[En Banc Oral Argument scheduled for December 17, 2014]

No. 14-5018

IN THE
United States Court of Appeals
for the District of Columbia Circuit

JACQUELINE HALBIG, ET AL.,

Appellants,

v.

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

Appellees.

On Appeal from the United States District Court for the
District of Columbia (No. 13-623 (PLF))

BRIEF *AMICI CURIAE* OF MEMBERS OF CONGRESS AND STATE LEGISLATURES

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* members of Congress and state legislatures represents that all parties have consented to the filing of this brief.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certifies that a separate brief is necessary. *Amici* are members of Congress who led the enactment of the Patient Protection and Affordable Care Act and members of state legislatures who served during the period when their governments were deciding whether to create their own Exchanges under the Act. Thus, *amici* are particularly well-suited to provide the Court with background on the text, structure, and history of the statute and the manner in which it was intended to operate. Indeed, because *amici* include both members of Congress and state legislatures, *amici* have unique knowledge on an issue at the core of this case: whether the purpose of the statute's provision for tax credits and subsidies was to induce States to set up their own Health Benefit Exchanges, under penalty of withdrawal of those credits and subsidies if States chose to allow the federal government to operate Exchanges in their stead.

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

So far as counsel are aware, all parties and *amici* appearing before the district court and this Court are listed in the Brief for Appellants and Brief for Appellees.

II. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Appellants.

III. RELATED CASES

So far as counsel are aware, this case has not previously been filed with this Court or any other court, and counsel are aware of no other cases that meet this Court's definition of related.

Dated: November 3, 2014

By: /s/ Elizabeth Wydra
Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

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 the 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 the 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 text and history of the statute. It is also inconsistent with its most fundamental purpose to make health insurance affordable for all Americans by providing subsidies for low and middle-income individuals, wherever they reside, who purchase

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

insurance on the new Exchanges created by the Act. *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 affordable "near-universal coverage," 42 U.S.C. § 18091(2)(D). Toward that end, the ACA provides that individuals can purchase competitively-priced health insurance policies on American Health Benefit Exchanges ("Exchanges"), and it authorizes federal tax credits and subsidies for low and middle-income individuals who purchase insurance on the Exchanges. *Amici* are members of Congress who served while the 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 the ACA's core purpose is to achieve universal health care cover-

age, that Exchanges are critical to achieving that goal, and that the provision of tax credits and subsidies to low- and middle-income Americans is indispensable to the effective functioning of the Exchanges.

Appellants seek to invalidate the Internal Revenue Service regulation confirming that the 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 text of 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 Congress drafted the ACA in a way that would guarantee the collapse of non-state-run Exchanges, even though that would drastically curb, rather than broaden, 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 legis-

lators 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 the statutory provisions that establish the Exchanges, including the section prescribing the credits and subsidies that are an indispensable component of the Exchange provisions. Instead, Appellants rely on just four words in the subsection setting out the formula for calculating the *amount* of the tax credit. Yet the language on which they rely provides, at best, ambiguous support for their interpretation. In any event, it makes no sense to think that Congress would have hidden such an important condition in this particular subsection if it were trying to make clear to legislators that premium assistance credits and subsidies would be unavailable if their State failed to set up its own Exchange. As congressional *amici* know from their experience drafting and enacting the legislation, Congress imposed no such condition. The purpose of the tax credit provision was to facilitate access to affordable insurance through all Exchanges, state-run or federally-facilitated, and to ensure that all Exchanges could work with other fundamental components of the law in order to provide near-universal access to insurance. It was *not*, as Appellants would have it, to incentivize the establishment of state Exchanges above all else, and certainly not to thwart the overall

statutory scheme and 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 credits, *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 the 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 the ACA's text, purpose, and history. Indeed, if the Court were to accept Appel-

lants' version of the statute, it would render inoperable not only the system of Exchanges, but other critical aspects of the law—such as the individual mandate and the provisions guaranteeing coverage for people with pre-existing conditions—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 available to 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). The 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(b)(2)(A).

