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REWRITING THE LAW: EXAMINING THE
PROCESS THAT LED TO THE
OBAMACARE SUBSIDY RULE

HEARING
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT, AGENCY
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FEDERAL COURTS
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REWRITING THE LAW: EXAMINING THE PROCESS THAT LED TO THE OBAMACARE SUBSIDY RULE

THURSDAY, JUNE 4, 2015

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL
RIGHTS AND FEDERAL COURTS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:37 p.m., Room 226, Dirksen Senate Office Building, Hon. Ted Cruz, Chairman of the Subcommittee, presiding.

Present: Senators Cruz [presiding], Hatch, Sessions, Coons, Whitehouse, Klobuchar, and Blumenthal.

OPENING STATEMENT OF HON. TED CRUZ, A U.S. SENATOR FROM THE STATE OF TEXAS

Chairman CRUZ. Welcome, everybody. Welcome, to the Members of this Committee.

Before we get to the substance of the hearing, I want to take just a few minutes to discuss the empty table before us. It is a symbol for how little regard the Obama administration seems to have for the American people.

Two weeks ago, this Committee sent a letter to three current employees of the U.S. Treasury Department requesting their attendance here at this hearing to talk about the Treasury's role in developing the Obamacare exchanges subsidy rule, which is hurting millions of people across this country, and which is directly contrary to the statutory text of the underlying bill.

Specifically, this Committee sent letters to Mark Mazur, who is Assistant Secretary for Tax Policy at Treasury; to Emily McMahon, who is the Deputy Assistant Secretary for Tax Policy at Treasury and who was serving as the acting Assistant Secretary Policy when the rule was written and finalized; and, to Cameron Arterton, who is the Deputy Tax Legislative Counsel for Tax Policy at Treasury.

Shortly after these invitation letters were sent, the Treasury Department reached out to my staff and brazenly indicated they did not intend to send any witnesses.

I would note our former Attorney General, Eric Holder, the first Attorney General in the history of this country to be held in contempt of Congress; these three empty seats demonstrate the ongoing contempt for Congress and for the American people that is manifested by the Obama administration.

For the Treasury Department to tell the U.S. Senate they have no time, they will not even answer questions about how they promulgated rulemaking in direct conflict with statutory text, is the height of arrogance.

The beginning of this hearing was to give them an opportunity to come and answer questions, to recognize the oversight responsibility given to the Senate, given to Congress by the United States Constitution.

By their absence, I take it the administration is saying they are not subject to oversight. Yet, at the end of the day, the American people provide the ultimate oversight.

Given that the administration refused to cooperate in this hearing, it is my hope that the Full Committee will take it to the next level of invoking compulsory process so that Members of the executive branch will be made to answer whether they tried to follow the law or whether they were instructed by political operatives to disregard the law in the interest of a political outcome.

That is a question the Executive needs to answer and the purpose of this hearing is to begin getting to the bottom of it. I can understand why the administration is reluctant to engage in this discussion. I can understand why, both in substance, after over 5 years of Obamacare, we have seen that millions of people are hurting under it.

The American people were promised by the President, if you like your health insurance plan, you can keep your health insurance plan. Millions of people discovered that promise was false, that it was knowingly, deliberately false, as millions of Americans had their health insurance plans canceled.

The President promised the American people, if you like your doctor, you can keep your doctor. That, too, we now know was a statement that was knowingly, deliberately false.

Today, as a consequence of Obamacare, millions of Americans have lost their jobs and been forced into part-time work, have lost their health insurance, have lost their doctors, and are facing skyrocketing insurance premiums. I can understand why the administration would be reluctant to defend that record on the merits.

I can also understand why the administration does not want to answer questions about the underlying legal question. The statutory text is straightforward and at the end of the day, it is not a complicated question. What the administration did is took statutory language of an exchange established by a State and, through transmogrification that would make Harry Houdini shake his head in wonderment, defined the Federal Government's exchange as an exchange established by a State.

The question this hearing and the next panel hopefully will get to is: Was that an attempt by an executive agency to follow the law, to carry out the President's constitutional obligation to take care that the laws be faithfully executed, or was it instead a deliberate effort to ignore the law driven by political and partisan objectives from political appointees at the Treasury Department and the White House?

This is a question of exceptional importance because if the Executive refuses to implement the laws that are passed by Congress, then the basic protections of our Constitution become ephemeral.

That is the purpose of this hearing. I am disappointed that the administration has chosen not even to engage in this conversation. With that, I will recognize the Ranking Member, Senator Coons.

**OPENING STATEMENT OF HON. CHRISTOPHER A. COONS,
A U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator COONS. Thank you, Senator Cruz.

I thought I would open by commenting that in this very same room earlier today, we had a lengthy 3-hour markup of the Senate Judiciary Committee on a distinct, but important issue, patent litigation reform, and at the conclusion of his remarks, I was compelled to whisper to my staff counsel that I thought Senator Cruz, on that topic, got it exactly right.

I will not be saying the same thing—

Chairman CRUZ. I hope that comment is not used against you in your next campaign.

Senator COONS. Hopefully, it will not.

[Laughter.]

Chairman CRUZ. I hope it is not used against you in your campaign.

[Laughter.]

Senator COONS. I just mention that at the outset by way of saying that while we may have found agreement on some important issues of the protection of a constitutionally protected property right this morning, we will approach, I think, today's discussion and this hearing with a somewhat different perspective.

I find it unremarkable that the witnesses requested for today did not appear. The administration has ongoing litigation, litigation before the Supreme Court, which is expected to be resolved very soon, and it is my understanding that they were not comfortable sending a witness to this hearing under those circumstances, and I find that unremarkable.

Congress has a way of compelling cooperation with oversight, which it has not done. The simple fact is we are left with a so-called hearing today about the rulemaking process in a Senate Judiciary Subcommittee with witnesses who are not in any way involved in the rulemaking process.

It is my hope that we will move past this political theater and on—or, back to the substance of the Judiciary Committee. Thank you.

Chairman CRUZ. We will go ahead and give each Senator who is here a chance to make a brief opening statement before we move on to the next—next panel.

The Senator on this side of the aisle who was here next was Senator Sessions.

**OPENING STATEMENT OF HON. JEFF SESSIONS,
A U.S. SENATOR FROM THE STATE OF ALABAMA**

Senator SESSIONS. Thank you, Mr. Chairman.

As a long-time practitioner in Federal court, 15 years really practicing before Federal judges, I developed such a great respect for those men and women who lead those courts, the judicial process that we go through, the legal process that we go through, and in Alabama and in States all over the Nation, we presume laws are

passed, juries are told that the Executive enforces the laws, and the people expect that.

That is the whole essence of the American legal system. The President of the United States is, in fact, the chief law enforcement officer in America. He has an absolute duty to see that laws are faithfully executed. I have seen in my time here Presidents of both parties acquiescing in the policies they do not like because the law was to the contrary.

We have to a degree—I do not believe we have ever seen a President of the United States who is so willing to just ignore plain law to advance a political agenda. This threatens law in America.

The American people acquiesce in court decisions every day, many of which they strongly disagree with, but they acquiesce because that is our system. Part of their acquiescence is a grudging belief that somewhere somebody is following through on legal procedures and what has happened to them in the courtroom is a result of some sort of fair and decent process.

I do believe, Senator Cruz, that we are not in a healthy relationship right now and if we get to the point where the American people believe that the Supreme Court, 5 members out of 9 of the Supreme Court are just advocating and imposing their views instead of faithfully following classical interpretative policies of law, then I think we have threatened the foundation of this republic.

My full and firm belief is that the strength of this republic is founded on the Anglo-American rule of law which we basically inherited. We just celebrated the 800th anniversary of Magna Carta and that is different for a lot of people.

Mr. Chairman, thank you for having this hearing and I do not believe the President is entitled to do what he wants to no matter what the law says.

Chairman CRUZ. Thank you, Senator Sessions. Senator Blumenthal.

**OPENING STATEMENT OF HON. RICHARD BLUMENTHAL,
A U.S. SENATOR FROM THE STATE OF CONNECTICUT**

Senator BLUMENTHAL. Thank you, Mr. Chairman. I want to join with my colleague, Senator Coons, in expressing my appreciation for your very eloquent remarks this morning, even though we voted on opposite sides of the issue, and for your having this hearing, because I think it is a topic that well merits attention and scrutiny.

If I had been asked for my advice by these witnesses, and I was not, I would have probably given them counsel that appearing here to talk about these issues literally on the eve or perhaps a few days before the U.S. Supreme Court rules on almost directly related questions of law and possibly fact would have been imprudent and even foolhardy and might have been perceived as improper.

The timing of this hearing in relation to the U.S. Supreme Court decision predetermined the outcome of their appearing here, and I would respectfully suggest, Mr. Chairman, that these same witnesses be invited at some later point.

Certainly, consideration by the Full Judiciary Committee of any compulsory process should await another invitation at a different time. I do not mean to suggest that the empty table was used as a prop or an argument that may be misperceived, but I would

strongly urge that this Committee revisit the potential testimony from these witnesses on another occasion.

On the issue at hand, contrary to the arguments of many partisan opponents, I firmly believe that the right decision will be to uphold this law, both the Act itself and plainly overwhelming evidence from its consideration and passage demonstrate its nationwide scope. Everybody involved understood when it was being debated and when it was being passed that tax credit would be available regardless of which government entity set up an exchange.

The Act simply would not have worked any other way. The financial support for universal coverage would not have been there without this understanding.

I welcome the scrutiny and oversight and hope that we will find a path where we can really, on a very bipartisan basis, work together. Thank you, Mr. Chairman.

Chairman CRUZ. Thank you, Senator Blumenthal. Senator Hatch.

**OPENING STATEMENT OF HON. ORRIN G. HATCH
A U.S. SENATOR FROM THE STATE OF UTAH**

Senator HATCH. Thank you, Mr. Chairman. Let me begin by thanking the Chairman for convening what I consider to be an important hearing.

I would also like to say I am very disappointed by the first panel's decision not to appear here today and testify. Here we are investigating a hugely important issue, whether Obamacare authorizes subsidies for healthcare plans, purchaser of the Federal exchanges, and the administration's representatives will not even talk to us.

You would think the administration would jump at this opportunity to tell the public how it determined that the text of Obamacare means the exact opposite of what it says; how it determined that established by State means established by the Federal Government.

I can only conclude that the administration's refusal to participate today means it has no really good explanation. It decided early on that subsidies needed to be available on Federal exchanges if the law was to work the way the President envisioned and did not particularly care what the statute actually said.

Many things about this whole process are disturbing. You have the Congress that passes a hugely consequential bill through a backward legislative process after the people of Massachusetts elect a Republican Senator to stop the bill from moving forward. You have a President that then decides to rewrite the law through administrative fiat so that it says what he wishes it said rather than what Congress actually wrote. And now, you have senior Administration officials refusing to even show up to explain how they arrived at their anti-textual reading of the statute.

These are not the actions of an executive branch accountable to the rule of law. These are the actions of an executive branch willing to bend the law to suit political purposes.

I have spoken many times about President Obama's disturbing disregard for the rule of law, of which the Obamacare subsidy rule is just one example. Last month, I published an article with the

UCLA Law Review explaining how the President's rewriting of Obamacare contravenes important constitutional checks on his authority. The article is entitled *King v. Burwell* and the Rule of Law, after the court case challenging the President's action.

I would like to just quote from that article. Quote, "What is ultimately at stake here is the President's obligation to follow the law. Faced with a statute that doesn't operate quite the way he envisioned, President Obama decided to disregard the parts of the law he doesn't like and instead implement a different statute. The Constitution doesn't give the President leave to unilaterally rewrite laws. The power to amend laws lies with Congress and until Congress amends a statute, the President is bound to the text Congress passed," unquote.

I ask unanimous consent that the article be entered into the record.

Chairman CRUZ. Without objection.

[The information appears as a submission for the record.]

Senator HATCH. I am glad we have a second panel with us today who can talk about the administration's path to determining that subsidies can be offered on federally established exchanges, even though Obamacare provides no such authority.

I wish the administration would take this as seriously as we do. Let me just say, that I lived through that whole Obamacare matter and heard all sides and really got tremendously involved in it, naturally, because I have done an awful lot of healthcare legislation over my 39 years in the Congress, and I have to say that one of the principal arguments was by some that—the, the people who have to go—the exchanges would have to be set up by the State. The argument behind it was that is the only way you are going to get people to really sign up for it because that is where the money goes, and that argument was used on more than one occasion, and all I can say is I am very concerned about this whole issue.

The statute is unambiguous. It is amazing to me that we have come this far without somebody admitting that, hey, they made a mistake and that we would have to rewrite the law so that you can do what they have just unilaterally decided to do without any real legal authority to do it. Thank you, Mr. Chairman.

Chairman CRUZ. Thank you, Senator Hatch. Senator Whitehouse.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. Thank you, Chairman. I want to echo the comments of my colleagues about the empty chairs here. Senator Blumenthal and I have both been the attorneys general of our States, and we have had the obligation to provide advice to government officials on how to respond when their agency is the subject of ongoing litigation, and I concur fully with the remarks of Senator Blumenthal, and I concur fully with his recommendation that once that impediment is lifted, the Chairman should consider having the witnesses return. I think it could be a constructive hearing if it were not for that impediment, which I think is a real and genuine one.

In Rhode Island, we are not very affected by *King v. Burwell* because we did set up a State exchange, and our State exchange has been quite a success. We have just hit 500 businesses having achieved healthcare through our exchange, which has a business plan, as well as the individuals plan. Thousands of families have achieved coverage.

Our major primary care practice groups are adapting the way in which they practice to take advantage of some of the innovation programs in the Affordable Care Act. They are seeing better care for their patients. Their patients are seeing longer hours, simpler processes, more support for prevention and other types of less costly ways of dealing with people's health.

We are seeing really better delivered in a less costly way that is simpler and clearer, less bedeviled by the confusion and duplication that had been the hallmark of our healthcare system. We are seeing that at the national level through the savings. The Pioneer ACOs have just been put through the Innovation Center as an approved nationwide process because they were able to demonstrate to the actuary hundreds of millions of dollars in savings, all accompanied by better, simpler care for the individuals whom they serve.

I think we have a continuing process that we are obliged to pursue to make sure that the American healthcare system, which remains, by 30 percent to 50 percent, more expensive per capita than all of the countries that we compete with, the other industrialized countries, and I think that gives us an obligation to really try to keep our eye on the ball and to make sure that we are reducing the cost of care while maintaining or actually, likely, even improving the quality of care that our people receive.

There is absolutely no reason that we should continue to be the country that has the higher per capita costs in the developed world and yet has healthcare outcomes as measured by things like length of life that equate to countries like Greece and Croatia.

We can do a lot better. The Affordable Care Act is a tool that has already been proven to do a lot better and, in my view, the exchanges are a tool for continuing to drive the healthcare system in that direction, away from duplication, away from fee-for-service, away from confusion.

Unfortunately, behind the political language and the political fights that have accompanied the Affordable Care Act, there are just an awful lot of Americans, particularly those who have had a loved one or who themselves had a very serious illness and who have had to deal with the American healthcare system, and they have seen firsthand what a complex, burdensome, inefficient, bedeviling system it was.

I think that particularly in this area of lowering costs by improving the quality of care, the Affordable Care Act has really made some important breakthroughs. We want to encourage those breakthroughs to make us more internationally competitive and to provide a better human—humane result, frankly, for the people of the country.

