UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Jacqueline Halbig, *et al.*, *Appellants*, v. Kathleen Sebelius, Secretary of Health and Human Services, *et al.*, *Appellees*.	)	Case No. 14-5018

NOTICE OF INTENT TO FILE *AMICUS* BRIEF

The States of Oklahoma, Alabama, Georgia, West Virginia, Nebraska, and South Carolina, and Consumers' Research intend to file an *amicus* brief in support of the Appellants in the above-captioned appeal, and hereby provide notice of that intent pursuant to Circuit Rule 29(b). All parties have consented to the filing of this brief. A copy of the brief is attached hereto.

Respectfully submitted,

/s/ Rebecca A. Beynon

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Dated: February 5, 2014

STATEMENT PURSUANT TO D.C. CIRCUIT RULE ECF-3

Pursuant to D.C. Circuit Rule ECF-3(B), the undersigned certifies that counsel for parties other than *Amicus* Consumers' Research consent to the filing of this document.

/s/ Rebecca A. Beynon
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 26.1 and 29(b), *Amicus Curiae* Consumers' Research hereby submits the following corporate disclosure statement:

Consumers' Research is a nonprofit 501(c)(3) organization. Consumers' Research is not a publicly held corporation, and no corporation or other publicly held entity owns 10% or more of its stock.

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of February 2014, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ Rebecca A. Beynon
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ORAL ARGUMENT SCHEDULED FOR MARCH 25, 2014

No. 14-5018

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

JACQUELINE HALBIG, *et al.*,

Appellants,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Appellees.

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

BRIEF OF *AMICI CURIAE* STATES OF OKLAHOMA, ALABAMA, GEORGIA, WEST VIRGINIA, NEBRASKA, AND SOUTH CAROLINA, AND CONSUMERS' RESEARCH IN SUPPORT OF APPELLANTS

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CONSTITUTION, STATUTES, REGULATIONS, AND RULES

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LEGISLATIVE MATERIALS

OTHER MATERIALS

GLOSSARY

Act or ACA	Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029
CHIP	Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 8
DOL Unemployment Compensation Overview	U.S. Dep't of Labor, Office of Unemployment Insurance, Division of Legislation, *Unemployment Compensation: Federal-State Partnership* (Apr. 2013)
EPA	Environmental Protection Agency
Exchange	American Health Benefit Exchange
NCLB	No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425

INTEREST OF *AMICI CURIAE*[1]

Amici States Oklahoma, Alabama, Georgia, West Virginia, Nebraska, and South Carolina have a profound interest in the outcome of this case. Sections 1311 (codified at 42 U.S.C. § 18031) and 1321 (codified at 42 U.S.C. § 18041) of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (collectively, the "Act" or "ACA"), allow States to choose to establish an "American Health Benefit Exchange" (an "Exchange") to facilitate execution of the Act's key provisions. If a State elects not to establish an Exchange under section 1311, section 1321 authorizes the Secretary of Health and Human Services instead to establish an Exchange to operate in that State.

Important consequences flow from a State's decision whether to establish an Exchange. If a State elects to establish its own Exchange, the federal government will make "advance payments" of premium tax credits to insurance companies on behalf of some of the State's residents to subsidize health insurance enrollment through the State-created Exchange. Under the ACA's plain language, however,

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for *Amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

such tax subsidies are *not* available to individuals that live in States that have chosen not to establish an Exchange. Significantly, the federal government's payment of a subsidy – for even a single employee – triggers costly obligations for employers within that State, placing such States at a competitive disadvantage in employment.

