[ORAL ARGUMENT SCHEDULED FOR MARCH 25, 2014]

No. 14-5018

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

JACQUELINE HALBIG, *et al.*,

Appellants,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *et al*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (NO. 13-623 (PLF))

BRIEF FOR AMICI CURIAE SENATOR JOHN CORNYN, SENATOR TED CRUZ, SENATOR ORRIN HATCH, SENATOR MIKE LEE, SENATOR ROB PORTMAN, SENATOR MARCO RUBIO, CONGRESSMAN DAVE CAMP, AND CONGRESSMAN DARRELL ISSA IN SUPPORT OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies that:

(A) Parties and *Amici*: All parties and *amici* appearing before the district court and those that have filed an appearance or notice of appearance in this court are listed in the Appellants' Brief, except for the following *amici*: The Pacific Research Institute; the Cato Institute; America's Health Insurance Plans; the State of Oklahoma; the State of Alabama; the State of Georgia; the State of West Virginia; the State of Nebraska; the State of South Carolina; Consumer's Research; National Federation of Independent Business Small Business Legal Center; Senator John Cornyn; Senator Ted Cruz; Senator Orrin Hatch; Senator Mike Lee; Senator Rob Portman; Senator Marco Rubio; Congressman Dave Camp; and Congressman Darrell Issa.

(B) Rulings Under Review: References to the ruling at issue appear in the Appellants' Brief.

(C) Related Cases: To the best of Counsel's knowledge, there are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

Dated: February 6, 2014

/s/ Charles J. Cooper
Counsel for Amici Curiae

CERTIFICATE IN SUPPORT OF SEPARATE BRIEF

It was impracticable for *amici* to join in any other amicus brief in support of the Appellants because, as Members of Congress, they have a distinct perspective on how courts should interpret the statutes they write. In particular, *amici* believe that it is especially important that courts honor the Constitution's allocation of the legislative and judicial functions by leaving to Congress the task of deciding whether to amend a statute's text. In light of their experience as elected representatives, *amici* are also concerned that the district court's decision upending a legislative compromise could make it more difficult for Congress to forge such compromises in the future. The D.C. Circuit's local rules recognize that governmental officials such as members of Congress frequently have a separate interest and perspective on the legal questions before this Court. D.C. Cir. Rule 29(d)(4) (requirement that *amici* on the same side join in a single brief "does not apply to a governmental entity").

Dated: February 6, 2014

/s/ Charles J. Cooper
Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES*

Cases **Page**

Legislative Materials and Rules

* Authorities upon which we chiefly rely are marked with asterisks.

Other

GLOSSARY

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

PERTINENT STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Appellants' Brief.

INTEREST OF AMICI CURIAE[1]

John Cornyn is the Senate Minority Whip. 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. Mike Lee is the Ranking Member of the Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights. Rob Portman is the Ranking Member of the Senate Finance Subcommittee on Fiscal Responsibility and Economic Growth. Marco Rubio is the Ranking Member of the Senate Foreign Relations Subcommittee on East Asian and Pacific Affairs. Congressman Dave Camp is the Chairman of the House Ways and Means Committee. Congressman 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 ACA's implementing regulations 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

[1] Pursuant to FED. R. APP. P. 29, amici certify that both parties, through their respective counsel, consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund its preparation or submission.

to the ACA. Another *amicus*, the Ranking Member of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, recently released a report that outlines the current Presidential Administration's repeated attempts to ignore the ACA's statutory text, including by adopting the interpretation the Government defends in this Court.[2] 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(c) 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://oversight.house.gov/wp-content/uploads/2014/02/IRS-Rule-OGR-WM-Staff-Report-Final1.pdf.

SUMMARY OF ARGUMENT

I. The text of 26 U.S.C. § 36B(c) is clear: the federal exchange established under ACA § 1321 is not "an Exchange established by the State under

[2] 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), www.scribd.com/doc/190442365/The-Legal-Limit-The-Obama-Administration-s-Attempts-to-Expand-Federal-Power-Report-No-2-Obamacare.

section 1311." The district court nevertheless refused to follow the plain meaning of that unambiguous statutory text, reasoning that if similar language in *other* provisions of the ACA were read in the same way, *those* provisions would produce absurd results. This was error. Nothing about withholding tax credits from federal exchange enrollees is absurd, and even if reading other provisions of the statute in accordance with their plain terms would produce absurd results (and as Appellants have demonstrated, it would not) that would at most warrant interpreting those other provisions to avoid absurdity.

