No. 14-1158

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DAVID KING, ET AL.,

Appellants,

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA (NO. 3:13-CV-630 (JRS))

REPLY BRIEF FOR APPELLANTS

MICHAEL A. CARVIN
Lead Counsel
YAAKOV M. ROTH
JONATHAN BERRY
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Email: macarvin@jonesday.com

Counsel for Appellants

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE GOVERNMENT CANNOT DEFEND THE IRS RULE, WHICH IS CLEARLY *ULTRA VIRES* 2

A. The Government's Reading of § 36B Is Irreconcilable with Its Plain Text, the ACA's Structure, and All Canons of Construction 2

B. The Government Fails To Show Any Absurdity Resulting from the Subsidy Provision's Plain Text 9

C. The Government's Broad "Purpose" Argument Is Irrelevant, Wrong, and Directly Refuted by the Legislative History 14

II. THE IRS RULE IS NOT ENTITLED TO *CHEVRON* DEFERENCE 20

III. THE GOVERNMENT'S HALF-HEARTED JURISDICTIONAL ARGUMENTS ARE MERITLESS 23

A. It Is Undisputed That the IRS Rule Imposes Economic Injury on at Least Appellants Hurst and Levy, Plainly Conferring Standing 23

B. Appellants Are Not Required To Violate the Individual Mandate and Incur Penalties Before They May Challenge the IRS Rule 25

IV. IF THIS CHALLENGE SUCCEEDS, THE IRS WILL HAVE NO LEGAL AUTHORITY TO PAY SUBSIDIES WITHIN THIS CIRCUIT 27

CONCLUSION 28

CERTIFICATE OF COMPLIANCE 29

CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

Page

CASES

Abbott Labs. v. Gardner,
387 U.S. 136 (1967)....................26

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987)....................19

Am. Fed'n of Gov't Employees v. Shinseki,
709 F.3d 29 (D.C. Cir. 2013)....................21

Bob Jones University v. Simon,
416 U.S. 725 (1974)....................26

Bowen v. Massachusetts,
487 U.S. 879 (1988)....................26

Burnet v. Harmel,
287 U.S. 103 (1932)....................22

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984)....................20, 22

Chrysler Corp. v. Brown,
441 U.S. 281 (1979)....................27

City of Arlington v. FCC,
133 S. Ct. 1863 (2013)....................20

Cohen v. United States,
650 F.3d 717 (D.C. Cir. 2011) (en banc)....................26

Custis v. United States,
511 U.S. 485 (1994)....................4

DeNaples v. Office of Comptroller of Currency,
706 F.3d 481 (D.C. Cir. 2013)....................21

Green v. Bock Laundry Mach. Co.,
490 U.S. 504 (1989)....................9

TABLE OF AUTHORITIES
(continued)

Page(s)

Halbig v. Sebelius,
No. 13-623, 2014 WL 129023 (D.D.C. Jan. 15, 2014) 18

INS v. St. Cyr,
533 U.S. 289 (2001)..22

Ithaca College v. NLRB,
623 F.2d 224 (4th Cir. 1980) 27

Lamie v. United States Tr.,
540 U.S. 526 (2004)..9

Liberty University, Inc. v. Lew,
733 F.3d 74 (4th Cir. 2013) 25

Loving v. IRS,
No. 13-5061, 2014 WL 519224 (D.C. Cir. Feb. 11, 2014) 20

Mayo Found. for Med. Educ. & Research v. United States,
131 S. Ct. 704 (2011)..22

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993)..14

NFIB v. Sebelius,
132 S. Ct. 2566 (2012)...19, 24, 25

Republic of Argentina v. Wetlover, Inc.,
504 U.S. 607 (1992)..15

Sackett v. EPA,
132 S. Ct. 1367 (2012)..26

Shaw v. Hunt,
154 F.3d 161 (4th Cir. 1998) 23

Sigmon Coal Co. v. Apfel,
226 F.3d 291 (4th Cir. 2000) 9, 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n,
824 F.2d 108 (D.C. Cir. 1987)....................7

STATUTES

26 U.S.C. § 35....................7

26 U.S.C. § 7421....................25

31 U.S.C. § 1341....................27

ACA § 1201, *codified at* 42 U.S.C. § 300gg *et seq.*....................13

ACA § 1311, *codified at* 42 U.S.C. § 18031....................*passim*

ACA § 1312, *codified at* 42 U.S.C. § 18032....................3, 12, 13

ACA § 1321, *codified at* 42 U.S.C. § 18041....................*passim*

ACA § 1323, *codified at* 42 U.S.C. § 18043....................5

ACA § 1401, *codified at* 26 U.S.C. § 36B....................*passim*

ACA § 1557, *codified at* 42 U.S.C. § 18116....................13

ACA § 2001, *codified at* 42 U.S.C. § 1396a....................8

OTHER AUTHORITIES

76 Fed. Reg. 50931 (Aug. 17, 2011)....................17

79 Fed. Reg. 13220 (Mar. 10, 2014)....................11

Georgia Health Ins. Exchange Adv. Comm., Report to the Governor (Dec. 15, 2011)....................17

HHS Bulletin, http://cms.hhs.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/retroactive-advance-payments-ptc-csrs-02-27-14.pdf....................8

TABLE OF AUTHORITIES
(continued)

Page(s)

Sarah Kliff, *The Small End of Ted Kennedy's Big CLASS Act Dream*, 2013 WLNR 23345419, WASH. POST (Sep. 18, 2013)....15

Sarah Kliff, *Think Your State Has Obamacare Problems? They're Nothing Compared to Guam*, 2013 WLNR 31695303, WASH. POST (Dec. 19, 2013)....15

Christopher Weaver, *Millions Trapped in Health-Law Coverage Gap*, WALL ST. J. (Feb 10, 2014)....10

SUMMARY OF ARGUMENT

I. Lacking any tenable reading of the ACA's text, the Government and its *amici* resort to the policy claim that subsidies are good and so Congress must have wanted them everywhere. This simplistic claim fails because (i) general legislative "purpose" cannot defeat plain statutory text; (ii) it ignores Congress's other "purpose," inducing states to run Exchanges; and (iii) adhering to the ACA's text would have furthered Congress's desire to achieve nationwide subsidies, because states would have established their own Exchanges had they known that subsidies depended on it. Only because the IRS instead told states that there would be no consequences of opting out did Congress's twin goals not come to fruition.