States have an interest in seeking to prevent the unauthorized imposition of financial obligations on employers beyond the scope expressly contemplated by the ACA. In addition, States have an interest in ascertaining conclusively their rights and obligations under the ACA, so that they may make reasoned and informed healthcare policy choices that respect the needs and preferences of their employers and citizens. *Amici* States have predicated decisions regarding establishment of Exchanges on the implementation of the ACA and its incentives as-written, only to have those expectations unsettled by an interpretation of that law that cannot be squared with its plain language.[2]

[2] Oklahoma has brought litigation in the U.S. District Court for the Eastern District of Oklahoma, seeking a judgment upholding Article II, Section 37 of the Oklahoma Constitution as a protection against mandated purchases of health insurance and invalidating the Internal Revenue Service ("IRS") regulations that are at issue in this case. *See* Am. Compl. for Declaratory and Injunctive Relief, *Pruitt v. Sebelius, et al.*, Case No. CIV-11-030-RAW (E.D. Okla. filed Sept. 19, 2012). On January 6, 2014, the district court entered a briefing schedule pursuant to which the parties' briefing on the parties' summary judgment motions and cross-motions will be completed by May 19, 2014. *See* Order, *id.* (Jan. 6, 2014).

Amicus Consumers' Research is an independent educational organization located in Washington, D.C., which has focused on consumer education and consumer welfare for more than 80 years. Consumers' Research opposes the expansion by IRS regulation of market-distorting tax incentives that will, to consumers' detriment, burden local employers and subsidize private insurers.

SUMMARY OF ARGUMENT

The plain language of the ACA makes clear that tax subsidies are available only in those States that have established Exchanges pursuant to section 1311 (codified at 42 U.S.C. § 18031). Specifically, section 1401(a) of the ACA (codified at 26 U.S.C. § 36B(a)) provides that taxpayers may receive a tax credit equal to an applicable taxpayer's "premium assistance credit amount," which the statute defines as the sum of the monthly premium assistance amounts for "all coverage months of the taxpayer occurring during the taxable year." 26 U.S.C. § 36B(b)(1). A "coverage month" is one in which "the taxpayer . . . is covered by a qualified health plan . . . enrolled in through an *Exchange established by the State under section 1311* of the [ACA]." *Id.* § 36B(c)(2)(A)(i) (emphasis added).[3]

Notwithstanding the statute's unambiguous language, the IRS promulgated regulations making subsidies available for coverage purchased on *both* State and federal Exchanges. *See* 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20. Its action

[3] Other portions of the ACA likewise make plain that tax subsidies are available only in States that have established Exchanges. *See* 26 U.S.C. § 36B(b)(2).

triggered mandates and penalties for individuals and employers in those States that have chosen not to establish Exchanges. *See* Slip. Op. at 5-7 (JA 329-31).

In upholding the IRS's implementing regulations under step one of the analysis dictated by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), the district court reached the remarkable conclusion that the statute unambiguously means something completely different from what it actually says. Although it acknowledged that the ACA's "plain language . . . appears to support" Plaintiff-Appellants' understanding, Slip Op. at 26 (JA 350), it nevertheless concluded that "the plain text of the statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges," *id.* at 37 (JA 361). In so doing, the district court improperly imported the phrase "*or the federal government*" into section 1401(c)(2)(A)(i) of the ACA (codified at 26 U.S.C. § 36B(c)(2)(A)(i)), thereby ensuring that individuals will receive federal tax subsidies even if they live in States that have chosen not to establish Exchanges. *See* Slip Op. at 38 (JA 362).

The district court ignored the ACA's plain language, in part, on the ground that such a reading would run contrary to Congress's intent: "A state-run Exchange is not an end in and of itself, but rather a mechanism intended to facilitate the purchase of affordable health insurance." *Id.* at 34 (JA 358). Thus,

the district court reasoned, "[i]t makes little sense to assume that Congress sacrificed nationwide availability of the tax credit . . . in an attempt to promote state-run Exchanges." *Id*. at 34-35 (JA 358-59).

As Plaintiff-Appellants have ably explained, neither the ACA's specific statutory provisions, nor its overall structure, nor its legislative history permit this result. The ACA's limitation of the availability of tax credits to citizens in those States that have elected to establish Exchanges reflects Congress's deliberate effort to secure the voluntary participation of States in the implementation of a nationwide policy. This result is consistent with the longstanding presumption – legislatively established by Congress in the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011 – that health insurance regulation is a matter of State control.