The district court's decision is especially troubling because it effectively rewrites the plain text of a provision that was the specific subject of extensive negotiations in the Senate—negotiations that culminated in a compromise that made the ACA's enactment possible. To judicially amend that provision now would change the terms of the deal, striking a new bargain that Congress did not and could not have struck.

More fundamentally, the district court erred in assuming that every provision of the sweeping, complex 2700-page ACA must fit together in a seamless, unified whole. The ACA's unusual legislative history makes that assumption patently false in this case. Most of the statutory text at issue was originally part of a bill that, when it passed the Senate, was expected to be extensively revised prior to enactment. But amending provisions of the bill (unrelated to budgetary items)

became impossible when the election of Senator Scott Brown cost Democratic supporters of the Senate bill their filibuster-proof majority. The bill's supporters then decided to enact the Senate bill as is, making only those few changes that could be made by a simple majority vote through the budget reconciliation process. Under the circumstances, it is hardly surprising that the ACA is disjointed, confusing, and often internally inconsistent.

II. Again, section 36B(c)'s text is unambiguous: the health insurance exchange established by the federal government is not an exchange "established by [a] State." But even if the provision's language admitted of doubt on this point, the district court was surely wrong to conclude that the statute *unambiguously* compels the IRS's contrary interpretation, thus precluding the IRS from revisiting this issue in the future. At an absolute minimum, this Court should refuse to give IRS's highly questionable interpretation a permanent place in the United States Code.

ARGUMENT

I. The District Court's Decision Raises Serious Separation of Powers Concerns by Effectively Amending the ACA in an Attempt To Make It Coherent.

It is not uncommon for this Court, or any federal court, to be confronted with the challenge of interpreting an omnibus law that is not, as it is often put, a "model of clarity." The Affordable Care Act takes this familiar problem to extraordinary, perhaps unprecedented, heights. It is no exaggeration to say, as the

Supreme Court once said of the Telecommunications Act of 1996, that the 2700-page ACA "is in many important respects a model of ambiguity or indeed even self-contradiction." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). Often, such legislation is an open congressional invitation to interpretive discretion in the administering agency. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-45 (1984). But not in this case.

The agency interpretation at issue here, adopted by the IRS and affirmed by the court below, slams headfirst into two brick walls. First, the text of the operative provision, section 36B(c), is simple and perfectly clear: a national health insurance exchange established by the federal government is not "an Exchange established by the State." And no amount of agency, or judicial, legerdemain can change that. Second, the peculiar legislative history of the ACA makes clear that the plain language of section 36B(c) reflects a specific political compromise that enabled enactment of the ACA. In other words, it is quite clear that if the text of section 36B(c) had been revised before passage to actually *say* what the IRS and the court below now say it *means* (*i.e.*, "an exchange established by the State *or the federal government*"), the ACA would not have become law. We turn first to that legislative history.

A. Background

Healthcare legislation was a top priority for President Obama from early in his first term. But rather than proposing specific legislation, as President Clinton had done unsuccessfully fifteen years before, President Obama laid out a broad set of principles and left to Congress the task of drafting a bill. To that end, the chairmen of three House Committees—the Education and Labor, the Energy and Commerce, and the Ways and Means Committees—began drafting legislation in March 2009. After months of committee hearings and public debate, those efforts culminated on November 7, 2009, with the passage of House Bill 3962. *See generally* John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 LAW LIBR. J. 131, 137-43 (2013). Among many other things, the House bill would have created a single national exchange on which individuals eligible for tax credits could purchase federally-subsidized health insurance. *See* H.R. 3962, 111th Cong. § 301 (Nov. 7, 2009).