At least in Rhode Island, I think the State exchange is helping our State manage that problem and steer itself in that direction. Thank you very much for the time and with my time expiring, I will yield back.

Chairman CRUZ. Thank you, Senator Whitehouse.

I will make a couple of observations and then we will welcome the second panel. One, when it comes to discussions of costs and limiting healthcare and health insurance costs, I think on the merits, Obamacare has been an abject failure.

President Obama promised the American people if this law passed, that the average family would see a \$2,500 decrease in health insurance premiums. I think you will be hard-pressed to find many families for whom that is the case. Indeed, the average family in America under Obamacare has not seen any health insurance premium decrease. Rather, the average health insurance premium increase has been over \$3,000. That is \$5,500 difference out of hardworking Americans who are struggling to pay the bills, and they are discovering that under Obamacare they are getting less coverage for that. They have higher deductibles, they have higher copays, they have less coverage, and they are paying more.

I would also note that the administration's justification for not being here is the pendency of *King v. Burwell*, and, yet, Ms. McMahon, one of the three witnesses who was called here today, testified before the House Oversight Committee on July 31, 2013, while the *Halbig* case, with the same underlying issue was pending. The record was open in that case and yet the administration sent a witness, and, yet, here they are unwilling to answer those same questions about whether the administration is willing to comply with the law.

The letter this Committee sent to Treasury Secretary Jack Lew on May 22, without objection, I am going to enter that letter into the record, and I will hold the record open for a week for any additional material Senators would wish to enter.

[The information appears as a submission for the record.]

Chairman CRUZ. With that, I would like to welcome the second panel to the table, and we will start immediately as soon as you can be seated.

[Pause.]

Chairman CRUZ. I would like to introduce briefly the members of the panel. We have Mr. Michael Carvin. He is a partner at Jones Day. He is the lead lawyer in *King v. Burwell*, and he has the ignominious distinction of being my very first boss in private practice, which I am sure many will hold him to account for all of the mistakes I have made since then.

We have got Mr. Michael Cannon, who is the Director of Health Policy Studies at the Cato Institute. He is a learned and well respected scholar on questions of economics and healthcare.

We have Professor Andy Grewal, who is an Associate Professor of Law at the University of Iowa College of Law in Iowa City.

We have Ms. Elizabeth B. Wydra, who is the chief counsel of the Constitutional Accountability Center here in Washington, DC.

We have Mr. Robert Weiner, who is a partner at Arnold & Porter.

I would like to ask each of the witnesses to stand and be sworn in, please.

[Witnesses are sworn in.]

Chairman CRUZ. Thank you very much. Mr. Carvin, we will start with you. Please turn your microphone on.

**STATEMENT OF MICHAEL A. CARVIN,
PARTNER, JONES DAY, WASHINGTON, DC**

Mr. CARVIN. Is it on now? Thank you. I was just talking about the importance of this hearing. As a number of Senators have already indicated, while the policy issues are obviously very important, I think the real issue for this hearing is the rule of law.

Is this going to be a Nation governed by laws enacted by this body pursuant to constitutional prerogatives or is it going to be governed by the policy preferences of unelected bureaucrats?

I think that that is exactly what happened in this case. I think this is an extraordinary simple case and I think the IRS has not interpreted the law, but very dramatically revised the law, and that is because the law simply says that you receive subsidies on exchanges established by the State under Section 1311, and the IRS has transformed that into something that where you receive subsidies on exchanges established by HHS under 1321. And anyone who speaks English knows that that is not a reasonable interpretation of that language.

The proponents of the IRS rule have argued—they cannot dispute that the plain language commands the opposite of what the rule says, so they try and change the subject. They say, “Well, you have ripped that language out of context and that language is contrary to the underlying purpose of the statute.” In reality, neither of those is true.

In fact, the context in which those words reside confirms in every way that the plain language means exactly what it says and following that plain language is really the only way to implement the broader purposes of the Affordable Care Act.

For example, in terms of context, it is argued that this is an unusual place to put a restriction on subsidies, but the reality is that Section 36(b) is the only provision in the Act that deals with the availability of subsidies, and the reality is that it is the only restriction, for example, that makes it clear that you need to make a purchase off an exchange in order to receive the subsidies. So, far from being an unusual place to put the restriction in the statute, it is the only logical place and the context makes that clear.

In terms of the statute’s broader purposes, the plain text of Section 1311 of the Act makes it clear that a principal purpose of the Act is to ensure that States run these exchanges and not the Federal Government. Indeed, it is stated in the mandatory. The States shall establish and operate these exchanges.

One of the principal problems with the IRS rule is it dramatically undermines that statutorily stated purpose. Since the IRS rule makes the subsidies available regardless of whether States have established an exchange, it provides the States no incentives to undertake this difficult and arduous task.

The IRS rule dramatically undermines one of the stated purposes of the ACA, which is to have States establish the exchanges.

None of the proponents to the rule can explain why any reasonable person or reasonable legislature would have thought all the States or most of the States would have done this if they were provided no incentive to do so and they cannot explain any incentive other than conditioning of the subsidies.

The notion that there is some purpose out there to have subsidies in all States is simply a fiction invented by the Obama administration. There is no text, there is no legislative history anywhere suggesting that Congress intended to make subsidies available on exchanges that are established by HHS.

Therefore, the purpose argument is not any effort to discern congressional intent through any of the normal means of expressing legislative intent. It is actually a unilateral effort to impose the executive branch's own purposes in contradistinction to those of the legislature. We have a specific statutory provision that tells you what the limitation is in 36(b). We have a specific statutory provision, Section 1311, that tells you why they impose that limitation and there is no legislative history which contradicts either of those statutorily enacted texts.

Any legislative material that any Justice on the Supreme Court has looked at, there is no purpose that would justify the IRS' revision in the Code.

I think my final point I will make is that the proponents of the Act cannot even agree on the rationale behind why the IRS' revision was okay. The Solicitor General invented this term of art theory in the Supreme Court. You will not see that term of art theory anywhere in the IRS' discussion of the rule at the time they did it. This was a post hoc invention by the Solicitor General that is not even consistent with what the IRS came up with.

The media explanation for all of this was that it was a giant mistake, that nobody really understood what was going on, but neither the Solicitor General nor the IRS has bought into this notion that this was simply a matter of oversight.

All of the various rationales that have been offered up for this bureaucratic revision of the statute's plain text are not only unpersuasive, they are actually at odds with each other. Thank you.

[The prepared statement of Mr. Carvin appears as a submission for the record.]

Chairman CRUZ. Thank you, Mr. Carvin. Mr. Cannon.

**STATEMENT OF MICHAEL F. CANNON, DIRECTOR
OF HEALTH POLICY STUDIES, CATO INSTITUTE,
WASHINGTON, DC**

Mr. CANNON. Thank you, Mr. Chairman, Ranking Member Coons and Members of the Committee, for the opportunity to discuss what we do know about how the IRS developed its health insurance premium tax credit rule of May 23, 2012. That is the rule that is being challenged in *King v. Burwell*, and it is the rule that implements the premium assistance tax credit provisions of the Patient Protection and Affordable Care Act of 2012.

Two Federal courts have found that that rule expanded the reach of the ACA's employer mandate beyond the clear limits Congress imposed on the IRS' authority. According to those courts, the IRS is unlawfully subjecting more than 250,000 employers and 57 million workers to that tax.

One of those workers is Kevin Pace, a jazz musician who lives not far from here in northern Virginia. According to the Washington Post, Pace lost \$8,000 of income in the first year the IRS

unlawfully imposed that mandate on his employer as a direct result of the imposition of that mandate.

According to one estimate, this illegal tax reduces a typical affected worker's income by nearly \$1,000 and has eliminated nearly a quarter-million jobs. Those Federal courts likewise found the IRS' tax credit rule unlawfully expanded the reach of the ACA's individual mandate. As a result, the IRS is currently subjecting an estimated 11 million taxpayers to an illegal tax averaging \$1,200 each.

Whatever good the IRS hopes to accomplish with the funds raised by these taxes is irrelevant. The authority to levy taxes and to spend Federal dollars rests with Congress alone.

In *King v. Burwell*, 4 Virginia taxpayers alleged that this tax credit rule is subjecting them, Kevin Pace, and 57 million other Americans to illegal taxes. The Supreme Court has heard oral arguments in March and will likely rule later this month. A ruling for the challengers would invalidate that rule. It would create an estimated 237,000 new jobs, free more than 57 million Americans from illegal taxes, and increase affected workers' earnings by nearly \$1,000.

My co-author, Jonathan Adler, and I have written at length about how neither the ACA nor the legislative history provide any support for the IRS' interpretation of the statute. Indeed, both the legislative history and the statute squarely foreclose the IRS' interpretation.

Today, for the remainder of my testimony, I would like to discuss the troubling picture that emerges from what little we know about how the IRS developed this rule and why we know so little about how the IRS developed this rule.

The available evidence suggests that IRS officials recognized that the ACA did not give them the authority to impose these taxes, yet they impose these taxes anyway. Treasury and IRS officials performed little or no analysis of the ACA and its legislative history. They used legislation that was rejected by Congress in order to support their theory of congressional intent and they failed to consider important dimensions of this issue.

The IRS' proposal to implement these taxes and subsidies in Federal exchange States met immediate and sustained criticism, including from some Members of this Committee as far back as 2011.

The administrative record offers no support or substantive explanation, no statutory support or substantive explanation of the IRS' decision to ignore the plain meaning of the tax credit eligibility requirement that recipients must enroll in health insurance through an exchange established by the State.

The administrative record contradicts arguments the Government offered before the Supreme Court and reveals those arguments to be post hoc rationalizations.

Mr. Carvin mentioned the term of art argument that the Solicitor General made before the Supreme Court. What little we know about the administrative record shows dispositively that the IRS did not believe that this was a term of art.

The IRS has attempted to hide its actions and its reasoning from congressional scrutiny. According to an article in the Washington Post which interviewed several members—several officials at the

Treasury Department and IRS who were involved in the development of this rule, one formal official said, quote, "The overriding concern was not generating negative news stories. The overriding concern of the officials who wrote this rule was not guilty to the law, but avoiding negative news stories."

The IRS continues to try to avoid scrutiny. In December 2011, the then Ranking Member of the Senate Finance Committee, a Member of this Committee who is here today, Senator Hatch, sent a letter to the Department of the Treasury, after the promulgation of this proposed rule and before it was finalized, disputing the legality of the rule and asking the Treasury Department to turn over all documents related to the development of this rule and the IRS' reasoning behind this rule.

The IRS and the Treasury Department have been ignoring that request for 3½ years. The IRS is taxing and spending the American people's money without permission from or accountability to Congress. The American people need to know how this happened and that begins with transparency.

I thank you very much for your time, and I look forward to your questions.

[The prepared statement of Mr. Cannon appears as a submission for the record.]

Chairman CRUZ. Thank you, Mr. Cannon. Professor Grewal.

**STATEMENT OF ANDY GREWAL, ASSOCIATE
PROFESSOR OF LAW, UNIVERSITY OF IOWA
COLLEGE OF LAW, IOWA CITY, IOWA**

Professor GREWAL. Thank you very much, Mr. Chairman.

I suspect that if the IRS had shown up today, it would tell you that it tried to carefully obey its statutory authority when it issued regulations under Section 36(b).

I want to explain why that is nearly impossible to believe. At the outset, I will say I do not take any particular position on the *King v. Burwell* issue, and I do not know whether Obamacare is a good idea or a bad idea. That is why I am sitting here in the middle.

I do want to discuss three circumstances where other regulations under 36(b) clearly contradict the legislative language. If you think established by the State is clear, you will think these ones are very clear. I have even offered a case up here on Twitter to anybody who could just come up with some colorful counterargument.

In the first circumstance, a statute plainly grants credits only to citizens when their income falls within a particular range, 100 percent to 400 percent of the relevant poverty line amount. The IRS does not like that result and it has potentially expanded credits to several million persons below the 100 percent amount. Again, if you think established by the State is clear, a statute that refers to 100 percent or 400 percent is far clearer.

In the second circumstances, the ACA has two related provisions. One provision says that if you are a large employer and you offer health insurance to your employees, we want you to automatically enroll all those employees in coverage, and the Department of Regulations will issue regulations saying as much. If you are going to have a plan, get everybody in there.

As a sweetener to this, the persons who are enrolled will not get credits under 36(b) because they are going to be getting coverage under the employer plan. With no credits, that means there are no penalties on employers when they automatically enroll employees in their existing plan.

The IRS does not like that result and it has issued a regulation saying that in some circumstances, you will actually get a credit under Section 36(b) even though you are getting coverage by your employer and the employer will relatedly get hit with a penalty.

The third category I want to discuss relates to unlawful aliens. Congress recognized that some very low-income persons who are here lawfully cannot get Medicaid. Some States say, "Well, all right, you are not a citizen, but we will help you, but please wait 5 years before you apply for Medicaid."

The statute, Section 36(b), says that, "Okay. We will help you out with credits on the Federal"—or sorry—"on the State exchanges," and, arguably, the Federal exchanges, "if you are here lawfully, you yourself can get a credit for policies purchased on an exchange."

The Treasury has issued a regulation saying that even if you are here unlawfully and you meet the income requirements, you are eligible for a credit. I think the statute is very clear that says that you must be here lawfully to get this benefit of this special rule.

All of these three provisions may be good ideas in the abstract. I do not know. They seem reasonable on one level. They clearly violate the relevant statutory language.

In closing, I just want to emphasize that as we talk about the Treasury expanding Section 36(b), we do not give enough attention to the fact that an expansion of 36(b) means more penalties from employers. Unlawful credits lead to unlawful penalty collections. The fact that the IRS, in expanding Section 36(b), is illegally collecting penalties from private businesses should receive more attention.

Thank you, Mr. Chairman.

[The prepared statement of Professor Grewal appears as a submission for the record.]

Chairman CRUZ. Thank you, Professor. Ms. Wydra.

**STATEMENT OF ELIZABETH B. WYDRA,
CHIEF COUNSEL, CONSTITUTIONAL
ACCOUNTABILITY CENTER, WASHINGTON, DC**

Ms. WYDRA. Thank you, Chairman Cruz, Ranking Member Coons and the Members of the Subcommittee, for inviting me here to testify before you today.

I must take issue, I am afraid, however, with the substantive premise of today's hearing, at least as reflected in its title, which suggests that the Treasury Department rewrote the Affordable Care Act when it ensured that tax credits would be available nationwide to all Americans who need them.

Far from rewriting the statute, I would assert that the Treasury Department applied the ACA according to its text, statute design and purpose when it interpreted the Act and made this rule.

Similarly, I must take issue, I am afraid, with my esteemed colleague, Mr. Carvin. What you just heard him describe a few moments ago is not how statutory interpretation works. How you

heard him describe the Affordable Care Act is also not how anyone who was involved with enacting the statute understood that law to work.

Republican and Democratic Members and staffers alike involved in drafting the law have made clear that no one understood the law to preclude tax credits for residents of States that opted to use the Federal fallback provided to them in the law instead of electing to set up an exchange for themselves.

To the contrary, statements by Members of Congress at the time and reports drafted by committees and the CBO all assumed that tax credits would be available in every State on any exchange without making a distinction between State-run and federally facilitated exchanges.

