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. 13-cv-00630-JRS)

BRIEF *AMICI CURIAE* OF MEMBERS OF CONGRESS AND STATE LEGISLATURES IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of Congress who led the enactment of the Patient Protection and Affordable Care Act ("ACA") (specifically, the chairs of the committees that crafted the legislation and the House and Senate leaders who melded the respective committee versions into the bill that was ultimately enacted).[2] *Amici* also include members of state legislatures who served during the period when their governments were deciding whether to create their own Exchanges under ACA. Based on their experiences, *amici* are familiar with the statute and with the debates that took place in Congress regarding enactment of the statute and in state legislatures regarding its implementation.

Amici have an interest in ensuring that ACA is construed by the courts in accord with its text and purpose. In that regard, *amici* submit this brief to address Appellants' assertion that the tax credits at issue in this case were intended to encourage States to set up their own health benefit Exchanges under penalty of withdrawal of crucial tax credits and subsidies for lower-income residents. As *amici* know from their own experiences, Appellants' assertion is inconsistent with the

[1] The parties have consented to the filing of this brief. *Amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

[2] Former Senator Baucus joins solely in his individual capacity as a former Member of the Senate.

text and history of the statute, and with its most fundamental purpose—to make health insurance affordable for all Americans, wherever they reside. *Amici* well understand, as they well understood when the legislation was under consideration in Congress and state capitals, that, without premium assistance tax credits and subsidies, the Exchanges themselves would be rendered inoperable, and, indeed, the effectiveness of other major components of the law, such as guarantees of affordable insurance for people with pre-existing health conditions and the "individual mandate" to carry insurance or pay a penalty, could be gravely jeopardized.

A full listing of congressional *amici* appears in Appendix A, and a full listing of state legislator *amici* appears in Appendix B.

SUMMARY OF ARGUMENT

In 2010, Congress enacted the Patient Protection and Affordable Care Act ("ACA"), a landmark law dedicated to achieving the single goal of widespread, affordable health care. To help achieve the statute's goal of "near-universal coverage," 42 U.S.C. § 18091(2)(D), ACA provides that individuals can purchase competitively-priced health insurance on American Health Benefit Exchanges ("Exchanges"), and it authorizes a federal tax credit for low and middle-income individuals who purchase insurance on the Exchanges. *Amici* are members of Congress who served while ACA was being passed and members of state legislatures who served while their state governments were deciding whether to create their

own Exchanges. *Amici* know from personal experience that ACA's core purpose is to achieve universal health care coverage and that the provision of tax credits and subsidies to low- and middle-income Americans is indispensable to achieving that purpose.

Appellants seek to invalidate the Internal Revenue Service regulation confirming that ACA's premium tax credits are available to all qualifying individuals, regardless of whether they purchase insurance on a state-run or federally-facilitated Exchange, on the ground that the statute authorizes tax credits only for individuals who purchase insurance on Exchanges "established by the State." In other words, according to Appellants, individuals who would otherwise qualify for the tax credits should be denied that benefit if they purchase insurance on a federally-facilitated Exchange. Because the textual basis for this argument is so weak (Appellants isolate a four-word phrase in one provision rather than considering the statute as a whole), they impute to Congress—in effect, to congressional *amici* themselves—the purpose of having structured the statute so that tax credits would be available only on state-run Exchanges, as a means of encouraging States to set up their own Exchanges. This objective, they claim, was so important that it overrode Congress's core purpose of broadening access to health insurance. *Amici* submit this brief to demonstrate that the purpose attributed to the statute by Appellants was, in fact, never contemplated by the legislators who enacted the law, nor

by the state officials charged with deciding whether to establish their own Exchanges.

The text, purpose, and history of the statute all support *amici*'s position. Indeed, there is no support for Appellants' position in either the statutory provisions that establish the Exchanges or in the provisions creating the relevant tax credits. Instead, Appellants rely on just four words in the provision setting out the formula for calculating the *amount* of the tax credit. Yet the provision on which they rely provides, at best, ambiguous support for their interpretation. It makes no sense to think that Congress would have hidden this condition in the formula provision if it were trying to send a message to state legislators that the tax credit would not be available if their State failed to set up its own Exchange. As congressional *amici* know from their experience drafting and enacting the legislation, Congress did not provide that the tax credits would only be available to citizens whose States set up their own Exchanges. The purpose of the tax credit provision was to facilitate access to affordable insurance through the Exchanges—*not*, as Appellants would have it, to incentivize the establishment of state Exchanges above all else, and certainly not to thwart Congress's fundamental purpose of making insurance affordable for all Americans.

Just as *amici* members of Congress never sent States the message that they needed to set up their own Exchanges for their citizens to qualify for the tax cred-

its, *amici* state legislators never understood Congress to be sending that message. To the contrary, *amici* state legislators understood that tax credits would be available to their citizens regardless of whether their State set up its own Exchange. State governments identified numerous implementation issues, but the possibility that the failure to set up a state-run Exchange would preclude that State's citizens from enjoying the tax credits and subsidies was never one of them. Indeed, some *amici* served in States that declined to set up their own Exchanges; had *amici* thought there was even a possibility 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.

In sum, as *amici* know from their own experience and as the record reflects, the availability of tax credits under ACA should not turn on whether an individual purchased insurance on a federal or state Exchange. Rather, such credits should be available to all qualified individuals regardless of where they live. As the district court correctly held, such a conclusion is the only one consistent with ACA's text, purpose, and history. Indeed, if the Court were to accept Appellants' version of the statute, it could destabilize important aspects of the law—such as the individual mandate and the system of Exchanges more generally—crucial to achieving the health care reforms intended by ACA, further evidence that such interpretation is wholly without merit. This Court should affirm the judgment of the district court.

