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

BRIEF OF THE GALEN INSTITUTE AND STATE LEGISLATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI 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 following State Legislators also join this brief, based on their interest in opposing efforts by the federal government's Executive Branch to impose policies in violation of the Affordable Care Act's unambiguous text, under the overarching limits imposed by the Constitution. They were serving in office when their States were deciding whether to create State health insurance exchanges under the Affordable Care Act:

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1 The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

John Adams has served in the Ohio House of Representatives since 2011, representing the 85th District.

Mae Beavers has served in the Tennessee Senate since 2002, representing the 17th District. She previously served in the Tennessee House of Representatives from 1994 to 2002.

Mike Bell has served in the Tennessee Senate since 2010, representing the 9th District. He previously served in the Tennessee House of Representatives from 2006 to 2010.

Janice Bowling has served in the Tennessee Senate since 2012, representing the 16th District.

James Gotto served in the Tennessee House of Representatives from 2010 to 2012, representing the 60th District.

Dr. Mark Green has served in the Tennessee Senate since 2012, representing the 22nd District.

Dolores Gresham has served in the Tennessee Senate since 2008, representing the 26th District. She previously served in the Tennessee House of Representatives from 2002 to 2008.

Ferrell Haile has served in the Tennessee Senate since 2010, representing the 18th District.

Dr. Joey Hensley has served in the Tennessee Senate since 2012, representing the 28th District. He previously served in the Tennessee House of Representatives from 2002 to 2012.

Jack Johnson has served in the Tennessee Senate since 2006, representing the 23rd District.

Brian Kelsey has served in the Tennessee Senate since 2009, representing the 31st District. He previously served in the Tennessee House of Representatives from 2004 to 2009.

Bill Ketron has served in the Tennessee Senate since 2002, representing the 13th District.

Becky Duncan Massey has served in the Tennessee Senate since 2010, representing the 6th District.

Mark Norris has served in the Tennessee Senate since 2000, representing the 32nd District. He is the Senate Majority Leader.

J. Douglas Overbey has served in the Tennessee Senate since 2008, representing the 2nd District. He previously served in the Tennessee House of Representatives from 2000 to 2008.

Ronald Ramsey is Tennessee's Lieutenant Governor, and the Speaker of the State Senate. He has served in the Tennessee Senate since 1996, representing the 4th District. He previously served in the Tennessee House of Representatives from 1992 to 1996.

Steve Southerland has served in the Tennessee Senate since 2002, representing the 1st District.

John Stevens has served in the Tennessee Senate since 2012, representing the 24th District.

Bo Watson has served in the Tennessee Senate since 2006, representing the 11th District. He previously served in the Tennessee House of Representatives from 2004 to 2006.

Ken Yager has served in the Tennessee Senate since 2008, representing the 12th District.

Ron Young has served in the Ohio House of Representatives since 2011, representing the 61st District.

SUMMARY OF ARGUMENT

The Affordable Care Act ("ACA") authorizes the Administration to provide a specific set of subsidies (and concomitant penalties) for health insurance purchased "through an Exchange established by the State under [§] 1311[.]" 26 U.S.C. § 36B(b)(2)(A). As Petitioners explain, this unambiguous provision reaches only Exchanges established *by* a *State*—and not, as the IRS contends, Exchanges established by the federal government in lieu of a State.

The Government decries what it call Petitioners' "blinkered focus" on "a single phrase . . . considered in isolation," and invokes a "fundamental canon of statutory construction" that statutory text be interpreted in light of its "context"—*i.e.*, "structure, history, and purpose." Gov't Br. in Opp. 13. But the statute's "context" actually confirms Petitioners' interpretation, not the IRS's. Pet'r Br. 27-30.

Amici write separately to stress two other fundamental canons of construction that refute the IRS's position: the federalism canon and the "major questions" canon. For while the IRS focuses on the Exchange-subsidy provision's place in the ACA, it fails to consider the provision's place in our constitutional structure.

