No. 14-114

IN THE

Supreme Court of the United States

DAVID KING; DOUGLAS HURST;
BRENDA LEVY; and ROSE LUCK,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, as U.S. Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JACOB LEW, as U.S. Secretary of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE; and JOHN KOSKINEN, as Commissioner of Internal Revenue,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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In 2011, the Eleventh Circuit became the first Circuit to invalidate the ACA's individual mandate. Although that provision had survived other parallel challenges and was not even scheduled to take effect for more than two years, the Government recognized the imperative to "put these challenges to rest." White House Blog, *Obama Administration Asks Supreme Court To Hear Health Care Lawsuit*, Sept. 28, 2011. It therefore eschewed *en banc* review and asked this Court for definitive resolution. Drawn-out litigation over the legality of a central plank of this landmark legislation, the Government understood, would paralyze the Nation and disserve its citizens.

So too here. Indeed, the subsidies that the IRS has illegally expanded have *already* begun to flow, meaning billions of taxpayer dollars are pouring out of the Treasury absent congressional authorization and millions of Americans are ordering their lives around an impugned regulation. Yet the Government is content to leave the spigots of cash open and the Nation in limbo in the hopes that (i) the en banc D.C. Circuit reverses the *Halbig* panel, and (ii) no other Circuit enforces the Act's plain text. All to avoid this Court's scrutiny.

That is irresponsible. Whatever the outcome at the D.C. Circuit, rehearing will fracture that court, propagating rather than eliminating the uncertainty hanging over the IRS Rule. And identical challenges will inevitably follow across the country, creating chaos as other courts—like one in Oklahoma two weeks ago—strike down the subsidies, destabilizing insurance markets and threatening Americans with a bait-and-switch on subsidized health insurance.

The question is therefore not *whether* the Court should resolve this issue, but *when*. It can do so now, thus minimizing potential unfairness, providing maximum clarity to those subject to the Act, and preserving the integrity of federal expenditures. Or it can do so in 2016 or 2017, after tens of billions of Treasury funds are irretrievably spent, after the insurance industry restructures to adapt to the new regime, after employers lay off countless workers (or cut their hours) to avoid the employer mandate, and after millions of Americans buy insurance because they believe it will be subsidized (or because they are forced to under an individual mandate from which they are properly exempt).

Denial of this petition might be appropriate, if at all, only if *every* Circuit were expected to accept the Government's meritless defense of its Rule. That is why the Opposition spends so long trying to dress up that defense with unexplained statutory references, garbled explication, and minutiae of irrelevant provisions—to give the appearance of respectable statutory construction. But this case is strikingly simple. As the Oklahoma court remarked after reviewing both *King* and *Halbig*, the Government's argument "leads us down a path toward Alice's Wonderland, where up is down and down is up, and words mean anything." *Oklahoma v. Burwell*, No. 11-cv-30, 2014 U.S. Dist. LEXIS 139501, at *16 (E.D. Okla. Sept. 30, 2014). And such "interpretation" cannot be justified by contrived statutory anomalies, *absence* of legislative history, or bald assertions of a "subsidies-above-all" purpose found nowhere in the Act—as even the court below admitted.

I. LOWER COURTS ARE IN CONFLICT, AND WILL REMAIN SO UNTIL THIS COURT ACTS.

The Government does not and cannot dispute that the Nation needs certainty over whether the IRS may subsidize coverage on HHS Exchanges, given how those subsidies are affecting millions of individuals and employers across the country, not to mention important state policies and expenditure of billions of federal dollars. It instead argues that any uncertainty somehow dissipated when the D.C. Circuit agreed to rehear *Halbig* en banc. (Opp.32.) That is out of touch with reality.

A universally well-respected appellate panel held the IRS Rule to be illegal. The en banc order vacated the panel's *judgment*, but not its *opinion*, which means there is still technically a conflict between the two Circuits. *See* D.C. Cir. R. 35(d) ("If rehearing en banc is granted, the panel's judgment, but ordinarily not its opinion, will be vacated."). And still other cases raising identical challenges remain pending. The Government's plea to deny review thus asks this Court to assume both that the en banc D.C. Circuit will necessarily reverse the panel, and that no other Circuit will align with Judges Griffith and Randolph. If *either* assumption fails, denial of this petition will mean only *delayed* review—from this Term until the next, or the Term after that. But because final invalidation of the IRS Rule would be "tremendously disruptive" to the extent that "taxpayers, employers, insurers, the States," and others "have relied on the availability of credits," as the Government concedes (Opp.33), postponing review until after even *further* reliance would be the *worst* possible course.