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. Appellants' En Banc Br. 17-19. 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 disable the Exchanges and thereby thwart—the law's core purpose of promoting universal access to affordable health insurance. *Id.* at 43.

As *amici* can attest, that was never the purpose of the tax credit provision, which is clear from the debates within Congress over the 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 the 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 (Appellants' En Banc Br. 43), is simply false, as the text and history of the statute make clear.[3] In fact, during the debates over the ACA in Congress, 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 encouraged States to establish Exchanges if state officials were never told that availability of the credits turned on whether or not a

[3] Significantly, even as Appellants' argument critically depends on the idea that the tax credits were a tool to encourage States to establish Exchanges, two 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* Kansas et al. En Banc Br. 14.

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, as the district court noted, "[o]ne would expect that if Congress had intended to condition availability of the tax credits on state participation in the Exchange regime, this condition would be laid out clearly in . . . the provision authorizing the credit." JA 359 n.12. 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 technical formula for calculating the amount of the credit that the subsidy provision expressly makes available to "applicable taxpayer[s]," regardless of State of residence. 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—especially in the context of other language in Section 36B(a) expressly making the credit available to *all* applicable taxpayers, regardless of where they live—would hardly have made sense if, as Appellants argue, the purpose of the tax

[4] Instead of focusing on the tax credit provision, Appellants point to *other* provisions as evidence that Congress uses "carrots" and "sticks" to encourage state action. *See, e.g.*, Appellants' En Banc Br. 3, 33. No one disputes that Congress *can* use such tools; the question is whether Congress did so here. Congress did not.

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.").

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 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,[5] especially since, contrary to Appellants' claim otherwise (Appellants' En Banc Br. 49), 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. Michael Burgess); 155 Cong. Rec. S12,543 (Dec. 6, 2009) (statement

[5] 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. Appellants' En Banc Br. 14. 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 the ACA did was add "individuals . . . whose income . . . does not exceed 133 percent of the poverty line" 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.

of Sen. Tom Coburn).[6] Yet no one did.

In fact, everyone understood that tax credits would be available to purchasers on all of the Exchanges, federal and State. For example, on March 20, 2010, the three House committees with jurisdiction over the 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.[7] 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."[8] The fact sheet also noted that the ACA "[p]rovides premium tax credits," but did not suggest that they

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[6] *See also, e.g.*, David D. Kirkpatrick, *Health Lobby Takes Fight to the States*, N.Y. Times, Dec. 28, 2009, 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, 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.

[7] *See* H. Comms. on Ways and Means, Energy and Commerce, and Educ. and Labor, *Health Insurance Reform at a Glance: The Health Insurance Exchanges* 1 (2010), *available at* http://housedocs.house.gov/energycommerce/EXCHANGE.pdf.

[8] *Id.*

would only be available on state-run Exchanges.[9] 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 exchange*."[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 the ACA, 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 Dur-

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[9] *Id.* at 2.

[10] *Id.*

[11] Staff of Joint Comm. on Taxation, JCX-18-10, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010"* 12 (2010), *available at* https://www.jct.gov/publications.html?func=select&id=48 (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

bin, 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 for qualifying for the tax credits would be income.[14] In short, as the director of the Congressional Budget Office later stated, "[T]he 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." JA 275 (Letter from CBO Director Douglas Elmendorf to Rep. Darrell Issa).

Significantly, even ACA opponents in Congress recognized that that the on-

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credits," 155 Cong. Rec. S12,764 (Dec. 9, 2009), an estimate that could only be accurate if tax credits were available in *all* States.

[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 (Dec. 17, 2009) (statement of Sen. Tim Johnson); Sen. Mary Landrieu, *Breaking: Landrieu Supports Passage of Historic Senate Health Care Bill* (Dec. 22, 2009), 2009 WLNR 25819782; Sen. Mark Pryor, Press Release, *On Senate Passage of Health Care Reform* (Dec. 24, 2009), 2009 WLNR 26018100; Sen. Russell Feingold, *Sen. 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.