Moreover, the district court's conclusion that interpreting the ACA to limit the availability of tax subsidies solely to those States that have established Exchanges would lead to "strange or absurd results," Slip Op. at 32 (JA 356), is flatly at odds with the legislative backdrop against which Congress enacted the ACA. Consistent with the principle that Congress may not commandeer or coerce State implementation of national policy, *see Printz v. United States*, 521 U.S. 898, 935 (1997), Congress routinely incentivizes State participation in federal programs in ways functionally indistinguishable from those employed by the ACA.

Indeed, an examination of other legislation reveals that the statutory mechanisms employed by the ACA – far from being "strange or absurd," Slip Op. at 32 (JA 356) – are commonplace. In this regard, three propositions underpinning the district court's decision warrant close scrutiny. *First*, contrary to the district court's conclusion that a plain-language interpretation of the ACA would "run[] counter to [the] central purpose of the ACA: to provide affordable health care to virtually all Americans," *id.* at 33 (JA 357), Congress routinely enacts legislation that withholds, or limits the availability of, federal benefits to citizens of those States that choose not to implement federal policy and sacrifices the uniform implementation of important national goals in an effort to secure States' implementation of a law. *Second*, contrary to the district court's suggestion that Congress would not use the Tax Code to incentivize State implementation of the ACA's policy objectives, *see id.* at 34 (JA 358), Congress has previously done just that through the federal unemployment compensation program, which encourages State implementation of the program by affording beneficial tax treatment to those in participating States. *Third*, by concluding that the federal establishment of Exchanges somehow constitutes action "on behalf of a state that declines to establish its own Exchange," *id.* at 33 (JA 357), the district court improperly imposed unauthorized and unprecedented burdens on States that have elected not to participate in a federal program.

ARGUMENT

I. Congress Routinely Conditions the Availability of Federal Subsidies to Citizens on Their State's Implementation of Federal Policy

The district court disregarded the plain language of the ACA on the ground that federal healthcare tax subsidies must be made available to *all* individuals, regardless of whether they live in a State that has elected to establish an Exchange. It reasoned that this reading was necessary to further the "central purpose" of the ACA – *i.e.*, the provision of affordable healthcare to "virtually all Americans." Slip Op. at 33 (JA 357). Concluding that "there is simply no evidence . . . in the legislative history of any intent by Congress to ensure that states established their own Exchanges," *id.* at 34 (JA 358),[4] the district court found implausible that

[4] This conclusion is simply inaccurate. As the Secretary of Health and Human Services herself recognized, "[i]t all starts with the assumption that the states take the lead." Kate Pickert, *Health Reform: Reluctant States Could Invite a Federal Takeover*, Time, Nov. 12, 2010. *See also* 156 Cong. Rec. S1835 (daily ed. Mar. 23, 2010) (statement of Sen. Conrad) ("This health care reform . . . creates State-based health exchanges for individuals and small businesses."); *id.* at 1860 (statement of Sen. Murkowski) ("[T]he health care bill that is now law creates these State exchanges where all non-Medicaid and Medicare individuals will go to purchase their health insurance."); *id.* at S1948 (daily ed. Mar. 24, 2010) (statement of Sen. Baucus) ("The bill also provides for State-based exchanges."); *id*. at 1962 (statement of Sen. Feingold) ("[O]ver the next 4 years, States will prepare to set up health insurance exchanges for individuals and small businesses to purchase more affordable health insurance."); *id.* at H2207 (daily ed. Mar. 22, 2010) (statement of Rep. Burgess) ("Now, you have heard that several States around the country are looking at, I believe it's up to 37, . . . somehow exempting their State from participating in this new Federal legislation, and that also means that they may not set up the State-based exchange that the bill, the Senate bill, calls for.").