While the House bill was working its way towards passage, the Senate Committee on Health, Education, Labor and Pensions (HELP) and the Senate Committee on Finance each simultaneously began crafting their own healthcare bills. The HELP Committee completed its work first, voting its bill out of committee on July 15, 2009. For many months, the Senate Finance Committee's

efforts were defined by bipartisan negotiations among the so-called "group of six" senators. But when those negotiations failed to bear fruit, Committee Chairman Max Baucus ultimately introduced a bill that was voted out of committee on October 13. Cannan, *supra*, at 146-48. Unlike House Bill 3962, both the HELP and Finance Committee bills left to the States primary responsibility for establishing insurance exchanges. *See* S.1679, 111th Cong. § 142 (2009) (HELP Committee bill); S.1796, 111th Cong. § 1205 (2009) (Finance Committee bill).

With the Senate Republican caucus united in opposition, Majority Leader Harry Reid led the effort to combine the HELP and Finance Committee bills in a way that could garner support from all 60 Democratic and independent senators necessary to overcome a Republican filibuster. Majority Leader Reid introduced his proposed compromise legislation on November 18, and for the next month he negotiated with representatives from the White House and ten Democratic senators in an effort to hammer out a final deal. *See* E.J. Dionne Jr., Editorial, *Why the Senate Must Pass Health Bill by Christmas*, WASH. POST (Dec. 7, 2009), www.washingtonpost.com/wp-dyn/content/article/2009/12/06/AR2009120602380.html. At last, after agreeing to numerous changes demanded by the more moderate senators and promising to allocate to several of their States substantial additional Medicaid dollars, Majority Leader Reid had a deal on December 18. *See Senate Democrats Win over Key Holdouts To Reach 60 Votes on Reform Bill*,

CNN (Dec. 19, 2009), www.cnn.com/2009/POLITICS/12/19/health.care. He introduced the agreed-upon amendments to the bill the next day and made the first of three successive cloture motions necessary to end debate and force a vote on the final text of the Senate bill. After a series of procedural delays forced by Republican senators, the bill finally passed on December 24.

At that time, it was expected that the Senate bill would be extensively revised during negotiations with the House over the legislation's final text. *See* Shailagh Murray & Lori Montgomery, *Senate Passes Health-Care Bill, Now Must Reconcile It with House*, WASH. POST (Dec. 25, 2009), www.washingtonpost.com/wp-dyn/content/article/2009/12/24/AR2009122400662.html. But everything changed on January 19, 2010, when Democrats unexpectedly lost their filibuster-proof Senate majority as a result of Republican Scott Brown's victory in Massachusetts. The bill's supporters considered attempting to pass a revised bill before the new Senator could be seated, but ultimately decided on a different procedural strategy: enacting the draft bill the Senate had already passed and making limited amendments to the new law through budget reconciliation. Through reconciliation, a simple majority of senators can pass budget-related legislation without the threat of a filibuster. Although many of the Act's supporters in the House were bitterly disappointed with the Senate bill, they ultimately

concluded that it was "better than nothing,"[3] passing it on March 21. President Obama signed the Affordable Care Act (ACA) into law on March 23. A few amendments to the ACA that were feasible to make through the budget reconciliation process became law two days later.[4]

Despite many months of contentious public debate over healthcare legislation, members of Congress had very little occasion even to carefully read the Act's 2700-page text, let alone carefully to study and to harmonize its many complex, ill-fitting, and even inconsistent provisions through the normal bicameral legislative process. House Speaker Nancy Pelosi famously urged House Democrats "to pass the bill so that you can find out what is in it,"[5] and Chairman Baucus has

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[3] House Majority Leader Steny Hoyer, *quoted in* Carrie Budoff Brown & Patrick O'Connor, *The Fallout: Democrats Rethinking Health Care Bill*, POLITICO (Jan. 21, 2010), www.politico.com/news/stories/0110/31693.html.

[4] Debate on measures proposed through budget reconciliation is limited to 20 hours and not subject to a filibuster. However, any senator who opposes a budget reconciliation provision may object on the ground that it has no budgetary impact. *See* S. Con. Res. 21, 110th Cong.; 2 U.S.C. § 644 (Byrd Rule). If the chair sustains the objection, its ruling can only be overturned by a vote of three-fifths of the Senate's membership (60 senators, if no seats are vacant). *See generally* Cong. Research Serv., *The Budget Reconciliation Process: The Senate's 'Byrd Rule'* (2010), http://assets.opencrs.com/rpts/RL30862_20100702.pdf. Accordingly, although it is possible to amend legislation through budget reconciliation, amendments that have no budgetary impact require 60 votes—votes the Act's supporters did not have.