II. The IRS Rule is not entitled to deference. It is implausible to believe that Congress gave the IRS discretion to authorize $150 billion *per year* in federal spending, particularly when Congress had directly spoken to this issue. Major economic decisions like these—indeed, *any* decisions granting tax credits—must be made unambiguously by Congress itself.

III. No barrier exists to this suit. The IRS Rule forces Appellants to spend *money*, on either insurance they do not want or a penalty. They are not required to incur that penalty and seek a refund before they may obtain judicial review.

IV. Finally, if this challenge succeeds, the IRS will have no legal basis to issue subsidies on federal Exchanges within this Circuit.

ARGUMENT

I. THE GOVERNMENT CANNOT DEFEND THE IRS RULE, WHICH IS CLEARLY *ULTRA VIRES*.

To sustain the IRS Rule, the Government must persuade this Court that "Exchange established by the State under section 1311 of the [ACA]" actually means "Exchange established by a state *or HHS* under § 1311 *or § 1321*." But there is no basis for interpreting the Act's language to mean the opposite of what it says. Construing the language to mean what it says does not produce an absurd result, and that is the end of the matter. The Government's conclusory claim that Congress must have intended subsidies to be available nationwide, because a world without subsidies would be bad, provides no legitimate basis for departing from the text; anyway, that syllogism ignores that, as the district court admitted, Congress expected to induce all states to establish Exchanges by conditioning billions of subsidy dollars on such participation, just as it intended to induce all states to expand Medicaid by conditioning billions of federal dollars on such expansion.

A. The Government's Reading of § 36B Is Irreconcilable with Its Plain Text, the ACA's Structure, and All Canons of Construction.

Grasping for a textual hook for the IRS Rule, the Government offers the confused theory that the Act directs HHS to establish Exchanges "on behalf of" states that fail to (Govt.Br.14) and thereby somehow equates the HHS-established Exchanges with state-established ones, such that any reference to the latter must necessarily include the former. (Govt.Br.16-19.) That is not remotely tenable.

1. At the outset, it is worth observing how bizarre this theory truly is. The Government argues that Congress intended to capture *all* Exchanges in the subsidy provision, yet inexplicably added the limitations "established by the State" and "under section 1311," which could only defeat that supposed intent. Why add those modifiers? The Government gives no answer. This is not "superfluity" in the usual sense of *redundancy*, the proverbial belt-and-suspenders that sometimes is used in complex statutes and may thus be overlooked. (Govt.Br.19.) Rather, the Government's claim is that Congress inserted limiting clauses that facially state the *opposite* of what it actually meant. Imprecise "short-hand references" are one thing (Govt.Br.19), but why use needless, contradictory long-hand?

It is not as if the Act unthinkingly says "Exchange established by the State under section 1311" *every time* it wants to refer to all Exchanges. Rather, the Act often refers to "Exchange," standing alone, and elsewhere uses the broad phrase "Exchange established under this Act." ACA § 1312(d)(3)(D)(i)(II), *codified at* 42 U.S.C. § 18032(d)(3)(D)(i)(II). The latter is obviously how Congress would have written § 36B had it intended to extend subsidies to HHS Exchanges. Indeed, it is how the Government's *own brief* (mis)describes that provision, confirming that this is the only sensible way to convey the meaning that the Government attributes to the Act. (Govt.Br.4 (describing Act as subsidizing coverage purchased on "Exchanges created pursuant to the Act").)

On the Government's view, therefore, Congress not only added unneeded and misleading modifiers, but did so even though it demonstrably knew how to make its supposed intent perfectly clear. *But see Custis v. United States*, 511 U.S. 485, 492 (1994). Why? Again, the Government has no answer.

Moreover, the Government's theory is that Congress silently equated HHS-established Exchanges under § 1321 of the ACA with state-established Exchanges under § 1311, such that any reference to the latter implicitly includes the former. But, if so, why did Congress—in the *very same* section of the ACA—*expressly* specify *both* types of Exchanges when it imposed certain reporting requirements? 26 U.S.C. § 36B(f)(3). (*Cf.* Govt. Br. 22.) Once again, the Government is silent.

2. In the face of the above, the Government contends that references to "Exchange established by the State under section 1311" include those established by HHS under § 1321, because "Congress defined the Exchange established by the [HHS] Secretary on behalf of a State to be the Exchange that a State would have established if it had elected to establish an Exchange." (Govt.Br.14.) Unpacking that convoluted logic exposes the emptiness of the Government's position.

First, the ACA does not say that HHS should establish Exchanges "on behalf of" declining states. It says that HHS should establish Exchanges "within" them. ACA § 1321(c), *codified at* 42 U.S.C. § 18041(c). That is language of *geography*, not *agency*. And even if the Act said that HHS should act "on the State's behalf,"

that Exchange would still be established *by HHS for the state*, not *by the state*. Indeed, the crucial premise allowing HHS to act is the state's *failure* to. HHS thus cannot be acting "on the State's behalf," because the state has decided that it does *not* want to establish an Exchange. HHS is acting *instead of* the state.