Congress would have "sacrificed *nationwide availability* of the tax credit" in order to "promote state-run Exchanges," *id.* at 34-35 (JA 358-59) (emphasis added).

The district court's holding is fundamentally counter to the purpose and structure of the ACA. As with other social welfare programs, Congress intended the ACA to benefit needy citizens across the nation – here, by reducing healthcare costs. But the ACA *also* clearly reflects Congress's separate objective that – in keeping with all major social welfare legislation enacted since the New Deal – States should have principal responsibility for implementing the ACA's provisions, including the establishment of Exchanges. Congress could not constitutionally "order the States to regulate according to its instructions," *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (plurality opinion), and it thus encouraged States to implement federal policy by offering tax subsidies only to those citizens of the States that had set up Exchanges. Indeed, other provisions of the ACA reflect similar efforts to influence States' policy choices. *See* 42 U.S.C. § 1396c (providing that payment of Medicaid funding to States may be conditioned on compliance with federal requirements).

That these federal tax subsidies are not available under the ACA to citizens of States that have chosen not to establish Exchanges is simply the natural consequence of this familiar legislative approach. In this regard, the ACA is on all fours with a host of federal social welfare programs that are directed at providing

assistance to citizens nationwide – but that nevertheless condition the federal assistance actually available to citizens on whether, or the extent to which, their State has chosen to implement federal policy. Such laws reflect Congress's recognition of a self-evident proposition: the measures needed to incentivize State implementation of federal social welfare legislation may mean that policy will not be uniformly implemented across the United States and that citizens of different States may receive varying levels of federal assistance.

A. For example, the stated purpose of the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended primarily in scattered sections of 20 U.S.C.) ("NCLB"), is "to ensure that *all* children have a fair, equal, and significant opportunity to obtain a high-quality education." 20 U.S.C. § 6301 (emphasis added). To accomplish this purpose, Congress intended to "distribut[e] and target[] resources sufficiently to make a difference to . . . schools where needs are greatest." *Id.* § 6301(5). But the NCLB conditions this federal educational funding – and thus the benefits available to the children that live in a State – on the State's compliance with and implementation of federal policy. To receive funding under the NCLB, a State must submit a detailed plan to the Secretary of Education that provides for statewide academic standards, academic assessments, and academic accountability, *see id.* § 6311(a)-(b), and must submit detailed annual state "report cards," *see id*. § 6311(h). States may also

receive special funding under the NCLB – for example, for teaching children with limited English proficiency – if they agree to monitor educational subunits for compliance with federal educational goals and to sanction those subunits for noncompliance (with sanctions including firing teachers, changing curricula, or withholding funds). *See*, *e.g.*, *id.* § 6842(a)(1), (b)(4).

As a result of these and other federal funding mechanisms, the amount of federal educational funding distributed, on a per-pupil basis, differs substantially across different States and school districts, depending on the extent to which the particular State has elected to implement federal policies. For example, according to the Department of Education's 2010 statistics for the 100 largest public elementary and secondary school districts in the United States, Utah's Jordan School District received approximately $36.5 million in federal revenue (around $750 per pupil), whereas Georgia's Atlanta Public Schools received approximately $102.6 million (or $2,100 per pupil). *See* U.S. Dep't of Education, Nat'l Center for Education Statistics, *Revenues and Expenditures for Public Elementary and Secondary School Districts: School Year 2009-10 (Fiscal Year 2010), First Look*, at 10 (Apr. 2013), *available at* http://nces.ed.gov/pubs2013/2013307.pdf.