ARGUMENT

The Affordable Care Act's express goal was to make health care insurance affordable for all Americans. *See, e.g.*, 42 U.S.C. § 18091(2)(D). To achieve that goal, the statute provides for the establishment of Exchanges on which individuals can purchase health insurance. Under the statute, each State may establish its own Exchange, 42 U.S.C. § 18031(b)(1), or if a State chooses not to establish an Exchange, the Secretary of Health and Human Services is directed to establish "such Exchange" in its stead, *id.* § 18041(c)(1). ACA also creates tax credits for low- and middle-income Americans to ensure that they can afford to purchase insurance on the Exchanges, *see id.* §§ 18081-18082, and it sets out a formula for calculating the amount of the credit, which is partially determined by the "monthly premiums for . . . qualified health plans . . . enrolled in through an Exchange established by the State," 26 U.S.C. § 36B.

Appellants argue that because the provision setting out the formula for calculating the amount of the credit refers to "an Exchange established by the State," the tax credits are available only to individuals who purchase insurance on state-run Exchanges. App. Br. 16-17. In other words, such credits are not available to individuals who purchase insurance on a federally-facilitated Exchange. According to Appellants, the statute was structured this way because its drafters calculated that the availability of the tax credits would induce States to establish their own

Exchanges, and they placed so high a priority on this objective that they structured the Exchange provisions to override—indeed, to empower state officials to thwart—the law's core purpose of promoting universal access to affordable health insurance. *Id.*

As *amici* can attest, that was never the purpose of the tax credit provision, which is clear from the debates within Congress over ACA's enactment and in state capitols over its implementation. Indeed, it was widely understood that the tax credits would be available to all Americans who satisfied the statute's income criteria regardless of where they lived. If, as Appellants argue, the threat of cutting off access to insurance for upwards of 80% of the individuals expected to gain access through the Exchanges was a "stick" to encourage state officials to establish state Exchanges, Congress surely would have communicated to the States that the availability of the tax credit turned on the establishment of a state Exchange, and the States would have understood that message. Neither event happened.

I. CONGRESS NEVER INTENDED—OR SUGGESTED TO THE STATES—THAT TAX CREDITS WOULD ONLY BE AVAILABLE TO INDIVIDUALS WHO PURCHASED INSURANCE ON STATE-RUN EXCHANGES

Amici members of Congress chaired the committees that crafted ACA and led the two chambers as the respective committee versions were melded into the bill that was ultimately enacted. They know from that experience that the tax credits are indispensable to the statute's goal of affordable health insurance for *all*

Americans and Congress accordingly prescribed such credits for *all* Americans, regardless of whether they purchased their health insurance on a state-run or federally-facilitated Exchange. Appellants' contrary conjecture, that the tax credits were primarily a "tool[] to encourage states" to establish Exchanges (App. Br. 4), is simply false, as the text and history of the statute make clear.[3] In fact, during the debates over ACA, no one suggested, let alone explicitly stated, that a State's citizens would lose access to the tax credits if the State failed to establish its own Exchange. Appellants do not—and cannot—explain how the tax credits could have "encourage[d]" States to establish Exchanges if state officials were never told that availability of the credits turned on whether or not a State created its own Exchange.[4]

The text of the statute makes clear that the state establishment of an Exchange was never viewed as a condition for the availability of tax credits. Indeed, "[o]ne would expect that if Congress had intended to condition availability of tax

[3] Significantly, even as Appellants' argument critically depends on the idea that the tax credits were a "tool[] to encourage states" to establish Exchanges, several states supporting Appellants have suggested just the opposite, i.e., that they would produce "profoundly negative consequences," and were thus a reason *not* to set up Exchanges. *See, e.g.*, Br. of Kansas et al. 14.

[4] Instead of focusing on the tax credit provision, Appellants repeatedly point to *other* provisions as evidence that Congress uses "carrots" and "sticks" to encourage state action. *See, e.g.*, App. Br. 13, 29, 44. No one disputes that Congress *can* use such tools; the question is whether Congress did so here. Congress did not.

credits on state participation in the Exchange regime, this condition would be laid out clearly in . . . the provision authorizing the credit." *Halbig v. Sebelius*, 2014 WL 129023, at *17 n.12 (D.D.C. Jan. 15, 2014). Yet Appellants point to nothing in that provision that would have indicated to States that their citizens would lose access to the tax credits if the State failed to set up its own Exchange. Instead, Appellants point only to language in the formula for calculating the tax credit, and even that language does not suggest, let alone state unambiguously, that the failure to set up a state-run Exchange would result in loss of the tax credit. Drawing the connection between the tax credits and the Exchanges so obliquely would hardly have made sense if, as Appellants argue, the purpose of the tax credit was to induce States to establish their own Exchanges. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("[Congress] does not . . . hide elephants in mouseholes.").[5]

Nor did members of Congress say anything during debates about the bill to suggest that States would need to set up their own Exchanges if they wanted their

[5] As Appellants' brief makes clear (*see* App. Br. 44), when Congress wants to make a benefit conditional, it knows how to do so. For example, with respect to tax credits for individuals enrolled in certain state-sponsored coverage, ACA provides that "'qualified health insurance' does not include any coverage described in subparagraphs (B) through (H) of paragraph (1) *unless the State involved has elected to have such coverage treated as qualified health insurance under this section*." 26 U.S.C. § 35(e)(2) (emphasis added); *cf.* Gov't Br. 21 n.7 (noting that ACA made some forms of insurance available nationwide and allowed States to designate additional kinds of insurance). Congress could, of course, have said that individuals would be eligible for the premium tax credits unless the State in which the individual is purchasing insurance has elected not to establish its own Exchange. It did not do so.

