No. 14-114

In the Supreme Court of the United States

DAVID KING, ET AL.,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE SENATORS JOHN CORNYN, TED CRUZ, ORRIN HATCH, ROB PORTMAN AND MARCO RUBIO; AND REPRESENTATIVES DAVE CAMP AND DARRELL ISSA IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Senator John Cornyn is the Senate Minority Whip. Senator Ted Cruz is the Ranking Member of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights. Senator Orrin Hatch is the Ranking Member of the Senate Finance Committee. Senator Rob Portman is the Ranking Member of the Senate Finance Subcommittee on Fiscal Responsibility and Economic Growth. Senator Marco Rubio is the Ranking Member of the Senate Foreign Relations Subcommittee on East Asian and Pacific Affairs. Representative Dave Camp is the Chairman of the House Ways and Means Committee. Representative Darrell Issa is the Chairman of the House Oversight and Government Reform Committee.

As elected representatives, amici have a powerful interest in protecting the liberty of their millions of constituents. Amici have taken a strong interest in the implementing regulations of the Patient Protection and Affordable Care Act ("ACA") in general and the regulation at issue in this case in particular. Two amici were members of the Senate Republican caucus that originally united against the passage of the ACA and remain outspoken critics of the Administration's usurpation of congressional authority, including with respect to the ACA. Another amicus, the Ranking Member of the Senate Judiciary Subcommittee on the

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[1] Pursuant to SUP. CT. R. 37.2(a), amici certify that counsel of record received timely notice of the intent to file this brief and granted consent. Pursuant to SUP. CT. R. 37.6, amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or its counsel made such a monetary contribution.

Constitution, Civil Rights and Human Rights, released a report that outlines the current Presidential Administration's repeated attempts to ignore the ACA's statutory text, including by adopting the interpretation at issue in this case. *See* United States Senator Ted Cruz, *The Legal Limit: The Obama Administration's Attempts To Expand Federal Power – Report No. 2, The Administration's Lawless Acts on Obamacare and Continued Court Challenges to Obamacare* (Dec. 9, 2013), http://goo.gl/BX5oer. Two amici are the Chairmen of the House Ways and Means and the House Oversight and Government Reform Committees, which recently released a joint report documenting the results of a year-long investigation that revealed that the IRS failed to seriously grapple with the plain meaning of section 36B before issuing its regulation. *See* Joint Staff Report of the House Committee on Oversight and Government Reform and the House Committee on Ways and Means, *Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies* (Feb. 5, 2014), http://goo.gl/5thZ4J.

SUMMARY OF ARGUMENT

The plain text of the ACA reflects a specific choice by Congress to make health insurance premium subsidies available only through "an Exchange established by the State." 26 U.S.C. § 36B(c)(2)(A)(i). The IRS has discarded this unambiguous statutory limitation and made subsidies available on exchanges established not only by the States, but by the federal government. The Fourth Circuit upheld this executive overreach by reading the ACA as providing that the federal government acts on behalf of a State when establishing an exchange for that State's citizens. *See*

Pet.App.18a. But nothing in the statute supports this interpretation. As the D.C. Circuit has held in reaching a contrary conclusion, "the ACA unambiguously restricts the section 36B subsidy to insurance purchased on Exchanges 'established by the State . . . .' " *Halbig v. Burwell*, -- F.3d --, 2014 WL 3579745, at *1 (D.C. Cir. July 22, 2014).

There are compelling reasons to grant certiorari and authoritatively resolve the issue presented by this case, several of which are of particular importance to amici as members of Congress. First, the executive branch's extension of premium subsidies beyond State exchanges rewrites the ACA and improperly encroaches upon Congress's lawmaking function. Indeed, the IRS's regulation is just one example of the Administration's repeated treatment of the ACA's directives as optional rather than binding law. Second, the executive incursion at issue here has immediate, immense, and ongoing implications for the public purse. If the IRS's regulation is permitted to stand, projections indicate that it will result in tens of billions of dollars in unlawful spending over the next year, and hundreds of billions over the next decade. Finally, the departure from the statutory text at issue here is especially improper given the nature of the compromises that were required in order to pass the ACA. The executive should not be able to accomplish through grasping agency rulemaking, and friendly judicial review, what it could not accomplish in legislative negotiations.