First, by interpreting the ACA's section 1401 (26 U.S.C. § 36B) as injecting the Act's elaborate new set of subsidies and penalties into the health insurance markets of States that chose *not* to establish Exchanges, the IRS substantially altered the longstanding "balance between the States and Federal Government." But that can be done only when Congress "make[s] its intention to do so 'unmistakably 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 did not state such clear intent to rearrange the federal-State balance for federally established Exchanges. Even the court below did not hold the statutory grant of power to be a *clear* statement in support of the IRS's position; instead, it found the provision to be merely "ambiguous and subject to multiple interpretations." *See* Pet. App. 6a; *see also id.* at 25a ("simply put, the statute is ambiguous and subject to at least two different interpretations"). But a "self-contradictory, ambiguous provision" (*id.* at 31a) cannot justify regulatory encroachment upon an "area[] of traditional state concern," because Congress did not command that encroachment with "unmistakably clear" language. *Gregory*, 501 U.S. at 460. Indeed, by blurring the ACA's federal-State distinction, the IRS Rule undermines the "clear lines of accountability" between voters and the governmental actors responsible for policy decisions and outcomes.

Second, 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). The tax credit for individual insurance has major political and economic ramifications, and it triggers other tax consequences, including penalties for individuals and employers who fail to purchase or offer qualifying plans. Congress cannot be presumed to have "delegate[d] 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).

ARGUMENT

The ACA unambiguously limits the "premium assistance" credit—and concomitant penalties—to taxpayers who enroll in health plans via 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).

The IRS and HHS argue otherwise, but agencies have "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 an agency expect the Court to effectively rewrite a statute to achieve the agency's own vision of how the statutory scheme should operate: "a reviewing court's task is to apply the text of the statute, not to improve upon it." *EPA* v. *EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014) (alterations and quotation marks omitted). The statute's meaning 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, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

If the ACA's unambiguous terms did not already foreclose the IRS's extension of these penalties and subsidies to federally established Exchanges, then the IRS's interpretation of the Act would still be impermissible, in light of the canons of statutory construction. *Amici* Galen Institute and State Legislators agree with the Petitioners that *Chevron*'s general rule of deference to agencies' interpretations of ambiguous statutes does not apply here in light of the IRS's lack of interpretive authority outside the Tax Code, Pet. Br. 55-56, and the clear statement rule for tax credits, *id.* at 53-55.

But as *Amici* explain, even if the statute were ambiguous the IRS Rule still would not be entitled to *Chevron* deference, for two further reasons: first, the resulting upheaval of the longstanding federal-state balance of power; and second, the enormity of the political and economic effects of that interpretation.

I. The ACA Is a "Cooperative Federalism" Program That Offered States a Meaningful Choice, Attempting to Entice Them To Create State Exchanges.

The Government refers to the ACA as a "model of cooperative federalism," Gov't Br. in Opp. 13, but it fails to address the full implications of that characterization. The ACA does indeed create a "cooperative federalism" framework—and like other cooperative federalism programs, it structures its incentives to convince States to opt into the program. It offers to participating States benefits not offered to non-participating States, to induce them to accept the parallel burdens that the program imposes.

Specifically, as this Court has explained, "cooperative federalism" programs offer States a "choice": "the residents of the State retain the ultimate decision as to whether or not the State will comply" with the federal program. *New York* v. *United States*, 505 U.S. 144, 168 (1992). "If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline" the Government's inducements. *Id.* "States are not required to participate in the program," but they can obtain "substantial" federal benefit by opting in and accepting the burdens that come with the program. *King* v. *Smith*, 392 U.S. 309, 316 (1968) (describing the "scheme of cooperative federalism" underlying the Aid to Families with Dependent Children program).[2]

But the choice offered to the States must be meaningful: "there is nothing 'cooperative' about a federal program that compels state agencies either to function as bureaucratic puppets of the Federal Government or to abandon regulation of an entire field traditionally reserved to state authority." *FERC* v. *Mississippi*, 456 U.S. 742, 783 (1982) (O'Connor, J., concurring in the judgment and dissenting in part).