Did any Members of Congress stand up at that time and profess the vision of the tax credit provision that we heard Mr. Carvin and other critics of the Treasury rule put forth? As Mr. Carvin had to admit when the Supreme Court asked him this very question, there were none.

I would like to back up for a moment to talk about the language of the statute itself because I think it is important to correct what I see as some mischaracterizations.

As Justice Scalia reiterated last year, it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme; in other words, not plucking a foreword phrase out of a statute and using it to defeat the very fundamental purpose of the entire Act, which, in this case, was to provide affordable health insurance for all Americans.

To help achieve this aim of broadening access to healthcare and insurance, the statute provides for the establishment of exchanges on which individuals can purchase quality, affordable health insurance.

Section 1311 provides that, quote, “Each State shall, not later than January 1, 2014, establish an American health benefit exchange.” The Act clarifies, however, that there is, quote, “State flexibility” in meeting this requirement. A State may elect to set up the exchange for itself or if a State chooses not to establish an exchange or cannot establish an exchange that meets the Act’s requirements, then HHS, according to the statute, shall establish and operate such exchange within the State.

When the statute then uses the term “an exchange established by the State” in the statute, it refers to exchanges established at the State level by the State, as well as exchanges established at the State level by HHS standing in the shoes of the State.

With respect to the eligibility for tax credits allowing individuals to afford to purchase insurance on these exchanges, the Act expressly presents income level as the method by which an individual is determined to be eligible or not for these tax credits, not the bureaucratic entity which runs the health insurance exchange in that State.

What about the phrase seized upon by critics of the Treasury Department’s rule found in the provision for calculating the amount of the tax credit from—who purchased a policy at an exchange established by the State? You could pluck a foreword phrase out of

Moby Dick and say that it was a story about a Sunday whale watching cruise, but that is not how you read a book and that is not how the Supreme Court tells us you read a statute either.

Reading the law to provide tax credits nationwide on both State-run and federally facilitated exchanges allows the provisions of the ACA to work harmoniously, which is something the Supreme Court has told us clearly is something that should be a guidepost when we are reading statutes.

In contrast, the reading asserted by the *King* challengers would deny effect to the regulatory scheme by subverting the Act's structure and design and basic purpose and rendering important provisions absurd, something the Supreme Court has told us we should avoid when reading a statute.

I believe the interpretation of the law reflected in the Treasury rulemaking tax credits available nationwide to all Americans who need them regardless of the State in which they live accords with the plain text of the law and allows the law to work in the way that Congress intended.

Interpreting Section 36(b) in this way allows the fundamental market reforms at the heart of the law to work in the way that they were intended and is the best interpretation of the law when you read the law according to the way that the Supreme Court tells us we should read statutes.

I would be delighted to answer any questions the court has—I mean, the panel has. I am used to being in front of judges. Thank you for your time, and I would be delighted to answer further questions.

[The prepared statement of Ms. Wydra appears as a submission for the record.]

Chair CRUZ. I can promise you none of us will be wearing robes. [Laughter.]

Chairman CRUZ. Mr. Weiner.

**STATEMENT OF ROBERT N. WEINER, PARTNER,
ARNOLD & PORTER, LLP, WASHINGTON, DC**

Mr. WEINER. Thank you, Mr. Chairman, Ranking Member Coons, for inviting me to testify today. Let me say first that I think it is wrong, or at least premature, to be talking about a violation of the rule of law by the Treasury Department when the Supreme Court may yet tell us, and I think will tell us, shortly that they were right.

Second, I would like to say that the Affordable Care Act, in fact, is working; 14.1 million more Americans have insurance than did before. The rate of uninsured Americans has dropped from 20 percent to 13 percent. Healthcare price inflation is at its lowest level in 50 years and the rate of increase in insurance premiums has declined.

Third, the opponents of the ACA in the *King* case would roll back this progress and they contend that the Treasury Department, charged with implementing Congress' intent, should have found that what Congress intended to do was to enact a self-destructive statute, one that coerced States to set up their own exchanges by threatening if they did not, to impose a Federal backup system that did not work.

Why would Congress have done that when the whole point—why would they have had a nonfunctional backup as a threat when the whole point of the backup was to ensure that the statute did work in those jurisdictions, and why would Congress plant a time bomb in the statute anyway?

The argument is that those questions are off limits because the language was so clear that there was only one permissible interpretation. Let me answer one more question and that is why would the States have an incentive without the coercion to establish exchanges, and the States themselves answered that question in the very case that Mr. Carvin handled. When the amended the complaint in the *NFIB* case, the State governments alleged that the exchanges were coercive. Why were they coercive? Not because they threatened subsidies of the citizens of those States if they did not set up an exchange. They were coercive, the lawsuit said, because the States would cede regulatory authority if the Federal Government established exchanges.

That is not my position. That is the States' position and that is their incentive, along with a lot of grants to establish exchanges.

The opponents really have to take the position that the statute has one and only one permissible reading because there is a strong presumption that you read statutes to be effective—that you read statutes in furtherance of their evident purpose. Justice Scalia says that in his book on statutory interpretation.

The argument here is that this self-immolating interpretation that the Treasury Department was so derelict in rejecting can prevail only if it is impossible to construe the statute any other way.

It is crystal clear, they say, but no one at the time the statute was enacted was aware of it. In fact, it was so obscure that it was not discovered, and that is the word that has been used, “discovered,” until months after the statute was enacted by a lawyer whose announced mission was to find a statutory glitch that would take down Obamacare. Nor is this one and only interpretation accepted now by authoritative interpreters—probably at least 4 members of the Supreme Court, the Solicitor General, Senate and House leaders and staffers who were involved in the drafting of the bill, health insurers, the American Hospital Association, the American Cancer Society, 22 States, the former director of the CBO—all of these people interpret the statute the same way the IRS does. And to say that their interpretation is impermissible is to question either their literacy or their candor, and neither is really in doubt.

Let me just say with regard to the IRS and their process, truth is a defense, and the IRS engaged in a process that produced a reasonable result, one that did not gut the statute as the interpretation offered by the ACA opponents would do, one that was consistent with the commonly—with the commonly understood meaning of the statute by those who enacted it at the time.

Thank you.

[The prepared statement of Mr. Weiner appears as a submission for the record.]

Chairman CRUZ. Thank you very much. I would like to thank each of the Members of this learned panel. I agree very much with the testimony of Mr. Carvin that this is fundamentally about the rule of law. This is fundamentally about the question of whether

the Federal Government can impose billions of dollars of taxes upon millions of Americans directly contrary to the text of Federal law. It is likewise about whether the Federal Government can spend billions of dollars explicitly prohibited by Federal law.

If the answer to both of those questions is yes, if the Administration's interpretation is acceded to, it makes the entire constitutional law-making function superfluous. If the Executive has the authority to tax and spend directly contrary to statute, the limits on the Executive's authority are all together abdicated.

The legal question is not terribly complicated. The statute provides that monthly premiums for qualified health plans enrolled through an exchange established by the State, the entire argument here is whether the Federal exchange established by HHS is an exchange established by the State.

Several witnesses have testified that no one possibly envisioned that an exchange established by the State meant an exchange established by the State. I would note that at least one person understood that very well, someone who has been described as one of the leading architects of Obamacare, Professor Jonathan Gruber, who indeed achieved worldwide fame when he candidly admitted that passage of Obamacare depended upon, as he put it, the stupidity of the American people. Professor Gruber quite candidly said what is important to remember politically about this is if you are a State and you do not set up an exchange, that means your citizens do not get your tax credits.

I would note we heard several times no one understood this. Apparently Professor Gruber understood it very well, but was relying upon a lack of transparency and, as he put it, the stupidity of the American people to keep it hidden.

I want to focus on the decision-making process that occurred at Treasury and the IRS. Mr. Weiner mentioned that no one is questioning the candor or erudition of Treasury or the IRS.

It is difficult to make an assessment of that because they are unwilling to show up and defend their decision-making. So, what I can tell you is they are not here. They are refusing to recognize the oversight responsibility of the Senate.

I would like to ask you, Mr. Cannon, you have examined this question closely. What do we know about the decision-making process at the IRS and Treasury in establishing the rule here?

Mr. CANNON. Unfortunately, very little, Senator, because as I mentioned before, a request by Senator Hatch for all the documents related to the development of this rule has been ignored by Treasury and IRS for 3½ years.

In September 2014, the Chairman of the House Oversight Committee, after being frustrated by Treasury and IRS' unwillingness to release those documents to his Committee, issued a subpoena for those documents. Treasury and IRS have been ignoring that subpoena for—how long ago was September of last year—almost a year.

Chairman CRUZ. Let me stop you on that point, because it was said a moment ago that no one is doubting the candor of Treasury or the IRS. You are telling me that Treasury and the IRS are denying a Congressional subpoena, are refusing to show up to this hearing, is that correct?

Mr. CANNON. That is—well, the Congressional subpoena has to do with a subpoena from a House committee for those documents, not a subpoena to show up at this hearing. Yes, they are ignoring a Congressional subpoena to provide those documents, which I think bears on the suggestion made by the Ranking Member that if they do not show up at this hearing, perhaps compulsory process could be pursued. Compulsory process has already been pursued against Treasury and IRS and they are—

Chairman CRUZ. The Obama administration is defying that process. Well, that seems, at a minimum, not an exercise in candor, living with the ordinary bounds of the English language.

Mr. CANNON. It is not an ideal transparency, no.

Chairman CRUZ. My understanding is that staff was permitted to review some documents under highly restrictive circumstances. Can you describe those circumstances, as you understand them?

Mr. CANNON. After much persistence by the staff of the House Oversight and Government Reform Committee, the Treasury and IRS did release some documents, 386–87 pages, I believe, a fair amount of which was the final rule itself, about half of it—a lot of it, maybe, I would think, a fifth, 20 percent of it was my work that they just released to the Committee. Only about 5 percent even commented on was there any substantive discussion by Treasury and IRS officials, and it was never here are the factors we are considering. It was just mentioning these things tangentially.

As for—but those are the documents that they have released, which do not tell us a lot about the deliberative process.

Chairman CRUZ. The staff, as I understand, was also allowed to review some documents, but not take notes, not make copies of those documents.

Mr. CANNON. There are many documents that Treasury and IRS have not released and on two or three occasions, staff were allowed to review those documents. They were allowed to go into a room, sometimes with pen and paper, sometimes without pen and paper. They were not allowed to take any of those documents out of the room. They were not allowed to make copies of those documents. They were allowed to look at them and make notes and on one occasion, they were not even allowed to make notes. They were only allowed to read—

Chairman CRUZ. No notes, no copies, no transparency to Congress, no transparency to the American people, defying subpoenas, refusing to show up at this hearing.

My understanding is those documents which they are fighting tooth and nail to avoid sunshine coming upon show that initially career staff at Treasury and the IRS analyzed the phrase “an exchange established by the State” and concluded that it means exactly what it says, an exchange established by one of the 50 States, is that correct?

Mr. CANNON. I am not sure about that, Senator. What we know is that—and this was from the in camera review where they were allowed to go into the room with the document, but could not even take pen and paper with them. They had to scramble out of the room and write down everything they remembered seeing.

From that in camera review—in that in camera review, staff were allowed to look at different drafts of the proposed rule before

the proposed rule was issued and what we know from their review of those drafts is initially, IRS officials had included that statutory requirement that tax credit recipients be enrolled, quote, “through an exchange established by the State.”

Around the same time a Treasury official raised this issue with the IRS, that requirement, that statutory language was dropped from the proposed rule.

Chairman CRUZ. Mr. Cannon, I want to make sure this Committee understands that. Our understanding, although, to be clear, the Obama administration is blocking release of the documents, so it is all deliberately hidden in the lack of transparency that Professor Gruber bragged about, but our understanding is the initial version of the rule drafted by career staff at the IRS and Treasury attempting to follow the law followed the plain text and concluded it had to be an exchange established by a State.

Then subsequently it appears that political appointees at the Department of Treasury overruled that decision and substituted instead a political decision contrary to the judgment of the career staff, but consistent with the political outcome desired by President Obama and the White House.

Mr. CANNON. What we know for a fact is that that provision, that statutory provision, was dropped from the implementing regulations around the same time that this political appointee at the Treasury Department intervened. We do not know anything of the substance of those discussions, what happened there, but we do know that that was a statutory provision that was on its way to being implemented as part of the proposed rule and then it was dropped.

That is significant because it tells us a couple of things. One, it tells us that Treasury and IRS officials never believed that the phrase—the statutory requirement “through an exchange established by the State” was a term of art, as the Solicitor General now argues.

Chairman CRUZ. My understanding is at least some of these documents had notations, initials that appear to reflect an individual or perhaps may reflect an individual who also worked in the White House as part of the policymaking apparatus, is that correct? Although this is all murky and opaque, by design of the administration. But is that your understanding, as well?

Mr. CANNON. There was White House input into the development of this rule, as there was White House input into the development of many rules. We do not know exactly who provided that input.

Chairman CRUZ. The initials LF were written on at least one of these documents.

Mr. CANNON. I have not reviewed those documents, but that is what House investigators report.

Chairman CRUZ. All right. Let me ask a final question. The administration is arguing, pursuant to *Chevron* deference, that the courts owe deference to its efforts to implement this law.

I want to ask Mr. Carvin. If the process that there appears to be a suggestion occurred here, although quite deliberately, the administration is blocking any effort for the American people to know if it occurred, but if it is the case that career professionals at Treasury and the IRS, in their expert judgment, read the statute

to mean exactly what it means on its face, that an exchange established by the State means an exchange established by the State, and if it is the case that political operatives ordered those career professionals to disregard the law and reach a political conclusion instead, is it your understanding that sort of partisan political decision to disregard the law is the kind of decision that is ordinarily given *Chevron* deference?

Mr. CARVIN. No, Mr. Chairman. As you know, one of the principal things that agencies cannot do under *Chevron* is behave in an arbitrary and capricious manner and, obviously, the paradigmatic definition of arbitrary and capricious is simply implementing political or ideological objectives.

I would also point out in terms of process, you are not deferring to the tax expertise of the IRS if the task force, which I think is undisputed, drawing up these regs was not just IRS people, was HHS and White House operatives.

I do not even think they went through the pretense of pretending this was a mutual interpretation of the law. I hasten to add, of course, *Chevron* is inapplicable here anyway because the statute is completely unambiguous. There is no opportunity for deference. As Justice Kennedy pointed out during oral argument, there is a strong canon of statutory construction that because this body, Congress, controls the purse, moneys will come out of the Federal Treasury only if that is done unambiguously.

Chairman CRUZ. Thank you, Mr. Carvin. I would note that if it is indeed the case that partisan political operatives in the Obama administration instructed career professionals to disregard the law and reach a political outcome, it is not surprising that they were afraid to come here and testify and explain that that is what occurs, and that perhaps gives some context to why the three witnesses in the first panel chose not to attend. Senator Coons.

Senator COONS. Thank you, Mr. Chairman. I will note you have taken nearly 10 minutes in your first questioning. I hope I will have roughly the same period of time, if possible.

I believe the core issue we are seeking to have a conversation about here today is the availability of studies that roll in the ACA and the appropriateness of how the ACA has been interpreted and applied.

Let me first speak more broadly to that general context. The ACA, as Mr. Weiner pointed out in his testimony, is working. Thanks to the ACA, 16 million people have gained access to affordable quality health insurance, and since October 2013, the uninsured rate, just to take one of many positive statistics, for the non-elderly adults in America has fallen by nearly 35 percent.

