ORAL ARGUMENT SCHEDULED FOR DECEMBER 17, 2014

No. 14-5018

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

JACQUELINE HALBIG, et al.,

Plaintiffs-Appellants,

v.

SYLVIA MATHEWS BURWELL, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Eastern District of Virginia (No. 1:13-cv-00623-PLF)

BRIEF ON REHEARING *EN BANC* OF THE GALEN INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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October 3, 2014

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rules 26.1 and 29(b), I certify that *amicus* Galen Institute is a 501(c)(3) public policy research organization. It is not a publicly held corporation, and no corporation or other publicly held company owns 10% or more of its stock.

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CERTIFICATE REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amicus curiae* Galen Institute represents that all parties have consented to the filing of this brief.

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel certifies that a separate brief on behalf of *amicus* Galen Institute is necessary to address the federalism concerns raised by the IRS Rule at issue here. The other parties and *amici* have not focused on the federalism arguments presented in this brief.

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Act or ACA	Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029]

INTEREST OF AMICUS CURIAE[1]

The Galen Institute is a non-profit, Section 501(c)(3) public policy research organization devoted to advancing ideas and policies that would create a vibrant, patient-centered health sector. It promotes public debate and education about proposals that support individual freedom, consumer choice, competition, and innovation in the health sector. It focuses on individual responsibility and control over health care and health insurance, lower costs through competition, and a strong safety net for vulnerable populations.

The Galen Institute has an interest in maintaining the federal-state balance that has long served to protect individual choice in the health insurance market. The other parties and amici have not focused on the federalism arguments presented in this brief.

[1] Pursuant to Rule 29(c)(4) of the Federal Rules of Appellate Procedure, undersigned counsel for *amicus curiae* Galen Institute represents that all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

The ACA's framework for the establishment of health insurance "Exchanges" presented States with a straightforward choice, embodied by sections 1311 and 1321 of the Act. Each State could elect to establish an exchange, under section 1311 (42 U.S.C. § 18031). Or the State could elect not to establish an Exchange, in which case the Federal Government would establish an Exchange within that State instead, under section 1321 (42 U.S.C. § 18041).

The stakes of that choice were also defined by the ACA's plain language. If the State chose to establish an Exchange, then section 1401 of the ACA directed the Internal Revenue Service ("IRS") to provide a tax credit for health plans "enrolled in through an Exchange established by a State under [§] 1311 of" the ACA. 26 U.S.C. § 36B(b)(2)(A). But those benefits would come at a substantial cost. First, the credit actually *increases* the number of citizens subjected to the individual mandate penalties. This is because individuals whose "required contribution" to the cost of insurance exceeds 8 percent of their household income are eligible for an exemption from the penalty, ACA § 1501, *codified at* 26 U.S.C. § 5000A(e)(1)(A); *see Halbig v. Burwell*, 758 F.3d 390, 395 (D.C. Cir. 2014), and the "required contribution" is "reduced by the amount of the

credit allowable under section 36B," 26 U.S.C. § 5000A(e)(1)(B)(ii). In other words, the premium assistance credit effectively lowers the income threshold at which the individual mandate penalties are triggered. Second, the availability of the premium assistance credit also gives rise to potential penalties for employers within the State, at a cost of thousands of dollars per employee. That is because the penalty for noncompliant employers applies only if one or more of an employer's workers resort to health plans "with respect to which an applicable premium tax credit . . . is allowed or paid." ACA § 1513, *codified at* 26 U.S.C. § 4980H(a); *see Halbig*, 758 F.3d at 395. Finally, in addition to all of these costs borne by citizens and businesses within the State, the State itself would bear the financial, administrative, and political costs inherent in maintaining a State Exchange. *See* Appellants' Panel Br. at 28.

The State was also free *not* to establish a State Exchange. *See* 42 U.S.C. § 18041. And because the aforementioned subsidies and penalties pertain only to "an Exchange established *by the State* under 1311," 26 U.S.C. § 36B(b)(2)(A) (emphasis added), the State could avoid them simply by exercising its prerogative not to establish an Exchange, *see generally* Appellants' Panel Br. 6, 9-10; *Halbig*, 758 F.3d at 399-400.

