP enroll on Exchanges to receive subsidies. 42 U.S.C. §1396w-3(b)(1)(C); *id.* § 1397ee(d)(3)(B). Since subsidies are not available on HHS Exchanges, there is no point helping people who requested *subsidized* Medicaid or CHIP coverage to enroll in *unsubsidized* private Exchange coverage. If these provisions serve any other purposes, *e.g.*, identifying Medicaid-eligible individuals, HHS will simply do that on its own authority.

inapplicable, these provisions on the Government's construction would be binding yet *impossible*.

The Government has thus unwittingly illustrated why it is a fool's errand to search for a construction that eliminates any conceivable tension in every part of this gargantuan law—one that Congress was told, infamously, that it had to pass to find out its content. Rather, the "haste and confusion attendant upon the passage of this massive bill" are "all the more reason … to hew to the statutory text." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1092 (D.C. Cir. 1996).

C. Far from Being Absurd, § 36B's Plain Text Advances Reasonable Purposes.

Plain text can be disregarded only if objectively absurd; here the Government does not contend that § 36B meets that test. Nor can it show even that the text is *inconsistent* with Congress's purposes.

1. The Government emphasizes that subsidies help expand the risk pool. If the IRS Rule is vacated, it claims, states served by HHS Exchanges would see increased premiums, reduced enrollment, and ultimately "death spirals." (Govt.Br.36-38.)

Even if that were true (*but see* p.20, *infra*), these consequences are the result of the *IRS Rule*, not the *statute*. Had the IRS from the start made clear that subsidies were limited to state Exchanges, states would not have overwhelmingly refused to establish them. Indeed, Congress had no reason to doubt that all (or virtually all) states would establish Exchanges to ensure citizens' eligibility for subsidies. It is thus perfectly "plausible" (Pet.App.25a)—and clearly not "quite impossible," *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring in judgment)—that Congress intended to condition the subsidies, even though enforcing that condition *now*, given the IRS's misleading deception of states, would (temporarily) have effects Congress did not desire.

As such, not even the Government claims that limiting subsidies to state-established Exchanges is *objectively* absurd. Yet that is the only scenario in which a court can disregard plain statutory text. *See Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004).

2. Instead, the Government contends that Congress did not *subjectively* intend to condition subsidies, because it would not have played such a "high-stakes game of chicken." (Govt.Br.18.)

That is legally irrelevant. "Where the statutory language is clear and unambiguous, we need neither accept nor reject a particular 'plausible' explanation for why Congress would have written a statute" as it did. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 460 (2002). Here, not even *legislative history* says that subsidies are available on HHS Exchanges. *Infra*, pp.17-18. So there is *no* basis to infer—under *any* interpretive theory—that Members of Congress who read § 36B did not "intend" the limit on subsidies its text plainly imposes (and which *concededly* furthers the textually stated purpose that states "shall" run Exchanges). In short, the Government wants this Court to depart from plain text that *serves* express legislative "intent," by speculating about *how risk-averse* Congress was in implementing that intent.

3. Even if assessing congressional risk aversion were permissible, there is far more evidence that Congress was willing to take the "high-stakes" risk that states would turn down its deal than that Congress secretly created a "term of art" whereby HHS serves as states' "surrogate."

First, the Government provides no inkling how the Act, *other* than by conditioning subsidies, could have avoided the overwhelming state rejection caused by the IRS Rule.

Second, it is ludicrous to deny that Congress would engage in a "high-stakes game of chicken" with states (Govt.Br.18) when Congress undeniably did just that by threatening to withhold *all* Medicaid funds unless states expanded Medicaid per Congress's wishes. (Pet.Br.32.) The Government notes that Medicaid grants are nominally given to states, not individuals, but this is immaterial since they are *used* for "coverage for low-income individuals." (Govt.Br.43.) Whether the payments flow through the state (Medicaid) or private insurers (subsidies), the state interest is identical: insuring its citizens. States are therefore equally responsive to conditions on either benefit. And, indeed, Congress elsewhere conditioned *individual* tax credits on state action. 26 U.S.C. § 35(e)(2)(A). (Govt.Br.44 n.15.)