Thus, as a cooperative federalism program, the ACA's framework for the establishment of health insurance "Exchanges" presented States with a straightforward choice in sections 1311 and 1321 of the Act: A State could elect to establish an Exchange, under section 1311 (42 U.S.C. § 18031). Or, it could

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2 *See also*, *e.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618, 651 (1969) (describing federal welfare assistance) ("Congress deliberately adopted the intermediate course of a cooperative program. Such a program, Congress believed, would encourage the States to assume greater welfare responsibilities and would give the States the necessary financial support for such an undertaking.").

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 ACA's plain language defined the stakes of that choice. If the State chose to establish an Exchange, then section 1401 of the ACA directed the IRS to provide a tax credit for health plans "enrolled in through an Exchange established by the State under [§] 1311 of the [ACA]." 26 U.S.C. § 36B(b)(2)(A).

But those benefits 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, 26 U.S.C. § 5000A(e)(1)(A); *see Halbig* v. *Burwell*, 758 F.3d 390, 395 (D.C. Cir. 2014), *vacated for reh'g en banc*, 2014 WL 4627181, 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 potentially triggers penalties for employers within the State, costing thousands of dollars per employee. That is because the penalty for noncompliant employers applies only if one or more of an employer's workers enroll in health plans "with respect to which an applicable premium tax credit

. . . is allowed or paid." 26 U.S.C. § 4980H(a)(2); *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.

But because the ACA's insurance Exchanges are a "cooperative federalism" program, each 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.

Congress offered the States a choice because it could not *command* them to opt into the system: the federal government is, after all, constitutionally barred from commandeering State governments in the service of the federal health insurance policy. *See Nat'l Fed. of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2602 (2012) ("*NFIB*") (opinion of Roberts, C.J.)[3]; *see also New York*, 505 U.S. at 176 ("As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction."). Indeed, even as this Court struck down the Act's Medicaid expansion as an unconstitutional "gun to the head," *NFIB*, 132 S. Ct.

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3 In this brief, all citations to *NFIB* correspond to the opinion of Chief Justice Roberts.

at 2604, it 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,'" *id.* at 2601 (quoting *College Savings Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999)).

Thus, the ACA offered the States a clear and meaningful choice: either take control of the State's health insurance market through establishment of a State Exchange and accept the associated federal penalties and burdens within and upon the State and its citizens and businesses; or, yield control of the health insurance market to a federal Exchange but protect local citizens and businesses from the tax penalties associated with the individual and employer mandates. The Act's unambiguously differentiated 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 Act Stance*, N.Y. Times, July 25, 2014, at A16. Nor would citizens and businesses in non-participating States face the increased burdens of the individual and employer mandates, intensified by subsidization of insurance within participating States.

Each State was responsible for making its own choice, in the interests of its own people. Most States chose to forego the federal penalties and subsidies by declining to establish a State Exchange. Pet. Br. 7. 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.

States considered the stakes when making their choices. In Wisconsin, for example, when the Governor announced that the State would not set up an Exchange, he conceded that the lack of a State Exchange would cause Wisconsin to lose the attached federal benefits. But those benefits were outweighed by the costs that the State would have borne by opting into the system: "hidden taxes for Wisconsin families, increased health care costs and insurance premiums, and more uncertainty in the private sector." Press Release, Office of the Governor of Wisconsin, Governor Walker Turns Down ObamaCare Funding (Jan. 18, 2012).[4]

By contrast, Idaho weighed the ACA's costs and benefits and decided to opt into the program, creating a State Exchange. Idaho's "Health Insurance Exchange Working Group," which the Governor established to advise on the State's choice, stressed concerns voiced by some that "that federal subsidies would not be available in a federal exchange." Idaho Dep't of Ins., *Health Exchange Working Group Findings* 48 (Oct. 30, 2012).[5] When the Governor announced that Idaho would opt into the ACA's

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4 http://www.wisgov.state.wi.us/newsroom/press-release /governor-walker-turns-down-obamacare-funding.