This success would not be possible without the availability of the premium tax credit which provides nearly 8 million American individuals in the 37 States using healthcare.gov with an average subsidy of \$3,200 to purchase health insurance.

As we all know, this historic decrease in the number of uninsured is only possible under the ACA, is only possible that it becomes affordable because the 87 percent of individuals who signed up under healthcare.gov qualify for subsidies, and this was central to the intent of the law.

In my view, eliminating subsidies, which may well be the outcome of the Supreme Court action if they, I think, rule on this in a way that is advocated by some today, would result in a massive disruption in the individual market, with millions losing access to affordable insurance and the average cost of the remaining insured increasing significantly.

It is my contention that that is not required by the structure, the text, the history of the law. In fact, the opposite, that the text and the history and the structure of the ACA leads to only one possible conclusion, that tax credits are available to all poor working-class and middle-class Americans, those who earn between 100 percent and 400 percent of the poverty level.

As we all know, there are many who have opposed the ACA for principally ideological reasons. They fought it in Congress and lost. They fought it before the Treasury Department and lost. They fought the individual mandate in the courts and have lost. Now, another group of opponents has raised another legal challenge, asking our courts to bless a contorted reading of the law in a way that would sabotage a core provision of the Act and undo the way that these subsidies work to the fulfillment of the core goal of the Affordable Care Act.

Neither the distinguished Chairman of the Subcommittee nor myself were present as the law was crafted, but there have been a number of quotes in the press recently from those who were actively engaged suggesting that this cramped reading that is being advanced runs directly contrary to the universally held understanding of those who were engaged in its drafting and its implementation, from Doug Elmendorf, head of the CBO at the time, to Members of the Joint Committee on Taxation, to Charles Clapton, the former counsel to Senator Enzi, to Senator Snowe herself, who have all recently been quoted saying that they did not see or recall any distinction between Federal and State exchanges as this was being drafted and the denial of subsidies based on that would have gone contrary to their understanding of the intent.

Let us be clear. In my view, this hearing is just another part of a 5 year effort to deny working-class Americans any help in affording health insurance. Having failed at frontal assaults, the ACA's opponents are trying to contort the letter of the law, this important law, to defeat its spirit.

For some insight into that, let me begin with Mr. Weiner, if I might. In your view, is there any doubt that at the time the ACA was adopted, it was understood to mean what Treasury has subsequently said it meant at the time that it was passed? And what, in your view, happened to create the dispute that we are discussing today?

Mr. WEINER. Senator, there is no doubt at all of that proposition. We see, for example, Jonathan Gruber's statement several years after the statute was adopted. He is an economist, an academic economist. I see your Jonathan Gruber and I raise it with four aces, Senator Orrin Hatch, who said back in January 2010, that establishing an exchange is not a condition of receiving Federal funds, and that was stated by other people, as well.

In June—well, I mentioned when the States amended their complaint, October 2011, the American Legislative Council—Exchange

Council, ALEC, a right-wing organization, told the States, in urging them not to adopt exchanges, there is no penalty for a State in allowing the Federal Government to implement an exchange.

November 2012, Nebraska's Governor, explaining why States—why the State would not set up an exchange, said there is no real operational difference between a Federal exchange and a State exchange. Officials assessing exchanges in Georgia, South Carolina, West Virginia, all these States, evidenced knowledge that subsidies were available.

This is the way the statute was understood, and since it was understood that way, it really does not prove much to say that the Treasury Department incorporated the language of the statute into an early draft of the regulation.

Senator COONS. Thank you, Mr. Weiner.

If I might, Ms. Wydra, the majority of witnesses have urged us to read four words in isolation, and I have and have argued that it leads to only one possible interpretation.

The Supreme Court, in its 2007 decision in *National Association of Homebuilders v. Defenders of Wildlife*, wrote, quote, "The meaning or ambiguity of certain words or phrases may only become evidence when placed in context."

How does the context of these four words—how does the text of the entire statute support the reading that exchanges established by the State includes exchanges established for the State by the Secretary of HHS? You touched on this in your previous testimony. I would appreciate your revisiting the point.

Ms. WYDRA. Thank you, Senator. Yes. The Supreme Court has made absolutely clear in numerous court rulings by Justices of all ideological stripes that statutes are to be read in their entirety, in their context, and to effectuate rather than to defeat their central purpose.

I think it is important to note that there are basically three main features of the Affordable Care Act that make its insurance market reforms work. You have the individual mandate, which ensures that either you sign up for health insurance or pay a tax penalty, assuming you have the income to do so; the important market reforms, such as preventing insurance companies from discriminating against individuals with preexisting conditions; and then, of course, you have what we are talking about here today, which are the tax credits which make it affordable for Americans to enter the insurance market and to make the entire Affordable Care Act reforms work as they are intended to by the law.

In looking at the statute as a whole and in looking at the issue that is before the Supreme Court in *King v. Burwell*, it is important to note the role of the tax credits in effectuating the key purpose of the Affordable Care Act to make insurance available for all Americans.

I think when we are looking at the exchanges, it is important to note that when you are talking about who is going to run the exchange, whether or not the State establishes its own exchange or the Federal Government does it according to Section 1321 standing in the shoes of the State, the idea is still to ensure that tax credits are nationwide available to all Americans who need them.

Otherwise, the Act simply does not work and numerous provisions of the law are rendered absurd if you take the reading of the tax credit provision that critics of the Treasury rule have put forth.

You know, we talk about what Congress intended and when you look at what they intended, it was, again, because of the purpose of the Act and the way that it is structured, integral to achieving the purposes of the law that every American who needs these tax credits be able to have them. That is the way that it was scored by the Congressional Budget Office, the statute. That is the way that the Joint Committee on Taxation understood the law to work. That is the clear congressional intent behind the law.

When you look at the law in the way that the Supreme Court tells us, looking at it in context, reading the text of the law, looking against the backdrop of cooperative federalism, which Justice Kennedy raised in oral argument, noting that if you take the critics of the Treasury Department's rule, you can basically put the States to an irrational choice, either set up an exchange or if you take the Federal fallback, which the statute allows you to do, we will take away millions, perhaps even billions of dollars from your constituents who need them, need those tax credits desperately.

That just simply does not make sense and it is not in line with the way the Supreme Court tells us that we should read statutes.

Senator COONS. Thank you, Ms. Wydra. That was very helpful. I appreciate the testimony of both witnesses.

Chairman CRUZ. Thank you. Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman. The fact that you say there is a goal to make insurance available for all Americans does not mean the statute can be written in any way you would like to to effectuate some theory of care.

Congress will be faced with the legislative responsibility if the court rules to deal with the statute as it is left standing. It is going to be a difficult challenge, but I think that is what we are paid to do.

The President does not get to make up the law, as he has done so often, and it is really troubling to me the extent to which this has become the theory around here, that the Executive Office must do something, Congress would fail to act. When Congress fails to act, it acts. It makes a decision and it says no to some of these things. They did not pass the law unless the State exchange language was in there. That is what Congress passed.

I really think we are on dangerous ground when we get this far away from plain statutory law.

With regard to the healthcare costs, I see in CNN Money, a recent report from CNN Money, UnitedHealthcare costs in Florida is up 18 percent, Humana up 30 percent in Texas. That is two of the biggest States and two of the biggest insurers in America. I do not know how well it is doing in the practical world.

Mr. Grewal, let us take another area that I think is even simpler that you raised in your study, that the Affordable Care Act provides tax credits to U.S. citizens with incomes between 100 percent and 400 percent of the Federal poverty level.

Are you aware of anything else in the Affordable Care Act that would alter that number, that range, 100 to 400?

Professor GREWAL. No. It is—for aliens, there is an exception. Congress decided that for aliens they would come up with a special rule because aliens could not get Medicaid. For citizens, there is absolutely no statutory exception and the IRS has affected that amendment by regulation.

Senator SESSIONS. By regulation, IRS altered what would appear to be plain language to extend credits for citizens that would affect several million people below 100 percent of the Federal poverty level, is that right?

Professor GREWAL. Right now the estimate by Kaiser is about 4 million people are not eligible for Medicaid, but do not get—do not satisfy the 100 percent statutory floor. We are talking several million people. yes.

Senator SESSIONS. Mr. Carvin, you have studied this. Are you aware of any exception that could be used to justify adding several million people when they do not fall within the statutory range?

Mr. CARVIN. It is precisely the rationale they used for the lawless IRS rule here, which is it is a good thing to give poor people insurance. Congress cut it off below 100 percent. We do not like that, so we are going to take billions of dollars from the Federal Treasury and help poor people. We do not need no statutory language, we will just do what is right.

No, it is precisely the same analysis you have seen here, which is this is supposed to be available for all Americans and, therefore, we can do whatever we want.

Senator SESSIONS. Mr. Grewal, another one, it seems to me, is dramatically clear and has been violated. As you noted, Section 36(b) of the ACA grants credits to some noncitizens with low incomes only if they themselves are lawfully present in the United States and cannot obtain Medicaid coverage.

IRS regulations issued pursuant to that statute, however, contradict the statute and allow subsidies if, quote, “the taxpayer or a member of the taxpayer’s family is lawfully present in the United States” and, quote, “the lawfully present taxpayer or family member is not eligible for the Medicaid program.”

Do you find any statutory basis for the administration to find such an exception to what appears to be plain language?

Professor GREWAL. Absolutely not. The odd thing about that particular change is, as opposed to the other two, at least for the other two they had the courtesy to announce what they were doing in the preamble to the regulation. For this one, there is no explanation at all, just the text of the regulation goes beyond the statute, without any hint that they are expanding the credit to persons not lawfully residing here.

Senator SESSIONS. I think your analysis is important to us. We have had a number of studies that talk about really a lawless approach to governmental administration and the American people have a right to expect that when a law is passed, the Chief Executive will follow that law, and this is just plain.

Mr. Carvin, you have studied the ACA. Is Mr. Grewal correct? Is there any authority that you can find that would allow the administration to provide healthcare coverage to individuals if a member of their family is lawfully present in the United States?

Mr. CARVIN. It is yet another revision in a series of stark revisions to the ACA that the Obama administration has done all pursuant to roughly the same analogy, which is we want to make this better, we want to make it work in the way that we want and all the kinds of legislative compromises that go into actually crafting statutes will be disregarded if the people in the administration view it as inconvenient.

Senator SESSIONS. I think maybe, Ms. Wydra, the statute could have just been written. Our goal is to make available healthcare for all Americans. That was not what the law said, however.

Thank you, Mr. Chairman.

Chairman CRUZ. Thank you, Senator Sessions. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman. Mr. Carvin, you argued in the Supreme Court, did you not?

Mr. CARVIN. I did.

Senator BLUMENTHAL. You argued for the plaintiffs.

Mr. CARVIN. Correct.

Senator BLUMENTHAL. Are they here today?

Mr. CARVIN. No.

Senator BLUMENTHAL. This hearing has been conducted with a lot of hype and hyperbole, not uncharacteristic of the debate surrounding the Affordable Care Act, a lot of overheated, overreaching rhetoric, but there are some facts and, as Ronald Reagan said, facts are stubborn things.

The fact is the Affordable Care Act is working. It has provided insurance coverage to millions of Americans, more than 10 million Americans, and not only did Congress intend certain results, but what Congress intended is actually happening.

We are dealing here with reality on the ground. In Connecticut, which has a health exchange, like 13 States do, the uninsured rate has been cut by one-half, from 12.3 percent to 6 percent; 7.7 percent of Connecticut consumers have qualified for the tax credit.

Millions of people across the country are now protected against discrimination, for example, based on preexisting conditions.

For years and years, as the attorney general of the State of Connecticut, I did advocacy on behalf of people who were discriminated against because of supposed preexisting conditions. There is mental healthcare that has been expanded, along with substance use disorder benefits and Federal parity protection. Sixty-two million Americans have benefited and more than 600,000 in Connecticut.

The ACA is working and the Public Health and Prevention Fund has provided Connecticut alone with \$31 million for tobacco cessation, obesity prevention, health coverage enrollment assistance.

Those facts, in effect, I think, support the argument that Congress not only intended certain consequences and the interpretation suggested by Ms. Wydra and Mr. Weiner fits as part of the statutory hole and the context of the statute, but also the results of the statute.

I would like to ask, Mr. Weiner, whether that interpretation, in effect, of the statute, the reality on the ground, comports with what Congress intended.

Mr. WEINER. Yes. It very much comports with what Congress intended. Congress did say in the statute that the goal was to extend

healthcare, affordable healthcare to all Americans. It said it six times. That was in language that was enacted by Congress, not some purpose intuited by a judge. It was what Congress said it was trying to achieve in the statute.

Senator BLUMENTHAL. Ms. Wydra, do you agree?

Ms. WYDRA. Yes, absolutely. You know, Senator Sessions joked that the statute should have been written to say healthcare should be available for all Americans. In point of fact, Title 1 of the Act is titled, quote, "Quality Affordable Health Care for All Americans."

That is the stated purpose of the law, and it would not make any sense for Congress to have written the tax credit eligibility to defeat that purpose.

Senator BLUMENTHAL. Mr. Carvin, I assume you disagree.

Mr. CARVIN. The model that was followed in the ACA for the subsidies was precisely the model for Medicaid. We all agree that Medicaid was conditioned on the States doing certain things.

My friends on the left here would say it would be insane to end Medicaid payments for the neediest Americans, and yet the ACA conditioned the Medicaid on the States doing certain things and that is because this body thought we can get the best of both worlds. We can get the States to do something and we can get universal coverage.

Precisely the same logic obtains here. You give the States a real incentive to do things and then the premiums will flow if the State does it.

There are two purposes to the ACA. One is stated in 1311, States shall run exchanges. The second is we want subsidies to be available.

The only way to accomplish both purposes is to condition the subsidies on States running the exchanges, just like Congress conditioned Medicaid funds on the States altering their Medicaid eligibility standards.

There is nothing inconsistent with the purpose, there is nothing illogical, unless this body is going to say that it was utterly illogical to do it what it did with Medicaid.

No, it is perfectly logical, perfectly reasonable public policy.

Senator BLUMENTHAL. Let me just say that your friends, who, from your perspective, are on your left actually are on our right. [Laughter.]

Mr. CARVIN. I was giving a geographic description, not an ideological one.

Senator BLUMENTHAL. Which I think, in a sense, reflects the different perspectives that we may bring to these issues and I respect yours, but I would just suggest, again, that Congress established a system that fits together as a whole. It is working as a whole.

We can argue hypothetically. We can use rhetoric. The fact of the matter is Congress actually did something good here. I can say that because I was not a part of Congress at the time and I approach this area with a lot of humility.

Very simply, in my view, a ruling for the plaintiffs in *King v. Burwell* would be contrary to—would be catastrophic for millions of families who owe their health insurance to the statutory structure that Congress approved; not a perfect structure, not absolutely perfect in all of its wording and statutory language, but a ruling for

the plaintiffs, in my view, would be a human tragedy, as well as a legal travesty.

I am hopeful that the reasoning that you advance to the court will not succeed. I thank you for being here today and I thank all of the members of the panel. Thank you.