B. The Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 8 ("CHIP"), is likewise directed at assisting children across the United States. CHIP's purpose is "to provide dependable and

stable funding for children's health insurance under . . . the Social Security Act in order to enroll *all* six million uninsured children who are eligible, but not enrolled, for coverage." *Id.* § 2, 123 Stat. 10 (reprinted at 42 U.S.C. § 1396 note). Children are eligible for these benefits, however, only if they live in States that have chosen to submit a "child health plan," 42 U.S.C. § 1397aa(b), which must comply with numerous federally determined requirements relating to eligibility and care metrics, *see id.* § 1397bb. States must receive federal approval of proposed plans as a condition of funding. *See id.* § 1397ff(a)(1). CHIP provides States with "performance bonus payment[s]" to offset enrollment costs resulting from enrollment and retention efforts. *See id.* § 1397ee(a)(3).

Again, as a result of States' differing choices regarding their implementation of this program, federally funded services available to citizens may vary in numerous respects, depending on their location. For example, in Colorado, higher-income enrollees in CHIP (at 150-200 percent of the federal poverty level) must make a $30 co-payment for an emergency care visit, whereas enrollees at that income level in Illinois pay only $5. *See* U.S. Gov't Accountability Office, *Report to the Chairman, Subcommittee on Health Care, Committee on Finance, U.S. Senate: Children's Health Insurance – Information on Coverage of Services, Costs to Consumers, and Access to Care in CHIP and Other Sources of Insurance*, GAO-14-40, at 40, 43 (Nov. 2013), *available at* http://www.gao.gov/assets/660/659180.pdf. Habilitative

outpatient services are not covered by CHIP plans in Utah or Kansas, but are covered to varying extents in Colorado (40 visits), Illinois (no limits), and New York (six weeks of physical and occupational therapy, no limit on speech therapy). *See id.* at 13.

C. Similarly, Congress's child support enforcement program (codified at 42 U.S.C. §§ 651-669b) is designed to assist "*all* children" across the nation by securing financial support from noncustodial parents. *Id.* § 651 (emphasis added). But again, depending on the States in which they reside, not all children necessarily benefit equally from this program. The amount of assistance afforded under the program depends on (among other things) an "incentive payment" made by the federal government to the State. To qualify for such payments, States must first establish a compliant plan for child and spousal support that meets extensive federal guidelines as to staffing, statewide applicability, paternity establishment services, and more. *See id.* § 654. Plans complying with detailed federal requirements may then qualify for federal assistance based on State performance levels in various categories (*e.g.*, paternity establishment, support orders, arrearage payments, and cost-effectiveness), *see id.* § 658a(b)(4), and on whether that State has met data quality standards, *see id.* § 658a(b)(5)(B).

States with higher performance levels receive greater incentive payments, and correspondingly enjoy greater funding for services to establish paternity, locate

noncustodial parents, and enforce child support orders. Thus, as with the NCLB and CHIP, children residing in States that receive more federal funding may receive greater benefits than those living in States that receive less. For example, both Texas and Ohio received roughly similar amounts of federal incentive payments in fiscal year 2010 (approximately $33.8 and $32.2 million, respectively), *see* Congressional Research Service, *Child Support Enforcement Program Incentive Payments: Background and Policy Issues* at CRS-36 (May 2, 2013), *available at* https://www.fas.org/sgp/crs/misc/RL34203.pdf, even though the population of Texas is more than twice that of Ohio, *see* U.S. Dep't of Commerce, Economics & Statistics Admin., *Population Distribution and Change – 2000 to 2010: 2010 Census Briefs* at 2, tbl. 1 (Mar. 2011) (population of Texas is 25.1 million, while population of Ohio is 11.5 million), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf.[5]

Like these other legislative frameworks, the ACA reflects Congress's judgment that certain federal programs are best implemented at the State level, and

[5] Other federal statutes similarly condition the availability or amount of federal subsidies that a citizen may receive on their State's implementation of federal policy. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (granting support for direct cash assistance to needy families contingent on a State's maintenance of certain funding levels and establishment of work requirements); Supplemental Nutrition Assistance Program, 7 U.S.C. § 2013 (authorizing issuance of allotment to eligible households in a State, provided the State requests such benefits and does not collect local sales tax on foods purchased with program benefits).

its recognition that, as a result of States' different choices, it is possible that not all U.S. citizens will receive equal benefits under such federal programs. As it has with numerous other social welfare programs, Congress conditioned the benefits that would be available to a State's citizens under the ACA on their State's decision to implement federal prerogatives.