citizens to have access to the tax credits. If, as Appellants argue, members of Congress had intended to use the tax credits to encourage States to set up their own Exchanges, surely someone at some point would have suggested as much,[6] especially since, contrary to Appellants' claim otherwise (App. Br. 6, 47), there was widespread awareness that many States were contemplating *not* setting up their own Exchanges, *see, e.g.*, 156 Cong. Rec. H2207 (Mar. 22, 2010) (statement of Rep. Burgess); 155 Cong. Rec. S12,543 (Dec. 6, 2009) (statement of Sen. Coburn).[7] Yet no one did.

In fact, everyone understood that tax credits would be available to purchas-

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[6] Appellants assert that members of Congress did not emphasize the "carrot" and "stick" nature of the Medicaid expansion and thus there is no reason to expect that they would have made clear the "carrot" and "stick" nature of the exchange tax credits. But this is an apples and oranges comparison. The ACA Medicaid expansion was simply an incremental modification of a half-century old conditional grant program, the nation's largest. Indeed, all ACA did was add "[i]ndividuals [w]ith [i]ncome at or [b]elow 133 [p]ercent of the [p]overty [l]ine" to pre-existing categories of Medicaid-eligible individuals that States were required to cover to receive Medicaid funding. *See* 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). The legal effect of this addition thus required no explanation. That in no way explains why Congress would have failed to make clear the conditional availability of new tax credits for individuals as part of a brand-new health exchange arrangement.

[7] *See also, e.g.*, David D. Kirkpatrick, *Health Lobby Takes Fight to the States*, N.Y. Times, Dec. 28, 2009, *available at* http://www.nytimes.com/2009/12/29/health/policy/29lobby.html?_r=0; Philip Rucker, *Sen. DeMint of S.C. Is Voice of Opposition to Health Care Reform*, Wash. Post, July 28, 2009, *available at* http://articles.washingtonpost.com/2009-07-28/politics/36871540_1_health-care-reform-health-care-fight-health-care; Letter from Lloyd Doggett et al. to President Barack Obama (Jan. 11, 2010), *available at* http://www.myharlingennews.com/?p=6426.

ers on all of the Exchanges, federal and State. For example, on March 20, 2010, the three House committees with jurisdiction over ACA issued a summary fact sheet explaining how the Exchanges would operate under the Senate bill as amended by the then-pending reconciliation language. That fact sheet, while recognizing that there would be both State-run and federally-facilitated Exchanges, drew no distinction between them.[8] Specifically, it explained that the Senate bill would "create state-based health insurance Exchanges, for states that choose to operate their own exchanges, and a multi-state Exchange for the others," and that "[t]he Exchanges"—that is, all of them—would "make health insurance more affordable and accessible for small businesses and individuals."[9] The fact sheet also noted that ACA "[p]rovides premium tax credits," but did not suggest that they would only be available on state-run Exchanges. To the contrary, the summary stated the only criterion for the tax relief was income level.[10]

Similarly, on March 21, 2010, the Joint Committee on Taxation explained that the statute "creates a refundable tax credit (the 'premium assistance credit') for eligible individuals and families who purchase health insurance through *an ex-*

[8] *See* Health Insurance Reform at a Glance: The Health Insurance Exchanges (Mar. 20, 2010), *available at* http://housedocs.house.gov/energycommerce/EXCHANGE.pdf.

[9] *Id.*

[10] *Id.* at 2.

change."[11] The summary's explanation that the credit would be available to individuals who purchased health insurance through "*an exchange*" made clear that the tax credits would be available to all qualifying Americans, regardless of whether their State set up its own Exchange.

Senators also consistently indicated that the credits would be available to all individuals who purchased insurance on an Exchange, be it state-run or federally-facilitated. The manager of ACA, *amicus* Senator Max Baucus, noted that "[u]nder our bill, new exchanges will provide one-stop shops where plans are presented . . . . And tax credits will help to ensure all Americans can afford quality health insurance." 155 Cong. Rec. S11,964 (Nov. 21, 2009).[12] Likewise, Senator Dick Durbin, the Senate Majority Whip, described the availability of the tax credit in broad terms that made clear the only qualifying criterion was income level. According to Senator Durbin, "[t]his bill says, if you are making less than $80,000 a year, we will . . . give you tax breaks to pay [health insurance] premiums." *Id.* S12,779 (Dec. 9, 2009).[13] President Obama, too, indicated that the only criterion

[11] Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," at 12, *available at* http://www.jct.gov/publications.html (emphasis added).

