**No. 14-5018**

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

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JACQUELINE HALBIG, ET AL.,

*Appellants*,

*v.*

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

*Appellees*.

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

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# OPPOSITION TO PETITION FOR REHEARING EN BANC

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# GLOSSARY

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| ACA | Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 |
| HHS | U.S. Department of Health and Human Services |
| IRS | Internal Revenue Service |

## INTRODUCTION

**I.** There is no doubt that this case is of great national importance. Not due to the legal principles at stake—this is a straightforward statutory construction case under well-established principles—but rather due to its policy implications for ongoing implementation of the Affordable Care Act ("ACA"). Those implications, however, are precisely why rehearing would *not* be appropriate here, as Judges of this Court have recognized in many analogous cases. Continued uncertainty over the validity of the IRS Rule at issue is simply not tenable, given its enormous consequences for millions of Americans, hundreds of thousands of businesses, dozens of states, and billions of dollars in monthly federal spending. Only the *Supreme Court* can lift that doubt by giving a *definitive* answer to the challenge raised here (and in other suits). The Supreme Court has already been asked to do so, in a petition from a conflicting Fourth Circuit decision that would allow the matter to be resolved during the Court's upcoming Term. En banc review, by contrast, would cause delay without providing any certainty—regardless of how the en banc court ultimately rules. Thus, for the same reasons that this Court expedited review of this case, the en banc petition should be denied and this matter should proceed immediately, as it ultimately must in any event, to final resolution by the Supreme Court. At the very least, the petition should be held in abeyance pending Supreme Court action on the certiorari petition already before it.

**II.** The vast majority of the Government's petition addresses the merits, asserting that majority erred by construing "Exchange established *by the State*" as excluding an Exchange established by the *federal government*. The Government transparently mischaracterizes both the statute and the panel's opinion.

*First*, the fact that § 1321 of the ACA *envisions* HHS-established Exchanges in states that refuse to establish their own obviously cannot support the notion that such Exchanges are somehow *state*-established. To the contrary, precisely *because* the Act directs two distinct entities to establish Exchanges, "Exchange established by the State" cannot be read to include an HHS-established Exchange. *Second*, the panel did not analyze only "a single phrase" in the Act; rather, it spent 15 pages parsing the relevant provisions and addressing "anomalies" that the Government claimed would result from a plain-text reading. Nor did the panel merely find the alleged anomalies "non-absurd"—it concluded that one provision "creates no difficulty" at all, and that another "seem[s] sensible." And the Fourth Circuit, for its part, *agreed* on this score. *Third*, it is not true that the panel "identified no reason" why Congress would have written the text as it did. To the contrary, the panel agreed (as did the Fourth Circuit) that there was a very "plausible" reason why Congress would have conditioned subsidies on state establishment of Exchanges—*i.e.*, to induce the states to shoulder the politically, financially, and logistically difficult burden of running these Exchanges.

## ARGUMENT

### I. BECAUSE THE SUPREME COURT MUST ULTIMATELY RESOLVE THE VALIDITY OF THE IRS RULE, REHEARING WOULD WASTE BOTH TIME AND EFFORT.

En banc review should occur "only in the rarest of circumstances." *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1243-44 (D.C. Cir. 1987) (Edwards, J., concurring in denial of rehearing en banc). Thus, while "exceptional importance" is among the grounds permitting rehearing, not every important case warrants it. Indeed, this Court twice recently denied rehearing in cases concerning nationally important EPA regulations, both of which the Supreme Court later reviewed. *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 U.S. App. LEXIS 25997, at *28-29 (D.C. Cir. 2012) (Sentelle, C.J., joined by Rogers & Tatel, JJ., concurring in denial of rehearing en banc) (denying rehearing where divided panel *upheld* EPA greenhouse gas rules, even though "stakes here are high" and "outcome of this case [is] undoubtedly … of exceptional importance," as "legal issues presented … are straightforward"); *EME Homer City Generation, L.P. v. EPA*, No. 11-1302, 2013 U.S. App. LEXIS 1624 (D.C. Cir. Jan. 24, 2013) (denying rehearing where divided panel *invalidated* EPA pollution rule).

In particular, where cases are "important" only by virtue of their national implications, or where Supreme Court review is otherwise required or likely, rehearing is not only a waste of resources but could actually harm the public

interest by delaying final resolution. Judges of this Court—and other Circuits—have long cited that dynamic to deny en banc review of many "important" cases:

- *Bismullah v. Gates*, 514 F.3d 1291, 1299 (D.C. Cir. 2008) (Garland, J., concurring in denial of rehearing en banc) ("Were we to grant en banc review in *Bismullah*, we would plainly delay our decision and hence the Supreme Court's disposition of *Boumediene*. As delaying the latter is contrary to the interests of all of the parties, as well as to the public interest, I concur in the denial of rehearing en banc without reaching the merits.").