Each State was responsible for making its own choice in the interest of the State's own people. Thirty-six States chose to forego the federal penalties and subsidies by not establishing a State Exchange. *See Halbig*, 758 F.3d at 394; A328.[2] And when each State made its choice, it did so pursuant to the Affordable Care Act's plain terms setting forth those options and the corresponding penalties and subsidies, and in light of the State's view of sound health insurance policy within the State.[3]

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[2] *See also, e.g.*, Annie L. Mach & C. Stephen Redhead, Congressional Research Service, Status of Federal Funding for State Implementation of Health Insurance Exchanges 7 n.d (2013) ("Louisiana's $998,416 exchange planning grant was returned in March 2011."); The Henry J. Kaiser Family Foundation, State Exchange Profiles: Maine (updated Apr. 2, 2013) ("[T]he Governor indicated in April 2012 the state would not spend the [Exchange Planning] grant money." (citing Letter from Governor Paul LePage to Katherine Bryant (CCIIO) (April 18, 2012))); Press Release, Office of the Governor of New Jersey, Governor Chris Christie Prudently Vetoes Health Care Exchange Legislation While Fundamental Issues Still Unresolved by U.S. Supreme Court (May 10, 2012), *available at* http://www.state.nj.us/governor/news/news/552012/approved/20120510a.html; Press Release, Office of the Governor of Wisconsin, Governor Walker Turns Down ObamaCare Funding (Jan. 18, 2012), *available at* http://www.wisgov.state.wi.us/newsroom/press-release/governor-walker-turns-down-obamacare-funding.

[3] *See, e.g.*, Letter from Governor Paul LePage to Secretary Kathleen Sebelius (Nov. 15, 2012) ("Since the ACA was signed into law, the State of Maine, along with several other states, has repeated on a number of occasions and we continue to believe that the law has severe legal problems, is bad policy, and overreaches into the lives and pocketbooks of fellow Americans."), *available at* http://www.themainewire.com/2012/11/lepage-issues-letter-feds-obamacare-exchanges-maine/; *see generally Internal Revenue Service Interprets ACA to Provide Tax Credits for Individuals*

(*footnote continued on next page*)

Despite the plain text of the statute, the IRS decided to attach the tax subsidies—and, therefore, the corresponding penalties—to not just State-established Exchanges, but also to Exchanges established by the Federal Government in lieu of the States. 26 C.F.R. § 1.36B-2(a)(1) ("IRS Rule"); *see also* 45 C.F.R. § 155.20 (redefining "Exchanges" to include federally established Exchanges).

The Federal Government's action, foisting the statutory subsidy-penalty framework upon States that elected not to establish their own Exchanges, thus imposes within those States the perverse consequences that the States sought to avoid: it subjects more lower income citizens to the individual mandate penalty and it imposes new penalties on employers (and thus deters businesses from moving to States in which no such penalties would have applied).

In sum, the unlawful individual and employer penalties, imposed by operation of the IRS Rule in States that chose not to establish

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Purchasing Insurance on Federally Facilitated Exchanges—Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012) (to be codified at 26 C.F.R. Pt. 1), 126 Harv. L. Rev. 663, 663 (2012) ("Due to political disagreements and obstacles to implementation, many states have been reluctant to create these insurance exchanges." (citing Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, N.Y. Times, Aug. 5, 2012, at A17, *available at* http://www.nytimes.com/2012/08/05/us/us-officials-brace-for-huge-task-of-running-health-exchanges.html)).

Exchanges, will amount to "more than $100 billion in unauthorized taxes," based on Congressional Budget Office projections through 2023. Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 Health Matrix 119, 138 (2013). Unsurprisingly, this policy is unpopular among many job-creating businesses. A37 (at ¶¶ 4-6).

Amicus Galen Institute strongly agrees with the Appellants in this case: the Federal Government's imposition of these costs and penalties upon States that did not establish Exchanges plainly violates the ACA's unambiguous terms. For that very reason, the Galen Institute respectfully urges this Court to reverse the district court and vacate the IRS Rule.

The Galen Institute submits this brief, however, in order to highlight yet another consideration counseling against the Government's interpretation of the ACA: namely, principles of federalism, which both undergird our constitutional system and, through canons of construction, cast substantial doubt on the Government's interpretation of the ACA.

SUMMARY OF ARGUMENT

The Affordable Care Act grants a tax credit for health insurance plans "enrolled in through an Exchange established by the State under

[section] 1311 of the [ACA]." ACA § 1401, *codified at* 26 U.S.C. § 36B(b)(2)(A). The Act makes no similar provision to subsidize plans enrolled in through an Exchange established by the federal government under section 1321. That is reason enough to invalidate the IRS Rule purporting to allow a credit without regard to the identity of the Exchange. For where "the intent of Congress is clear, that is the end of the matter." *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984).