The Government also observes that Congress did not create a "fallback" if states rejected Medicaid, but did authorize "fallback" Exchanges if states refused to establish their own. (Govt.Br.43-44.) All that shows is that the Medicaid deal had even *higher* stakes—*undermining* the Government's claim that Congress was highly cautious. A Congress willing to hold hostage *all of Medicaid* could surely have conditioned § 36B subsidies, with fallback Exchanges if states balked. And, from the *states'* perspective, the Medicaid deal was less attractive: It required states "to shoulder" up to "$60 billion" in "new state spending," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2666 (2012) (joint dissent) ("*NFIB*"), while Exchanges are financed through federal grants and user fees, 42 U.S.C. § 18031(a), (d)(5)(A).

Third, the Government admits that the Senate HELP Committee's bill "made tax credits conditional on state action in certain respects." (Govt.Br.48 n.18.) How could it be unthinkable for Congress to condition subsidies when a Senate committee whose bill "ultimately became the ACA" (Govt.Br.47) concededly wanted to do just that? Nor was this any novelty. The Clinton Administration's health-reform proposal used similar conditions 17 years earlier: "There needs to be a federal default if a state does not" administer a purchasing cooperative, but "the President wants to use withholding federal funds as lever to get all states to participate." *Health Reform Briefing* at 2 (Mar. 17, 1993), http://web.archive.org/web/20140627133428/http://clintonlibrary.gov/assets/storage/Research%20-%20Digital%20Library/formerlywithheld/batch4/2006-0810-F.pdf; *see also* Health Security Act, H.R. 3600, §1513, 103d Cong. (1994) (unless state complies, HHS shall "reduce" payments to "individuals and entities in the State," including "hospitals serving vulnerable populations"). Earlier bills, too, had long suggested the same approach. *E.g.*, National Healthcare Act, H.R. 14017, § 531, 93d Cong. (1974) (Nixon Administration); Financial Assistance for Health Care Act, S. 3137, §§ 105-106, 109, 94th Cong. (1976) (Ford Administration).

Fourth, the Government admits key Senators, including Sen. Nelson, "opposed" the House-proposed "national Exchange" bill, which allowed, but did not incentivize, states to *opt out* of the federal Exchange. (Govt.Br.51 & n.20.) Why would those Senators then be satisfied with a bill amounting to the same thing, allowing states to costlessly *opt for* a federal Exchange? The Government tries to distinguish the "*nationwide* Exchange" of the House bill from the "*state-specific* Exchanges run by HHS" (Govt.Br.50-51), but that is semantics. The House bill called for a federally run portal to sell, to a state's residents, plans tailored to their state's "rating area" and compliant with state licensing and other laws. H.R. 3962, §§ 303(e)(1), 304(b)(1) & (e)(6), 111th Cong. (2009). That is just how HealthCare.Gov operates.

Fifth, the Government's brusque dismissal of repeated confirmations of the Act's incentive function by ACA architect Jonathan Gruber is unconvincing. (Govt.Br.50 n.19.) Gruber belatedly sought to claim he was addressing what would happen if HHS failed to establish Exchanges. Jonathan Gruber, *Written Testimony Before House Comm. on Oversight & Gov't Reform* 2 (Dec. 9, 2014). Yet nothing in his comments even *hinted* at such a scenario, and there was no rational basis in January 2012 to believe that HHS would defy its statutory duty.

4. Against all this, the Government's "evidence" that Congress never intended to incentivize states to establish Exchanges is strained and unpersuasive.

First, the Government emphasizes the absence of legislative history confirming the text (Govt.Br.49), but that is irrelevant—especially here, given that the ACA was negotiated behind "closed doors" and Congress was unexpectedly blocked from amending it at conference. (Pet.Br.40, 42.) Sensing no irony, the Government presses this argument even though it offers no legislative history for its "term of art" or the proposition that subsidies are available on HHS Exchanges. (Its banal legislator statements do not even *address* HHS Exchanges, much less say that subsidies would be offered there. (Govt.Br.47-48.))[4]