ARGUMENT

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

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

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

The ACA provides that an exchange operating in any particular State may be established either by the State itself or by the federal government. As an initial matter, section 1311 of the ACA provides that "[e]ach State shall, not later than January 1, 2014, establish an . . . Exchange . . . for the State . . . ." 42

U.S.C. § 18031(b). Because Congress does not have the authority to compel a State to establish an exchange, this provision is precatory, not mandatory. And in the event a State does not accept Congress's invitation to establish an exchange, section 1321 of the ACA directs the Secretary of Health and Human Services ("HHS") to "establish and operate such Exchange within the State." *Id*. § 18041(c)(1).

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

The plain text of the ACA thus demonstrates (a) that an exchange may be established either by a State or by the federal government, and (b) that premium subsidies are available only for plans enrolled in through an exchange established by a State. Because "the ACA unambiguously restricts the section 36B subsidy to insurance purchased on Exchanges 'established by the State,' " *Halbig*, 2014 WL 3579745, at *1, the IRS's attempt to extend this subsidy to insurance purchased on an exchange established by the federal government is ultra vires and must be vacated.

While the Fourth Circuit agreed that "a literal reading of the statute undoubtedly accords more closely with [petitioners'] position" than with the government's, Pet.App.18a, it nevertheless strained to find an ambiguity in the statute's plain text in order

to uphold the challenged IRS regulation. According to the Fourth Circuit, section 1321 may be read as directing the federal government to establish an exchange "*on behalf of the state*" when the State elects not to establish an exchange itself. *Id.* (emphasis added).

Contrary to the Fourth Circuit's assertion, it "makes [no] sense to read § 1321(c)'s directive that HHS establish 'such Exchange' to mean that the federal government acts on behalf of the state when it establishes its own Exchange." *Id*. Indeed, the notion that a State's refusal to establish an exchange demonstrates that the State intended to appoint the federal government to act as its agent to establish an exchange on the State's behalf is difficult to take seriously. *Cf. Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666-67 (2013). To the contrary, a State that declines to establish an exchange is perforce electing not to play any part in the implementation and operation of an exchange, either directly or through the agency of the federal government. The federal government, of course, remains free to establish *its own exchange* to serve such a State's citizens. But surely the federal government cannot *appoint itself* to serve as an unwilling State's agent to establish an exchange *on behalf of* the State. *See Printz v. United States*, 521 U.S. 898, 935 (1997).

Furthermore, nothing in the ACA supports the notion that Congress meant to create the legal fiction that the federal government acts on behalf of a State when it establishes an exchange. Indeed, Congress elsewhere expressly provided that a United States territory that establishes an exchange "shall be treated as a State" for certain purposes. 42 U.S.C.

§ 18043(a)(1). Congress could have used similar language if it intended an exchange established by the federal government to be treated as an exchange established by a State, but it did not.

Nor do the statutory provisions cited by the Fourth Circuit provide support for the notion that Congress deemed the federal government to be acting on the State's behalf when establishing an exchange. The ACA, to be sure, defines the term "Exchange" to mean "an American Health Benefit Exchange established under section [1311]," 42 U.S.C. § 300gg-91(d)(21)—i.e., the section inviting States to establish their own exchanges. And section 1321 directs the federal government to "establish and operate *such* Exchange within the State" if the State does not. *Id.* § 18041(c)(1) (emphasis added). But these provisions at most provide that federal exchanges should be deemed "Exchanges established under section 1311," *Halbig*, 2014 WL 3579745, at *8; they in no way suggest that federal exchanges are to be deemed to have been established under section 1311 *on behalf of the State*.