II. Congress Uses the Tax Code To Incentivize State Implementation of Federal Policy

Implicit in the district court's opinion is the assumption that Congress would not use the Tax Code to incentivize States to implement the ACA's policy objectives. *See* Slip Op. at 34 (JA 358). But Congress has previously employed precisely such a mechanism. The unemployment compensation program, created by the Social Security Act of 1935, is "a federal-state partnership based upon federal law," which Congress intended to be "administered by state employees under state law." U.S. Dep't of Labor, Office of Unemployment Insurance, Division of Legislation, *Unemployment Compensation: Federal-State Partnership* at 1 (Apr. 2013), *available at* http://www.oui.doleta.gov/unemploy/pdf/partnership.pdf ("DOL Unemployment Compensation Overview").

As with the ACA, the unemployment compensation program conditions the private receipt of tax subsidies within a State on the State's participation in the federal program. Specifically, pursuant to provisions of the Federal Unemployment Tax Act (codified at 26 U.S.C. §§ 3301-3311) ("FUTA"), covered employers must

pay a federal unemployment wage tax on amounts paid to employees (at a current rate of 6 percent on wages up to $7,000 per year). *See id.* §§ 3301, 3306(b). However, if a State establishes an approved state unemployment compensation program, subject to certain federal guidelines and annual certification, *see* 42 U.S.C. § 503, employers in that State receive a credit of up to 90 percent of this tax obligation, *see* 26 U.S.C. § 3302(a)(1), (c). Thus, in States that have chosen to comply with specific federal requirements, employers pay an *effective* federal tax rate of 0.6 percent (or a maximum of $42 per covered employee) per year. *See* DOL Unemployment Compensation Overview at 6. Employers in States that have not implemented federal policy do not receive this tax subsidy. *See id.* at 2 (employers are eligible to receive tax credit "[i]f a state law meets minimum federal requirements under FUTA and Title III of the [Social Security Act]"). Also like the ACA, the federal unemployment compensation program also authorizes federal grants to States to assist in the implementation of the federal program. *Compare* 42 U.S.C. § 1101(c)(1)(A)(i) (authorizing federal grants to States for the purpose of "assisting the States in the administration of their unemployment compensation laws") *with id.* § 18031(a)(3) (authorizing federal grants to States for "activities (including planning activities) related to establishing an [Exchange]").[6]

[6] The Supreme Court upheld this statutory regime against a challenge that it unlawfully coerced the States into adopting unemployment compensation regimes. *See Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937) ("We

Thus, as with the federal unemployment program, the ACA reflects Congress's effort to induce State compliance with federal objectives by providing tax subsidies to residents of participating States, while giving them the choice not to participate in the implementation of federal policy. When viewed against this longstanding statutory backdrop, the district court's conclusion that tax subsidies will be available to all citizens, regardless of whether they live in a State that has established an Exchange, cannot be reconciled with the design or structure of the ACA.

III. The District Court's Conclusion that a Federally Established Exchange Is an "Exchange Established by the State" Is Contrary to Legislative Precedent and Imposes Unauthorized Burdens on Non-Electing States

The district court decided that the ACA was most naturally interpreted "as authorizing the federal government to create 'an Exchange established by the State under [42 U.S.C. § 18031]' on behalf of a state that declines to establish its own Exchange." Slip Op. at 32-33 (JA 356-57) (alteration in original). In doing so, as the statutory framework against which Congress enacted the ACA makes clear, the district court deprived States of their right to choose to avoid the burdens that come with implementation of the ACA.

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cannot say that [Alabama] was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power.").