But even if the statute were ambiguous, the agency's interpretation still would not be entitled to deference. Only a clear statement of Congress's intent could justify extending the tax credit to federal Exchanges, for two reasons in addition to those identified by Appellants' panel brief.

First, the IRS Rule represents a "major policy decision[] properly made by Congress." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (quoting *Am. Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965))). Because the tax credit for individual insurance has major political and economic ramifications and triggers other tax consequences, including tax penalties for individuals and employers who fail to purchase or offer qualifying plans, Congress should not be presumed to have "delegate[d] a decision of such economic and political significance

to an agency in so cryptic a fashion." *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

Second, by interpreting the ACA's Section 1401 (26 U.S.C. § 36B) as injecting this elaborate new set of subsidies and penalties into the health insurance markets of States that did not establish Exchanges, the Federal Government substantially altered the longstanding "balance between the States and Federal Government," something that can only be done only when Congress "make[s] its intention to do so 'unmistakeably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). While the ACA spoke with the requisite clarity as to State-established Exchanges, it certainly did not unmistakeably state an equivalent intent to rearrange the Federal-State balance for federally established Exchanges. Sustaining this sort of federal encroachment over an "area[] of traditional state concern," would be particularly damaging to the federal balance, because "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *United States v. Lopez*, 514 U.S. 549, 577 (1995).

The district court, the Government, and the panel dissent have all founded their untenable statutory interpretation on the fatal premise that the federal Government may "stand in the shoes of the State," JA 356;

Gov't Panel Br 15, 30, and establish a State Exchange "on behalf of" that State, A352-53; Gov't Panel Br. 21; *Halbig*, 758 F.3d at 413, 416, 417, 423, 424, 425, 427 (Edwards, J., dissenting). To entertain this startling notion is to embrace, in its starkest form, federal "commandeer[ing of] a State's legislative or administrative apparatus for federal purposes"—a usurpation at odds with our constitutional system of dual sovereignty. *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) ("*NFIB*").

ARGUMENT

The ACA unambiguously limits the "premium assistance" credit—and corresponding penalties—to health plans enrolled in through Exchanges established by the States, not Exchanges established by the Federal Government. When the Federal Government establishes an Exchange under section 1321 of the ACA, that Exchange is not and cannot be "an Exchange established *by the State* under *section 1311*[.]" 26 U.S.C. § 36B(b)(2)(A) (emphasis added). Unfortunately for the Government, "[m]erely saying" that one thing is another "does not make it so." *Am. Council on Educ. v. FCC*, 451 F.3d 226, 239 (D.C. Cir. 2006).

This agency, like all agencies, "has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory

terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always give effect to the unambiguously expressed intent of Congress." *Util. Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2445 (2014) (quotation marks omitted). Nor can the agency call upon this Court to effectively re-write the statute to ensure the efficacy of the agency's program, when the statute's own plain terms are insufficient to achieve the agency's ends—a "reviewing court's task is to apply the text of a statute, not to improve upon it." *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014) (brackets and quotation marks omitted). The meaning of the statute is unambiguous. For that reason alone, the IRS Rule is entitled to no deference and must be vacated as contrary to the express intent of Congress. *Chevron*, 467 U.S. at 844.

But if the ACA's plain terms did not already unambiguously foreclose the IRS from extending these penalties and subsidies to federally established Exchanges, then the IRS's interpretation of the Act would still be unreasonable and untenable, in light of the canons of statutory construction. *Amicus* Galen Institute agrees with Appellants that *Chevron*'s general rule of deference for agency interpretation of ambiguous statutes does not apply here in light of the IRS's lack of interpretive authority

outside the Tax Code, Appellants' Panel Br. at 46-49, and the clear statement rule for tax credits, *id.* at 49-52.

In addition, even if the statute were ambiguous, the IRS Rule would not be entitled to *Chevron* deference, for two distinct reasons—first, the enormity of the political and economic effects of that interpretation, and, second, the resulting violation of the federal-state balance of power.

I. The IRS Regulation Is Not Entitled to *Chevron* Deference, Because It Would Decide a "Major Question" Not Committed to Agency Discretion.

"Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Brown & Williamson*, 529 U.S. at 159 (citing *Chevron*, 467 U.S. at 844). But this premise fails in "extraordinary cases," where "the legal question" addressed by the agency's interpretation "is an important one." *Id.* (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986)).[4] Congress should not be presumed to have delegated major questions to the agency.