In fact, both implicit assumptions are dubious, and if the Court denies this petition, it will almost certainly have to intervene later, when the stakes will be even higher. For one thing, the en banc D.C. Circuit *agrees* with its panels roughly a third of the time. Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991-2002*, 70 GEO. WASH. L. REV. 259, 263 (2002). And given that plain text dictated *Halbig*'s holding, there is a good chance it will do so here, notwithstanding the Senate Majority Leader's cynical suggestion in the wake of the panel opinion that the "simple math" of en banc review "vindicates" his elimination of the filibuster to confirm three new D.C. Circuit judges. Josh Gerstein, *How Obama's Court Strategy May Help Save Obamacare*, POLITICO, July 22, 2014.

Moreover, whatever the outcome at the en banc D.C. Circuit, other cases remain in the pipeline. Belying the Government's implicit suggestion that the *Halbig* panel's ruling was a mere fluke that will never be repeated, an Oklahoma district court just two weeks ago—*after* en banc review was granted in *Halbig*—reviewed that panel decision as well as the Fourth Circuit's here, and declared that the former was "more persuasive." *Oklahoma*, 2014 U.S. Dist. LEXIS 139501, at *14. The Government speculates that the Tenth Circuit might reverse that decision too (Opp.31 n.9), but there is no basis for that speculation and, anyway, there are ten other Circuits that will inevitably be asked to weigh in if this Court does not act first. *Oklahoma* thus illustrates that this dispute will persist, lower courts will continue to disagree, and confusion will reign, until a definitive resolution. *See* Mo. Liberty Amicus Br. 4-7.

That argument for immediate review, says the Government, could be made in *any* challenge to "a major statute or regulation." (Opp.33.) And indeed, this Court often *does* grant certiorari in such cases *without* a conflict. *E.g.*, *Tex. Dep't of Housing & Cmnty. Affairs v. Inclusive Cmnties. Project, Inc.*, No. 13-1371; *Zivotofsky v. Kerry*, No. 13-628; *Utility Air Regulatory Grp. v. EPA*, No. 12-1146; *Shelby Cnty. v. Holder*, No. 12-96; *Free Enterprise Fund v. PCAOB*, No. 08-861.

But review is needed far more urgently here than in just "any" challenge to a statute or regulation. *First*, as *Halbig* and *Oklahoma* show, this challenge is substantial, bearing the imprimatur of serious jurists. *Second*, the ACA is not just "any" law, but the most significant social legislation in a generation, inducing pervasive reliance by not only nearly every American citizen and business (*see* Mo. Liberty Amicus Br. 8-15) but also by all the states (*see* Okla. Amicus Br. 5-16).[1] *Third*, tens of *billions* of dollars will be spent annually based on this Rule, triggering unique separation-of-powers concerns. *See* Cornyn Amicus Br. 11-16.

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[1] While the Government implicitly concedes most of the examples of reliance in the petition (Pet.18-22), it claims that the IRS will have discretion to not claw back improperly-paid subsidies. (Opp.32-33.) It is doubtful that a clawback for the *current* tax year would constitute "retroactive" application of a judicial decision. But even if there is no clawback, that just underscores that subsidies now being paid will be *irretrievably* lost if the IRS Rule is invalidated—a stark example of ongoing *national* reliance. And the disruption to individuals will be severe regardless of clawback; at best, they will unexpectedly lose their subsidies *after* enrolling based on a false promise.

In short, the Court may either resolve this issue *before* tens of billions of dollars are lost, *before* employers restructure their workforces to avoid the employer mandate, *before* individuals rely on subsidies in making health-care decisions, *before* insurers revamp their offerings to account for new risk pools, and *before* more States default to the HHS Exchange assuming no consequences follow—or delay until *after* that reliance, on the Government's baseless assertion that this matter of extraordinary national importance and heated jurisprudential debate will go away on its own. The Government's position is irresponsible and should be rejected.[2]

II. THE IRS RULE IS AN EXERCISE IN "DISTORTION, NOT INTERPRETATION."

Somewhat ironically for a brief intended to *evade* merits review, the Opposition is largely a putative defense of the IRS Rule. The Government needs at least the veneer of legitimate statutory construction to support its speculation that the D.C. Circuit will reverse the *Halbig* panel and that other Circuits will similarly ignore the Act's plain text. But a veneer is all it is, masking a gross distortion of plain statutory text to advance the Administration's preferred policy goals.