Second, the ACA's instruction to HHS to establish "*such* Exchange," ACA § 1321(c), *codified at* 42 U.S.C. § 18041(c) (emphasis added), if the state fails to do so, does not mean that the Act somehow directed HHS, impossibly, to establish a "state-established Exchange." (Govt.Br.17.) The word "such" cannot bear the weight of this contorted reading. All it means is that, as the Government says, HHS should establish the same "Exchange that *the State would otherwise have established* if it had elected to create an Exchange." (Govt.Br.17.) But that HHS-established Exchange is still established by HHS, not "by the State." As the Government's use of conditional terms implicitly acknowledges, in this scenario the state has *not* established an Exchange.

The Government's argument about the word "such" is also refuted by the section of the Act that *expressly* equates territorial Exchanges with state Exchanges. It provides that a territory may elect to "establish[] *such an Exchange*," referring back to the provision authorizing states to establish Exchanges—and then proceeds to say that such territory "shall be treated as a State." ACA § 1323(a)(1), *codified at* 42 U.S.C. § 18043(a)(1). If the Government were correct that mere use of the

term "such" creates an equivalence with state Exchanges, however, the Act would not have needed also to include *express* equivalence language for territories.

The Government also relies on the ACA's global definition of "Exchange" as an Exchange "established under section 1311" (Govt.Br.17-18), but Appellants have already explained that this actually *bolsters* reading § 36B as limited to state-established Exchanges. (App.Br.21.) Contrary to the Government's non-sequitur, this definition of "Exchange" does not remotely define "Exchange established by the Secretary" as "the required State Exchange." (Govt.Br.18.) The former is a *fallback* for the latter. It therefore cannot be *the same thing*.

3. Of course, "Congress is free to define statutory terms in any way that it chooses" (Govt.Br.18), and so Congress could easily have defined or deemed an HHS-established Exchange as "established by the State." But Congress chose *not* to do so here, although it did precisely that in the territorial provision, as noted. An earlier version of the ACA (which included a default national Exchange) likewise stated that, if a state established an Exchange, "references in this subtitle to the Health Insurance Exchange … shall be deemed a reference to the State-based Health Insurance Exchange." (A247-248 (H.R. 3962, § 308(e), 111th Cong. (2009)).) Such clear "deeming" language contrasts starkly with the opaque cross-references and unwritten implications that the Government offers here.

For the IRS or this Court to nonetheless read "deeming" language into the Act would "ignore [the] duty to pay close heed to both what Congress said and what Congress did not say in the relevant statute." *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 824 F.2d 108, 115 (D.C. Cir. 1987).[1]

4. The Government and its *amici* also object that the phrase "established by the State under section 1311" appears in the formula for calculating a subsidy (specifically, in the definition of "premium assistance credit amount"), as opposed to the provision defining "applicable taxpayer." (Govt.Br.15, 20; Amicus Br. of Families USA 21-22.) But the "applicable taxpayer" provision specifies only the eligible *people*, while the "premium assistance credit amount" provision specifies the eligible *purchases*. There is no dispute that the latter is what limits subsidies to coverage purchased on an "Exchange" (rather than from insurers directly), so the Government cannot argue that the relevant clause does not limit eligibility.

Nor is it unusual for Congress to put conditions on eligibility for tax credits into the formula for calculating their value—even if the conditions require states to take action so as to render their citizens eligible. *E.g.*, 26 U.S.C. § 35(a), (b), (e)

---

[1] An *amicus* insists that Congress sometimes deems one actor to be another, even without saying so. Amicus Br. of Families USA 16. But its examples show no such thing. They simply reflect common law of agency, under which a lawyer may file pleadings for a client, companies can be liable for misconduct by their hirees, and doctors' associates may be subject to privacy laws. *Id.* 16-17 & n.25. But HHS is obviously *not* an agent of a state that refuses to establish an Exchange under any recognizable concept of agency, and Congress did not *deem* it to be.

(also using definition of "coverage month" to restrict tax credit to state-sponsored coverage that meets federal criteria).[2] And in the ACA itself, the Medicaid "deal" is set forth in a provision defining Medicaid *eligibility*—just like the condition on subsidies. *See* ACA § 2001(a), *codified at* 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (amending definition of who must be eligible under state Medicaid programs).

5. It is worth noting that the Government's disregard for § 36B's text extends beyond the IRS Rule. Last month, HHS issued a bulletin that eliminates even the requirement that, to be eligible for a subsidy, coverage must be purchased "through an Exchange."[3] It provides that if someone enrolled in "coverage offered outside of the [Exchange]," the Exchange may later "deem the individual to have been enrolled … through the [Exchange]." (Bulletin at 2.) The individual "will be treated for all purposes as having been enrolled through the Marketplace since the initial enrollment date," and eligible on a "retroactive" basis for subsidies. (*Id.*)

Thus, not only does the Government believe that it may simply "deem" HHS-established Exchanges to be established "by the State" notwithstanding a lack of any statutory authority for such transmogrification, but that it may also

---

[2] As the Government admits, this provision "permitted States to designate additional kinds of insurance that would meet certain minimum standards" and therefore qualify for the tax credit. (Govt.Br.20 n.7.) Thus, exactly as Appellants said, § 35 of the Internal Revenue Code, just like § 36B, offers a tax credit for certain residents of a state upon the state's compliance with federal "standards."

[3] http://cms.hhs.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/retroactive-advance-payments-ptc-csrs-02-27-14.pdf ("Bulletin").

"deem" individuals who buy coverage *outside* an Exchange to have purchased it *on* an Exchange. If such administrative revision—simply "deeming" A to be B—were permitted, there is literally nothing in the ACA (or any other law) that could not just as easily be reversed by mere agency fiat.