[12] Senator Baucus also subsequently noted that "[a]bout 60 percent of those who are getting insurance in the individual market on the exchange will get tax credits," 155 Cong. Rec. S12,764 (Dec. 9, 2009), an estimate that could only be accurate if tax credits were available in *all* States.

for qualifying for the tax credits would be income.[14]

Finally, even ACA opponents in Congress recognized that that the only criterion that determined eligibility for the tax credits would be income. Congressman Paul Ryan, for example, asserted on March 15, 2010 that the tax credits were a "new open-ended entitlement that basically says that just about everybody in this country—people making less than $100,000, you know what, if your health care expenses exceed anywhere from 2 to 9.8 percent of your adjusted gross income, don't worry about it, taxpayers got you covered, the government is going to subsidize the rest."[15] Further, Ryan expressly stated that "[f]rom our perspective, these state-based exchanges are very little in difference between the House version—which has a big federal exchange . . . But what we're basically saying to people

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[13] Many Senators noted that the tax credits would be broadly available to help low- and middle-income Americans afford health insurance regardless of where they lived. *See, e.g.*, 155 Cong. Rec. S13,375 (Sen. Johnson) (Dec. 17, 2009); Sen. Mary Landrieu, *Breaking: Landrieu Supports Passage of Historic Senate Health Care Bill* (Dec. 22, 2009), 2009 WLNR 25819782; Sen. Mark Pryor, News Release (Dec. 24, 2009), 2009 WLNR 26018100; Sen. Russell Feingold, *Feingold Issues Statement on Health Care, Education Affordability Reconciliation Act of 2010* (Mar. 25, 2010), 2010 WLNR 6142152; *see also* Rep. Joe Sestak, News Release, *Rep. Sestak Votes for Final Passage of Historic Health Care Reform Legislation* (Mar. 23, 2010), 2010 WLNR 6031395.

[14] President Barack Obama Holds a Townhall Event, Nashua, New Hampshire, Roll Call (Feb. 2, 2010), 2010 WL 358122, at 18; *see* Kathleen Sebelius, HHS Secretary, National Press Club (Apr. 6, 2010), *available at* http://gantdaily.com/2010/04/07/hhs-secretary-sebelius-warns-americans-against-health-insurance-crooks.

[15] House Committee on the Budget Holds a Markup on the Reconciliation Act of 2010, Roll Call, 2010 WL 941012 (Mar. 15, 2010).

making less than 400% FPL . . . don't worry about it. Taxpayers got you covered."[16]

Again, everyone recognized that many States would likely decline to set up their own Exchanges. *See supra* at 10. Yet the President and members of Congress made clear that "all Americans" who satisfied the income criteria would be entitled to the tax credits. No one suggested, let alone explicitly stated, that tax credits would only be available to individuals in States that set up their own Exchanges. *See* JA275 (letter from CBO Director Douglas Elmendorf to Rep. Darrell Issa stating that "the possibility that those subsidies would only be available in states that created their own exchanges did not arise during the discussions CBO staff had with a wide range of Congressional staff when the legislation was being considered").

Ignoring all of this evidence, Appellants argue that "the limited legislative history firmly supports the proposition that Congress conditioned the subsidies on state creation of Exchanges as a means to induce states to act." App. Br. 43.[17] Ac-

[16] *Id.* at 98.

[17] In a brief *amici curiae*, congressional opponents of ACA argue (Br. of Cornyn et al. 15) that this court is "constitutionally bound" to read the § 36B phrase "established by the State" in isolation, out of its statutory context, and accept Appellants' narrow interpretation—rather than follow the district court's ruling that "[c]ourts have a duty to construe statutes as a whole." 2014 WL 637365, at *11. To ground this novel claim, these Congressional opponents elaborate a narrative portraying that textual phrase as "embod[ying]" a "legislative compromise," brokered on the Senate floor by *amicus* Senate Majority Leader Harry Reid; the

cording to Appellants, four pieces of evidence support that proposition. In fact, none do. As the district court held, "the lack of *any* support in the legislative history of the ACA indicates that [Appellants' interpretation of section 36B] is not a viable theory." 2014 WL 637365, at *14 (emphasis added).

To start, Appellants assert that "conditioning subsidies on state Exchanges was proposed early on" (App. Br. 44), but they do not point to any proposal in the actual legislative record. Instead, they point to an unpublished academic paper, a paper that is nowhere even mentioned in the voluminous record of the ACA debates. Moreover, even if that paper had been considered, that would not support Appellants' position. The paper actually suggested *multiple* ways in which Congress could encourage state participation in the Exchanges. Specifically, it stated that "Congress could . . . provide a federal fallback program to administer exchanges in states that refused to establish complying exchanges. *Alternatively* it could . . . offer[] tax subsidies for insurance only in states that complied with fed-

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"statutory language that emerged," their brief contends, "was the product of lengthy negotiations on the very question at issue here"—and, moreover, "was necessary to the ACA's passage." Br. of Cornyn et al. 7, 14-15, 18. This argument has no basis in fact: the pertinent text was included in the bill reported by the Senate Finance Committee, at no point a focus of controversy or even attention, and never altered on the floor as part of any "deal." S. 1796, 11th Cong. § 1205(a) (2009). The brief from congressional opponents of ACA presents no reason to circumvent the district court's manifestly correct statutory construction.

eral requirements."[18] As *amici* know and the record reflects, Congress chose the former option.

Second, Appellants claim that "the Senate Committees working on ACA legislation took up [the suggestion in that academic paper]." *Id.* at 45. But to support this assertion, they cite a provision drafted by only one of the committees involved in drafting ACA, and the committee that took it up (HELP) was not the committee (Finance) that was the source of the Exchange provisions relevant to this appeal. Thus, the provision is irrelevant to interpreting the Finance Committee-drafted provisions at issue here. If anything, the draft HELP provision underscores that Congress knows how to draft conditional grant provisions when it wants to do so.

Third, Appellants argue that *amicus* Senator Baucus, chair of the Finance Committee which was responsible for drafting the Exchange provisions, "used the conditional nature of the subsidies to justify his jurisdiction over the Exchanges and related regulations of health coverage in the draft ACA." App. Br. 45. Again, that is simply not accurate. Appellants point to an informal exchange during a Committee mark-up session, but video of the exchange makes clear that Senator

[18] Timothy S. Jost, *Health Insurance Exchanges*, O'Neill Institute, Georgetown Univ. Legal Ctr., no. 23, at 7 (Apr. 7, 2009), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1022&context=ois_papers (emphasis added).