[5] Marguerite Bowling, *Video of the Week: We Have To Pass the Bill So You Can Find Out What Is in It*, THE FOUNDRY (Mar. 10, 2012, 3:30 PM), http://blog.heritage.org/2010/03/10/video-of-the-week-we-have-to-pass-the-bill-so-you-can-find-out-what-is-in-it.

publicly admitted that he never read the bill.[6] Senators were given only five days to review the voluminous, complex Act before voting on it. And by January 2010, the Act's supporters believed they had no political alternative but to pass, at any cost, the bill that had already been approved by the Senate; any changes to that bill, even changes designed solely to clarify and harmonize its disparate, ill-fitting provisions, would doom the entire measure to a Republican filibuster in the Senate. Thus, given the widespread belief that the failure to enact healthcare legislation of some sort would have been "the worst result for everybody who has supported this bill,"[7] the Senate bill was enacted into law.

B. The plain meaning of section 36B(c)'s unambiguous text is the law.

The text of 26 U.S.C. § 36B(c) is perfectly clear: the federal exchange established under section 1321 is not "an Exchange established by the State under section 1311." Accordingly, under the plain meaning of the statutory text, federal subsidies are not available to individuals who purchase insurance through a federal exchange. Neither the IRS nor this Court may depart from that text unless "the

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[6] Jordan Fabian, *Key Senate Democrat Suggests that He Didn't Read Entire Healthcare Reform Bill*, THE HILL (Aug. 25, 2010, 2:40 PM), http://thehill.com/blogs/blog-briefing-room/news/115749-sen-baucus-suggests-he-did-not-read-entire-health-bill.

[7] David Axelrod, *quoted in* Carrie Budoff Brown & Patrick O'Connor, *The Fallout: Democrats Rethinking Health Care Bill*, POLITICO (Jan. 21, 2010), www.politico.com/news/stories/0110/31693.html.

plain language of the statute would lead to patently absurd consequences" that "Congress could not possibly have intended." *Public Citizen v. Department of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment) (emphasis, citations, and internal quotation marks omitted).

Far from absurd, there are good reasons why Congress might have wanted to withhold tax credits from those who purchase insurance on the federal exchange. Even some of the Act's supporters, including the pivotal Senator Nelson, opposed creation of a federal exchange for fear that it would "start us down the road of . . . a single-payer plan."[8] And recent events illustrate why others might have preferred that the federal government stay out of the complex, politically-fraught business of operating an exchange. For those reasons, Congress may well have wished to provide an incentive to States to establish insurance exchanges by withholding tax credits from citizens of States that refused to do so. At the same time, it could have very reasonably decided to create a federal exchange to enhance access to health insurance in non-cooperating States by making the insurance market more efficient and publicizing the expansion of Medicaid. *See* 42 U.S.C. § 18031(4) (requiring exchange to create website that presents health insurance options in a standardized format and informs users whether they are eligible for Medicaid); President Barack

[8] Carrie Budoff Brown, *Nelson: National Exchange a Dealbreaker*, POLITICO (Jan. 25, 2010, 7:59 PM), www.politico.com/livepulse/0110/Nelson_National_exchange_a_dealbreaker.html.

Obama, Remarks on the Affordable Care Act and the Government Shutdown in the Rose Garden, Washington, D.C. (Oct. 1, 2010), www.whitehouse.gov/the-press-office/2013/10/01/remarks-president-affordable-care-act-and-government-shutdown. ("Just visit healthcare.gov, and there you can compare insurance plans, side by side, the same way you'd shop for a plane ticket on Kayak or a TV on Amazon.").

To be sure, the district court reasoned that if other provisions of the ACA were read in the same way, they would produce absurd results. A353-A357. But as appellants demonstrate, that is not so—26 U.S.C. § 36B(f), 42 U.S.C. § 18032, and the various other provisions of the ACA on which the district court relied can be read in accordance with their plain terms without creating absurdity. Appellants' Br. 30-36. And in any event, any absurdity in other provisions of the statute would at most justify the Court in correcting the specific sections in which the absurdity was found; such absurdity most certainly would not give the Court a roving license to rewrite other provisions of the statute as it sees fit. *See Public Citizen*, 491 U.S. at 470 (Kennedy, J., concurring in the judgment) (absurdity rule "remains a legitimate tool of the Judiciary . . . only as long as the Court acts with self-discipline"); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring) (when construing statute to avoid absurd results, court should adopt interpretation that "does least violence to the text" while still avoiding absurdity).