The ACA exemplifies a legislative regime that has become increasingly commonplace since the Supreme Court made clear that the Constitution does not permit federal commandeering of State governments. *See Printz*, 521 U.S. at 935; *New York* v. *United States*, 505 U.S. 144, 188 (1992). Such laws contemplate that the States will be the default and preferred implementers of federal policy, but provide for a federal "fallback" option, whereby the federal government will step in and operate a program should a State decline to do so or fail to implement it successfully. To cite but a few examples of such laws, the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, contemplates that States will submit to the Environmental Protection Agency ("EPA") for approval plans that implement national air quality standards. *See id.* § 7410(a)(1). But the law provides that the EPA will step in and promulgate a federal implementation plan if the State does not submit a plan or the State's plan is not acceptable. *See id*. § 7410(c)(1).

Likewise, the Telecommunications Act of 1996 (codified throughout 47 U.S.C.) contemplates that State public utility commissions will review and approve interconnection agreements between an incumbent carrier and competing local exchange carriers, *see* 47 U.S.C. § 252(e)(1), but provides that the Federal Communications Commission will assume responsibility for resolving these matters should the State commission fail to act, *see id.* § 252(e)(5). The Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584 (1967) (codified as

amended at 21 U.S.C. §§ 601-695), provides that a State may receive federal funding and implement programs to protect the public from consuming unwholesome meat, *see id.* § 661(a), but authorizes the Secretary of the United States Agriculture Department to take action if the State's program is inadequate, *see id*. § 661(c)(1). Similarly, the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678, authorizes States to assume responsibility for the development and enforcement of occupational safety and health standards, *see id.* § 667(b), and authorizes federal grants to assist States in implementing such plans, *see id.* § 672(a). However, the Secretary of the Department of Labor has responsibility for implementing federal policy if a State's plan fails to comply with the applicable requirements. *See id.* § 667(d)-(f).

While all of these statutes, like the ACA, contemplate that the federal government will step in and act directly should a State fail to implement federal law adequately, or simply choose not to act, none of them contemplates the further step taken by the district court here – *i.e.*, by deeming federal action to be "on behalf of a state," Slip Op. at 33 (JA 357), the district court imposed on non-participating States burdens that under the statute they would have assumed only if they had *chosen* to participate in the federal legislative scheme. As with all of the legislative frameworks discussed above, the ACA affords States certain benefits if they choose to implement federal law. Some citizens receive federal tax credits, a

State may receive federal grant money to establish an Exchange, and a State will have some flexibility to decide how its Exchange will operate. But a State's implementation of an Exchange also entails burdens, as the availability of tax subsidies extends the individual mandate to many otherwise-exempt individuals and triggers costly tax obligations for the State's employers. Statutes like the ACA are designed to give States a choice, in view of the benefits and burdens that come with implementation of federal policy, to participate in a federal program or to decide against doing so. *Cf. Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 596-97 (1983) (plurality opinion) ("[T]he receipt of federal funds under typical Spending Clause legislation is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt. . . . [S]tatutes must respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the further obligations and duties that a court has declared are necessary for compliance.").

The district court's approach denies States the right to make the tradeoff expressly contemplated by the ACA. Nothing in the ACA – or the legislative backdrop against which Congress enacted that law – supports the conclusion that States that do not wish to participate in a federal program and thus will not receive

the benefits associated with its implementation should nevertheless be saddled with its burdens.

CONCLUSION

For the foregoing reasons, *Amici* respectfully ask this Court to reverse the judgment of the district court.

Respectfully submitted,

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STATEMENT PURSUANT TO D.C. CIRCUIT RULE ECF-3

Pursuant to D.C. Circuit Rule ECF-3(B), the undersigned certifies that counsel for parties other than *Amicus* Consumers' Research consent to the filing of this brief.

/s/ Rebecca A. Beynon
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C) and D.C. Circuit Rule 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1), this brief contains 4,739 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2007) used to prepare this brief.

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February 5, 2014

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of February 2014, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ Rebecca A. Beynon
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