Chairman CRUZ. Thank you very much. I would note, on the discussions of the expansions of healthcare, that studies have also shown that virtually all of the expansion has been on Medicaid and that roughly 900,000 people have received private insurance, that nearly as many people have had their insurance canceled as have signed up on the exchanges for private insurance, and the data are compelling that forcing people onto Medicaid ends up predictively producing worse healthcare outcomes.

With that, Senator Hatch.

Senator HATCH. I might also add that more people are now going to the emergency rooms because they cannot get care. There is too long a wait to get the care that they need.

I also want to bring out that there were about 30 million people that did not have healthcare when we started this issue and this bill. Guess how many there are today? Between 30 million and 35 million still do not have healthcare. Now, maybe you can make some explanations about that.

You quoted my letter, Mr. Weiner. I will just put the letter in the record, if I can.

Chairman CRUZ. Without objection.

[The information appears as a submission for the record.]

Senator HATCH. Mr. Carvin—well, let me just say another thing to Mr. Weiner. With respect to Mr. Weiner, the quote that you made from my Law Review article, where you said supports the President's position, was a reference to the Supreme Court's holding in *South Dakota v. Dole*. I do address that issue in my UCLA Law Review article.

Let me just put that into the record, as well, just the page where I address it. Okay.

Chairman CRUZ. Without objection.

[The information appears as a submission for the record.]

Senator HATCH. Mr. Carvin, you have been carrying a lot of load on your shoulders here. Proponents of the President's position have argued that Congress could not have intended to deny subsidies to federally established exchanges.

Is it not a fact that a very good reason that Congress would have wanted to limit subsidies to State-established exchanges was namely to incentivize States to create these exchanges? Congress could not order the States to create exchanges directly, so it needed a way to incentivize the States to create exchanges.

I think—is that not a perfectly reasonable argument as to what was going on here?

Mr. CARVIN. You are entirely right about the constitutional provision. This body has, in countless statutes, incentivized States precisely the same way. It is noteworthy that the Health Committee, at the same time was considering it, conditioned subsidies on certain insurance reform provisions.

The Clinton administration healthcare proposals also conditioned subsidies on State cooperation. So, far from departing from the

norm, this is the norm that this body has continually used not only in the healthcare area, not only with respect to Medicaid in the ACA, but with respect to virtually every provision, which is since we cannot force the States to do it, but we want them to take an operational role, the best and traditional way of doing it is conditioning Federal funds on having the States become our cooperative partners.

Senator HATCH. All right. Let me just ask this question to you and Mr. Cannon, as well. I want to thank you both for your important work on this issue.

I would like to read for you a passage from my recent UCLA Law Review article and then ask you to comment. Quote, "Advocates of the President's position that Obamacare authorizes subsidies for federally enrolled plans would have us believe that statutes are infinitely malleable; up can mean down, right can mean left, established by a State can mean established by the Federal Government. What matters to them is advancing some alleged statutory purpose regardless of what the statute actually says and that furthers the President's agenda. Those of us on the other side, however, insist that text does matter, words matter. They always have. What the statute says is what matters because at the end of the day, the words in our statutes and in our Constitution are what bind our leaders and what prevent them from doing whatever they want to. Fidelity to text is the foundation of the rule of law."

Do you agree with that passage?

Mr. CARVIN. I do, and I want to make it clear that we are not talking about ripping text out of context. I fully agree with my friends that you need to read this in context. I have said that approximately 400,000 times, and I have always supplemented it with the point that context reinforces, for the reasons I have already articulated, at every turn, that 36(b) should be interpreted to mean what it says.

We are not talking about some green eye shade pulling words out of context, that is not statutory interpretation. Read in context, this serves a very valuable, sensible purpose and there is no reason to depart from the plain language.

Senator HATCH. Mr. Cannon, in your written testimony you discuss an investigation that two House committees conducted into the IRS' drafting of the Obamacare subsidy rule. What are your takeaways from that investigation? If you could add this, too, in your view, what are the most troubling things that the House investigators found?

Mr. CANNON. As I mentioned in my testimony, I think the most troubling things are those that show—or that indicate that the Treasury Department and the IRS recognize that this statutory language posed an obstacle to how they wanted to implement the statute. They jettisoned what the statute says and they implemented the law as they saw fit or they exercised power as they saw fit. This is not a victimless sort of scenario here. There are 57 million individuals and employers in this country who are being subjected to illegal taxes because the IRS decided that it would ignore the clear language of Federal law.

One of those people is Kevin Pace, who I mentioned in my testimony. His income—he took a hit to his income of \$8,000. He is a

jazz musician. If you think \$8,000 is a lot of money to you, it is a lot more money to a jazz musician.

Others who are affected by this rule are seeing their incomes hit by \$1,000. Others are paying penalties to the IRS, employers and individuals, from which they are statutorily exempt. That is—and the IRS—it appears, from what little we know, that the IRS knew that this language prevented them from doing that, but they tried to find a workaround. They tried to disregard it.

The other problem—the other thing that this investigation shows is how the—the arguments that the Government has made before the Supreme Court are not the—were not the reasoning that the IRS used when it developed this rule.

The fact that they jettisoned the statutory phrase “through an exchange established by the State” from their implementing regulations tells us that they knew it was not the term of art the Solicitor General claims.

If it were a term of art that incorporated an exchange established by the Federal Government, there would be no reason to take it out of the draft proposed regulations. You could keep it in there if it is a term of art, but they knew it was not. They knew it was an obstacle to implementing these taxes and spending that money, and so they threw it out.

Senator HATCH. Mr. Carvin, let me just ask you this. Under the well known *Chevron* doctrine, if a statute is ambiguous, an agency interpretation can be sustained only if it is a product of, quote, “reasoned decision-making,” unquote.

From the evidence we have, do you believe that the IRS subsidy rule was the product of reasoned decision-making and if not, why not? What does that tell us about the lawfulness of the rule? You can also answer, if you care to, the arguments of the two who are arguing for the administration’s position.

Mr. CARVIN. With respect to your specific question, Senator Hatch, no. As I have indicated to Senator Cruz, fulfilling the administration’s ideological agenda is the opposite of reasoned decision-making because they are simply substituting their policies for that of the enacted law.

I would, in addition, point out that it strikes me as incredible—and I believe the Solicitor General more or less admitted this during oral argument—that from anybody’s perspective, the notion that this body was delegating to the IRS the seminal decision on whether or not to have these subsidies, which my friends to the left agree is very important to the Act, strikes me as quite counterintuitive.

This was not filling in the gaps in the statute. This was the basic policy decision. No, Congress spoke precisely to the question that is at issue, as the *Chevron* phrase has, and Congress made a decision. There was no room for the IRS, much less White House operatives to change the basic policy decision embodied in the statute.

Senator HATCH. Thank you. Let me ask Professor Grewal. You identify in your written testimony several other IRS regulations that grant Obamacare subsidies to statutorily ineligible recipients. These include regulations granting subsidies to individuals outside this statutory income range, individuals automatically enrolled in

employer healthcare plans, and even some categories of unlawful aliens.

What does the fact that the IRS ignored limits on its authority to grant subsidies in other instances tell you about its general attitude toward obeying limits on statutory authority?

Mr. GREWAL. Regarding the *King v. Burwell* issue, if that regulation is valid, it is impossible to believe that it is because they closely paid attention to the statute and their statutory authority. It could be by accident that the regulation is valid, but I think with so many instances, it is obvious to me that they are implementing the law that they wanted to see enacted rather than what actually was enacted.

Senator HATCH. All right. I appreciate the extra time that the Chairman and Ranking Member have granted to me. I appreciate you both.

Chairman CRUZ. Thank you, Senator Hatch.

I would like to thank each of the witnesses here. We have heard, I believe, incredibly important testimony, testimony that I think has particular salience to the millions of residents in the States that have not established State exchanges, to the millions of young people, young people fresh out of college, millennials, who the Obama administration is trying to exact billions of dollars in illegal taxes from each of you, to a legal immigrant like my father 58 years ago, if you live in a State that has not established an exchange, the testimony we have heard today at this hearing is that the Obama administration is trying to impose on you personally thousands of dollars in penalties that are flatly contrary to law.

I would note that these penalties coming from the individual mandate disproportionately hurt the most vulnerable among us. The people being hurt by these illegal taxes are not the Warren Buffetts and the Bill Gates of the world. They are young people, they are single moms, they are Hispanics, they are African Americans, that are suddenly finding a big tax bill that is due from an administration that is ignoring and violating Federal law to extract illegal taxes.

I would note the testimony this panel has given, that the career professionals at the IRS and the Treasury Department recognized they were bound by law not to collect those taxes from millions of people who did not owe them until political operatives, the testimony suggests, overruled them, instructed them to disregard the law and collect taxes from people who did not owe them and could not afford them.

That testimony is quite stunning and it is testimony that every American ought to consider.

I want to thank each of the witnesses from the Subcommittee. The Committee will keep the hearing record open for an additional 5 business days, which means the record will be closed as of the close of business next Thursday, June 11, 2015.

I note Senator Coons wishes to make a closing remark. I will allow him. Senator Coons.

Senator COONS. Thank you, Mr. Chairman.

We came to this hearing today with differing views of the history, the structure, the purpose and the impact of the ACA, and I thank the witnesses for their testimony, but I think we leave with

sharply different views of the path forward and of what the purpose was of this hearing today.

In my view, this is just another part of a 5-year-long effort to deny working-class Americans any help in affording health insurance. Having failed at repeated frontal assaults, the ACA's opponents are now trying to advance a contorted view of the letter of this important law in order to defeat its very spirit.

I too will raise the specter of a tax increase. These opponents of the Affordable Care Act apparently find the idea that every American should have access to affordable health insurance so offensive that they are willing to advance a cause which, if successful, would immediately raise taxes for 7.7 million Americans by an average of \$3,200 a year, in order to destabilize this law, and ultimately in an effort to bring it down.

I hope they are not successful and I hope instead the Affordable Care Act continues to be improved and to strengthen access to quality healthcare in this country.

Thank you for holding this hearing. I appreciate the fairness with which you have conducted it.

Chairman CRUZ. Thank the Members of the panel and the hearing is now adjourned.

[Whereupon, at 4:45 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

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**Senate Judiciary Subcommittee on
Oversight, Agency Action, Federal Rights and Federal Courts**

**Testimony of Michael A. Carvin
Jones Day
June 4, 2015**

Mr. Chairman and distinguished members, thank you for the opportunity to testify on
“Rewriting the Law: Examining the Process That Lead To the ObamaCare Subsidy Rule.”

While I am not familiar with the internal processes that resulted in the IRS Rule, I can
offer three conclusions about its substance. First, it is directly contrary to any reasonable reading
of the Affordable Care Act’s plain language, structure and purpose. Second, the statutory
“interpretation” offered to justify the Rule is nothing more than an arbitrary and unsupported *ipse
dixit* at odds with every basic principle of statutory construction. Finally, the IRS’s interpretation
bears no relation to the *post hoc* “term of art” theory invented by the Solicitor General for the
Government’s Supreme Court brief in *King v. Burwell*.

**I. It Is Clear That Premium Tax Credits Are Only Available On Exchanges
Established By States.**

The issue presented in *King* is extraordinarily simple and the correct answer is compelled
by the ACA’s plain language: Subsidies for insurance coverage are only available for purchases
made on Exchanges established by a State. Three ACA provisions dispose of this case. First, §
1311 instructs that all states “shall” establish Exchanges. 42 U.S.C. § 18031(b). Second, § 1321
provides 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 third, the Act then grants
subsidies for coverage that is “enrolled in through an Exchange established by the State under
section 1311.” 26 U.S.C. § 36B(c)(2)(A) & (b)(2)(B) (emphasis added). Any English speaker
would immediately understand that no subsidies are available for coverage obtained on an
Exchange established by HHS under § 1321. If Congress had wanted subsidies to be available in

both Exchanges, there is simply no explanation for why it would have gone out of its way to specify that only coverage through Exchanges “established by the State under section 1311” may be subsidized. Why would Congress add unnecessary words that, on any reading, say precisely the opposite of what it supposedly meant?

1. In the face of this unambiguous text, the Government has argued that § 1321’s authorization for HHS to create Exchanges (if and only if states fail to do so) somehow means that HHS-established Exchanges under this section are themselves state-established Exchanges under § 1311. But that obviously does not follow; every iteration of this argument is facially meritless.

First, the fact that the Act authorizes HHS to establish Exchanges plainly does not imply that those Exchanges are “established by the State.” Just the opposite: Because the Act contemplated that two different entities could establish Exchanges, § 36B’s words are a clear exclusion of HHS Exchanges.

Second, the instruction to HHS to establish “such” Exchange if the state defaults simply means that HHS is to establish the same type of Exchange. But § 36B makes subsidies turn not on the type of Exchange, but on who established it, and the word “such” does not somehow require HHS to, impossibly, establish a state-established Exchange.

Third, the notion that HHS acts on behalf of a defaulting state is both false and irrelevant. The Act directs HHS to establish an Exchange “within” the defaulting state, not on its behalf. Indeed, HHS’s authority is only triggered by a state’s refusal, so it cannot possibly be acting on the state’s behalf. And either way, the Exchange is still established by HHS.

Fourth, the Act’s definition of “Exchange” as one established “under § 1311” does not advance the ball: If anything, potential confusion over whether HHS acts under § 1321 or

indirectly under § 1311 explains why § 36B further clarifies that only Exchanges “established by the State” trigger subsidies.

Fifth, there is no merit to the Government’s theory that “established by the State” is a “term of art” encompassing HHS Exchanges; the Act says nothing of the sort. Congress could have deemed HHS Exchanges to be “established by the State” for subsidy purposes, but it never did so—in contrast to other equivalences established in the U.S. Code, an early ACA draft, and elsewhere in the final Act itself.

2. The Government also contends that Section 36B’s plain language should be read “in context.” That is, of course, correct, but § 36B is the *only* ACA provision that defines the subsidy’s scope and statutory context only *confirms* its plain text. Context shows that Congress elsewhere used broader phrases, such as “Exchange” or “Exchange under this Act,” that clearly encompass HHS Exchanges, but chose not to do so in § 36B. Context shows that Congress expressly deemed other nonstate entities, such as territories, to be “states,” but again, chose not to do so for HHS. Context shows that Congress did not treat state and HHS Exchanges as indistinguishable; it referred distinctly to both types of Exchanges in another subsection of § 36B itself. Finally, context shows that § 36B’s formula for computing the value of the subsidy, far from being a “mousehole” in which Congress would not have naturally limited subsidies, is the provision that sets the substantive parameters of the subsidy in *all* relevant respects.

3. More generally, reading § 36B’s plain text to mean what it says is fully consistent with the Act’s other “purposes.” Indeed, it is the *only* reading that faithfully effectuates the Act’s other purposes.

To be sure, subsidies are important to the statutory scheme, and Congress wanted them nationwide. But conditioning subsidies on state creation of Exchanges is not contrary to that

desire, any more than conditioning Medicaid funds on state expansion of Medicaid eligibility is contrary to Congress's obvious desire to extend those funds to all states. There is no inconsistency between desiring subsidies and conditioning their availability on certain state action, because such conditions serve a valuable purpose of the Act that is lost if subsidies are unconditional—namely, inducing states to take the desired action of establishing Exchanges. As such, there is no basis for rewriting the condition embodied in § 36B's plain text, because it is clearly not absurd. Rather, it produces the valuable benefit of inducing the state action strongly encouraged—indeed, purportedly mandated—by § 1311 of the Act, *i.e.*, having states establish Exchanges.