More fundamentally, the district court erred in assuming that it must do, through interpretation, that which Congress deliberately chose not to do—harmonize the various provisions of the ACA into a coherent whole that fits neatly together. *See* A351. Principled statutory construction requires no such inflexible approach. To the contrary, courts often read the same or similar terms in long, convoluted statutes like the ACA to have different meanings. Thus, in *General Dynamics Land Systems, Inc. v. Cline*, the Supreme Court held that the term "age" has different meanings in different parts of the ADEA. 540 U.S. 581, 594-598 (2004). And in *Northeast Hospital Corp. v. Sebelius*, this Court rejected both parties' efforts to reconcile "two inconsistent sets of statutory provisions" that appeared in the same Act. 657 F.3d 1, 11 (D.C. Cir. 2011).[9] Those and many other cases acknowledge that the legislative process sometimes fails to produce internally consistent statutes. When there is reason to expect that language in an Act may not cohere, reference to its overall design and structure frequently is not a viable interpretive approach. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 883 (9th Cir. 2001) (en banc) ("Clearly, neither a logician nor a

[9] *See also, e.g., Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) ("[M]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section."); *Center for Arms Control & Non-Proliferation v. Pray*, 531 F.3d 836, 840-41 (D.C. Cir. 2008) (reading the word "utilized" to have different meanings in different sections of the Federal Advisory Committee Act).

grammarian will find comfort in the world of CERCLA. It is not our task, however, to clean up the baffling language Congress gave us . . . ."); *Cabell Huntington Hosp., Inc. v. Shalala*, 101 F.3d 984, 992 (4th Cir. 1996) (Luttig, J., dissenting) (observing that Medicare statute uses varied language for "no reason whatever that anyone . . . has been able to divine").

C. The ACA's unusual legislative history makes it especially inappropriate for the Court to revise section 36B(c) in an effort to harmonize it with the rest of the Act.

Rewriting the plain language of section 36B(c) in an attempt to reconcile it with other provisions of the ACA or a perceived overarching statutory "purpose" would be particularly inappropriate in light of two important features of the ACA's unusual legislative history. First, the legislative history reveals that section 36B(c) was the specific subject of extensive negotiations and its language embodies a legislative compromise that this Court is constitutionally bound to honor. Second, the legislative history also shows that the ability of the Act's supporters to amend the Senate bill's disparate, ill-fitting provisions was unexpectedly cut off prior to passage, eliminating any justification for the Court to treat the Act's provisions as a unified, coherent whole. Together, those features of the legislative history make it both improper and unwise to judicially amend section 36B(c) in an effort to harmonize it with the rest of the statute.

1. The text of section 36B(c) embodies a legislative compromise that this Court is constitutionally bound to honor.

The provisions at issue in this case were the product of contentious political compromise that any administrative or judicial amendment would be certain to upset. The Act's supporters did not have the votes to establish a single-payer system or even to take what was feared to be a significant first step towards such a system—the establishment of a national exchange providing federal subsidies to low-income participants. Supporters of healthcare legislation needed 60 votes in the Senate to overcome a filibuster, and one Senator essential to the 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."[10] Senator Nelson was ultimately able to leverage his opposition to "scrub[ ] dozens of . . . things out of it that federalized the bill."[11] 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 on the very question at issue here.[12]

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[10] Brown, *Nelson: National Exchange*, *supra* note 8.

[11] United States Senator Ben Nelson, Interview with LifeSiteNews.com (Jan. 26, 2010), www.lifesitenews.com/news/archive/ldn/2010/jan/10012603.