5 http://www.doi.idaho.gov/HealthExchange/Final_report.pdf.

regime of subsidies and penalties and establish a State Exchange—despite his own prior criticism of the ACA—he stressed the State's refusal to "willingly surrender a role for Idaho in determining the impact on our own citizens and businesses." News Release, Office of Gov. C.L. Otter, Governor Opts for State-Based Exchange (Dec. 11, 2012).[6]

Those were the choices that the ACA left for the States to make, and States made them accordingly, each in light of the needs and desires of each State's own people. And those choices were nullified by the IRS's re-interpretation of the ACA, when it decided to attach the tax subsidies—and, therefore, the concomitant penalties—not just to State-established Exchanges, but also to Exchanges established by the federal government. 26 C.F.R. § 1.36B-2(a)(1). The IRS's action, foisting the statutory subsidy-penalty framework upon States that elected not to establish their own Exchanges, thus imposes upon those States some of the harmful consequences that the States intended 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, or expanding in, those States).

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6 http://gov.idaho.gov/mediacenter/press/pr2012/12Dec/pr_64.html.

II. The Court Should Not Construe the Statute to Displace States' Traditional Authority Over Substantive Insurance Regulation, 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, this Court reaffirmed the critical importance of the federal-State balance in our system of government. *NFIB*, 132 S. Ct. at 2577. The Constitution allocated limited powers to the federal government, and thus reserved broad police powers to the States, for at least two reasons:

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 also 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 attempt to introduce latent ambiguity into the unambiguous statutory language undermines the longstanding federal-State 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." *Id.* at 2602 (quoting *Pennhurst State Sch. & Hosp.* v.

Halderman, 451 U.S. 1, 17 (1981)) (quotation marks omitted). Crucially, the federal Government must not be allowed to misuse the spending power by "surprising participating States with post-acceptance or 'retroactive' conditions.'" *Id.* at 2606 (quoting *Pennhurst*, 451 U.S. at 25).

But that is what the IRS did here. The IRS Rule eliminated the States' statutory choice by imposing those tax burdens in *all* States—even those that declined to establish their own Exchanges. The result is an exertion of federal regulatory control over health insurance beyond that which Congress's statute authorized. Because health insurance is traditionally within the province of State—not federal—regulation, the IRS's aggressive statutory interpretation violates the canon 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. at 460 (alterations omitted).

A. States, Not the Federal Government, Traditionally Regulate the Substance of Health Insurance.

For over a century, the States and the federal government have operated under a basic agreement that insurance is primarily a matter of state regulation, not federal regulation. As this Court observed, "[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 (1955). Through laws such as

McCarran-Ferguson Act of 1945, 59 Stat. 33, *codified at* 15 U.S.C. §§ 1011-1012, Congress has 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.

The ACA departs radically from those deep-seated principles and practices. It goes further than the federal government has ever gone with respect to controlling the *substance* of health insurance policies, using the ACA's regulation of Exchanges and the ACA's tax incentives and penalties to promote the purchase of health insurance that comports with federal regulators' own policy judgments about what health insurance should and should not cover. *See*, *e.g.*, 42 U.S.C. § 18022 ("Essential health benefits requirements").

B. The Court Interprets Statutes To Avoid Federal Encroachments Upon State Authority, Absent An "Unmistakably Clear" Statutory Command to the Contrary.

"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 this "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.* (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985)) (alterations omitted). "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so *unambiguously*." *NFIB*, 132 S. Ct. at 2637 (quoting *Pennhurst*, 451 U.S. at 17) (emphasis added).[7]

When the Court enforces this clear statement rule in "traditionally sensitive areas, such as legislation affecting the federal balance," it "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. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)).[8] "This plain statement rule is nothing more than an acknowledgment that the States retain

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7 *See also Bond* v. *United States*, 134 S. Ct. 2077, 2090 (2014) ("These precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute."); *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992) (applying "the presumption against the pre-emption of state police power regulations").