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[2] If this Court believes the *Halbig* en banc proceeding will yield a "more complete airing of the issues" (Opp.34) from which this Court would benefit (even though the issues have already been exhaustively briefed, argued, and decided in three district courts and two Circuits), the Court should at minimum hold the petition pending the result of the en banc proceeding, to allow for more expedited review once *Halbig* is resolved en banc.

A. The Government tries to make the statutory issue seem complex, but it is not. Only three ACA provisions need to be understood. Section 1311 instructs that states "shall" establish Exchanges. 42 U.S.C. § 18031(b). Section 1321 clarifies that in case of a state's "failure to establish [an] Exchange," HHS "shall … establish and operate such Exchange within the State." *Id.* § 18041(c). And then the Act grants subsidies for coverage "enrolled in through an Exchange *established by the State under section 1311*." 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added). Any English speaker reading those provisions would immediately understand that if a state "fail[s] to establish [an] Exchange" and taxpayers instead enroll through an Exchange established by *HHS* under *§ 1321*, no subsidies are authorized.

Congress is always "free to give statutory terms a 'broader or different meaning.'" (Opp.15.) Yet while the Government repeatedly claims that an Exchange established by HHS is "established by the State" "as a matter of law" (Opp.12, 14)—a sort of legal fiction, apparently—it cites nothing in the statute that even remotely so hints. Where is the provision that says HHS "shall be treated as a State" for subsidy purposes? *Cf.* 42 U.S.C. § 18043(a)(1) (saying so for territories). Or that stipulates that any references to "an Exchange established by the State" are "deemed" to include HHS Exchanges? *Cf.* H.R. 3962, § 308(e), 111th Cong. (2009) (House bill doing so in converse setting). Various formulations are conceivable (*cf.* Opp.15 n.3), but the ACA includes *none*—and baldly asserting that A = B "as a matter of law" does not make it so. Inventing a legal fiction and "deeming" text to mean whatever the Government says may be convenient, but is not statutory construction.

The Government's reasoning appears to be that § 1321 spells out "alternative means" by which states may *satisfy* the requirement to establish Exchanges, and so an HHS-established Exchange is "established by the State" because it represents one way for the *state* to *meet* its obligation to establish one. (Opp.14.) But the statute says just the opposite. Section 1321 authorizes an HHS Exchange only upon the state's "*failure* to establish [an] Exchange." 42 U.S.C. § 18041(c). Only in this Alice-in-Wonderland world could "*failure*" to meet a requirement be a "wa[y] for that requirement to be satisfied." (Opp.12.)

Not only is the Government's "legal fiction" directly contrary to § 1321's text, it also renders § 36B's choice of language incomprehensible. If subsidies are authorized for all Exchanges, why does § 36B specify an Exchange "established by the State under section 1311"? The Government purports (for the first time) to answer: Section 36B had to refer back to "the specific State mentioned earlier," *i.e.*, indicate that one must enroll through the *particular* Exchange in one's own state. But that limit on enrollment is already crystal-clear from other parts of the Act. (*Cf.* Opp.7.) And if Congress for some reason wanted to *repeat* it here, it would simply have said that coverage must be obtained on "an Exchange *in* the State." On the Government's view, Congress chose not only the most circuitous and confusing way to make this obvious point—but used language that says the very *opposite* of Congress's alleged intent.

As Judge Randolph aptly put it, the IRS engaged in "distortion, not interpretation." *Halbig v. Burwell*, 758 F.3d 390, 412 (D.C. Cir. 2014) (concurring).

B. Unable to plausibly square the IRS Rule with § 36B's text, the Government resorts to "context." (Opp.18.) But § 36B is the *only* provision that speaks to subsidies; ignoring its clear answer in favor of strained inferences from irrelevant provisions is plainly improper. Anyway, context *confirms* § 36B's text: It shows that Congress elsewhere (but not in § 36B) used broad phrases that clearly encompass HHS Exchanges, *e.g.*, 42 U.S.C. § 18032(d)(3)(D)(i); that Congress expressly deemed other entities (but not HHS) to be "states," *e.g.*, *id.* § 18043(a)(1); and that, when it meant to, Congress referred distinctly to *both* Exchanges, *e.g.*, 26 U.S.C. § 36B(f)(3).[3]