[12] Chief Justice Roberts acknowledged that the ACA embodies a delicate legislative compromise during oral argument on the severability issue in *NFIB v. Sebelius*:

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. That is the teaching of *Barnhart v. Sigmon Coal Co.*, in which the Supreme Court refused to allow an agency to rewrite the text of a provision that required a seemingly incongruous result, explaining that "[d]issatisfaction . . . is often the cost of legislative compromise" and that to ignore the provision's "delicate crafting" would undo a deal that was critical to passage. 534 U.S. 438, 461-62 (2002); *see also Artuz v. Bennett*, 531 U.S. 4, 10 (2000) ("We hold as we do because respondent's view seems to use 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

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> The reality of the passage—I mean, this was a piece of legislation [where there] had to be concerted effort to gather enough votes so that it could be passed. And I suspect with a lot of these miscellaneous provisions that Justice Breyer was talking about, that was the price of a vote: Put in the Indian health care provision and I will vote for the other 2700 pages. Put in the black lung provision, and I'll go along with it.

No. 11-393, Tr., at 27 (Mar. 28, 2012). *See also NFIB v. Sebelius*, 132 S. Ct. 2566, 2673 (2012) (Scalia, Thomas, Kennedy & Alito, JJ., dissenting) (provision of the ACA not severable because to preserve it "would be to eliminate a significant *quid pro quo* of the legislative compromise and create a statute Congress did not enact" (internal quotation marks omitted)).

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. To do otherwise would make legislation even more difficult to enact.

More fundamentally, for this Court to upset the legislative compromise that the unambiguous text of section 36B(c) embodies would effectively strike a new and different compromise, one the Congress demonstrably could not and did not pass itself. The Constitution reserves the power to enact, amend, or repeal statutes to Congress alone. *Clinton v. City of New York*, 524 U.S. 417 (1998); *see* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 59 (2001). For that reason, courts must follow the clear command of a statute's text, even when doing so leads to seemingly incongruous results. The Supreme Court did exactly that in *United States v. Locke*, explaining:

> [T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. . . . On the contrary, *deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that the legislative purpose is expressed by the ordinary meaning of the words used*.

471 U.S. 84, 95 (1985) (emphasis added) (internal quotation marks omitted); *see also TVA v. Hill*, 437 U.S. 153, 173 (1978) (refusing to "ignore the ordinary meaning of plain language" despite consequences apparently not contemplated by other provisions of federal law).[13]

The language of section 36B(c) memorializes a legislative compromise that was necessary to the ACA's passage. To cast that compromise aside, as the district court did in the name of advancing the Act's supposed general purpose, would effectively amend the law by handing its most enthusiastic supporters a victory that they were unable to achieve through the political process. "'The Act must do everything necessary to achieve its broad purpose' is the slogan of the enthusiast, not the analytical tool of the arbiter." *See MetroPCS Cal., LLC v. FCC*, 644 F.3d 410, 414 (D.C. Cir. 2011) (quoting *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting)).

[13] The IRS's effective amendment of section 36B(c)'s plain text is especially problematic because it usurps Congress' "exclusive authority to collect taxes to provide for the general welfare of the United States." *Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen v. United States*, 129 F.3d 195, 197 (D.C. Cir. 1997) (citing U.S. CONST. art. I, § 8, cl. 1). Deference to that congressional prerogative is the rationale for the longstanding canon that tax exemptions and credits must be expressed in clear and unambiguous terms. *See id.* at 197-98; Appellants' Br. at 49-52. Because Congress legislates with that background interpretive principle in mind, it provides an independent and sufficient basis for vacating the IRS's regulation.

2. Given the ACA's unusual legislative history, the Court has no basis on which to presume that its disparate provisions use language consistently.

As previously discussed, the ACA took an unusual path through Congress. The House passed its version of the healthcare legislation on November 7, 2009, and the Senate followed suit with its own very different bill on December 24. At the time, the Senate version was thought to be little more than a placeholder—one chamber's opening bid in bicameral negotiations that were expected to shape the law's final content. But after supporters of the healthcare legislation unexpectedly lost their filibuster-proof Senate majority, they decided to change course and enact the Senate's bill into law as is, making only limited revisions that were possible through the budget reconciliation process by majority vote in the Senate. With the Act's supporters having thus enacted into law what amounted to a preliminary draft that they could not readily amend, it is hardly surprising that the Act's text does not entirely cohere as a unified and carefully calibrated whole.