The Fourth Circuit also erred in interpreting section 1311(d)(1)'s directive that "[a]n Exchange shall be a governmental agency or nonprofit entity that is established by a State," 42 U.S.C. § 18031(d)(1), as *definitional*, i.e., as "apparently narrowing the definition of 'Exchange' to encompass only state-created Exchanges." Pet.App.17a. Section 1311(d)(1) is *operational*, not definitional. It and "[t]he other provisions of section 1311(d) are operational requirements, setting forth what Exchanges must (or, in some cases, may) do. Read in keeping with that theme, (d)(1) would simply require that an Exchange operate

as either a governmental agency or nonprofit entity." *Halbig*, 2014 WL 3579745, at *8 (footnote and citation omitted). Furthermore, Congress elsewhere expressly defined the term "Exchange," *see* 42 U.S.C. § 300gg-91(d)(21), making even less plausible the Fourth Circuit's interpretation of section 1311(d) as definitional. *See Halbig*, 2014 WL 3579745, at *8. Finally, section 1311(d)(1) is directed at the *States*, and it naturally requires a State-established exchange to "be a governmental agency or nonprofit entity that is established by a State." 42 U.S.C. § 18031(d)(1). Section 1321, by contrast, is directed at the federal government, and it requires the federal government to establish and operate an exchange "directly or through agreement with a not-for-profit entity," *id.* § 18041(c)(1); it says nothing to suggest these activities are to be deemed to be the actions of a State. In sum, as the D.C. Circuit concluded, "[t]he premise that (d)(1) is definitional . . . does not survive examination of (d)(1)'s context and the ACA's structure." *Halbig*, 2014 WL 3579745, at *8. The Fourth Circuit erred by concluding otherwise.

II. This Court Should Grant Certiorari To Ensure that the Executive Branch's Implementation of the ACA Accords with Congress's Clear Instructions.

The foregoing demonstrates that the Fourth Circuit erred in holding that the ACA authorizes the IRS to extend premium subsidies to health plans offered on an exchange established by the federal government. This Court should grant certiorari to correct this error.

As an initial matter, certiorari should be granted because the Fourth Circuit "has entered a decision in conflict with the decision of [the D.C. Circuit] on the same important matter." SUP. CT. R. 10(a). The government, to be sure, has filed a petition for en banc rehearing in *Halbig*.[2] But certiorari should be granted in this case regardless of how the D.C. Circuit rules on the government's rehearing petition, for the Fourth Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c). And there are compelling reasons why this Court should settle that question now, rather than waiting for any further developments in the courts of appeal. Several of these reasons are of particular importance to amici as members of Congress.

1. The Constitution vests Congress with the authority to make laws, and it imposes upon the President the duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. This division of authority is not "merely an end unto itself." *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014). Rather,

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[2] If past practice is any guide, it is likely that the D.C. Circuit will deny the government's rehearing request and that the circuit split therefore will persist. *See* Adam J. White, *No Need for a Halbig Rehearing*, WALL STREET JOURNAL (Aug. 4, 2014, 7:45 PM), http://goo.gl/RkwMjh ("[I]f the D.C. Circuit rehears the case en banc, it would be a sharp break from history" because "[t]he D.C. Circuit rehears virtually none of its cases."); Douglas H. Ginsburg, *The Behavior of Federal Judges: A View from the D.C. Circuit*, 97 JUDICATURE 109, 111 (2013) ("The number of rehearings en banc averaged six per year in the 1980s, three in the 1990s, and less than one in the first decade since." (footnotes omitted)); *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1242 (D.C. Cir. 1987) (Edwards, J., concurring in the denials of rehearing en banc).

"the constitutional structure of our Government is designed first and foremost not to look after the interests of the respective branches, but to protect individual liberty." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2593 (2014) (Scalia, J., concurring in the judgment) (brackets and internal quotation marks omitted). In fact, "[s]o convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). As relevant here, "the Constitution diffuses power the better to secure liberty . . . ." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). This diffusion of power reflects the founding generation's belief "that checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

The IRS's decision to extend premium subsidies to health plans available on exchanges established by the federal government rewrites the law and encroaches on Congress's constitutional authority. Again, the ACA restricts premium subsidies to individuals "covered by a qualified health plan . . . that was enrolled in through an Exchange established by the State . . . ." 26 U.S.C. 36B(c)(2)(A)(i). The IRS's regulation, by contrast, makes subsidies available "regardless of whether the Exchange is established and operated by a State . . . or by HHS." 26 C.F.R. § 1.36B-1(k); 45 C.F.R. § 155.20. The executive branch, in other words, effectively has struck the words "established by the State" from section 36B, thus amending it to read that subsidies are available to individuals