- *Nat'l Inst. of Military Justice v. DOD*, No. 06-5242, 2008 U.S. App. LEXIS 16732, at *5 (D.C. Cir. Apr. 30, 2008) (Tatel, J., concurring in denial of rehearing en banc) ("Only the Supreme Court can clarify the outer limits of the 'intra-agency' prong of Exemption 5.").

- *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1071 (D.C. Cir. 1995) (Tatel, J., concurring in denial of rehearing en banc) ("This case presents antitrust and labor issues of national significance. The issues have been fully engaged and developed by the majority and dissenting opinions. Supreme Court review is essential to the resolution of these issues.").

- *Kimberlin v. Quinlan*, 17 F.3d 1525, 1526 (D.C. Cir. 1994) (Williams, J., concurring in denial of rehearing en banc) ("[I]t seems to me on balance preferable to continue with [Circuit precedent] until the Supreme Court resolves the issue"); *see also id.* (Silberman, J., concurring the denial of rehearing en banc) (agreeing that "the Supreme Court is better positioned than we to resolve" the issue).

- *Ayuda, Inc. v. Thornburgh*, No. 88-5226, 1989 U.S. App. LEXIS 16504, at *6 (D.C. Cir. Oct. 4, 1989) (Buckley, J., concurring in denial of rehearing en banc) (describing the "only likely result of our rehearing the case" en banc as "to … den[y] [appellees] the opportunity for prompt review by the Supreme Court").

- *Dep't of Treasury, IRS v. Fed. Labor Relations Auth.*, 862 F.2d 880, 884 (D.C. Cir. 1989) (Ginsburg, J., joined by Williams & Sentelle, JJ., concurring in denial of rehearing *en banc*) (in light of contrary decisions by the Fourth and Ninth Circuits, it is "likely that the Supreme Court will

want to resolve this question," and so "I do not conceive it to be a sensible allocation of our time to rehear this case *en banc*").

- *Alliance for Open Soc'y Int'l, Inc. v. United States*, No. 08-4917, 2012 U.S. App. LEXIS 3193, at *6 (2d Cir. Feb. 2, 2012) (Pooler, J., concurring in denial of rehearing en banc) ("Even if we were willing and able to tackle these questions, our resolution simply could not substitute for the Supreme Court's attention.").

- *Mitts v. Bagley*, No. 05-4420, 2010 U.S. App. LEXIS 25036, at *15 (6th Cir. Dec. 3, 2010) (Sutton, J., concurring in denial of rehearing en banc) ("Sometimes there is nothing wrong with letting the United States Supreme Court decide whether a decision is correct and, if not, whether it is worthy of correction.").

- Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1025 (1991) ("If the conflict is important, the Supreme Court is likely to resolve it, and its decision is not likely to be affected by anything that the en banc court could add to the debate already reflected in the conflicting opinions of the circuits.").

This is the *quintessential* case in which the urgent need for Supreme Court review weighs strongly against en banc consideration. The significance of the IRS Rule makes prompt and definitive resolution a national imperative, and only the Supreme Court can provide it. By contrast, en banc rehearing would waste a great deal of resources and cause significant delay, contrary to the public interest.

**A.** Because of the monumental implications of the IRS Rule, there is a compelling need for final resolution, as soon as possible, of its legal validity. If the Rule is indeed invalid, as the panel majority held, the consequences for individuals, employers, insurers, states, and federal spending will be vast—and the longer the Rule is in effect, the greater the upheaval when it is ultimately vacated.

For *individuals*, the Government says that nearly five million people have been receiving subsidies through federally established Exchanges. (Pet.6.) Until the validity of the IRS Rule is definitively resolved, these Americans do not know whether they can continue to count on these subsidies or must make alternative arrangements. And, in the meanwhile, they may be incurring thousands of dollars of debt to the Treasury, since the ACA contemplates a clawback of improperly paid subsidies. *See* 26 U.S.C. § 36B(f)(2). Only expedited resolution can curtail the unfairness caused by that ongoing and considerable detrimental reliance.