B. The Government Fails To Show Any Absurdity Resulting from the Subsidy Provision's Plain Text.

Because § 36B's text is clear, this Court's inquiry is at an end. The only permissible basis for departure from plain text is absurdity, *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004), and even the Government does not contend that it would have been *absurd* for Congress to use subsidies to induce states to establish Exchanges. Congress conditions its spending to induce state action *all the time*. The Government says that Congress did not actually "intend" such a condition here (Govt.Br.38), but the question is not whether "Congress" subjectively "intended" a result, but whether *the Act's language* produces an *objectively* absurd result. *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000).

The Government argues that *other* provisions of the ACA would be absurd if HHS is not treated as a "State" throughout the ACA. But no absurdity is created *anywhere* in the Act by giving § 36B its plain-text meaning. And even if *other* provisions using *different* language are absurd (which they are not), that still would provide no basis for rewriting § 36B's perfectly reasonable language. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring).

Notably, all of the Government's supposed anomalies pale in comparison to the one created by many states' unanticipated refusal to expand their Medicaid programs: Millions of Americans are too *wealthy* for Medicaid yet too *poor* for subsidies under § 36B, creating a "gap" Congress obviously did not intend. *See* Christopher Weaver, *Millions Trapped in Health-Law Coverage Gap*, WALL ST. J. (Feb 10, 2014). Just as that anomaly caused by unanticipated state refusal to join in the Medicaid expansion does not allow the IRS to expand § 36B subsidies to those with incomes below the statutory cutoff, any miscalculation about state creation of Exchanges does not allow it to expand subsidies to HHS Exchanges.

1. The Government argues that, without subsidies, HHS Exchanges would "nonsensical[ly]" (Govt.Br.22) have to report as "zero" the "amount of any advance payment of [the § 36B] credit" paid to each enrollee, and report nothing for two other categories of data concerning subsidies to enrollees. 26 U.S.C. § 36B(f)(3)(C), (E), (F). Nothing here is nonsensical: The *same* "[i]nformation requirement" applies to both HHS- and state-established Exchanges. Some data points may be irrelevant for federal Exchanges (because they offer no subsidies) but those data points *are* relevant to state-run Exchanges—and so not superfluous. The *other* data points ("level of coverage," "total premium," and "name, address, and TIN" of each enrollee, 26 U.S.C. § 36B(f)(3)(A), (B), (D)) are equally relevant to HHS Exchanges, which is why they are subject to reporting too.

The Government disputes that there is any reason to require reporting except "to enable the IRS to reconcile end-of-year premium tax credits" with advance payments. (Govt.Br.23.) But reporting applies, by its terms, to "any health plan provided through the Exchange," even plans purchased *without* subsidies. 26 U.S.C. § 36B(f)(3). Congress thus clearly had an interest in obtaining this data about *all* enrollees, whether they receive subsidies or not.

Indeed, as Appellants explained, Treasury needs enrollment information to enforce the individual mandate. The Government responds that Congress already requires *insurers* to report enrollment information. (Govt.Br.24.) But, of course, the ACA is broadly premised on distrust of insurance companies, so it makes good sense to require *Exchanges* to report enrollment information too. And, in fact, the IRS has by rule *eliminated* insurers' duty to report as to coverage offered through an Exchange, citing the fact that "Exchanges must report on this coverage under section 36B(f)(3)." 79 Fed. Reg. 13220, 13221 (Mar. 10, 2014). That confirms the critical importance of reporting by federal Exchanges, even absent subsidies.

Moreover, the same ACA section requires a "study on affordable coverage" (ACA § 1401(c)), providing yet another reason to track data on *all* Exchanges. That the study is meant to evaluate "the impact of the tax credit" (Govt.Br.25) only proves Appellants' point: HHS Exchanges without subsidies are the ideal "control group" for studying subsidies' effects on affordability.

2. The Government contends that nobody would be eligible to purchase coverage on HHS Exchanges unless one assumes that HHS somehow acts as a state when it creates an Exchange, because the Act defines "qualified individual" as someone who "resides in the State that established the Exchange," ACA § 1312(f)(1)(A), *codified at* 42 U.S.C. § 18032(f)(1)(A). (Govt.Br.25-28.) But Appellants identified three sensible ways to read this provision without creating absurdity, each of which is preferable to the Government's wholesale revision of the Act. Indeed, if the Government loses this case, it will surely adopt just such a reading, not take the position that nobody may enroll on HHS Exchanges.

Of Appellants' three readings, the Government ignores one completely—that, in light of the Act's definition of "Exchange," this eligibility provision in § 1312 of the Act does not apply *at all* to the HHS-established Exchanges that a subsequent provision of the Act (§ 1321) will authorize. (App.Br.32-33.) That alone resolves the supposed absurdity *consistent* with the Act's plain text.[4]

Moreover, the Government is unable to point to *any* language that actually *restricts* Exchange enrollment to "qualified individuals." The "Consumer Choice" provision says that qualified individuals have the *right* to enroll in "any" plan

[4] It does not matter that there is no separate provision defining "qualified individuals" for HHS Exchanges (Govt.Br.26), because the ACA authorizes HHS to "take such actions as are necessary to implement," for federal Exchanges, the requirements applicable to state Exchanges. ACA § 1321(c), *codified at* 42 U.S.C. § 18041(c). So HHS could, by regulation, restrict enrollment to state residents.

available to them. ACA § 1312(a)(1), *codified at* 42 U.S.C. § 18032(a)(1). On its face, this provision only requires *inclusion* of *qualified* individuals, not *exclusion* of *unqualified* individuals. Nor would such a reading allow illegal aliens to enroll (Govt.Br.27), because the Act says *expressly* that such aliens "may not be covered under a qualified health plan … offered through an Exchange," ACA § 1312(f)(3), *codified at* 42 U.S.C. § 18032(f)(3) (which would be unnecessary if the Act already excluded everyone but "qualified individuals").[5]

In short, there is no reason to believe that the qualified individual provision would bar enrollment on federal Exchanges—and certainly no reason to leverage any such absurd result to ignore the plain text of a distinct ACA provision.