"covered by a qualified health plan . . . that was enrolled in through an Exchange ~~established by the State~~ . . . ." As this Court emphasized in *Clinton v. City of New York*: "There is no provision in the Constitution that authorizes the President . . . to amend . . . statutes." 524 U.S. at 438; *see also Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("The power of executing the laws . . . does not include a power to revise clear statutory terms that turn out not to work in practice."). And the IRS regulation at issue here is just one example of the Administration's selective approach to following the directives of Congress contained in the ACA. *See* Senator Cruz, *The Legal Limit*, http://goo.gl/BX5oer.

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

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

2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348 (3d ed. 1858). The Constitution thus seeks "to assure that public funds will be spent *according to the letter* of the difficult judgments reached *by Congress* as to the common good . . . ." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990) (emphases added).

In June of this year, the Office of the Assistant Secretary for Planning and Evaluation ("ASPE") of HHS released a report that provides some insight into the magnitude of unlawful spending that is occurring as a result of the IRS regulation at issue here. *See* AMY BURKE ET AL., PREMIUM AFFORDABILITY, COMPETITION, AND CHOICE IN THE HEALTH INSURANCE MARKETPLACE, 2014 (ASPE Research Brief) (June 18, 2014), http://goo.gl/e9zgzh. HHS reported that more than 5.4 million people enrolled in health plans through exchanges established by the federal government during the initial open enrollment period. *Id.* at 3. Of the individuals who enrolled through a federal exchange, 87% selected a plan with premium tax credits, with an average tax credit of $264 per month. *Id.* at 5. These figures indicate that the government is spending over $1.2 billion unlawfully each and every month on premium subsidies. (5.4 million enrollees × .87 with credits × $264 average credit per month = $1,240,272,000 per month.)

The HHS report, however, understates the fiscal effects of the IRS's regulation, both because the number of individuals enrolling in plans through exchanges is expected to increase and because the report does not include cost-sharing subsidies available to a subset of individuals receiving premium subsidies. *See* 42 U.S.C. § 18071(f)(2). A recent Congressional

Budget Office report helps to fill out the picture. *See* CBO, UPDATED ESTIMATES OF THE EFFECTS OF THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT, APRIL 2014, http://goo.gl/iEeX0b. The CBO

> anticipate[s] that coverage through the exchanges will increase substantially over time as more people respond to subsidies and to penalties for failure to obtain coverage. Coverage through the exchanges is projected to increase to an average of 13 million people in 2015, 24 million in 2016, and 25 million in each year between 2017 and 2024. Roughly three-quarters of those enrollees are expected to receive exchange subsidies.

Id. at 6.

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

subsidies for health insurance would cause spending for some of the largest federal programs to increase relative to GDP." CBO, THE LONG-TERM BUDGET OUTLOOK at 1 (July 2014), http://goo.gl/VaiPNw.

The totals described in the previous paragraph are for all exchanges, not just exchanges established by the federal government. But if circumstances remain as they are today it can be expected that a majority of these costs will be incurred for plans enrolled in through federal exchanges. Again, the federal government has established exchanges for 36 of the States. And HHS's figures indicate that over two-thirds of individuals enrolling in health plans through exchanges have done so through exchanges established by the federal government. *See* ASPE, HEALTH INSURANCE MARKETPLACE: SUMMARY ENROLLMENT REPORT FOR THE INITIAL ANNUAL OPEN ENROLLMENT PERIOD at 4 tbl.1 (May 1, 2014), http://goo.gl/qmr9Ph (noting approximately 5.4 million federal exchange enrollees out of approximately 8 million total exchange enrollees).

In sum, the IRS's decision to extend subsidies to federal exchanges has serious implications for this Nation's finances. It is doubtful that "Congress [would] have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). As the text of the ACA demonstrates, "Congress is more likely to have focused upon, and answered, major questions" such as the one at issue here, "while leaving interstitial matters to answer themselves in the course of the statute's daily administration." *Id.* at 159 (quoting

Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)).