For *employers*, the validity of the IRS Rule determines whether hundreds of thousands of employers are exposed to the ACA's employer mandate penalty. The ACA requires certain employers to sponsor affordable coverage for employees, but penalties are triggered only if at least one such employee obtains a subsidy through an Exchange. Thus, if no subsidies are available in the 36 states served by HHS Exchanges, employers there are effectively exempt from the employer mandate. (*See* Op.8-9.) Until there is an authoritative answer on whether the IRS Rule is valid, therefore, these businesses have no idea whether they must comply with this burdensome ACA provision. And that uncertainty harms *employees*, too, because employers worried by potential penalties may lay off workers or reduce their hours to evade the employer mandate. *E.g.*, Robert Pear, *Public Sector Capping Part-Time Hours to Skirt Health Care Law*, N.Y. TIMES, Feb. 21, 2014, at A12.

For *insurers*, the validity *vel non* of the IRS Rule is crucial to budgeting, planning, and rate-setting for future coverage. If the Rule is invalid, as the panel held, that will have a substantial effect on the makeup and revenue of the insurance pool going forward. *See* Robert Pear, *New Questions on Health Law as Courts Differ on Subsidies*, N.Y. TIMES, July 23, 2014, at A1 (describing "confusion and turmoil" in "health insurance markets" because of uncertainty over status of IRS Rule). Insurance markets therefore also require a quick and final answer.

For *states*, only final resolution will allow them to make fully informed decisions whether to establish their own Exchanges prospectively. States are far more likely to do so if such action is necessary to qualify state residents for billions of dollars in tax credits. *See, e.g.*, Louise Radnofsky, *States Try To Protect Health Exchanges from Court Ruling*, WALL ST. J., July 25, 2014 ("A leading proponent of a fully state-run exchange [in Illinois] said he believed legislators would back his position if the D.C. panel's decision is upheld."). The sooner a final resolution is reached, the sooner these states can make these consequential decisions.

Finally, only a definitive resolution will clarify whether the Treasury has the authority to spend the *billions* of tax dollars that are right now being expended every *month* under the authority of the IRS Rule. (Govt. Br. 5.) These funds will continue to be spent until vacatur of the Rule takes effect. Because "the protection of the public fisc is a matter that is of interest to every citizen," *Brock v. Pierce*

*Cnty*., 476 U.S. 253, 262 (1986), there is thus a great public interest in prompt resolution. Conversely, the longer the issue remains unresolved by the Supreme Court, the more money is unlawfully spent without Congress's approval—a very serious matter, *cf.* 31 U.S.C. § 1341 (criminalizing unauthorized federal spending).

Indeed, for all of these reasons, a panel of this Court (Brown, Tatel, and Pillard, JJ.) greatly expedited appellate proceedings, giving Appellants only 7 days to file an opening brief and setting oral argument for "the earliest available date." Expedited, final resolution of this matter is thus clearly in the public interest.

**B.** The Supreme Court is primed to provide that final resolution. In *King v. Burwell*, which was also greatly expedited, the Fourth Circuit upheld the IRS Rule that the panel here invalidated. *See* No. 14-1158, 2014 U.S. App. LEXIS 13902 (4th Cir. July 22, 2014). And, even before the Government filed its en banc petition, the *King* plaintiffs filed a certiorari petition asking the Supreme Court to grant review to resolve the Circuit conflict. Exh. A (Pet. for Cert., No. 14-114). The Government's response to the petition is due by September 3, 2014, allowing the Court to grant review in late September or early October and to resolve the case on the merits during the upcoming Term. In light of the division among the lower courts and the self-evident importance of the issue, there is no doubt that, if this Court denies rehearing, the Supreme Court would do just that. There would accordingly be a final, authoritative determination by June 2015 at latest.

**C.** By contrast, rehearing would either waste effort or, worse, perpetuate damaging uncertainty and postpone definitive resolution. Regardless of how the Supreme Court would respond to a grant of rehearing, and regardless of how the en banc court would rule, the result would be worse for the Nation as a whole.

*First*, if this Court grants rehearing and then, in October, the Supreme Court chooses to grant the *King* petition nonetheless, any work done in the interim by this Court, the parties, or their *amici* would become effectively moot.

*Second*, if rehearing is granted and the Supreme Court stays its hand, the en banc court may well agree with the panel, as it does roughly a third of the time. *See* Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991-2002*, 70 GEO. WASH. L. REV. 259, 263 (2002). Yet by then, the chance for the Supreme Court to resolve the Circuit conflict during the upcoming Term will be lost, with final resolution delayed at least a year. Importantly, given that the panel's holding was dictated by the Act's plain text, there is a good chance of en banc affirmance, notwithstanding the Senate Majority Leader's cynical suggestion that the "simple math" of en banc review in this case "vindicates" his elimination of the filibuster to confirm three new judges to this Court. Josh Gerstein, *How Obama's Court Strategy May Help Save Obamacare*, POLITICO, July 22, 2014; *see also* Emily Bazelon, *Obamacare Is Safe*, SLATE, July 22, 2014 (claiming that the panel "will likely be reversed" because "D.C. Circuit (finally!) has four Obama appointees").