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[4] *See also Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 97 ("[T]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in unauthorized assumption by an agency of

(*footnote continued on next page*)

Such extraordinary cases arise where, for example, the agency's interpretation results in regulation of "a significant portion of the American economy," *id.*, where it determines "whether an industry will be entirely, or even substantially, rate-regulated," *id.* (quoting *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994)), or where the interpretation has broad implications for the surrounding statutory scheme, *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *cf.* Fed. R. App. P. 35(a)(2) (en banc rehearing appropriate for questions of "exceptional importance").

The tax credits at issue here, no less than the air quality standards at issue in *Whitman*, are "the engine that drives nearly all of" the surrounding statutory mechanism. 531 U.S. at 468.[5] If the premium assistance credit applies outside the context of State Exchanges, then so does the corresponding penalty for failure to obtain insurance; and so too does the penalty for failing to offer it to one's employees. *See supra* at 2-3.

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major policy decisions properly made by Congress." (quoting *Am. Ship Building*, 380 U.S. at 318)).

[5] *Cf. EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 28 (D.C. Cir. 2012) (rejecting an agency's statutory interpretation that "would transform the narrow good neighbor provision [of the Clean Air Act] into a 'broad and unusual authority' that would overtake other core provisions of the Act." (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006))).

If Congress wanted to import this tax regime from the express context of "an Exchange established by the State under section 1311" to the parallel context of an Exchange established by the Federal Government under section 1321, it could have said so. As the Supreme Court put it in *Whitman*, Congress "does not, one might say, hide elephants in mouseholes." 531 U.S. at 468 (citing *MCI*, 512 U.S. at 231; *Brown & Williamson*, 529 U.S. at 159-60).

As in *Whitman*, Congress has shown itself capable of explicitly delegating the very kind of authority that the IRS now seizes. *Compare id.* at 467 (refusing "to find implicit in ambiguous sections of the [Clean Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted"). If Congress had wanted federally established Exchanges to be regulated in tandem with State Exchanges, it knew how to do so. *See* ACA § 1312(d)(3)(D)(i)(II), *codified at* 42 U.S.C. § 18032(d)(3)(D)(i)(II) (referring more broadly to an "Exchange established *under this Act*," rather than "established *by a State*").

Following the Supreme Court's example in *Brown & Williamson*, *MCI*, and *Whitman*, this Court should conclude that "Congress could not have intended to delegate a decision of such economic and

political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160 (citing *MCI*, 512 U.S. 218).

II. The Statute Should Not Be Construed To Displace States' Authority Over Substantive Insurance Regulation—a Traditional State Function—Absent a Clear Statement from Congress.

In the very opinion that upheld the Affordable Care Act's tax on individuals who decline to purchase health insurance, the Supreme Court reaffirmed the critical importance of the federal-state balance to our system of government. *NFIB*, 132 S. Ct. 2566. The Constitution's allocation of limited powers to the Federal Government and its corresponding reservation of broad police powers to the states is central to the constitutional design.

First, this federal balance "ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy." *Id.* at 2578 (quoting The Federalist No. 45, at 293 (J. Madison)).

Second, the "independent power of the States . . . serves as a check on the power of the Federal Government: 'By denying any one government complete jurisdiction over all the concerns of public life,

federalism protects the liberty of the individual from arbitrary power.' " *Id.* (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)).

The IRS's introduction of latent ambiguity into the statutory scheme undermines the federal balance. "The legitimacy of Congress's exercise of the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the contract." *NFIB*, 132 S. Ct. at 2602 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (quotation marks omitted); *see also id.* at 2606 ("As we have explained, '[t]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or 'retroactive' conditions.' " (quoting *Pennhurst*, 451 U.S. at 17). Instead, "[t]hese twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty." *Gregory*, 501 U.S. at 459.

The ACA was intended to preserve a role for the States in the regulation of health insurance. Because the state character of the Exchanges through which taxpayers were to enroll in health plans was politically expedient, *see* Adler & Cannon, *supra*, at 149-50, and because the federal Government is constitutionally barred from commandeering State governments in the service of the federal health insurance policy, *see*

NFIB, 132 S. Ct. at 2602, Congress saw fit to encourage State cooperation by offering their constituents a financial incentive—namely the premium assistance credit of 26 U.S.C. § 36B. Inducements of this sort are typical of statutory schemes that depend on state implementation of federal policies, including other aspects of the ACA itself. *See* Adler & Cannon, *supra*, at 151-53. Indeed, even as it struck down the Act's Medicaid expansion as an unconstitutional "gun to the head," the Supreme Court affirmed Congress's long-recognized "power to grant federal funds to the States, and [to] condition such a grant upon the States' 'taking certain actions that Congress could not require them to take.' " *NFIB*, 132 S. Ct. at 2601 (quoting *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999)).