In fact, limiting subsidies to state-established Exchanges was the best, and probably the only, way Congress could accomplish both nationwide subsidies and state-run Exchanges. Congress reasonably could expect states not to reject a “deal” providing their citizens with billions of dollars of free federal money to purchase health insurance. Absent such a financial incentive, however, it was quite unlikely that all states would voluntarily assume this complicated and controversial responsibility. Proving the point, when the IRS eliminated the incentive of subsidies, replacing a deal too good to refuse with a “deal” that offered states nothing, a large majority of states declined the role Congress had urged upon them.

To the extent, therefore, that vacating the Rule now could have adverse policy consequences on the insurance markets, those effects are the *result* of the unlawful IRS Rule. They cannot be invoked to *sustain* it.

In short, the Government's constant refrain that Congress viewed subsidies as important is entirely beside the point. As a practical matter, the same Congress imposed conditions on Medicaid funds, which are more important and more entrenched than the new subsidies, belying

any notion that the ACA would refrain from conditioning federal funds if they were viewed as highly desirable. And as a legal matter, the perceived importance of the subsidies is irrelevant: If the condition imposed by § 36B's plain text produces an objectively non-absurd result—and even the Fourth Circuit conceded that it does—then the condition cannot be ignored, just as neither the judiciary nor the Executive would be empowered to authorize desperately needed Medicaid funds for a state that had not satisfied the conditions thereupon.

Finally, for essentially the same reasons, it is irrelevant whether Congress stated its desire to induce the states to establish Exchanges in the Act's legislative history. There is no requirement that Congress expressly articulate an objectively nonabsurd purpose in the legislative history to make unequivocal statutory text enforceable. To the contrary, even express legislative history cannot overcome plain text. Its absence is thus certainly irrelevant, and especially unsurprising for a statute negotiated largely behind closed doors.

In any case, there is ample evidence that Congress meant exactly what it said. A pre-debate proposal by an influential expert suggested that Congress tie subsidies to state cooperation. A draft Senate bill undeniably did just that, further belying the notion that any such condition would have been unthinkable to Congress. Meanwhile, a House bill that gave states no incentives to create Exchanges was a non-starter in the Senate for this reason, as everyone concedes, and the House had no capacity to push back against the Senate bill after supporters of the Act lost their filibuster-proof majority. If that were not enough, one of the Act's principal architects later explained that the point of linking subsidies to state Exchanges was precisely to politically pressure states by offering the incentive of federal funds for state residents.

4. In yet another argument even the Fourth Circuit rejected, the Government claims that giving § 36B its plain meaning would lead to anomalous results as to other provisions in the

Act. But even if the anomalies in the other provisions rose to the level of absurdity, that could not justify ignoring § 36B's text, which is concededly not absurd. In all events, the Government's contention fails on its own terms. The "anomalies" it alleges are simply contrived. All of the Act's other provisions are just as compatible with the plain meaning of § 36B as with the Government's unlawful revision of it, as the Fourth Circuit admitted. These provisions obviously do not come anywhere close to absurdity, on any terms, and they certainly do not justify "exporting" the absurdity to revise the statutory text wholesale, throughout the Act.

In sum, if the rule of law means anything, it is that text is not infinitely malleable, and that agencies must follow the law as written—not revise it to "better" achieve what they assume to have been Congress's purposes. *King* may be socially consequential and politically sensitive, but that only heightens the importance of judicial fidelity to the rule of law and well-established interpretive principles. It is clear that the IRS Rule is directly at war with these bedrock principles.

II. The IRS's Rationale For The Rule Is Facially Meritless And Contrary To The Rule Of Law.

As the foregoing reflects, there is no plausible way to magically convert the phrase "an Exchange established by the State under section 1311" to mean one "established by *HHS* under section 1321." Nonetheless, the IRS "construed" § 36B to mean precisely the opposite of what it says. The sum total of its "reasoning" in support of such statutory revision is as follows:

The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.

77 FR 30,377, 30, 378 (May 23, 2012).

This analysis is manifestly wrong at every turn. As just demonstrated, “the language of section 36B” plainly does not “support the interpretation that credits are available to taxpayers who obtain coverage through a . . . Federally-facilitated Exchange.” Rather, it directly *precludes* the inference that subsidies are available on such federal Exchanges.

Moreover, it is quite understandable why the IRS did not deign to identify *which* “other provisions of the Affordable Care Act” purportedly support the notion that subsidies are available on HHS-established Exchanges: There are no such provisions for the reasons outlined above. Indeed, as noted, all the relevant provisions reinforce the conclusion that subsidies are limited to State-established Exchanges. The IRS’s wholly unsupported conclusory assertion cannot alter this reality, or the plain language of § 36B itself.

Perhaps most dangerous of all is the IRS’s notion that an Executive Branch agency can ignore or modify the plain meaning of statutory text because “the relevant legislative history does not demonstrate that Congress intended” to do what the statutory text demonstrably does; *i.e.*, “limit the premium tax credit to State Exchanges.” This fundamentally distorts the role of legislative history in interpreting statutes and authorizes agencies to flout clear statutory text. Even if legislative history expressly contradicts unambiguous statutory language, that is of no moment. *See, e.g., Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 808, n.3 (1989) (“Legislative history is irrelevant to the interpretation of an unambiguous statute,” and so “inconsistency with the legislative history need not detain us.”). Obviously, therefore, the *absence* of legislative history “demonstrating” Congress’ intent by *repeating* the text’s plain language cannot possibly be relevant. Thus, the IRS’s bizarre notion that legislative history echoing statutory text is somehow necessary to “demonstrate” congressional intent is wholly

lawless. *See, e.g., Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (“[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of the statute.”)

Indeed, all agree that, under the ACA, subsidies are limited to coverage purchased on an “Exchange” and that Medicaid funds are limited to states that expand eligibility. Yet nowhere does the ACA’s legislative history reject subsidies for coverage purchased directly from insurers, or Medicaid funds for states that decline to expand their eligibility. This reinforces the legal point that such legislative history “amens” are irrelevant, and the practical point that the ACA’s legislative history does not discuss all important issues.

In sum, the *ipse dixit* supporting the IRS Rule is directly contrary to the plain language of § 36B, inconsistent with other provisions of the ACA and improperly uses the absence of legislative history as a means to flout clear statutory text.

III. The “Interpretation” Set Forth To Support The IRS Rule Is Entirely Different Than The “Interpretation” Advanced In The Supreme Court By The Government.

Significantly, nothing in the IRS’s “interpretation” supports or resembles the statutory interpretation offered by the Solicitor General in the Supreme Court. Compelled to acknowledge that subsidies are limited to Exchanges “established by the State” and that HHS is not a “State,” the Government offered a “term of art” theory to the Supreme Court in *King*; *i.e.*, that “Exchange established by the State” is a term of art that includes an Exchange established by HHS. (Govt. Br. 20-23). Notably, the IRS did not hint at any such theory in its Delphic pronouncement concerning “other provisions” of the ACA. That is presumably because nothing in the provision relied on by the Solicitor General—Section 1321—remotely converts § 36B into a “term of art” that means the opposite of what it says.

Specifically, the Government argues that § 1321 provides “flexibility,” by “furnish[ing] alternative means” for states to “fulfil[l]” § 1311’s “requirement” to establish Exchanges—namely, by using HHS as a “surrogate.” (Govt.Br.20, 22.) The Act, however, says exactly the opposite: HHS must establish upon a state’s “[f]ailure to establish” an Exchange. 42 U.S.C. § 18041(c). A “failure” to establish the Exchange obviously does not “fulfil[l]” the “requirement” to establish it; and an “Exchange established by the State” does not paradoxically result even when a state exercises its “flexibility” not to establish it. If anything, § 1321 therefore refutes the claim that an HHS Exchange is “established by the State.” (And, even if HHS could somehow serve as surrogate for an unwilling state, § 36B does not authorize subsidies for “Exchanges established by surrogates of the State.”)

The word “such” in § 1321 cannot fill this gaping hole. (Govt.Br.22.) “[S]uch Exchange” clarifies what HHS is establishing; it does not alter the reality that HHS, not the state, is establishing it. Further, plain text and common sense refute the notion that “such Exchange” necessarily connotes an Exchange where subsidies are available. (Govt.Br.24.) In describing a territorial Exchange, the ACA likewise crossreferences § 1311 and refers to “such an Exchange,” 42 U.S.C. § 18043(a)(1), but the Government admits that subsidies are not available on “such” Exchanges. (Govt.Br.23 n.7.) Whether established by the state, HHS, or a territory, the Exchange itself is the same; the only difference is that consumers who buy on state-established Exchanges will (sometimes) be reimbursed by Treasury under § 36B. The latter distinction controls only the IRS’s expenditures, not HHS’s operation of the Exchange. If a law told the Transportation Secretary to build “such highway” if a state fails to, the “highway” is identical even if the state’s failure decreases its federal highway funds.

* * * *

In sum, the IRS Rule vividly exemplifies the sort of abusive agency rulemaking that courts are obliged to invalidate. It is difficult to believe that this facially meritless “interpretation” was the result of reasoned decision-making about the law actually enacted by Congress, rather than the naked policy desires of the Executive Branch.

U.S. Senate Committee on the Judiciary, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, hearing on the Internal Revenue Service final rule implementing the premium-assistance tax credit provisions of the Patient Protection and Affordable Care Act of 2010, testimony of Michael F. Cannon, director of health policy studies, Cato Institute¹

June 4, 2015

Chairman Cruz, Ranking Member Coons, and members of the Committee, thank you for the opportunity to discuss what we know about how the Internal Revenue Service developed its Health Insurance Premium Tax Credit rule of May 23, 2012, implementing the premium-assistance tax credit provisions of the Patient Protection and Affordable Care Act of 2010.²

Two [federal courts](#) have found that rule expanded the reach of the ACA's employer mandate beyond the clear limits Congress imposed on the agency's authority.³ According to those courts, the IRS is unlawfully subjecting more than 250,000 employers and 57 million workers to that tax.⁴ One of those workers is Kevin Pace, a jazz musician and music teacher in Virginia. According to the *Washington Post*, Pace [lost](#) \$8,000 of income in the first year the IRS imposed that mandate on his employer.⁵ According to one estimate, this illegal tax reduces a typical worker's income by nearly \$1,000 and has eliminated nearly a quarter-million jobs.⁶

Those federal courts likewise found the IRS rule unlawfully expanded the reach of the ACA's individual mandate. As a result, the IRS is currently subjecting an estimated 11 million taxpayers to an illegal tax averaging \$1,200 per taxpayer.⁷

Whatever good the IRS hopes to accomplish with those funds is irrelevant. The authority to levy taxes and to spend federal dollars rests with Congress alone.⁸

In *King v. Burwell*, four Virginia taxpayers allege the IRS's tax-credit rule is subjecting them, Kevin Pace, and [57 million other Americans](#) to illegal taxes.⁹ The Supreme Court heard [oral arguments](#) in March and will likely rule later this month. A ruling for the challengers would invalidate the rule, free more than 57 million Americans from illegal taxes, create an estimated 237,000 new jobs, and increase affected workers' earnings by nearly \$1,000.¹⁰

The IRS's "Forced" Interpretation of the ACA

The IRS rule is unlawful because it contradicts the clear and unambiguous language of the ACA. The ACA authorizes premium subsidies (nominally, tax credits) only "through an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act."¹¹ The availability of tax credits triggers penalties under the ACA's individual and employer mandates, such that if credits are not available, the individual mandate's reach is dramatically curtailed and the employer mandate ceases to operate entirely.¹²

The IRS rule purports to authorize subsidies in health-insurance Exchanges established by the federal government under Section 1321. The government argued before the Supreme Court, "The phrase 'Exchange established by the State under Section 18031' is a term of art that includes an Exchange established for the State by HHS." At a minimum, the government argued, the ACA is ambiguous on this question and the IRS's interpretation is reasonable.¹³ But as Harvard law professor Noah Feldman explains:

The uncomfortable truth (for liberals, at least) is that [*King v. Burwell*] arises from a piece of statutory language that on its face explicitly says that tax subsidies are only available for health insurance purchased on an exchange “established by the state.”

Liberals have tried to explain why, correctly interpreted, this language really means “established by the state or the federal government on the state’s behalf.” But their theories seem forced.¹⁴

My coauthor Jonathan H. Adler and I have written at length about how neither the ACA nor its legislative history provide any support for—and indeed squarely foreclose—the interpretation embodied in the IRS rule.¹⁵

How Did the IRS Reach Its Interpretation?

Exactly how the IRS came to interpret the ACA in this manner, however, remains a mystery. In the remainder of my testimony, I will discuss the troubling picture that emerges from what little we know about how the IRS developed this rule, and why we know so little.

1. The available evidence suggests IRS officials recognized the ACA did not give them the authority to impose these taxes.

Treasury and IRS officials permitted investigators from two House committees to interview officials involved in the developing the rule, and granted them brief access (see below) to certain documents.¹⁶

Investigators found that the IRS’s draft rule originally included the statutory language restricting tax credits to Exchanges “established by the State,” but IRS officials deleted it and inserted broader language when approached by a political appointee at the Treasury Department. In March 2011, Deputy Assistant Treasury Secretary for Tax Policy Emily McMahon read an article¹⁷ in which an ACA critic discussed how the Act offers tax credits only in states that establish Exchanges. According to one Treasury Department attorney, McMahon approached IRS officials and inquired whether this was “a glitch in the law we needed to worry about.” Investigators reported:

An early draft of the 36B proposed rule included the language “Exchange established by the State” in the section entitled “Eligibility for the Premium Tax Credit.” Between March 10, 2011, and March 15, 2011, the explicit reference to “Exchanges established by the State” was removed and the phrase “or 1321” was inserted in its place.¹⁸

As a result, when the IRS issued its proposed rule on August 17, 2011, it provided that “a taxpayer is eligible for the credit” if she purchases coverage “through an Exchange established under section 1311 or 1321.”¹⁹

The timing and content of these changes is significant. The deletion of the phrase “established by the State” suggests IRS officials knew this language posed an obstacle to offering tax credits in federal Exchanges. If it did not, there would have been no reason to delete it. The inclusion of the phrase “or 1321” suggests IRS officials saw a difference between Exchanges established by States under Section 1311 and Exchanges established by the federal government under Section 1321. (As discussed below, these elements of the administrative record contradict key arguments the government made before the

Supreme Court in *King v. Burwell*.) The timing of these changes raises questions about whether the agency discarded part of the statute for political reasons.

Investigators reviewed a March 25, 2011, e-mail in which Treasury and IRS officials described the lack of authorization for subsidies in federal Exchanges as a “drafting oversight”; noted the lack of any statutory language deeming federal Exchanges to be established by the State in which they operate; and suggested a regulatory work-around.²⁰ Each of these aspects suggests IRS officials knew the ACA did not allow them to do what they sought to do.

Investigators reported that a draft of the final rule claimed agencies have the power to override “apparently plain statutory language” if that language is inconsistent with the agency’s understanding of the purpose of the law. While agency officials dropped that discussion from the final rule shortly before release, its appearance suggests IRS officials recognized the plain meaning of the relevant provision.²¹

“In the end,” the *Washington Post* reports, “the Treasury and IRS officials who wrote the rules adopted the more expansive reading of the law — allowing subsidies for all marketplaces — because they concluded this was required for the new health-care initiative to succeed, according to current and former agency officials and documents they provided to congressional investigators.”²² This admission suggests IRS officials consciously elevated the political goal of helping the ACA succeed over a duty to implement the law according to the terms specified by Congress.