3. Finally, the Government points to the provision precluding states from restricting Medicaid eligibility until an Exchange "established by the State under section 1311" is operational. As the Government correctly says, this is "to protect Medicaid recipients from the loss of coverage until [they] … would be able to obtain subsidized health insurance." (Govt.Br.28.) This *proves Appellants' point*: Until the state establishes its own Exchange, no "subsidized" coverage is available, and so Medicaid beneficiaries will still need "protection" from Medicaid cutbacks.

[5] Incarcerated individuals are not similarly barred from Exchanges. But, conclusory assertions aside (Govt.Br.27), Congress may well not have wanted to categorically exclude *all* such individuals from buying coverage on an Exchange, if, for example, they were to be released from prison within the year.

The Government claims that Appellants' reading may "present constitutional problems" that its interpretation avoids. (Govt.Br.29.) That is irrelevant and false. Irrelevant, because the question is whether interpreting the law to mean what it says creates an *absurd* result that *Congress* could not have *intended*, not whether a non-absurd intended result would be viewed as constitutionally problematic by a court. And false, because the constitutional issue surely does not turn on whether the federal "coercion" persists past 2013 (and Appellants never said otherwise). If anything, the maintenance-of-effort rule is *less* constitutionally problematic *after* 2013, when states have the option of eliminating it by establishing an Exchange.

C. The Government's Broad "Purpose" Argument Is Irrelevant, Wrong, and Directly Refuted by the Legislative History.

All that remains is the claim that Congress's "purpose" would be ill-served by § 36B's plain text. The Government argues that having subsidies nationwide is critical to Congress's goal of affordable coverage, and this Court should therefore so read the Act. (Govt.Br.31-36.) There are multiple fatal flaws with this argument.

1. "[V]ague notions of a statute's 'basic purpose' are … inadequate to overcome the words of its text." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). Courts cannot "rewrite" statutes based on "general congressional purpose and various snippets of legislative history." *Sigmon Coal*, 226 F.3d at 294. Particularly since the Government effectively abandons any reliance on legislative history—arguing only that it does not *confirm* the *plain-text* meaning of the ACA

(Govt.Br.41-42)—there would be no way (other than through the text) to determine what Congress "wanted," even if that *were* the relevant inquiry. *But see Republic of Argentina v. Wetlover, Inc.*, 504 U.S. 607, 618 (1992) (question is "not what Congress 'would have wanted' but what Congress enacted").[6]

Thus, even where ACA provisions *did* have the adverse policy consequences that the Government warns of here, everyone recognized that only *Congress* could fix them. For example, Congress extended guaranteed issue and community rating to U.S. territories—but not the individual mandate; this "messed up the individual market in the Northern Mariana Islands so badly" that it is "literally impossible for an individual to buy a new policy" there now. Sarah Kliff, *Think Your State Has Obamacare Problems? They're Nothing Compared to Guam*, 2013 WLNR 31695303, WASH. POST (Dec. 19, 2013). Yet HHS recognized that it could not change the law "[a]s written by Congress." *Id.*; *see also* Amici Br. of Economic Scholars 22-25. And the ACA's CLASS Act offering generous long-term care benefits but no individual mandate, meaning that "only those who were sick and anticipating needing long-term care would enroll." Sarah Kliff, *The Small End of*

[6] *Amici* renew some legislative-history arguments that even the district court did not invoke. The banal legislator statements simply assume that all states would establish Exchanges; they do not purport to address HHS Exchanges. The Joint Committee on Taxation referred repeatedly to "state" Exchanges in discussing the subsidies. And the House report on a subsequent bill said nothing about federal Exchanges. Amici Br. of Members of Cong. *et al.* 12-14, 18-19. These arguments were thoroughly debunked below. *See* Pls.' SJ Opp.-Reply, ECF 40, at 18-24.

Ted Kennedy's Big CLASS Act Dream, 2013 WLNR 23345419, WASH. POST (Sep. 18, 2013). Unworkable, *Congress* repealed it. *Id.*

2. In any case, unlike those provisions, § 36B's plain text is eminently compatible with the "purpose" the Government attributes to Congress. Just as Congress intended to ensure expanded Medicaid nationwide by threatening to withhold funding from non-compliant states, Congress intended to ensure state-established Exchanges with subsidies nationwide by threatening to withhold subsidies from residents of non-compliant states. After all, what state would refuse to establish an Exchange if its citizens would lose billions of federal dollars? The Government objects that Congress would not have threatened to harm "people who need" subsidies (Govt.Br.37), but Congress plainly did just that in the Medicaid provision. Moreover, if the Government is right that, absent subsidies, premiums would increase for all, that *underscores* why states would have felt compelled to establish Exchanges: Not doing so would hurt not only low-income constituents, but people of *all* income levels—plus insurers, hospitals, and all of the other *amici* interest groups that have directed these policy arguments to this Court. Amicus Br. of Am. Hosp. Ass'n; Amicus Br. of Am. Health Ins. Plans. The political pressure would have been insurmountable, if not *before* the scheme took effect then surely *after*, when premiums on HHS Exchanges were revealed to be far higher than those in neighboring state Exchanges.