So the ACA offered the States a choice: either take control of the state health insurance market through establishment of a State Exchange and accept the associated federal tax burdens, or yield control of the health insurance market to a federal Exchange and protect local citizens and businesses from the tax penalties associated with the individual and employer mandates. The premium assistance credit for health plans purchased through a State Exchange was intended to sweeten the deal and

to encourage States to choose to establish State Exchanges and to accept the accompanying tax burdens. *See* Adler & Cannon, *supra*, at 153.

The Act's unambiguous differential treatment of State exchanges versus federal exchanges was highlighted by one of the Act's primary architects, MIT professor Jonathan Gruber, who explained that "What's important to remember politically about this is if you're a state and you don't set up an exchange, that means your citizens don't get their tax credits." *See* Robert Pear & Peter Baker, *Ex-Obama Aide's Statements in 2012 Clash With Health Care Act Stance*, N.Y. Times, July 25, 2014, at A16; *see also* Megan McArdle, *Obamacare's Smoking Gun Fires Again*, Bloomberg View (July 25, 2014), http://www.bloombergview.com/articles/2014-07-25/obamacare-s-smoking-gun-fires-again (highlighting Gruber's reiteration of this point on multiple occasions); Catherine Rampall, *Academic Built Case for Mandate in Health Care Law*, N.Y. Times, Mar. 28, 2012, at B1 (recounting Prof. Gruber's central role as an architect of the Affordable Care Act).

The IRS Rule eliminated the statutory choice by imposing those tax burdens in *all* States—even those that declined to establish their own Exchanges. The result is a more expansive exertion of federal regulatory control over health insurance than the statute authorized. Because health

insurance is traditionally within the province of State—not federal—regulation, the IRS's interpretation of the relevant statutes violates the rule that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' *Gregory*, 501 U.S. 452, 460 (1991).

A. Substantive Regulation of Health Insurance Is Traditionally a Function of the States.

For over a century, the States and the Federal Government operated under a basic agreement that insurance is primarily a matter of state regulation, not federal regulation. As the Supreme Court observed in the middle of the twentieth century, "[t]he control of all types of insurance companies and contracts has been primarily a state function since the States came into being." *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316 (1958). Through laws such as McCarran-Ferguson Act of 1945, 59 Stat. 33, *codified at* 15 U.S.C. § 1011, Congress has long recognized the importance of "leaving regulation to the States," because "the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government," *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 301-02 (1960). In the exceptional cases where the

Federal Government further intervened into the regulation of health insurance policies within the States, it did so explicitly and specifically.

The ACA departs radically from that well-established principle and practice. It goes further than the Federal Government has ever gone with respect to controlling the *substance* of health insurance policies. Its regulation of the Exchanges, as well as its use of tax incentives and penalties on employers, is rooted in the ACA's own policy judgments about what health insurance should cover. *See*, *e.g.*, 42 U.S.C. § 18022 ("Essential Health Benefits Requirements).

Nevertheless, Congress sought to preserve an important role for the States even while enacting the ACA. Indeed, the passage of the Act depended on it. *See* Adler & Cannon, *supra*, at 149-50.

B. Statutes Should Be Interpreted Narrowly to Avoid Federal Incursions into Traditional State Functions, Like Health Insurance Regulation.

"As long as it is acting within the powers granted it under the Constitution, . . . Congress may legislate in areas traditionally regulated by the States." *Gregory*, 501 U.S. at 460. But "[t]his is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Id.* Thus, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it

must make its intention to do so 'unmistakably clear in the language of the statute.' " *Id.* at 460 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)); *see also Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992) (applying "the presumption against the pre-emption of state police power regulations"); *NFIB*, 132 S. Ct. at 2637 ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." (quoting *Pennhurst*, 451 U.S. at 17)). "[I]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory*, 501 U.S. at 461 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989)), *see also Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) ("Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States") (opinion of Frankfurter, J.). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461.