And in fact it is immediately apparent to anyone who bothers to read the ACA that Congress passed a law that in places is disjointed, confusing, and even self-contradictory. *See* Jeffrey H. Kahn, *The Operation of the Individual Mandate*, TAX NOTES 521, 527 (2011), http://ssrn.com/abstract=1904892 (observing that "the technical drafting of the [ACA] is atrocious"). To name only two obvious examples, the Act contains three section 1563's and amends section 2721 of the

Public Health Service Act twice to say two different things. *See* ACA § 1563 (expressing "the sense of the Senate"); ACA § 10107 (redesignating ACA § 1562 as § 1563 and creating a third § 1563); ACA § 1562(a)(2)(A), (c)(12). Such mistakes evidence a bill stitched together from disparate sources that had not yet been reconciled and that could never be reconciled once further amendments became politically infeasible.

In light of the ACA's unique procedural history and patent inconsistencies, it would be a fool's errand to attempt to harmonize the Act's 2700 pages of text. Instead, the best the Court can do is follow the plain language of every provision insofar as doing so does not produce absurd results. Indeed, separation of powers principles compel that approach here, for the statutory text before the Court—warts and all—is the *only* text that Congress had the votes to pass. As this Court has previously recognized in somewhat similar (though less extreme) circumstances, "[t]he haste and confusion attendant upon the passage of this massive bill do not license the court to rewrite it; rather, they are all the more reason for us to hew to the statutory text because there is no coherent alternative to be gleaned from the historical record." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1092 (D.C. Cir. 1996).

II. At a Minimum, the Court Should Not Foreclose Future Administrations from Revisiting the IRS's Highly Questionable Interpretation of Section 36B(c).

The plain meaning of section 36B(c) is clear, and it must therefore be given effect rather than judicially amended. But whatever else may be said about the IRS's conclusion that the federal exchange established under section 1321 is somehow "an Exchange established by the State under section 1311," it surely is not unambiguously correct. The district court thus seriously erred in concluding otherwise. A362. That conclusion would preclude the IRS from promulgating a regulation that gives effect to the statute's plain language. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

The district court's ruling is contrary even to the statements of numerous IRS officials themselves, who have openly acknowledged outside the context of this litigation that the text and history of section 36B(c) present difficulties for the IRS interpretation. *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* (hereinafter "House Report"), at 18, 25 (Feb. 5, 2014), http://oversight.house.gov/wp-content/uploads/2014/02/IRS-Rule-OGR-WM-Staff-Report-Final1.pdf (reporting that IRS documents speculated that section 36B(c)'s failure to mention federal exchanges was a "drafting oversight" and

worried that the "apparently plain statutory language" favors the plaintiffs' interpretation); *id.* at 34 (documenting statements by Treasury officials that legislative history is "inconclusive"); *IRS: Enforcing Obamacare's New Rules and Taxes: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. 96 (2012) (statement of Douglas Shulman, Comm'r of the IRS) ("I think 36(b) has some contradictory language in it."). A ruling that the statute unambiguously compels the IRS's interpretation would also contradict the Congressional Research Service's considered view that "a strictly textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS's authority to issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a state-established exchange." Jennifer Staman & Todd Garvey, Cong. Research Serv., RL7-5700, *Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act*, at 8 (July 23, 2012).

Finally, in determining whether the IRS's interpretation is unambiguously correct, the Court should carefully consider the results of a recent House investigation into the agency's decisionmaking process. House investigators found that IRS officials failed to seriously grapple with the meaning of section 36B(c) despite believing that the textual question is difficult and that the legislative history is inconclusive. Among other things, House investigators found that the IRS

produced very little analysis on the meaning of section 36B(c) prior to issuing a proposed rule adopting its interpretation, deferring instead to the views of officials at the Department of Health and Human Services. House Report, at 15-19. Even after numerous commenters identified the issue as cause for concern, the IRS failed to undertake its own expert analysis. *Id.* at 20-23. Given the agency's failure to seriously grapple with the statutory text before adopting its interpretation, the Court should be reluctant to give that interpretation a permanent place in the statute.

CONCLUSION

The district court's decision should be reversed and the IRS Rule should be vacated.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 5613 words, excluding the parts exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and D.C. Cir. Rule 32(a)(1).

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Dated: February 6, 2014

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of February 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. I will also file eight copies of the foregoing document, by hand delivery, with the clerk of this Court.

February 6, 2014

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