Baucus never said what Appellants attribute to him.[19] Moreover, as congressional *amici* know (but Appellants apparently do not), the Finance Committee has jurisdiction over all issues related to taxes and thus would have had jurisdiction whether or not the credits were available on both federal and state Exchanges. Thus, while *amicus* Senator Baucus said that the committee had jurisdiction because tax credits would be available on the state-run Exchanges, he never suggested that tax credits would *only* be available on state-run Exchanges.

Finally, Appellants argue that the "House had little choice but to accede to the Senate bill [with the provision making tax credits conditional] after the election of Senator Scott Brown deprived ACA supporters of a filibuster-proof majority." App. Br. 46. But the fact that the provision was not amended does not support Appellants' position: the provision was not amended because, as previously discussed, no one then interpreted it in the way Appellants now do.[20] Indeed, the legislative history makes clear that Congress has never sought to make the availability of tax credits conditional on States establishing their own Exchanges. Congress has three times amended the section at issue here and each time the legislation, and

[19] Michael F. Cannon, *Exactly What Is Max Baucus Saying Here?*, Cato At Liberty (Oct. 18, 2012), *at* http://www.cato.org/blog/exactly-what-max-baucus-saying-here.

[20] Indeed, a national Exchange was a key component of the House bill, and the House would not have allowed the bill to survive had it understood the Senate version to eliminate tax credits on federally-facilitated Exchanges.

the accompanying budgetary predictions, reflected the understanding that the subsidies would be available on all Exchanges.[21] Because these amendments were to the specific provision at issue in this appeal, this history is not subsequent legislative history and is directly relevant to the question before this Court. *See, e.g.*, *U.S. v. Board of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 135 n.25 (1978).

Most significantly, Congress amended the provision to change the way subsidies (in all States) are calculated *after* the IRS had proposed the rule that allowed subsidies for customers using federally-facilitated Exchanges and after HHS had proposed a parallel rule on the obligations of Exchanges, 76 Fed. Reg. 41866-01 (July 15, 2011). *See* Pub. L. No. 112-56, § 401, 125 Stat. 711, 734 (Nov. 21, 2011). As *amici* know from their own experience, members of Congress were well aware of these regulations. Yet the report on the bill amending the subsidy calculation provisions—just like the many statements by members of Congress preceding ACA's passage—assumed that the credits would be available to all individuals who satisfied the income criteria. The report stated without qualification that the "premium assistance credit is available for individuals . . . with household incomes between 100 and 400 percent of the Federal poverty level."[22] More specifically, the report referenced estimates of the cost of the subsidies by the Congressional

[21] For a full discussion of these amendments, see Families Amicus Br., No. 13-cv-00623-PLF (D.D.C.), D.E. 48-1, at 24-26.

[22] H. R. Rep. No. 112-254, at 3 (2011), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt254/html/CRPT-12hrpt254.htm.

Budget Office and the Joint Committee on Taxation that reflected—and quantified—the shared understanding that ACA prescribed premium assistance on all Exchanges in all States.[23]

In the absence of any specific statements that the tax credits were a tool to encourage state action, Appellants infer that this must be the case because Congress had no other way to induce the States to participate. *See, e.g.*, App. Br. 13, 28.[24] But in fact the principal mechanism applied here—giving States the option of establishing a program compliant with federally prescribed criteria, but providing for federal operation of the program in any State that failed to do so on its own—is often used by Congress. *See, e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981). States frequently (in fact, usually) opt to operate such programs rather than cede control to the federal government because maintaining control leaves the States with the discretion to tailor federally prescribed programs to local needs. Indeed, in making the decision whether to estab-

[23] *Id.* at 12.

[24] Appellants also point to other "tools" they say Congress used to "encourage states" to establish Exchanges. App. Br. 4-5. But none of these inducements to establish Exchanges are conditional grants, and the conditional grant provisions that are in ACA were included for purposes entirely unrelated to the Exchanges. For example, Appellants point to the "maintenance of effort" prohibition on pre-effective date tightening of Medicaid eligibility standards, which is part of the Medicaid expansion provisions (App. Br. 5), but, as the Government notes, the actual purpose of this transitional prohibition was to protect Medicaid recipients from a possible loss of coverage until January 1, 2014 when they would become eligible for subsidized insurance via an Exchange, Gov't Br. 28.

lish state-run Exchanges, some governors acknowledged that they preferred for their State to set up its own Exchange for these very reasons. For example, "Republican Gov. Brian Sandoval told the Las Vegas Review-Journal . . . that Nevada's decision to run its own exchange—*and take as much control of the insurance system as possible under the law*—was the right one."[25] Likewise, Kentucky Governor Steve Beshear stated that "[a]nytime a large scale program of this nature kicks off there are concerns along the way, but we feel that *our state-centered process* allowed us to address those."[26] And proponents of setting up state Exchanges emphasized this factor. For example, one opinion piece noted that "if states do not move forward on their own, the federal government will. Because of this fact alone, states should move forward with creating their own exchanges. It's better for states to exert some control over the structure of their exchanges than to abdi-

[25] Vaughn Hillyard, *Politics Wasn't Only Reason Why Some GOP-Led States Didn't Set Up Own Exchanges* (Dec. 4, 2013), *available at* http://www.nbcnews.com/politics/first-read/politics-wasnt-only-reason-why-some-gop-led-states-didnt-v21755208 (emphasis added).