*Third*, even if a divided en banc court ultimately reverses the panel decision, that by no means would reduce the pressing need for Supreme Court review. The panel opinion proved that Appellants' challenge is sufficiently compelling to warrant the Supreme Court's attention, as leading commentators have recognized. *See* Tom Goldstein, *The Fate of the Obamacare Subsidies in the Supreme Court*, SCOTUSBLOG.COM, July 23, 2014 ("[E]ven if [*en banc* reversal] happens, the case seems too close and too important for the Supreme Court to pass it up."). Thus, however the en banc court were to rule, untenable uncertainty would persist until the Supreme Court supplies a definitive answer. This is especially true in light of the fact that *other*, identical legal challenges are already working their way to the Seventh and Tenth Circuits. *Pruitt v. Burwell* (No. 6:11-cv-00030, E.D. Okla.); *Indiana v. IRS* (No. 1:13-cv-01612, S.D. Ind.). And further challenges in yet other Circuits are very likely. Indeed, given the IRS Rule's irreconcilable conflict with the ACA's plain language, it is quite probable that the Rule will be invalidated at some point by another court, even if a majority of the en banc court reverses the panel's decision here.

In short, it is in everyone's interests for the Supreme Court to finally resolve this question *now*, to both preclude further detrimental reliance and to eliminate the cloud that will inevitably hang over the IRS Rule otherwise. En banc rehearing cannot achieve that goal. The Government's petition should therefore be denied.

**D.** At minimum, if this Court has any doubt over whether the Supreme Court will actually grant the pending certiorari petition in *King*, the Government's en banc petition should be held in abeyance pending action on the *King* petition. If the Supreme Court for some reason denies review, this court can then give the en banc petition further consideration. If the Supreme Court grants review in *King* as expected, the en banc petition can be safely denied. The Court has taken this approach in analogous situations. *Dep't of Def. Dependents Schs. v. FLRA*, 911 F.2d 743 (D.C. Cir. 1990) (per curiam) (at en banc stage, court "ordered that all proceedings be held in abeyance pending the decision of the Supreme Court" on pending certiorari petition in related case); *Trahan v. Regan*, 866 F.2d 1424 (D.C. Cir. 1988) (per curiam) (at en banc stage, court "held our proceedings in abeyance … pending the Supreme Court's decision" in related case).

## II. THE PANEL FULLY AND PERSUASIVELY ADDRESSED ALL OF THE GOVERNMENT'S ARGUMENTS ON THE MERITS.

The bulk of the petition contends that the panel erred because its "blinkered view of the plain meaning of a single phrase in Section 36B" did not consider the phrase in "context" or in light of the Act's "overall structure." (Pet.8-9.) That is obviously false. The opinion avowedly and carefully considered the Act's context and "overall structure." (Op.14.) It simply *rejected* the Government's meritless contextual arguments (all but one of which were, notably, *also* rejected by *King*), because the statutory "context" *confirms* that § 36B means what it says.

**A.** The Government's theme is that while the text of 26 U.S.C. § 36B allows subsidies only for coverage obtained through "an Exchange established *by the State*," reading the ACA in "context" somehow leads to the contrary conclusion: that subsidies are actually available through *any* Exchange, "*regardless* of whether the Exchange is established and operated by a State … *or by* [*HHS*]." 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20 (emphases added). (*See* Pet.2, 8-9, 12-13.)

Actually, a contextual reading of the ACA corroborates § 36B's plain text. *Context* shows that the Act elsewhere used a broad phrase, "Exchange established under this Act," 42 U.S.C. § 18032(d)(3)(D)(i)(II), that clearly encompasses HHS Exchanges. Giving that broader meaning to § 36B's narrower words violates the canon that "differing language" in "two subsections" of a law should not be given "the same meaning." *Russello v. United States*, 464 U.S. 16, 23 (1983). *Context* further shows that when Congress wanted to "deem" (Pet.10) a non-state entity to be a state, it "knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994). Congress said *expressly* that if a *territory* creates an Exchange, it "shall be treated as a State." 42 U.S.C. § 18043(a)(1). There is no such language about HHS Exchanges. *Context* also shows that Congress did not treat state and HHS Exchanges as indistinguishable; it referred *distinctly* to both Exchanges in another subsection of § 36B itself. *See* 26 U.S.C. § 36B(f)(3). Finally, *context* shows that § 36B, far from being a "mousehole" in which Congress would not have naturally

limited subsidies (Pet.15), is, in fact, the *only* provision defining subsidy-eligible purchases; indisputably houses another "crucial" limit on subsidies; and echoes the precise structure Congress used in a neighboring health tax credit. (Op.19 n.4.)