8 *See also Bethlehem Steel Co.* v. *N.Y. 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.).

substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461.

C. The IRS's Interpretation Blurs the Boundaries of State and Federal Authority, Undermining the Lines of Political Accountability.

Despite the statute's plain meaning to the contrary, the IRS decided "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 court below found that "it makes sense" to read the statute as allowing the Government to "act[] on behalf of the state" by creating a federal Exchange for that State, and to extend to that Exchange the same subsidies and penalties allowed for Exchanges established by the States. Pet. App. 18a. Even setting aside logical impossibility of an Exchange created by the federal government also qualifying as an "Exchange established by the State under [§] 1311," 26 U.S.C. § 36B(b)(2)(A), and the fact that the agency itself failed to articulate this interpretation in the rulemaking, *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943), the Court must reject this rationale because it results in an 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* the state" is completely 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 the very definition of unconstitutional "commandeer[ing of] a State's legislative or administrative apparatus for federal purposes." *Id.* And a federal agency cannot accomplish by "interpretation" what the Constitution prevents Congress from enacting by legislation. The alternative (and more natural and logical) 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 policy decisions that Congress left to the States, or of the Executive commandeering State administrative functions.

Moreover, by purporting to grant HHS the power to establish and operate a "State" Exchange, the IRS's interpretation introduces confusion about which government actor is politically accountable for the "State" Exchange. "[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*, 505 U.S. at 169). Meanwhile, by forcing States to bear unwillingly the federal program's economic and other burdens, federal officials "can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects." *Printz* v. *United States*, 521 U.S. 898, 930 (1997).

Those dangers are all too 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." *United States* v. *Lopez*, 514 U.S. 549, 577 (1995). But "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 (emphasis added). The ACA's provision of premium assistance credits only for individuals who enrolled in health plans through State-established Exchanges gave States that clear choice; thus, it promoted clear lines of accountability and avoided any confusion about what level of government is politically responsible for each Exchange and its consequences. The IRS Rule replaces clarity with confusion.

III. The IRS Rule Is Not Entitled to *Chevron* Deference, Because It Would Decide a "Major Question" Not Delegated by Congress to the Agency.

"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 that premise is untenable 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)).

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.* at 160 (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).

While agencies can be expected to ask the Court to defer to their self-interested characterizations of the powers that Congress granted them, "the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 97 (quoting *Am. Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965)). Accordingly, this Court does not presume that Congress delegates to agencies the power to decide such major questions unilaterally—rather, when an agency suddenly "claims to discover" vast new powers in a statute, courts "typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air Reg. Group*, 134 S. Ct. at 2444 (*quoting Brown & Williamson*, 529 U.S. at 159).

Such skepticism is well warranted here. The tax credits and penalties embodied by the IRS Rule, no less than the air quality standards at issue in *Whitman*, must be authorized by a "clear," "textual commandment" precisely *because* they are "the engine that drives nearly all of" the surrounding statutory mechanism. 531 U.S. at 468. If the premium assistance credit applies outside the context of Exchanges actually established by States, 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* Part I. If Congress had intended to impose this regime equally on Exchanges established by the *federal* government, it could have accomplished that goal explicitly, and not merely by implication through the inter-workings of a complex statutory framework. As this Court stressed 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 perfectly capable of explicitly delegating the very kind of authority that the IRS now seizes. *Compare id.* at 467 ("We have therefore refused 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"). Had Congress wanted insurance purchased on federal Exchanges to be subsidized and penalized no differently from insurance purchased on State Exchanges, it knew how to do so: it knew how to refer broadly to an "Exchange established *under this Act*," *see* 42 U.S.C. § 18032(d)(3)(D)(i)(II) (emphasis added), instead of referring narrowly to an "Exchange established *by* the *State*." 26 U.S.C. § 36B(b)(2)(A) (emphasis added).

Following this Court's example in *Brown & Williamson*, *MCI*, and *Whitman*, the 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.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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