[26] *Id.* (emphasis added). In the same vein, the Republican co-sponsor of the legislation creating Colorado's Exchange explained, "To me, and to the business community, . . [C]reating . . . a state exchange close to home in a pro-market manner was the best solution for us." Eric Whitney, *Despite Setbacks, Bipartisan Support Remains For Colorado Exchange*, npr.org, Mar. 18, 2014, *available at* http://www.npr.org/blogs/health/2014/03/18/290092059/despite-setbacks-bipartisan-support-remains-for-colorado-exchange.

cate control to Washington."[27] Thus, the loss of regulatory control was well established as a highly potent incentive for States to set up their own Exchanges, contrary to Appellants' assertions that without the threat of nullifying premium assistance tax credits and subsidies state officials would have had no incentive to establish State-operated Exchanges, *see* App. Br. 28. In short, Appellants' conjecture (*id.* at 42) that ACA's architects "could not have expected most states . . . to establish Exchanges" without the "incentive" of tax credits and subsidies that would not be available on a federally facilitated Exchange is both illogical and totally lacking in record support.

Thus, Appellants offer nothing to refute what the record shows and what *amici* know from their own experience: the purpose of the tax credits was not to encourage States to set up their own Exchanges. Indeed, making the tax credits conditional on state establishment of the Exchanges would have empowered hostile state officials to undermine ACA's core purpose. It defies common sense for Appellants to suggest that *amici* and other architects of ACA sought to encourage such a perverse result. This is no minor point—by blocking qualified individuals from receiving premium tax subsidies, as Appellants' version of ACA would allow, state opponents of ACA could also seriously undermine other aspects of the

[27] Opinion, David Merritt, *Why States Should Move Forward With Health Insurance Exchanges* (Mar. 13, 2012), *available at* dailycaller.com/2012/03/13/why-states-should-move-forward-with-health-care-exchanges/#ixzz2mjT2jiZe.

law crucial to achieving health care reform, including the individual mandate and the system of Exchanges more generally. The purpose of the tax credits was, as the district court recognized, to help effectuate the fundamental goal of the statute to make health care affordable for all Americans. *See* 2014 WL 637365, at *14 ("the text of the ACA and its legislative history evidence congressional intent to ensure broad access to affordable health coverage for all"). To achieve that goal, the tax credits must be available to all Americans.

II. STATE GOVERNMENT OFFICIALS NEVER UNDERSTOOD THE TAX CREDITS TO BE LIMITED TO STATE-RUN EXCHANGES

Just as Congress never told the States that their citizens would lose access to the tax credits if they did not set up their own Exchanges, members of state governments never understood the statute to operate in that way. *Amici* members of state legislatures were involved in the debates in their States over whether to set up Exchanges and thus know from their own experience that, even before the IRS promulgated its regulation confirming that tax credits would be available to purchasers on both state-run and federally facilitated Exchanges, no one in the States understood access to the tax credits to turn on the establishment of state-run Exchanges. Indeed, the States considered many factors in deciding whether to set up Exchanges, but the possibility that the failure to set up a state-run Exchange would preclude that State's citizens from enjoying the tax credits and subsidies was never one of them.

For example, California, in response to a query from HHS about "[w]hat factors [the States would] consider in determining whether they will elect to offer an Exchange by January 1, 2014," 75 Fed. Reg. 45,584, 45,586 (Aug. 3, 2010), noted that "the primary consideration for states is whether policy makers view the Exchange as an effective tool for improving access, quality, and affordability of health insurance coverage and view state administration of the Exchange as the best way to achieve these goals."[28] It did not mention the tax credits. In response to the same prompt, Texas noted that it would consider "cost containment, cost effectiveness, maintaining state flexibility, and how a state-run Exchange vs. a federally-run Exchange would interact with the Texas insurance market and Texas' existing health coverage programs, including Medicaid and CHIP."[29] It, too, failed to mention the tax credits. Strikingly, Ohio, in a working group report, listed five pros and four cons to establishing a State Exchange, but the availability (or not) of the tax credits did not appear on either list.[30] Indeed, so far as *amici* are aware, no

[28] California HHS, Public Comments to HHS on the Planning and Establishment of State-Level Exchanges (Oct. 4, 2010), *available at* https://www.statereforum.org/sites/default/files/california-1.pdf.

[29] Texas Dep't of Insurance & HHS Comm'n, Public Comments to HHS on the Planning and Establishment of State-Level Exchanges (Oct. 4, 2010), *available at* https://www.statereforum.org/sites/default/files/texas.pdf.

[30] Ohio Health Care Coverage & Quality Council, Report of Health Benefits Exchange Task Force, *available at* https://www.statereforum.org/sites/default/files/hbe_pros_cons_10_2_10_-_final_2.pdf (listing pros and cons of Ohio setting up its own Exchange).