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

4. These considerations highlight that a bill as massive and controversial as the ACA is bound to reflect many competing policy considerations and legislative compromises. It is particularly important to hew closely to the statutory text of such a law rather than trying to force it to fit any single overarching policy goal. But here, the Fourth Circuit scoured the Act in search of an ambiguity on which to justify upholding the IRS's regulation because it deemed the regulation as "advanc[ing] the broad policy goals of the Act." Pet.App.27a. The concurring opinion went so far as to suggest that "Congress has *mandated* in the Act

that the IRS provide tax credits to all consumers regardless of whether the Exchange on which they purchased their health insurance coverage is a creature of the state or the federal bureaucracy," *id.* 34a (emphasis added), relying on sources such as the New York Times and the President's remarks upon signing the ACA to interpret the law in a manner purportedly consistent with "Congress' central purpose in enacting the Act," *id.* 39a.

The words of a statute, of course, are the best guide to Congress's purposes in enacting the statute. "[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires [the assumption] that the legislative purpose is expressed by the ordinary meaning of the words used." *United States v. Locke*, 471 U.S. 84, 95 (1985) (internal quotation marks omitted). And given the manner in which the ACA was enacted, it is particularly important to interpret the words "an Exchange established by the State" to mean what they say. The ACA was the product of contentious political compromise that any administrative or judicial amendment would be certain to upset. The relative roles that would be played under the Act by the States and the federal government were highly controversial and hotly contested. The ACA's supporters did not have the votes to establish a single-payer system or even to take what many feared to be a significant first step towards such a system: the establishment of a national exchange providing federal subsidies to low-income participants. For example, supporters of healthcare legislation needed 60 votes in the Senate to overcome a filibuster, and because there was not a single vote to

spare, compromise within the Democratic caucus was necessary to ensure passage of any bill. Senator Ben Nelson, essential to the 60-vote majority, made clear his objection to a federal exchange, describing it as a "dealbreaker" because it would "start us down the road of . . . a single-payer plan." Carrie Budoff Brown, *Nelson: National Exchange a Dealbreaker*, POLITICO (Jan. 25, 2010, 7:59 PM), http://goo.gl/BloeHy. Senator Nelson was ultimately able to leverage his opposition to "scrub[ ] dozens of . . . things out of it that federalized the bill." Interview with United States Senator Ben Nelson by LifeSiteNews.com (Jan. 26, 2010), *see* http://goo.gl/2fDY1J. Like much of the ACA's drafting, those changes were made behind closed doors, and it is not known which amendments were inserted for what reason. What *is* known is that the statutory language that emerged was the product of lengthy negotiations.

Evidence of such political compromise makes faithful adherence to the plain meaning of the statutory text especially important, lest the Court undo the agreement that made the Act's enactment possible. "Dissatisfaction . . . is often the cost of legislative compromise," and to ignore a provision's "delicate crafting" could undo a negotiated political compromise that was critical to passage. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002); *see also Artuz v. Bennett*, 531 U.S. 4, 10 (2000) ("We hold as we do because respondent's view seems to us the only permissible interpretation of the text—which may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted."); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2417

(2003) ("The reality is that a statutory turn of phrase, however awkward its results, may well reflect an unrecorded compromise or the need to craft language broadly or narrowly to clear the varied veto gates encountered along the way to enactment."). In an era when Congress is often criticized for its inability to forge consensus and enact major legislation, the judiciary should take special care not to upset the legislative compromises that enabled passage of laws that come before it.

More fundamentally, the Administration's attempt to upset the legislative compromise embodied in the unambiguous text of the ACA would effectively strike a new and different compromise, one the Congress demonstrably could not and did not pass itself. To cast aside the compromise that resulted in the unambiguous language of section 36B in the name of advancing the Act's supposed general purpose would effectively amend the Act by handing its most enthusiastic supporters a victory that they were unable to achieve through the political process. Any "anxiety to effectuate the congressional purpose" behind enacting a statute "must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 161. Here, Congress plainly indicated that the availability of premium subsidies would stop at State exchanges and not extend to federal exchanges. The executive branch, and the courts, are required to honor that choice.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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