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

Ignoring all of this evidence, Appellants argue that "the scant legislative history supports the proposition that Congress conditioned the subsidies on state creation of Exchanges as a means to induce states to act." Appellants' En Banc Br. 45 (internal quotation marks and citation omitted). Appellants offer four pieces of alleged evidence to support that proposition. In fact, none do. *See* JA 431(Edwards, J., dissenting) ("Appellants have no credible evidence whatsoever to support their subsidies-as-incentive theory."); *King v. Sebelius*, 997 F. Supp. 2d 415, 431 (E.D.

[15] *House Committee on the Budget Holds a Markup on the Reconciliation Act of 2010*, 111th Cong. (2010), 2010 WL 941012 (statement of Rep. Paul Ryan).

[16] *Id.*

Va. 2014) ("the lack of *any* support in the legislative history of the ACA indicates that [Appellants' interpretation of section 36B] is not a viable theory" (emphasis added)).

To start, Appellants assert that "conditioning subsidies on state Exchanges was a proposal adopted by the Senate" and subsequently "forced onto the House" (Appellants' En Banc Br. 46), 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, it 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 federal requirements."[17] 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 47. But to support this assertion, they cite a provision drafted by only one of the committees in-

[17] Timothy S. Jost, *Health Insurance Exchanges: Legal Issues*, O'Neill Inst. at Geo. U. Legal Ctr., at 7 (2009), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1022&context=ois_papers (emphasis added).

volved in drafting the 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 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." Appellants' En Banc Br. 48.[18] But the fact that the provision was not amended does not support Appellants' position: in fact, the provision was not amended because, as previously discussed, no one then interpreted it in the way Appellants now do.[19]

[18] Congressional opponents of the ACA also argue that the language in Section 36B was the result of "lengthy negotiations" that were necessary because the absence of a filibuster-proof majority made "compromise within the Democratic caucus . . . necessary" to ensure the bill's passage. Cornyn et al. En Banc Br. 18, 17. This argument has no basis in fact: the pertinent text was included in the bill reported by the Senate Finance Committee on October 19, 2009, *see* S. 1796, 111th Cong. § 1205(a) (2009); it was at no point a focus of controversy or even attention; and it was never altered as part of any "compromise."

[19] 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.

Fourth, Appellants assert that the "incentive function [of the subsidies provision] was well understood by, among others, Prof. Jonathan Gruber," an economist at M.I.T. Appellants' En Banc Br. 48. But the only citation for this suggestion is *one* statement Gruber made in 2012 long after the law was enacted—a statement that is inconsistent with other statements he has made, *see generally* Economists En Banc Br. They do not cite (or even name) any of the "others" who purportedly understood the subsidies provision to work this way, let alone any members of the Congress who actually passed the law. That Appellants rely on this statement as evidence in support of their claim only underscores their inability to find any support in the *actual* legislative record.[20]

In fact, the ACA's 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 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

[20] Tellingly, Appellants now abandon one of the purportedly key pieces of legislative history evidence on which they relied before the panel, i.e., the informal exchange between Senator Baucus and Senator Ensign. Appellants' Panel Br. 42.

[21] For a full discussion of these amendments, see Families USA *Amicus* Brief at 24-26, *Halbig v. Sebilius*, No. 13-cv-00623-PLF (D.D.C. Nov. 12, 2013), ECF No. 48-1.

history is not subsequent legislative history and is directly relevant to the question before this Court. *See, e.g.*, *United States v. Bd. 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. 41,866 (July 15, 2011). *See* Pub. L. No. 112-56, § 401, 125 Stat. 711, 734 (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 the 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 Budget Office and the Joint Committee on Taxation that reflected—and quanti-

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

fied—the shared understanding that the 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.*, Appellants' En Banc Br. 43.[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. Va. 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 establish state-run Exchanges, some governors acknowledged that they preferred for

[23] *Id.* at 12.

[24] Appellants also point to other "carrots" and "sticks" they say Congress used to "induce states to establish Exchanges voluntarily." Appellants' En Banc Br. 3. But none of these inducements to establish Exchanges are conditional grants, and the conditional grant provisions that are in the ACA were included for purposes entirely unrelated to the Exchanges. For example, Appellants point to the prohibition on tightening of Medicaid eligibility standards, which is part of the Medicaid expansion provisions (*id.*), but, as the Government explains, that measure was a temporary one that had nothing to do with encouraging the States to set up their own Exchanges, Gov't En Banc Br. 30-31.