State *ever* suggested that the lack of subsidies on a federally-facilitated Exchange was a factor in its decision.[31] Surely, if the States had recognized that their citizens would lose access to the premium tax credits and subsidies if they failed to set up their own Exchange, that would have been at least one factor, if not a key factor, in their decisionmaking.[32]

The National Governors Association ("NGA"), too, identified numerous issues associated with implementing the Exchanges, but (again) the prospect that a State's citizens might be denied the tax credits if the State failed to set up its own

[31] *Amici*'s conclusion is consistent with research performed as part of a comprehensive Georgetown University Health Policy Institute study of state decisions implementing ACA Exchange provisions. As summarized by a co-author of this study, States were motivated by a mix of policy considerations, such as flexibility and control, and "strategic" calculations by ACA opponents, not the availability of tax credits. *See* Christine Monahan, Halbig v. Sebelius *and State Motivations To Opt for Federally Run Exchanges*, CHIRblog, http://chirblog.org/halbig-v-sebelius-and-state-motivations-to-opt-for-federally-run-exchanges/ (Feb. 11, 2014). Monahan notes that two *amicus* briefs filed in parallel litigation on behalf of States controlled by ACA opponents "imply [without actually asserting] that these states decided not to pursue state-based exchanges because they did not want premium tax credits to be available in their states," but the Georgetown researchers' extensive review of *contemporaneous* "official public statements," press accounts, and interviews shows this *post hoc* claim seeking to block premium assistance for their residents "was, at best, little more than an afterthought." *Id.*

[32] Tellingly, when State ACA opponents were filing their brief in the Supreme Court objecting to ACA's Medicaid expansion provisions, they did not think the tax credit provisions were intended to pressure them into setting up their own Exchanges. In fact, they repeatedly *contrasted* the Medicaid expansion, which they challenged as coercive, with the Exchange provisions, which they viewed as non-coercive. *See State of Florida v. U.S. Dep't of Health and Human Services*, No. 11-400, WL 105551, at *12 (11th Cir. Jan. 10, 2012); *see id.* at *22, 25, 51.

Exchange was never one of them. For example, within days of ACA's passage, the NGA circulated an eight page, single-spaced document identifying key implementation issues for its members.[33] Nowhere in this lengthy document was there any suggestion that the tax credits would not be available if States did not set up their own Exchanges. Similarly, on September 16, 2011, the NGA published an Issue Brief on "State Perspectives on Insurance Exchanges."[34] It, too, enumerated state concerns regarding implementation of the Exchange provisions, and it, too, did nothing to indicate that the NGA had even contemplated the possibility that the tax credits would not be available to individuals who purchased insurance on federally-facilitated Exchanges. Finally, another NGA document specifically identified loss of regulatory control as a key factor that States should consider in deciding whether to set up their own Exchange: "if a state decides not to set up an exchange and the federal government steps in to run an exchange for the state, the state will likely have to conform to the federal exchange's guidelines for Medicaid eligibility and low-income subsidy determinations, while the state is accustomed to using its

[33] *See* Implementation Timeline for Federal Health Reform Legislation, *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/1003HEALTHSUMMITIMPLEMENTATIONTIMELINE.PDF.

[34] *See* State Perspectives on Insurance Exchanges: Implementing Health Reform In An Uncertain Environment, *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/1109NGAEXCHANGESSUMMARY.PDF.

existing eligibility determination system. This may pose some difficulties and extra processes for the state."[35] The draft said nothing to indicate that tax credits would be lost if States failed to set up their own Exchanges. Given the important role that the tax credits were to play in making health insurance affordable—again, the core purpose of ACA—it makes no sense to think that issue would have been omitted as the NGA helped States decide whether and how they would participate in implementing the statute.

In short, as *amici* state legislators know from their own experience, the availability of the tax credits could not have induced States to establish their own Exchanges, because state legislators never understood their availability to turn on whether an Exchange was state or federally-facilitated. Indeed, if *amici* state legislators thought there was a possibility that their constituents would lose access to these valuable tax credits unless the State established its own Exchange, they would have vigorously advocated for a state-run Exchange citing this potential consequence. But this was not part of the debate in the States because no one understood the statute to operate in the manner Appellants claim. Rather, everyone at the time understood that the tax credits were an essential component of ACA that

[35] NGA, State Decision-Making in Implementing National Health Reform (presented at the NGA State Summit on Health Reform on March 15-16, 2010), *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/1003HEALTHSUMMITDECISIONMAKING.PDF.

were to be available to all Americans regardless of whether they purchased insurance on a state-run or federally-facilitated Exchange.

* * *

In conclusion, as *amici* know from their own experiences, Appellants' argument that the tax credits were intended to induce States to set up their own Exchanges makes no sense in light of the text, history, and purpose of the statute, all of which make clear that Congress never sent—and state officials never received—any message indicating that States needed to set up their own Exchanges if they wanted their citizens to have access to the tax credits and subsidies. Indeed, Congress never sent any such message for the simple reason that it did not intend the statute to operate in the way Appellants argue. Rather, the tax credits and subsidies were supposed to be available to all Americans to help realize the statute's goal of making insurance affordable for all Americans.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the judgment of the district court.

Respectfully submitted,

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Dated: March 21, 2014

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,936 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point Times New Roman font.

Executed this 21st day of March, 2014.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

Counsel for Amici Curiae

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on March 21, 2014.

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Executed this 21st day of March, 2014.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

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APPENDIX

No. 14-1158

David King, et. al., Appellants

v.

Kathleen Sebelius, Secretary of Health and Human Services, et al., Appellees

APPENDIX TABLE OF CONTENTS

APPENDIX A:
LIST OF CONGRESSIONAL *AMICI*

Baucus, Max, Former Senator of Montana*

Harkin, Tom, Senator of Iowa

Levin, Sander M., Representative of Michigan

Miller, George, Representative of California

Pelosi, Nancy, Representative of California

Reid, Harry, Senator of Nevada

Waxman, Henry, Representative of California

* Former Senator Baucus joins solely in his individual capacity as a former Member of the Senate.