2. Treasury and IRS officials performed little or no analysis of the ACA and its legislative history, used legislation rejected by Congress to support their theory of congressional intent, and failed to consider important dimensions of this issue.

Treasury and IRS officials were unable to provide investigators with any written record showing they had actually researched the ACA or its legislative history. Indeed, the agencies’ correspondence suggests it did not read the statute very closely. In an October 2012 letter to Congress, Assistant Treasury Secretary Mark Mazur claimed the ACA contained “no discernible pattern that suggests Congress intended the particular language of section 36B(b)(2)(A) to limit the availability of the tax credit.” Mazur ignored (or was unaware) that section 36B contains a second explicit passage and seven cross-references limiting tax-credit eligibility to those who enroll in coverage “through an Exchange established by the State”—a discernible pattern in itself.²³

Agency officials admitted that, in attempting to ascertain Congress’s intent, they relied on statements House members made about the health care bill that passed the House in 2009, but that Congress ultimately rejected in early 2010.²⁴ Such statements cannot represent congressional intent, because Congress rejected that bill’s approach. In particular, Congress rejected the House bill’s provision creating full equivalence between state-established and federal Exchanges.

Investigators found that the IRS never considered that the ACA’s authors had a clear preference for state-run Exchanges; never considered that Congress might have conditioned tax credits on states’ establishing Exchanges as a way of inducing states to implement this part of the law; never considered that a leading health-law scholar proposed conditioning premium subsidies on states’ establishing Exchanges in early 2009;²⁵ never considered that another leading Senate bill also conditioned Exchange subsidies on state cooperation;²⁶ and never considered that House Democrats complained that states that refused to establish Exchanges would prevent their residents from receiving “any benefit” from the ACA.²⁷

3. The IRS's proposal to implement these taxes and subsidies in federal-Exchange states met immediate and sustained criticism.

Within days of the IRS unveiling its proposed tax-credit rule on August 17, 2011, academics noted the IRS's interpretation is contrary to law.²⁸ Citizens challenged the IRS's proposed rule during the notice-and-comment period.²⁹ Beginning in 2011, members of Congress complained the IRS's interpretation is illegal, demanded the agency reverse its proposed rule, and demanded all documents and communications relating to the development of the proposed rule.³⁰ Three and a half years later, Congress is still waiting for the IRS to honor that request for documents.

4. The administrative record offers no statutory support for or substantive explanation of the IRS's decision to ignore the plain meaning of "through an Exchange established by the State."

The IRS's final rule, issued May 23, 2012, contained only a one-paragraph explanation of the agency's decision to implement the disputed taxes and subsidies in states with federal Exchanges:

The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.³¹

This paragraph constitutes the agency's entire explanation for its decision in the administrative record. It fails to include, to account for, or even to acknowledge the only statutory language—"through an Exchange established by the State"—that speaks directly to the question presented. It does not even identify the "statutory language," or the "language, purpose, and structure," or the "relevant" legislative history upon which the agency supposedly relied. Indeed, the IRS was so vague about its reasoning, it avoided claiming either that it believes the ACA plainly authorizes tax credits in federal Exchanges, or that the Act is ambiguous on this question.

5. The administrative record contradicts arguments the government offered before the Supreme Court, and reveals those arguments to be post-hoc rationalizations.

When *King v. Burwell* reached the Supreme Court, the government reprised its argument that federal Exchanges are Section 1311 Exchanges, and unveiled a new argument: "The phrase 'Exchange established by the State under Section [1311]' is a term of art that includes an Exchange established for the State by HHS."³² The available record shows IRS officials did not consider that phrase to be a term of art, and did not consider Section 1321 Exchanges to be established under Section 1311.

The facts that the IRS dropped the phrase "established by the State" from its draft regulations in March 2011; that IRS commissioner Douglas Shulman testified before Congress that the ACA contains "contradictory language" on this question;³³ and that IRS officials developing the rule researched how "tension/conflict between two statutory provisions" can trigger judicial deference to an agency's reasonable interpretation of a statute³⁴ all demonstrate that IRS officials recognized that phrase is not a

“term of art” that encompasses federal Exchanges. If it were, there would be no need to delete that phrase from the rule, or claim it is in tension with other parts of the statute.

Likewise, the fact that the IRS specified that tax credits would be available “through an Exchange established under section 1311 or 1321” demonstrates the agency did not interpret the statute as defining Section 1321 Exchanges as having been established under Section 1311.³⁵ If it did, there would have been no reason to list Section 1321 Exchanges separately.

6. The IRS has attempted to hide its actions and its reasoning from congressional and public scrutiny.

According to the *Washington Post*:

The Treasury and IRS team writing the regulations recognized that the environment was becoming highly charged...Discussions intensified inside Treasury and the IRS over how to show that the government had considered the opponents’ views but not draw media attention to the debate over subsidies, former officials recalled. “The overriding concern was not generating negative news stories,” one former official said.³⁶

That concern appears to have prevailed over reasoned decision-making and accountability.

It continues to do so. In December 2011, Senate Finance Committee ranking member Orrin Hatch wrote the Secretary of the Treasury to protest the IRS’s proposed rule, to ask the agencies to reverse the rule, and to request “any correspondence (including emails, memoranda, written notes, and electronic documents) addressing your agencies’ legal authority to issue a regulation that expands the section 36B Health Insurance Premium Tax Credit so as to be available for participation in Federally-facilitated Exchanges.”³⁷ In September 2014, the House Committee on Oversight and Government Reform issued a subpoena “to compel the Treasury Department to produce the documents that will answer the Committee’s outstanding questions.”³⁸ Treasury and the IRS continue to ignore both requests. The agencies’ lack of transparency is withholding crucial information from Congress and the public.

It is important to note that the only reason we know the IRS dropped the statutory requirement “through an Exchange established by the State” from its draft regulations is because, after much persistence by House investigators, Treasury officials let them sit in the room with some documents. Investigators were not allowed to take the documents with them. They couldn’t make copies. They couldn’t take pictures. They couldn’t take notes. They could only look at the documents, then leave the room to scribble down as many notes as they could remember. This is not how a democracy does business.

Conclusion

The IRS rule at issue in *King v. Burwell* does not appear to be an isolated incident, but part of a pattern. My co-panelist University of Iowa law professor Andy Grewal has discovered three other ways the IRS expanded eligibility for tax credits, and expanded the reach of the taxes they trigger, beyond the clear limits imposed by Congress in the ACA. Indeed, Grewal found the IRS “effectively provides the *largest* [subsidies] to persons who do *not* satisfy the statutory criteria.”³⁹

The IRS has gone rogue, taxing and spending the American people’s money without permission from or accountability to Congress. The American people need to know how this happened. That begins with

transparency. I thank you for the opportunity to share my perspective, and I look forward to your questions.

¹ Michael F. Cannon (@mfcannon) is director of health policy studies at the Cato Institute (www.cato.org), a non-partisan, non-profit, educational foundation dedicated to advancing the ideas of individual liberty, limited government, free markets, and peace. To preserve its independence, the Cato Institute accepts no government funding. Cannon has been described as “the intellectual father” of *King v. Burwell* (by *Modern Healthcare*), “ObamaCare’s single most relentless antagonist” (*The New Republic*) and “the man who could bring down ObamaCare” (*Vox*). His work on *King v. Burwell* is extensive. From 2010 through 2013, he counseled state officials not to implement the Patient Protection and Affordable Care Act’s (ACA) health-insurance “Exchanges.” He was the first to criticize the Internal Revenue Service (IRS) when it announced in August 2011 it would issue premium subsidies and impose the ACA’s employer mandate in states with federal Exchanges. With Jonathan H. Adler, a professor of administrative and constitutional law at Case Western Reserve University, Cannon conducted the legal and legislative research, and wrote the leading scholarly treatment of the IRS’s tax-credit rule, that laid foundation for *King v. Burwell* and three similar challenges to the IRS rule. He has authored numerous articles, participated in numerous debates, advised congressional investigators, and filed several amicus briefs related to these cases. He blogs about *King v. Burwell*, the ACA, and health care reform at DarwinsFool.com.

² U.S. Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 77 Fed. Reg. 30,377 (May 23, 2012) (final rule).

³ *Scott Pruitt v. Sylvia Burwell*, No. CIV-11-030-RAW (E.D. Okla. Sept. 30, 2014); and *Jacqueline Halbig v. Sylvia Burwell*, No. 14-5018 (D.C. Cir. Jul. 22, 2014). *But see Order Granting En Banc Review*, *Halbig v. Burwell*, No. 14-5018 (D.C. Cir. Sept. 4, 2014).

⁴ Michael F. Cannon, *King v. Burwell Would Free More Than 57 Million Americans From The ACA’s Individual & Employer Mandates*, DarwinsFool.com (Jul. 21, 2014).

⁵ Sandhya Somashekhar, “Health-Care Law Is Tied To New Caps on Work Hours for Part-Timers,” *Washington Post*, July 23, 2013.

⁶ Douglas Holtz-Eakin and Brittany LaCouture, “TaKing Stock: The Potential Impact of *King v. Burwell*,” American Action Forum, May 13, 2015, <http://americanactionforum.org/research/taking-stock-the-potential-impact-of-king-v.-burwell>.

⁷ Douglas Holtz-Eakin and Brittany LaCouture, “TaKing Stock: The Potential Impact of *King v. Burwell*,” American Action Forum, May 13, 2015, <http://americanactionforum.org/research/taking-stock-the-potential-impact-of-king-v.-burwell>.

⁸ U.S. Constitution, Article I.

⁹ Michael F. Cannon, *King v. Burwell Would Free More Than 57 Million Americans From The ACA’s Individual & Employer Mandates*, DarwinsFool.com (Jul. 21, 2014).

¹⁰ Douglas Holtz-Eakin and Brittany LaCouture, “TaKing Stock: The Potential Impact of *King v. Burwell*,” American Action Forum, May 13, 2015, <http://americanactionforum.org/research/taking-stock-the-potential-impact-of-king-v.-burwell>.

¹¹ See 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i) (direct language); 26 U.S.C. § 36B(b)(3)(B), (b)(3)(B)(i), (b)(3)(C), (b)(3)(D), (b)(3)(E), (c)(2)(A)(ii), (e)(A) (cross-references).

¹² See I.R.C. § 5000A(e)(1); I.R.C. § 4980H.

¹³ *Brief for the Respondents*, *King v. Burwell*, No. 14-114 (U.S. Jan. 21, 2015).

¹⁴ Noah Feldman, “Justices Drop Another Clue About Obamacare’s Future,” *Bloomberg View*, April 22, 2015.

¹⁵ See, for example, Jonathan H. Adler and Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, *Health Matrix: Journal of Law-Medicine* 23, No. 1 (2013): 119-195;

Jonathan H. Adler and Michael F. Cannon, [The Halbig Cases: Desperately Seeking Ambiguity in Clear Statutory Text](#), *Journal of Health Politics, Policy and Law* (Nov. 25, 2014); and [Brief of Amici Curiae Jonathan H. Adler and Michael F. Cannon](#), *King v. Burwell*, No. 14-114 (U.S. Dec. 29, 2014).

¹⁶ Staff of H. Comm. on Oversight and Gov't Reform, 113th Cong., [Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies](#) (Comm. Print 2014).

¹⁷ Thomas Edmondson, [Opponents of New Federal Health Care Law Wage Constitutional War in Courts](#), *Bloomberg BNA*, (Jan. 4, 2011).

¹⁸ Staff of H. Comm. on Oversight and Gov't Reform, 113th Cong., [Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies](#) (Comm. Print 2014).

¹⁹ U.S. Department of the Treasury, Internal Revenue Service, [Health Insurance Premium Tax Credit](#), Fed. Reg. 76 (August 17, 2011) (proposed rule).

²⁰ Staff of H. Comm. on Oversight and Gov't Reform, 113th Cong., [Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies](#) (Comm. Print 2014).

²¹ Staff of H. Comm. on Oversight and Gov't Reform, 113th Cong., [Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies](#) (Comm. Print 2014).

²² Lisa Rein, ["Six words might decide the fate of Obamacare at the Supreme Court,"](#) *Washington Post*, March 1, 2015.

²³ See 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i) (direct language); 26 U.S.C. § 36B(b)(3)(B), (b)(3)(B)(i), (b)(3)(C), (b)(3)(D), (b)(3)(E), (c)(2)(A)(ii), (e)(A) (cross-references). See also Michael F. Cannon, [George F. Will: "Four Words in the ACA Could Spell Its Doom,"](#) *Forbes.com* (Jan. 30, 2014).

²⁴ [America's Affordable Health Choices Act of 2009, H.R. 3200](#), 11th Cong. (2009).

²⁵ Timothy S. Jost, ["Health Insurance Exchanges: Legal Issues,"](#) O'Neill Institute Papers No. 23, April 27, 2009.

²⁶ Committee on Health, Education, Labor & Pensions, U.S. Senate, [Affordable Health Choices Act, S. 1679](#), 111th Cong. (2009).

²⁷ Rep. Lloyd Doggett, et al., [Letter to President Obama](#), January 11, 2010.

²⁸ David Hogberg, [Oops! No Obamacare Tax Credit Via Federal Exchanges?](#), *Investor's Business Daily* (Sept. 7, 2011) ("There is this technical problem in the law," said James Blumstein, a professor at Vanderbilt Law School. "I don't see how you get around that."); Jonathan H. Adler, [The IRS Wants to Give Tax Credits for Health Insurance Purchases Beyond Those Provided for in the ACA](#), *Volokh Conspiracy* (Sep. 9, 2011); David Hogberg, [Companies Could Challenge Obamacare Employer Fines](#), *Investor's Business Daily* (Sept. 16, 2011); Jonathan Adler and Michael Cannon, [Another ObamaCare Glitch](#), *Wall Street Journal Online* (Nov. 16, 2011).

²⁹ See Department of the Treasury, Internal Revenue Service, [Health Insurance Premium Tax Credit](#), Fed. Reg. 76 (August 17, 2011) ([Comment of Brian Clark](#), Sept. 9, 2011); Department of the Treasury, Internal Revenue Service, [Health Insurance Premium Tax Credit](#), Fed. Reg. 76 (August 17, 2011) ([Comment of Nicole Kaeding](#), Oct. 5, 2011); Department of the Treasury, Internal Revenue Service, [Health Insurance Premium Tax Credit](#), Fed. Reg. 76 (August 17, 2011) ([Comment of David Ford](#), Oct. 18, 2011); Department of the Treasury, Internal Revenue Service, [Health Insurance Premium Tax Credit](#), Fed. Reg. 76 (August 17, 2011) ([Comment of Christopher Whitcomb](#), Aug. 22, 2012).