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 abdicate control to Washington."[27] Thus, the loss of regulatory control was well estab-

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[25] Vaughn Hillyard, *Politics Wasn't Only Reason Why Some GOP-Led States Didn't Set Up Own Exchanges*, NBC News (Dec. 4, 2013), 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, "[T]o me, and to the business community, creating . . . 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), http://www.npr.org/blogs/health/2014/03/18/290092059/despite-setbacks-bipartisan-support-remains-for-colorado-exchange.

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

lished as a highly potent incentive for States to set up their own Exchanges, contrary to Appellants' assertions that the threat of nullifying premium assistance tax credits and subsidies was "probably the only way" to induce States to set up their own Exchanges, *see* Appellants' En Banc Br. 43. In short, Appellants' conjecture (*id.* at 14-15) that "[a]bsent such a financial incentive, it was quite unlikely that states" would set up their own Exchanges 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 the ACA's core purpose. It defies commonsense for Appellants to suggest that *amici* and other architects of the 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 the ACA would allow, state opponents of the ACA could prevent the law from delivering immensely valuable benefits to large numbers of low- and moderate-income individuals and families. Moreover, it would render the Exchanges inoperable, even for participants not entitled to tax credits or subsidies, and thus raise premiums and curtail insurance offer-

ings across the entire market for individual insurance. Eliminating premium assistance would undermine other aspects of the law crucial to achieving health care reform, including the individual mandate and the insurance reforms ensuring coverage of pre-existing conditions, preventing arbitrary terminations, and addressing other well-known insurance industry abuses.

It bears emphasis that the tax credits are not merely, as Appellants and the panel majority suggest (*see* Appellants' En Banc Br. 13; JA 374-76), related in some nonspecific manner to a vague overall statutory goal. Rather, the credits are indispensable to effectuating other specific components of the statutory scheme (including the provisions just discussed) that are themselves indispensable to the statute's fundamental goal of making health care affordable for all Americans. For the interdependent scheme Congress designed to work properly, those tax credits must be available to all Americans, regardless of where they live.

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 pur-

chasers 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' ex-

[28] Cal. HHS, *Public Comments to HHS on the Planning and Establishment of State-Level Exchanges* 2 (Oct. 4, 2010), *available at* https://www.statereforum.org/sites/default/files/california-1.pdf.

isting 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 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

[29] Tex. Dep't of Ins. & HHS Comm'n, *Public Comments to HHS on the Planning and Establishment of State-Level Exchanges* 1 (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).

[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 (Feb. 11, 2014), http://chirblog.org/halbig-v-sebelius-and-state-motivations-to-opt-for-federally-run-exchanges/. 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.*

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 Exchange was never one of them. For example, within days of the 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

[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* Brief of State Petitioners on Medicaid, *Florida v. U.S. Dep't of Health and Human Servs.*, No. 11-400 (11th Cir. Jan. 10, 2012), 2012 WL 105551, at *12; *see id.* at *22, 25, 51.

[33] *See* Nat'l Governors Ass'n, *Implementation Timeline for Federal Health Reform Legislation* (2010), *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/1003HEALTHSUMMITIMPLEMENTATIONTIMELINE.PDF.

[34] *See* Nat'l Governors Ass'n, *State Perspectives on Insurance Exchanges: Implementing Health Reform In An Uncertain Environment* (2011), *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/1109NGAEXCHANGESSUMMARY.PDF.

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. Given the important role that the tax credits were to play in making health insurance affordable—again, the core purpose of the 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 the ACA that 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: November 3, 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 6,734 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 3rd day of November, 2014.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on November 3, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 3rd day of November, 2014.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

Counsel for Amici Curiae

APPENDIX

No. 14-5018

Jacqueline Halbig, et. al., Appellants

v.

Sylvia Burwell, Secretary of Health and Human Services, et al., Appellees

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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

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