APPENDIX B:
LIST OF STATE LEGISLATOR *AMICI*

Ajello, Edith, Representative of Rhode Island

Albis, James, Representative of Connecticut

Alexander, Kelly, Representative of North Carolina

Antonio, Nickie, Representative of Ohio

Barrett, Dick, Senator of Montana

Beavers, Roberta, Representative of Maine

Bennett, David, Representative of Rhode Island

Briggs, Sheryl, Representative of Maine

Briscoe, Joel, Representative of Utah

Bronson, Harry, Assemblymember of New York

Bullard, Dwight, Senator of Florida

Carey, Michael, Representative of Maine

Chase, Cynthia, Representative of New Hampshire

Chenette, Justin, Representative of Maine

Cody, Eileen, Representative of Washington

Coleman, Garnet, Representative of Texas

Cooper, Janice, Representative of Maine

Cunningham, Carla, Representative of North Carolina

Daley, Mary Jo, Representative of Pennsylvania

Daughtry, Matthea, Representative of Maine

Dicks, Steph, Assemblymember of Pennsylvania

Dorney, Ann, Representative of Maine

Fahy, Patricia, Assemblymember of New York

Falk, Andrew, Representative of Minnesota

Farnsworth, Richard, Representative of Maine

Ferri, Frank, Representative of Rhode Island

Fisher, Susan, Representative of North Carolina

Fitzgibbon, Joe, Representative of Washington

Fludd, Virgil, Representative of Georgia

Fraser, Karen, Senator of Washington

Gardner, Pat, Representative of Georgia

Gattine, Drew, Representative of Maine

Gilbert, Paul, Representative of Maine

Gill, Rosa, Representative of North Carolina

Glassheim, Eliot, Representative of North Dakota

Glazier, Rick, Representative of North Carolina

Goode, Adam, Representative of Maine

Goodman, Neal, Representative of Pennsylvania

Gottfried, Richard N., Chair, Assembly of New York

Hamann, Scott, Representative of Maine

Harlow, Denise, Representative of Maine

Harrison, Pricey, Representative of North Carolina

Hatch, Jack, Senator of Iowa

Hunt, Sam, Representative of Washington

Insko, Verla, Representative of North Carolina

Johnson, Burt, Senator of Michigan

Johnson, Connie, Senator of Oklahoma

Jones, Brian, Representative of Maine

Keiser, Karen, Senator of Washington

King, Phylis, Representative of Idaho

Kline, Adam, Senator of Washington

Kloucek, Frank, former Representative of South Dakota

Kohl-Welles, Jeanne, Senator of Washington

Kruger, Chuck, Representative of Maine

Kumiega, Walter, Representative of Maine

Kusiak, Karen, Representative of Maine

Lemar, Roland, Representative of Connecticut

Lesser, Matthew, Representative of Connecticut

Liebling, Tina, Representative of Minnesota

Liias, Marko, Senator of Washington

Longstaff, Thomas, Representative of Maine

Luedtke, Eric, Delegate of Maryland

MacDonald, Bruce, Representative of Maine

Madaleno, Jr., Richard, Senator of Maryland

Markey, Margaret, Assemblywoman of New York

Marzian, Mary Lou, Representative of Kentucky

Mason, Andrew, Representative of Maine

Mastraccio, Anne-Marie, Representative of Maine

Mathern, Tim, Senator of North Dakota

McDonald, John, Assemblymember of New York

Mcgowan, Paul, Representative of Maine

McLean, Andrew, Representative of Maine

McNamar, Jay, Representative of Minnesota

McSorley, Cisco, Senator of New Mexico

Molchany, Erin C., Representative of Pennsylvania

Moody, Marcia, Representative of New Hampshire

Moonen, Matthew, Representative of Maine

Morrison, Terry, Representative of Maine

Mundy, Phyllis, Representative of Pennsylvania

Nelson, Mary Pennell, Representative of Maine

Noon, Bill, Representative of Maine

Nordquist, Jeremy, Senator of Nebraska

O'Brien, Michael, Representative of Pennsylvania

Orrock, Nan, Senator of Georgia

Ortiz y Pino, Gerald, Senator of New Mexico

Parker, Cherelle L., Representative of Pennsylvania

Paulin, Amy, Assemblymember of New York

Phillips, Mike, Senator of Montana

Porter, Marjorie, Representative of New Hampshire

Pringle, Jane, Representative of Maine

Richardson, Bobbie, Representative of North Carolina

Ringo, Shirley, Representative of Idaho

Rivera, Gustavo, Senator of New York

Rochelo, Megan, Representative of Maine

Rosenbaum, Diane, Senator of Oregon

Rosenwald, Cindy, Representative of New Hampshire

Rykerson, Deane, Representative of Maine

Ryu, Cindy, Representative of Washington

Sanborn, Linda, Representative of Maine

Saucier, Robert, Representative of Maine

Schlossberg, Michael, Representative of Pennsylvania

Schneck, John, Representative of Maine

Sells, Mike, Representative of Washington

Sepulveda, Luis, Assemblyman of New York

Sims, Brian, Representative of Pennsylvania

Skindell, Michael, Senator of Ohio

Slocum, Linda, Representative of Minnesota

Stanford, Derek, Representative of Washington

Talabi, Alberta, Representative of Michigan

Tavares, Charleta B., Senator of Ohio

Till, George, Representative of Vermont

Tipping-Spitz, Ryan, Representative of Maine

Townsend, Charles, Representative of New Hampshire

Treat, Sharon, Representative of Maine

Vuckovich, Gene, Senator of Montana

Wanzenried, David E., Senator of Montana

Ward, JoAnn, Representative of Minnesota

Witt, Brad, Representative of Oregon

Yantacka, Michael, Representative of Vermont

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

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