**B.** In the face of all of this, the Government falsely claims that the panel analyzed only "a single phrase in Section 36B," rather than "all relevant provisions of the Act." (Pet.9, 12.) Again, the panel did not ignore context; it just recognized that reading the Act from cover to cover cannot transform *HHS* into a *state*.

Rather than analyze "a single phrase," the panel read § 36B in view of the provisions directing states to establish Exchanges and HHS to do so in states that fail to. ACA §§ 1311, 1321, *codified at* 42 U.S.C. §§ 18031, 18041. The panel considered the Government's theory—that by telling HHS to establish "such" Exchanges in states that refuse, the Act somehow "deems" those HHS Exchanges to be "established by the State" (Pet.9-10)—and squarely rejected it. As the panel explained, § 36B makes subsidies turn on "who established" the Exchange. (Op.17.) Thus, the fact that *HHS* may establish Exchanges cannot imply that those Exchanges are somehow "established by the State." Quite the contrary: Because HHS may establish an Exchange only if the state *fails* to, such Exchanges cannot be established by or "on behalf of" the state. In short, the panel found "no textual basis—in sections 1311 and 1321 or elsewhere—for concluding that a federally-established Exchange is, in fact or legal fiction, established by a state." (Op.22.)

The Government next objects that, in responding to its claims that a plain reading of § 36B causes "anomalies" elsewhere, the panel asked only whether the text created "absurdity," rather than use the other provisions to ascertain § 36B's "plain meaning." (Pet.10-12.) This is wrong and irrelevant. The panel's approach was entirely proper: It analyzed the specific provision addressing subsidies in light of other provisions speaking to the relationship between state and HHS Exchanges, and, having determined that the relevant provisions authorize subsidies only on state Exchanges, asked whether that plain language produces an absurd result. (Op.16-30.) *See Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075, 1088-93 (D.C. Cir. 1996). This critique is also irrelevant: The panel found the supposedly conflicting provisions to be *consistent* with § 36B's text, not just non-absurd. (The *King* panel, too, was "unpersuaded." 2014 U.S. App. LEXIS 13902, at *27.) Preventing states that refuse to create Exchanges from restricting Medicaid was "sensible." (Op.29.) Reporting "serves the purpose of enforcing the individual mandate," even absent subsidies. (Op.24.) The SCHIP provision—which the Government cited only in a *footnote* in its brief—is not odd, because HHS could "step in and perform the same service" where it runs Exchanges. (Op.29 n.10.) And the "qualified individual" definition "creates no difficulty" (Op.27), even in light of the Government's newly cited provisions (Pet.12), which establish only that when Congress sought to define someone as "not … eligible for enrollment," ACA § 1331(e)(2), it did so expressly.

**C.** Ultimately, the Government resorts to policy arguments: Congress could not have wanted to limit subsidies, since subsidies promote the Act's broad purpose. (Pet.13-14.) Particularly with a law this complex, however, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam). Moreover, the Government ignores the "plausible" reason why Congress would have limited subsidies to state Exchanges—as a powerful incentive for states to establish them, thereby allowing Congress to achieve *both* its goals (state-run Exchanges *and* subsidies nationwide). (Op.35 n.11.) *Accord King*, 2014 U.S. App. LEXIS 13902, at *30 (agreeing that this is a "plausible" purpose). Although it does not matter whether this "plausible" purpose was legislators' actual subjective intent, there is ample evidence that it was—including statements by one of the Act's architects, Prof. Jonathan Gruber (whom the Government cited in its brief, Govt. Br. 39 n.12):

> [I]f you're a state and you don't set up an Exchange, that means your citizens don't get their tax credits. … I hope that that's a blatant enough political reality that states will get their act together and realize that there are billions of dollars at stake here in setting up these Exchanges, and that they'll do it.

Jonathan Gruber at Noblis, at 32:00 (Jan. 18, 2012), https://www.youtube.com/watch?v=GtnEmPXEpr0&feature=youtu.be&t=31m25s.

## CONCLUSION

For these reasons, the petition for rehearing en banc should be denied.

August 18, 2014

Respectfully submitted,

/s/ Michael A. Carvin

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 18th day of August 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. Nineteen paper copies of the foregoing document will also be filed today, by hand delivery, with the clerk of this Court.

August 18, 2014

/s/ Michael A. Carvin
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