The Government objects that a fundamental limit on subsidies would not be imposed in "technical drafting" in the subsidy formula. (Opp.18.) But an equally fundamental limit—to coverage obtained via *Exchanges*—admittedly derives from *the same text*. (Opp.24 n.6.) To distinguish that "through an Exchange" limit from the "established by the State" limit, the Government says the former "furthers the Act's central goals." (*Id.*) That exposes this as not a *structural* argument, but a *purposive* one. And a bad one, at that: The condition that coverage be obtained on an Exchange furthers one legislative purpose, by incentivizing consumers to use Exchanges. Likewise, the condition that coverage be through a *state-run* Exchange furthers *another* congressional purpose—incentivizing states to establish Exchanges.

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[3] The Government says that Congress did not specify Exchanges "established by the State" in other parts of § 36B—parts that do *not* define the subsidy's scope. (Opp.17.) That, of course, proves the point—that Congress's narrower language in the subsections that *do* define the subsidy was intentional.

Further afield, the Government insists that a plain-text reading creates "anomalies" elsewhere in the Act (Opp.19-23), even though this Court just held that courts cannot "revise legislation" to avoid such "apparent anomal[ies]," *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014), and even though *both* Circuits found the Government's alleged anomalies to be "unpersua[sive]" on their own terms. (Pet.App.22a); *Halbig*, 758 F.3d at 402-06.

A complete response to these supposed anomalies can be found in the *Halbig* appellants' en banc brief (http://sblog.s3.amazonaws.com/wp-content/uploads/2014/10/Halbig-brief-en-banc-CADC-10-3-14.pdf). In short, the argument about the reporting provision requires the Court to believe that Congress had no interest in premium or enrollment data for non-subsidized plans—which is demonstrably false, as reporting concededly applies to non-subsidized plans on state Exchanges. *Halbig*, 758 F.3d at 404. The "qualified individual" argument requires the Court to believe that if Petitioners win this case, HHS will be compelled to expel all enrollees from its Exchanges—a threat the Government tellingly refuses to issue, exposing this as merely a tendentious litigation position. As the Government knows, the qualified-individual provision can be sensibly construed to avoid that absurdity (in at least two ways, one of which the Government has *never disputed*) and so surely offers no basis to distort *§ 36B's* plain (and non-absurd) text. And the Medicaid maintenance-of-effort argument requires the Court to believe that Congress wanted to protect Medicaid beneficiaries *before* 2014 but could not care less how they were treated *after* 2014. That provision's plain text is thus "sensible, not absurd." *Id.* at 406.

C. The last refuge of every countertextual rule is amorphous "purpose." Why would Congress limit subsidies in the *Affordable* Care Act? (Opp.24-27.)

What this embarrassingly simplistic syllogism ignores is the *incentive* function of tying subsidies to state Exchanges. Since the goal was both subsidies nationwide *and* having states run Exchanges, this condition was ideal. No state would reject that tantalizing offer, Congress could assume, and so *both* goals would be satisfied. As even the court below admitted, this is a "plausible" account of Congress's intent (Pet.App.25a), one that directly echoes how the Act incentivized states to expand Medicaid.[4]

Since the Government cannot dispute that this is an entirely rational explanation for § 36B's text, it instead objects that no legislative history *confirms* it. (Opp.27-28.) Apart from being a backward approach to statutory construction, that is false. Even though the ACA's legislative history is "somewhat lacking" (Pet.App.23a)—because it was negotiated behind closed doors and rammed through Congress in record time—another Senate version of the bill proves that Congress was contemplating conditioning subsidies on state action (Opp.28), belying the notion that nobody conceived of conditional subsidies.

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[4] That is why, although an Act "[*w*]*ithout* the federal subsidies … would not operate as Congress intended," an Act that *conditions* subsidies on states establishing Exchanges operates precisely as Congress intended, by furthering both its goals of widespread subsidies and state-run Exchanges. (Opp. 12 (quoting *NFIB v. Sebelius*, 132 S. Ct. 2566, 2674 (2012) (joint dissent)).

Tellingly, the Government also ignores that Jonathan Gruber—the ACA architect whose work it cited in *every* brief below but is nowhere mentioned now—articulated the incentive purpose of § 36B as early as 2012. His comments flatly refute Judge Edwards's claim that this purpose was invented "out of whole cloth." *Oklahoma*, 2014 U.S. Dist. LEXIS 139501, at *26 n.24.

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