The Government's state-legislator *amici* prove the point, conceding that had they known "that their constituents would lose access to these tax credits unless the State established its own Exchange, they would have vigorously advocated for a state-run Exchange citing this potential consequence." Amici Br. of Members of Cong. *et al.* 5. Of course, they did *not* know, precisely because the IRS told them that states would be treated identically whether they participated or not.[7] Any allegedly adverse policy effects from lack of subsidies on federal Exchanges thus arose only because the IRS failed to faithfully transmit Congress's condition on the receipt of subsidies and thereby discouraged states from establishing Exchanges.

In short, conditioning subsidies on the state's establishment of an Exchange would accomplish *both* the Act's purpose of inducing states to undertake this thankless task *and* (almost certainly) its purpose of universal subsidies. The IRS Rule, in contrast, completely subordinates the former purpose to the latter, by eliminating *any* incentive for states to undertake the arduous obligation of running an Exchange. The Government cannot dispute that the subsidies are an enormous incentive, or rationally suggest why states would run Exchanges absent them.

---

[7] Similarly proving the point is the Georgia Health Insurance Exchange Advisory Committee report that the Government cites (Govt.Br.36 n.9)—which, *after* the IRS proposed its Rule, 76 Fed. Reg. 50931, 50934 (Aug. 17, 2011), noted that Georgians would be eligible for subsidies whether the Georgia Exchange "is established by the state or federal government" and so concluded that it would be "less appealing" for the state to establish its own Exchange. Georgia Health Ins. Exchange Adv. Comm., *Report to the Governor* 15 (Dec. 15, 2011).

That being so, it vainly attempts to fill this gaping hole by contending that Congress was *indifferent* to whether states ran Exchanges. (Govt.Br.37-40.) That is baseless. The Act says that states "shall" establish Exchanges and authorizes funding only for state-run Exchanges. ACA § 1311(a), (b), *codified at* 42 U.S.C. § 18031(a), (b). And the model the Government describes—in which states could *choose* to run Exchanges but were offered no benefits to induce them to do so—is precisely the model that the *House of Representatives* adopted. (A242-248 (H.R. 3962, § 308, 111th Cong. (2009)).) But that approach was "politically untenable and doomed to failure," *Halbig v. Sebelius*, No. 13-623, 2014 WL 129023, at *17 (D.D.C. Jan. 15, 2014), because of Senator Nelson's opposition. (App.Br.2-3.)

The Government responds that the ACA differs from the rejected House bill because only the latter included a "national insurance exchange." (Govt.Br.42.) That is sophistry: Both the House bill and the ACA allow states the choice of being served by an Exchange run by the federal government or by the state itself. The only difference is that the ACA induces states to choose to establish it. That inducement was critical to the goal of the swing Senate votes—keeping the federal government *out* of the process entirely.[8]

---

[8] Tellingly, none of the Senators who objected to the House bill joined the Government's congressional amicus brief. Rather, its signatories favored a national Exchange from the start, and now are trying to achieve through the IRS and this Court what they were unable to achieve in Congress. This is precisely why legislators' *ex post* accounts of legislative history have no weight.

In short, as even the district court recognized, "Congress did not expect the states to turn down federal funds and fail to create and run their own Exchanges. Instead, Congress assumed that tax credits would be available nationwide because every state would set up its own Exchange." (JA311) That is a complete answer to the argument that § 36B's plain text conflicts with congressional purpose.[9]

3. In sum, just as no court would disregard the plain language of the Act's Medicaid "deal" to further Congress's "purpose" of expanding Medicaid, there is no basis to reject § 36B's plain text just because it created the (unrealistic) theoretical potential of slightly undermining Congress's goal of universal subsidies. Indeed, the Government's arguments exemplify why the Supreme Court forbids courts to analyze what Congress "wanted" in the abstract and instead requires them to exclusively focus on what Congress *did* in the statute.[10]

---

[9] The sources that *amici* contend show "widespread awareness" that states would refuse to establish Exchanges actually show only that there was opposition to the Act *generally*. Amici Br. of Members of Cong. *et al.* 10-11. That is exactly why Congress knew it needed to provide robust incentives for state participation.

[10] The Government also cites the *NFIB* plaintiffs' brief on severability for the proposition that Congress did not intend Exchanges to exist without subsidies. (Govt.Br.35-36.) It is true that *eliminating* subsidies would mean the Exchanges would not work in the "*manner*" contemplated. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). But *conditioning* subsidies fulfills the Act's dual purposes by inducing state-established Exchanges with little cognizable risk of the states rejecting subsidies. Incidentally, the Government took the *opposite* view in *NFIB*, telling the Court that subsidies and Exchanges were "stand-alone provision[s] that independently advanc[e] in distinct ways Congress's core goal of expanded affordable coverage." Br. for Resps. on Severability, 2012 WL 273133 at *33.

II. THE IRS RULE IS NOT ENTITLED TO *CHEVRON* DEFERENCE.

The Government's request for *Chevron* deference does not survive scrutiny. *First*, the Government does not deny that the decision whether to offer subsidies on HHS Exchanges is of massive political and economic importance. Indeed, the Government says that, within ten years, subsidies will cost over $150 billion *per year*. (Govt.Br.5.) But "courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies." *Loving v. IRS*, No. 13-5061, 2014 WL 519224, at *8 (D.C. Cir. Feb. 11, 2014). The IRS was simply not empowered to make such important fiscal policy decisions. Rather, Congress "has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

The Government cites *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), but that case concerns whether to defer on issues implicating agencies' "jurisdiction." *Id.* at 1868. *Chevron* applies both to interpretations that "define the agency's 'jurisdiction'" and those involving "applications of jurisdiction the agency plainly has." *Id.* Nothing in *Arlington* calls into question the longstanding background presumption that Congress does not implicitly delegate questions of enormous economic importance to agencies—a presumption the D.C. Circuit invoked in *Loving* well after *Arlington* was decided. *Loving*, 2014 WL 519224, at *8.