Second, the Government claims it was "clear" that some States would not establish Exchanges (Govt.Br.42), but that is false (and, if true, would only *reinforce* the need for strong incentives). The Government's sole pre-enactment legislative source is the Oklahoma Insurance Commissioner's letter, introduced into the record, saying the *opposite*: Oklahoma "support[s] the state-based exchange concept" but needs a "grant" to pay for it. 155 Cong. Rec. S12543-S12544 (Dec. 6, 2009) (Sen. Coburn). Of course, the ACA provided such grants. *See* 42 U.S.C. § 18031(a). The Government also cites a news story referencing, not *state* proposals to opt out of creating Exchanges, but unspecified "proposals floated around Capitol Hill" that would "allow" states to "'opt-out' of regional health insurance markets or government-sponsored insurers." David D. Kirkpatrick, *At State Level, Health Lobby Fights Change*, N.Y. TIMES, Dec. 29, 2009. But the only legislator who warned of state default was a Republican *opponent* of the Act—*after* the ACA's enactment. 156 Cong. Rec. H2207 (Mar. 22, 2010) (Rep. Burgess). By contrast, the law's *supporters* were certain "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—and therefore

[4] The Senate Finance Committee described subsidies as available on "*state* exchanges." (Govt.Br.46.) Contrary to the Government's misleading implication (Govt.Br.47-48), HHS Exchanges were described as Exchanges "*within the* state." S. Rep. No. 111-89, at 19 (2009) (emphasis added).

provided no funding for HHS Exchanges, forcing HHS to turn to a general "administrative expenses" fund (Govt.Br.42 n.14).[5]

Third, the Government contends that Congress thought Exchanges served no viable function without subsidies and would not have created any Exchanges absent them. (Govt.Br.44.) That too is demonstrably false. *Territorial* Exchanges provide no subsidies. 42 U.S.C. § 18043(a). And the legislative history consistently emphasizes that the Exchanges' *primary* function is to create an "organized and transparent marketplace" for consumers to "shop and compare health insurance options." H.R. Rep. No. 111-443, at 976 (2010); *see also* 156 Cong. Rec. S1137 (Mar. 4, 2010) (Sen. Baucus) ("Just like Orbitz, just like Expedia."); 155 Cong. Rec. S10452 (Oct. 15, 2009); *id.* S12651 (Dec. 8, 2009). Hence the Government's representation in *NFIB* that "exchanges" and "tax credits" are "stand-alone provision[s]" that "independently advanc[e]" Congress's goals. Br. for Resps. on Severability at 33, *NFIB*, 132 S.Ct. 2566, 2012 WL 273133.[6]

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[5] Another ACA opponent, Senator Hatch, co-authored a *Wall Street Journal* article condemning the Act as infringing on state power since, *even if a state did not accept* "a condition for receiving federal funds," an Exchange would still be established in the state, without its consent. (Govt.Br.45.) He nowhere suggested that subsidies would be available in that event.

[6] The Government responds that its *NFIB* brief addressed *severability*, not whether Exchanges could "function without tax credits." (Govt.Br.44 n.16.) But severability *turns on* whether a provision is capable of "functioning independently." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-85 (1987).

In stark contrast, no member of the ACA Congress identified subsidies as critical to a "three-legged stool" (Econ.Am.Br.3) or said that Exchanges absent subsidies would cause "adverse selection" or trigger "death spirals." Rather, as the Government emphasized in *NFIB*, the *individual mandate* was justified on these grounds, "[a]s demonstrated by the experience of States that attempted [insurance] reforms without a minimum coverage provision." Br. for Resps. on Minimum Coverage Provision at 18, *NFIB*, 132 S.Ct. 2566, 2012 WL 37168. To be sure, more people will be exempt from the mandate absent subsidies, but Congress itself exempted *millions*, 26 U.S.C. § 5000A(d), (e), and the Administration has gone even further, "authoriz[ing] more than 30 types of exemptions," Robert Pear, *White House Seeks To Limit Health Law's Tax Troubles*, N.Y. TIMES, Feb. 1, 2015, at A15. All told, about *30 million* people are expected to claim exemptions for 2014, Stephanie Armour, *Up to Six Million Households Facing Penalty for Skipping Health Insurance*, WALL ST. J., Jan. 28, 2015, compared to just *five million* who enrolled on HHS Exchanges (Govt.Br.2). The claim that the incremental exemptions generated by eliminating subsidies will somehow destroy the market thus does not reflect any *congressional* (or even *executive*) judgment, only post-litigation "speculative hyperbole" by the Government and its *amici*. (Consumers.Res.Am.Br.16.)