C. The IRS Rule's Interpretation Results in the More Invasive Federal Incursion into Health Insurance Regulation.

Despite the plain meaning of the statute, the IRS adopted the "interpretation that credits are [also] available to taxpayers who obtain coverage through . . . the *Federally*-facilitated Exchange." Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377, 30378 (May 23, 2012) (emphasis added). Although the agency offered no explanation for this "interpretation," the lower court, the Government, and the panel dissent opined that by requiring the Secretary of HHS to "establish and operate such Exchange" within a noncompliant State, section 1321 of the ACA empowers the Federal Government to "create 'an Exchange established by the State under [ACA § 1311]' *on behalf of* that state." A352-53; *see* Gov't Panel Br. 21; *Halbig*, 758 F.3d at 413, 416, 417, 423, 424, 425, 427 (Edwards, J., dissenting). Setting aside its logical impossibility and the fact that the agency itself failed to articulate this interpretation, it must be rejected because, as compared to the alternative reading, it results in the more invasive extension of federal power into the realm of health insurance regulation.

First, the notion that the *Federal* Government may establish and operate a *state* agency "*on behalf of* that state" is itself foreign to the

concept of dual sovereignty in which the state and Federal governments are each presumed to be the masters of their respective spheres. *See generally NFIB*, 132 S. Ct. at 2602. Such an arrangement would be, indeed, the very definition of unconstitutional "commandeer[ing of] a State's legislative or administrative apparatus for federal purposes." *Id.* And a federal agency may not accomplish by interpretation what the Constitution prevents Congress from enacting by legislation. The alternative (and more natural) reading of the statutory scheme—that if a State declines to establish its own exchange under Section 1311, the Federal Government may establish a distinct federal Exchange under Section 1321—avoids the specter of Executive branch usurpation of an administrative function and related benefits and burdens committed to electing States by Congress.

Moreover, by purporting to grant HHS the power to establish and operate a State Exchange, the IRS's interpretation introduces confusion about what level of government is politically accountable for the "State" Exchange's existence, policies, and activities. "[I]t may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* (quoting *New York v. United States*, 505 U.S. 144, 169 (1992)). This risk is very real in the case of

a federal agency purporting to operate a "State Exchange" for health insurance on the State's behalf. For "[w]ere the Government to take over the regulation of entire areas of traditional state concern, . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577. By contrast, "Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer." *NFIB*, 132 S. Ct. at 2602-03. Interpreting the ACA to allow a premium assistance credit only for plans enrolled in through State-established Exchanges would promote clear lines of accountability and avoid any confusion about what level of Government is politically responsible for each Exchange and its tax consequences.

Finally, as we have already described, by interpreting away the statutory distinction between State and federal Exchanges, the IRS Rule has the effect of imposing financial penalties on individual state residents and employers from which, under the terms of the Statute, they should be exempt in opt-out States. A State could rationally determine that any benefits of establishing a State Exchange are outweighed by the political

and financial costs of subjecting its residents and employers to "individual" and "shared responsibility payments" for failing to purchase and offer qualifying health insurance. Counting these costs, most States elected not to establish their own Exchanges. *Halbig*, 758 F.3d at 394. The IRS's interpretation overrides this considered judgment, imposing the health-insurance related taxes on a broader range of individuals and businesses. By contrast, interpreting the Act according to its plain meaning would result in a smaller federal footprint on the terrain of health insurance regulation and greater State control over how State citizens are taxed for their health insurance choices. Under the Supreme Court's clear statement rule, that less invasive interpretation must control.

D. The Statute Lacks a Clear Statement of Congressional Intent to Grant Credits and Impose Penalties In the Absence of a State Health Insurance Exchange.

The Affordable Care Act contains no clear statement that would justify the extent of the IRS Rule's invasion into the traditional state function of health insurance in States that have exercised their prerogative not to establish a State Exchange. To the contrary, the statute expressly limits the premium assistance credit—and thus related penalties—to health plans "which were enrolled in through an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act." 26 U.S.C.

§ 36B(b). In any event, this language and the surrounding statutory system lacks any clear evidence of congressional intent to grant the tax credit (and impose the associated penalties) in States that opted not to establish Exchanges. Because health insurance is traditionally a matter for State regulation, the IRS's interpretation is entitled to no deference, and this court should instead resolve any ambiguity in favor of the interpretation that preserves the greatest degree of State autonomy over health insurance regulation.

CONCLUSION

The judgment of the district court should be reversed, and the IRS Rule should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 29(d), because the brief contains 5,276 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2014, I electronically filed the foregoing Brief on Rehearing *En Banc* of The Galen Institute as *Amicus Curiae* In Support of Appellants via the CM/ECF system, which will send notice of the filing to all counsel who are registered CM/ECF users.

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