Further confirming that Congress did not want the IRS to make this call, the Internal Revenue Code contains no ambiguity. Even the Government argues that the "relevant provisions are in Section 1321 of the Act," *i.e.*, in *Title 42* of the U.S. Code (Govt.Br.16), which supposedly implicitly equate HHS and state Exchanges. But the IRS has no authority to construe Title 42, just as HHS has no authority to construe the Tax Code. This parallels a recent case, in which the VA sought to construe "collective bargaining," a term appearing in a law it administered but as a cross-reference to a law it did *not* administer. *Am. Fed'n of Gov't Employees v. Shinseki*, 709 F.3d 29, 30-31, 33 (D.C. Cir. 2013). While *Shinseki* ultimately concluded that the statutory text was not ambiguous, it also held that no *Chevron* deference was appropriate in any event. *See id.* at 33.

The Government insists that deference is nonetheless proper because the IRS and HHS engaged in "coordinated" regulation. (Govt.Br.46-47.) But coordination does not help matters when one agency (the IRS) has no authority to construe the allegedly ambiguous statutory language and the other agency (HHS) has no power to construe tax laws. *Cf. DeNaples v. Office of Comptroller of Currency*, 706 F.3d 481, 488 (D.C. Cir. 2013) (noting that D.C. Circuit has "repeatedly pointed to … agencies' joint administrative authority … to justify *refusing* deference"). None of the Supreme Court cases that the Government cites for the contrary proposition actually addresses this issue, and all predate *DeNaples*.

Accordingly, even if there were any ambiguity here, it would not fall to the IRS to address it. Such ambiguity would be resolved, rather, by application of the venerable clear-statement rule for tax benefits; the major economic decision to dole out billions of dollars in tax credits must be *unambiguous*, to protect Congress's Spending and Taxing Powers. (App.Br.50-52.)

The Government objects that "the Supreme Court has never suggested that this principle displaces *Chevron* deference." (Govt.Br.47.) But the Court *has* held that an agency may act only if ambiguity remains after "employing traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, and that "no ambiguity" exists if a canon requires ambiguity to be construed in one direction, *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001). Just like canons concerning (for example) retroactivity, extraterritoriality, constitutional avoidance, and Indian law (App.Br. 50-51), the tax-credit canon does exactly that—and the Government provides no basis to distinguish it.[11]

[11] In *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011), the Court expressly stated that tax exemptions should by "construed narrowly." *Id.* at 715. Because the Government construed the tax exemption narrowly there, *Chevron* and the tax-credit canon reinforced one another. And the Government's competing canon, that tax laws should be uniform nationwide, is irrelevant here. Appellants' interpretation creates a *nationwide* scheme: every person making a qualified purchase (*i.e.*, on a state Exchange) receives a credit. This is just as nationwide as an education tax credit available only to those paying tuition to an "accredited" institution, even though not *all* tuition payments qualify. Anyway, the "express language" of § 36B overcomes any "nationwide" presumption. *Burnet v. Harmel*, 287 U.S. 103, 110 (1932).

III. THE GOVERNMENT'S HALF-HEARTED JURISDICTIONAL ARGUMENTS ARE MERITLESS.

The Government renews two jurisdictional arguments that even the district court rejected. They are facially meritless. Appellants plainly have standing to challenge the IRS Rule, because it requires them to pay money for a product they do not want or else incur a penalty. Nor is there any genuine doubt that the APA allows them to challenge unlawful final agency action.

A. It Is Undisputed That the IRS Rule Imposes Economic Injury on at Least Appellants Hurst and Levy, Plainly Conferring Standing.

The Government does not dispute that Appellants Hurst and Levy would qualify for an exemption from the individual mandate, but for the subsidy to which the IRS Rule entitles them. (Govt.Br.49; JA33.) Accordingly, as the district court found, "they will be forced to buy insurance or pay the [individual mandate] penalty" as a result of the IRS Rule. (JA298) "It follows that [they] have standing because their economic injury is real and traceable to the IRS Rule." (JA299)[12]

The Government objects that Appellants want to purchase "catastrophic" coverage, which it says is more expensive than subsidized comprehensive ACA-compliant coverage, such that Appellants are not harmed by receipt of subsidies. (Govt.Br.48-50.) The premise is false. Appellants never said that they wanted to

[12] There is a factual dispute regarding whether Appellants King and Luck are exempt from the individual mandate penalty even under the IRS Rule. This does not matter, because it is enough for only one plaintiff to have standing. *Shaw v. Hunt*, 154 F.3d 161, 167 (4th Cir. 1998).

buy catastrophic coverage. They said they did *not* want to buy comprehensive, ACA-compliant coverage. (JA25, 27) Because of the IRS Rule, they are required to do so (or pay a penalty). That is quintessential Article III injury.

Anyway, even if Appellants *did* want to buy catastrophic coverage, that would not call their standing into question: They are injured by being compelled to purchase a product that they do not want, and it is irrelevant how Appellants would spend the money that the IRS Rule compels them to spend on that unwanted item. That is why the *NFIB* plaintiffs had standing to challenge the individual mandate, without any inquiry into what they would do with their money if the mandate were struck down. The cognizable Article III injury, here as there, is that the Government is forcing individuals to spend their money on a product that they do not want. The Government does not cite a single case in its discussion of standing, because no authority exists for its novel argument.[13]

---

[13] Incidentally, there are good reasons why people might prefer catastrophic coverage over subsidized comprehensive coverage. *First*, because tax credits are not calculated until the *end* of the year, it is far from clear at the time of enrollment whether (as the Government claims) § 36B subsidies will end up making the latter cheaper than the former. 26 U.S.C. § 36B(f)(2). The IRS Rule thus compels purchase of an expensive product that *might* end up being subsidized and precludes purchase of a cheap product at a fixed price. *Second*, to obtain the § 36B subsidies for the comprehensive coverage, one must go through the administrative hassles of purchasing coverage on the malfunctioning Exchanges, which is itself Article III injury even apart from any economic harm.