Finally, the Government objects that Congress wanted "cooperative federalism," which conditioning subsidies would contradict. (Govt.Br.38-40.) Just the opposite. Cooperative federalism is impossible without state *cooperation*, which is not forthcoming when states are given no incentives. Consequently, Congress *routinely* conditions benefits for states or their residents on state compliance with federal policies. (Okla.Am.Br.5-14.)

Hence, what would be *unusual* is if Congress had provided that state residents would receive subsidies *whether or not* states abided by a directive that they "shall" establish Exchanges, 42 U.S.C. § 18031(b)(1), turning that "shall" into just a toothless suggestion. Such a scheme is *unheard-of*. The Government identifies schemes that allow the federal government to take over enforcement authority if states default, but they do not grant *federal benefits* in that event. 42 U.S.C. § 300gg-2; *id.* § 7410(c).

Nor was clearer "notice" needed. (Govt.Br.39-41.) The ACA's Medicaid "deal" was implemented by innocuously adding a subclause VIII to 42 U.S.C. § 1396a(a)(10)(i), enumerating Medicaid's eligibility criteria—not by express threats. ACA § 2001(a). Section 36B is certainly no less clear (and Congress could hardly have expected that states would ignore statutory text but somehow be alerted by "notice" buried in *legislative history*). In both situations, Congress relied on federal agencies to *accurately* represent the law to affected parties (during the *four years* before it took effect). The IRS's failure to do so does not prevent enforcement of the law under *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), because that doctrine prevents *binding states* to unclear conditions in a "contract," *see id.* at 17, whereas this suit seeks to *enjoin the IRS* (which will *allow* states to make an informed choice).

II. THE IRS IS NOT ENTITLED TO DEFERENCE.

Even apart from § 36B's unambiguous text, deference is triply unwarranted here.

1. Congress does not delegate "decisions of vast 'economic and political significance,'" *Util. Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2444 (2014), which this issue plainly is. The Government responds that *denying* subsidies on HHS Exchanges is equally significant. (Govt.Br.57.) That is exactly the point: This is so consequential that Congress would not have delegated it *either way*. This Court should therefore discern, based on *its* best reading of the ACA, what *Congress* meant when it "directly spok[e] to th[is] precise question," *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984)—not defer on the fiction that Congress left it to the IRS.[7]

2. As the Government admits (Govt.Br.57), tax credits must be narrowly construed. It argues that the canon is a wash here, because a narrower § 36B would expand individual and employer mandate-tax exemptions. (Govt.Br.58.) The canon, however, is not concerned with maximizing revenues, but with respecting Congress's role by not allowing executive spending based on mere "ambiguity." *United States v. Stewart*, 311 U.S. 60, 71 (1940). The mandate-tax exemptions are concededly unambiguous, and so the canon does not speak to them. But its constitutional concern is directly implicated by § 36B.

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[7] *City of Arlington v. FCC* concerns whether to defer on agency "jurisdiction." 133 S.Ct. 1863, 1868 (2013). It does not undermine *Utility Air*, written *later* and by the same Justice.

Nor is there a conflict here with the "competing" canon that tax laws should be uniform. That canon means that federal law, not state law, "determines whether and to what extent" to tax property. *United States v. Irvine*, 511 U.S. 224, 238 (1994). A federal credit conditioned on state action—like § 36B (and 26 U.S.C. § 35)—is plainly different. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 574, 584-85 (1937) (upholding credit for contributions to federally approved state unemployment funds). Anyway, the plain text *does* create a uniform *scheme*. Citizens *everywhere* may earn a credit if their state establishes an Exchange, and *all* states have equal opportunity to do so.

3. The Government cannot explain why the *IRS* should have authority to discover a "term of art" in Title *42* of the U.S. Code, over which it has neither authority nor expertise. And HHS can claim no deference on § 36B, since it does not administer that provision. None of this Court's cases has addressed whether to defer in such a case (*cf.* Govt.Br.58), and no traditional ground for deference supports doing so. Rather, when terms in an Act cut across multiple Code titles and multiple agencies' jurisdiction, *no agency* has been delegated interpretive authority.

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