B. Appellants Are Not Required To Violate the Individual Mandate and Incur Penalties Before They May Challenge the IRS Rule.

Next, the Government contends that even if Appellants have standing, the only way in which they may challenge the IRS Rule is to violate the individual mandate, incur a tax penalty, sue for a *refund*, and raise their challenge as a basis for recovering the tax. (Govt.Br.50-52.) Precedent forecloses that argument.

First, if the Government were correct, the Supreme Court could not have reached the constitutionality of the individual mandate in *NFIB*, but instead would have told the plaintiffs there to violate that mandate, incur a penalty, and raise the constitutional issue in a refund suit. Of course, it did not—because it held that the individual mandate penalty does *not* fall within the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a), which requires certain challenges to proceed by way of tax-refund suit. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2584 (2012). Since the AIA did not bar the suit, it could proceed in pre-enforcement posture. Likewise, when this Court held in *Liberty University, Inc. v. Lew*, 733 F.3d 74 (4th Cir. 2013), that the ACA's employer mandate is not a "tax" under the AIA, it did not proceed to hold that the challenge to that mandate was nonetheless barred by "equitable principles" and that the employers had to violate it, incur the tax, and then seek a refund. Rather, it considered the pre-enforcement claim on the merits. *See id.* at 91-95. From a justiciability perspective, this suit is no different from *NFIB* or *Liberty*.

On the Government's contrary view, the AIA is a superfluous nullity, because "general equitable principles" supposedly preclude Appellants' suit even though the AIA concededly *permits* it. (Govt.Br.50.) That is untenable. Moreover, since the AIA does not apply here, the AIA cases cited by the Government—*Bob Jones University v. Simon*, 416 U.S. 725 (1974), and *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (en banc)—are wholly inapposite.

Second, the premise of the Government's argument is that a tax-refund suit would be an "adequate" remedy for plaintiffs like Appellants. But that misses the fundamental point that requiring Appellants to incur penalties and only *then* obtain judicial review forces them to bear the risk of suffering those penalties if their legal challenge is rejected. Pre-enforcement review under the APA is meant precisely to spare parties such Hobson's choices. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967). An *ex post* remedy is thus plainly not "adequate" under the APA. *Bowen v. Massachusetts*, 487 U.S. 879, 904-05 (1988) (rejecting "unprecedented" argument that damages action was "adequate substitute for prospective relief"); *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (alternative remedy inadequate where party would be forced to accrue "potential liability" prior to judicial review). An after-the-fact, case-by-case tax refund cannot substitute for an "APA action" seeking broad "prospective relief." *Cohen*, 650 F.3d at 731-33.

IV. IF THIS CHALLENGE SUCCEEDS, THE IRS WILL HAVE NO LEGAL AUTHORITY TO PAY SUBSIDIES WITHIN THIS CIRCUIT.

At the end of its brief, the Government warns that even if this Court agrees with Appellants, nobody can prevent it from paying the unauthorized subsidies to "millions of other people" in this Circuit. (Govt.Br.52-54.)

That is a stunning claim, in effect amounting to a threat to flout this Court's ruling. If this Court holds that the IRS Rule is contrary to the ACA's text, that eliminates the only legal basis to distribute Treasury funds to those who purchase coverage on HHS Exchanges in Virginia, West Virginia, North Carolina, and South Carolina. If the IRS pays such subsidies anyway, it will plainly be acting illegally. *Ithaca College v. NLRB*, 623 F.2d 224, 228 (4th Cir. 1980) (rejecting NLRB "non-acquiescence," because "it is the courts that have the final word on matters of statutory interpretation" and "as must a district court, an agency is bound to follow the law of the Circuit").

It does not matter that this "is not a class action" because a decision here would only "bind" *parties*: Appellees. (Govt.Br.52.) As a matter of *precedent*, individuals who file suits demanding subsidies in district courts in this Circuit will lose, but that is because when this Court decides a question of law, its ruling obviously binds everyone in this Circuit. And IRS employees who continue to pay such subsidies will be committing a crime. 31 U.S.C. § 1341 (prohibiting payments from Treasury not "authorized by law"); *Chrysler Corp. v. Brown*, 441

U.S. 281, 312 (1979) (regulations promulgated without "strict compliance with the APA" do not have "force and effect of law").

While it has no bearing on proper resolution of this case, the Government's threat to disobey this Court's ruling is a telling signal of its desperation.

CONCLUSION

The judgment below should be reversed.

March 25, 2014

Respectfully submitted,

/s/ Michael A. Carvin
MICHAEL A. CARVIN
Lead Counsel
YAAKOV M. ROTH
JONATHAN BERRY
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Email: macarvin@jonesday.com

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,993 words, excluding the parts of the brief exempted by that Rule, as counted using the word-count function on Microsoft Word 2007 software.

March 25, 2014

/s/ Michael A. Carvin
MICHAEL A. CARVIN
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of March 2014, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Pursuant to this Court's Rules, I will also file eight copies of the foregoing document, by UPS overnight delivery, with the clerk of this Court.

March 25, 2014

/s/ Michael A. Carvin
MICHAEL A. CARVIN
Counsel for Appellant