³⁰ See Rep. David Phil Roe, U.S. House of Representatives, [Letter to Douglas Shulman, Comm'r, Internal Revenue Service](#) (Nov. 4, 2011); Sen. Orrin G. Hatch, U.S. Senate, [Letter to Timothy Geithner, Sec'y, Dep't of the Treasury and Douglas Shulman, Comm'r, Internal Revenue Serv.](#) (Dec. 1, 2011); Sen. Jim Demint, et al., ["Letter to National Governors Association"](#) (Jun. 29, 2012) ("[T]he IRS recently finalized a regulation that contradicts the law by allowing the federal government to provide premium assistance to citizens in those states that have not created exchanges. The IRS had no authority to finalize such a regulation. By refusing to create an exchange, you will assist us in Congress to repeal this violation which will help lower the costs of doing business in your state, relative to other states that keep these financially draining exchanges in place."); Rep. Darrell Issa, Chairman, Committee on

Oversight and Government Reform, U.S. House of Representatives, [Letter to Douglas H. Shulman, Commissioner, Internal Revenue Service](#) (Aug. 17, 2012); Committee on Oversight & Government Reform, U.S. House of Representatives, [Letter to Treasury Secretary Geithner and IRS Commissioner Shulman](#) (Oct. 18, 2012); Rep. Darrell Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, [Letter to Douglas W. Elmendorf, Director, Congressional Budget Office](#) (Nov. 30, 2012); Committee on Oversight & Government Reform, U.S. House of Representatives, [Letter to Treasury Secretary Jacob Lew](#) (July 25, 2013); Committee on Oversight & Government Reform, U.S. House of Representatives, [Letter to Treasury Secretary Jacob Lew](#) (Aug. 15, 2013).

³¹ U.S. Department of the Treasury, Internal Revenue Service, [Health Insurance Premium Tax Credit](#), 77 Fed. Reg. 30,377 (May 23, 2012) (final rule).

³² [Brief for the Respondents](#), King v. Burwell, No. 14-114 (U.S. Jan. 21, 2015).

³³ Lisa Rein, [“Six words might decide the fate of Obamacare at the Supreme Court,”](#) *Washington Post*, March 1, 2015.

³⁴ Email correspondence between Catherine Arterton, Deputy Tax Legislative Counsel for Tax Policy, Department of the Treasury, to Jessica Hauser, Deputy Tax Legislative Counsel at the Department of Treasury, December 1, 2011.

³⁵ U.S. Department of the Treasury, Internal Revenue Service, [Health Insurance Premium Tax Credit](#), Fed. Reg. 76 (August 17, 2011) (proposed rule).

³⁶ Lisa Rein, [“Six words might decide the fate of Obamacare at the Supreme Court,”](#) *Washington Post*, March 1, 2015.

³⁷ Sen. Orrin G. Hatch, U.S. Senate, [Letter to Timothy Geithner, Sec’y, Dep’t of the Treasury and Douglas Shulman, Comm’r, Internal Revenue Serv.](#) (Dec. 1, 2011).

³⁸ Rep. Darrell Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, [Subpoena Letter to Treasury Secretary Jacob Lew](#) (Sept. 23, 2014).

³⁹ Andy Grewal, [“Lurking Challenges to the ACA Tax Credit Regulations,”](#) SSRN.com, April 23, 2015. Emphases added.

"Rewriting the Law: Examining the Process That Led to the ObamaCare Subsidy Rule"

U.S. Senate Judiciary Committee, Subcommittee on Oversight, Agency Action, Federal Rights
and Federal Courts

June 4, 2015

Testimony of Professor Andy S. Grewal

Subcommittee Chairman Cruz and other distinguished members,

Thank you for inviting me to testify at this hearing. My name is Andy Grewal and I am an Associate Professor of Law at the University of Iowa College of Law. The views expressed here are solely my own.

I am testifying today to provide some further context for the Subcommittee's investigation into Treasury regulations that grant credits under Section 36B of the tax code, regarding policies purchased on the federally-established health insurance exchange. The validity of the Treasury regulations,¹ referred to by this Subcommittee as the ObamaCare Subsidy Rule, will be decided by the Supreme Court at the end of this month.

I do not take any position on the validity of the ObamaCare Subsidy Rule, nor do I take any position on the wisdom, or lack thereof, of the Patient Protection and Affordable Care Act of 2010 (the ACA). However, my research has revealed several instances where the IRS has promulgated regulations that plainly and unequivocally contradict provisions of Section 36B. I believe that an understanding of these instances may provide some context for the Subcommittee's investigation.

Ultimately, the IRS's repeated overreaches make it difficult to believe that the agency has tried to carefully obey its statutory authority when interpreting the tax-related provisions of the ACA, including the provision referring to "an Exchange established by the State." I have elsewhere² fleshed out the highly technical details of the IRS's overreaches and will offer only a brief summary here:

1. *Extension of Credits to Persons Outside of Statutory Income Range.* Section 36B plainly provides premium tax credits to citizens only when their household incomes come within a specified income range (100 to 400 percent of the poverty line). IRS regulations

¹ See Treas. Reg. § 1.36B-2(a)(1) (providing tax credit eligibility to anyone "enrolled in one or more qualified health plans through an Exchange") and Treas. Reg. § 1.36B-1(k) (defining "Exchange" to include federally established exchanges).

² See Grewal, "Lurking Challenges to the ACA Tax Credit Regulations," *Bloomberg BNA Tax Insights*, 98 DTR J-1 (May 2015), available at <http://tinyurl.com/grewalACA>. I am continuing to study Treasury regulations under Sections 36B and 4980H and expect to discuss further instances of IRS overreach at Notice & Comment, the blog of the Yale Journal on Regulation, accessible at <http://yalejreg.com>.

disregard the statutory limitation and grant credits to potentially several million persons below the 100 percent statutory floor.³

2. *Extension of Credits to Persons Receiving Employer-Sponsored Minimum Essential Coverage.* Section 1511 of the ACA instructs the Department of Labor to issue regulations requiring large employers (200+ employees) to automatically enroll their employees in any health benefits plan offered by the employer. Section 36B correspondingly denies credits to employees who are covered by an employer plan, since they don't need to purchase policies on an Exchange. IRS regulations contradict this statutory scheme and allow persons to enjoy premium tax credits when they are automatically enrolled in an employer plan by reason of Section 1511 or in some other circumstances.⁴
3. *Extension of Credits to Some Unlawful Aliens.* Section 36B allows aliens to enjoy premium tax credits even though they fall outside of the statutory income range, when those aliens themselves lawfully reside in the United States. However, IRS regulations contradict the statute and allow unlawful aliens to receive premium tax credits when only a family member resides lawfully.⁵

Putting aside issues of legal authority, and focusing solely on the beneficiaries of the IRS's largesse, these 3 regulations may be reasonable. That is, the IRS's rewrites may reflect an improvement over the enacted law. However, the executive branch cannot re-write a statute any time that it subjectively believes that doing so would serve the general welfare or serve favored constituencies.

Additionally, although the IRS regulations seemingly provide beneficial results to a class of taxpayers, they impose costs on others. When persons outside of the statutory income range receive a tax credit (Bullet Point #1), the receipt of that credit may trigger or increase employer penalties under Sections 4980H(a) & (b). In other words, an unlawful premium tax credit leads to unlawful penalty collections.

³ See Treas. Reg. § 1.36B-2(b)(6).

⁴ See Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,381 (May 23, 2012) (acknowledging that § 36B(c)(2)(C)(iii) flatly denies premium tax credit for any month in which employee pays for and obtains minimum essential coverage under employer plan, even if such coverage is unaffordable or does not provide minimum value, but breaking from statute and proposed regulations to "clarify," in Treas. Reg. § 1.36B-2(c)(3)(vii)(B), that § 36B(c)(2)(C)(iii) does not apply in some circumstances where employee obtains coverage via automatic enrollment). To qualify for credits under the regulation, employees must eventually opt-out of automatic enrollment. However, because the Section 4980H penalties are calculated on a monthly basis, even one month's worth of unlawful credits can have severe financial consequences on an employer.

⁵ See Treas. Reg. § 1.36B-2(b)(5).

Regarding Bullet Point #2, the extension of credits to persons who are automatically enrolled in employer-sponsored coverage will potentially trigger or increase large penalties on employers. Penalties for such employers seems exquisitely unfair, given that these employers are actually offering health coverage to their employees and may be contributing amounts to their employees' monthly premiums. The ultimate costs of the IRS regulation will largely depend on the DoL's future actions. However, even if the potential burdens of the regulation remain speculative at this point, the regulation nicely illustrates an instance where the IRS has contradicted the clear language of Section 36B.

For technical reasons, the extension of tax credits to some unlawful aliens (Bullet Point #3) does not seem likely to trigger or increase penalties on employers. However, the granting of credits to persons who do not reside lawfully in the United States reflects a sensitive issue that should be handled by the Congress, and by an agency only when it enjoys statutory authority to do so.

Although these cases of IRS overreach do not directly relate to *King v. Burwell*, they may help inform the Subcommittee of the process that led to the ObamaCare Subsidy Rule. Whatever nuances might exist regarding the debate over that Rule, in each of these cases, the statutory provisions clearly say one thing and the implementing regulations say something else. This suggests that the IRS has not carefully obeyed its statutory authority in implementing Section 36B.

None of this proves that the ObamaCare Subsidy Rule is invalid. Even a careless rifleman occasionally hits his target. But it's doubtful that the ObamaCare Subsidy Rule can be vindicated on the grounds that the IRS has done its best to respect its statutory authority under Section 36B.

I thank the Members for providing the opportunity to testify on these important matters.



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**THE AFFORDABLE CARE ACT ENSURES PREMIUM ASSISTANCE FOR
 ELIGIBLE INDIVIDUALS ON BOTH FEDERALLY-FACILITATED AND STATE-RUN
 EXCHANGES**

Testimony of Elizabeth B. Wydra
 Subcommittee on Oversight, Agency Action,
 Federal Rights and Federal Courts
 Committee on the Judiciary
 United States Senate

Thursday, June 4, 2015, 2:00 PM
 Dirksen 226

I would like to thank the Subcommittee for inviting me to assist its members and their colleagues in evaluating the lawfulness of the Obama administration's decision to ensure that Affordable Care Act (ACA) premium assistance tax credits and subsidies are fully available to all individuals eligible for such assistance, whether they seek insurance through ACA-prescribed exchanges facilitated by state governments or by the federal government. The Supreme Court in *King v. Burwell* is currently considering whether the Treasury Department permissibly interpreted 26 U.S.C. § 36B to make the ACA's federal premium tax credits available to eligible taxpayers through the Exchanges in every state.

I serve as counsel in *King* to members of Congress who are current and former leaders of the committees that crafted the ACA, and the House and Senate leaders who melded the respective committee versions into the bill that was ultimately enacted, as well as members of state legislatures who served during the period when their governments were deciding whether to create their own Exchanges under the ACA. On behalf of these legislators, I have filed briefs *amici curiae* in the Supreme Court and federal courts of appeal.¹ I have also spoken extensively about the Affordable Care Act since its passage in public debates, on academic panels, and in the media, and served

¹ Brief *Amici Curiae* of Members of Congress & State Legislatures in Support of Respondents, *King v. Burwell*, No. 14-114 (U.S. Jan. 28, 2015), available at http://theconstitution.org/sites/default/files/briefs/King_Amicus_Brief.pdf; Brief *Amici Curiae* of Members of Congress & State Legislatures in Support of Appellees & Affirmance, *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014), available at http://theconstitution.org/sites/default/files/briefs/King_v_Sebelius_CAC_Amicus_Final.pdf.

as counsel to state legislators in *NFIB v. Sebelius*.² I am currently Chief Counsel for the Constitutional Accountability Center, a public interest law firm, think tank, and action center, dedicated to realizing the progressive promise of our Constitution.

Introduction and Summary

In 2010, Congress enacted the Patient Protection and Affordable Care Act, 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. Section 36B of the ACA authorizes the Treasury Department to “prescribe such regulations as may be necessary” to implement the statute’s tax credits.³

Because the text, structure, and purpose of the statute make clear that Congress intended the Act’s tax credits to be available to all Americans who need them in every state across the nation, Treasury properly applied the law when it interpreted the statute to provide for tax credits on federally-facilitated exchanges as well as state-run exchanges. Critics’ assertion that tax credits should be available only on exchanges administered by the states relies on reading a four-word phrase from the statute in isolation—contrary to the most basic canons of statutory construction—and turning a blind eye to the statutory anomalies and disastrous consequences for individuals and industry that would result from this cramped interpretation of the law. As Justice Scalia explained last year, it is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”⁴ Reading the statute according to this well-established rule of statutory construction, only the interpretation adopted by Treasury accords with the plain text of the law and allows the law to work in the way Congress intended.

² Brief *Amici Curiae* of State Legislators from All Fifty States et al. Supporting Petitioners, *U.S. Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 2566 (2012), available at <http://theconstitution.org/cases/briefs/us-department-health-human-services-v-florida-florida-v-hhs/supreme-court-amici-brief>; Brief of *Amici Curiae* of State Legislators from All Fifty States et al. in Support of Defendants-Appellants, *U.S. Dep’t of Health & Human Servs. v. Florida*, 648 F.3d 1235 (11th Cir. 2011), available at <http://theconstitution.org/cases/briefs/us-department-health-human-services-v-florida-florida-v-hhs/11th-circuit-amici-brief>; Brief of *Amici Curiae* State Legislators in Support of Defendants, *Florida v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011), available at <http://theconstitution.org/cases/briefs/us-department-health-human-services-v-florida-florida-v-hhs/florida-district-court>.

³ 26 U.S.C. § 36B(g).

⁴ *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2441 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

Indeed, Treasury's interpretation of § 36B to provide tax credits for eligible individuals purchasing insurance on federally-facilitated as well as state-run exchanges is the only interpretation that is consistent with how everyone involved with the drafting of the ACA understood the law to work. Republican and Democratic members and staffers alike have made clear that no one understood the law to preclude tax credits for residents of states that opted to use the federal fallback provided for in the law instead of setting up and running their own exchanges.⁵ No member of Congress expressed the view that tax credits were only to be available in states that set up their own exchange during the Act's passage. And the state officials who, according to the narrative put forth by the rule's challengers, were supposed to have understood that Congress was offering a carrot and a stick to encourage state-run exchanges, never got that message.

In contrast to the interpretation of the tax credit provision asserted by the *King* plaintiffs and their allies, Treasury's interpretation of § 36B respects principles of federalism and implements the statute's stated desire to afford "State flexibility."⁶ As Justice Kennedy explained to counsel for the challengers during oral argument in *King*, "from the standpoint of the dynamics of Federalism," if the interpretation of § 36B as providing for tax credits only on state-run exchanges is accepted, "the States are being told either create your own Exchange, or we'll send your insurance market into a death spiral. We'll have people pay mandated taxes which will not get any credit [on] the subsidies. The cost of insurance will be sky-high, but this is not coercion....there's a serious constitutional problem if we adopt your argument."⁷ In essence, critics of the Treasury's tax credit rule would turn a statutory scheme expressly designed to give states flexibility into a program so harsh that several Supreme Court Justices raised concerns that it could rise to unconstitutional coercion.⁸ Treasury wisely rejected that interpretation of the tax credit provisions.

The Treasury rule providing for tax credits to all Americans who need them, regardless of which entity administers the health insurance marketplace in their state, implements the plain text of the ACA. Reading the statute as a whole in accordance with established Supreme Court precedent, this is the clear meaning of the law. But even if the statute were somehow understood to be ambiguous with regard to the availability of tax credits in states that declined to set up their own health insurance exchanges, Treasury's rule embodies a reasonable construction of the statute.

⁵ Robert Pear, *Four Words that Imperil Health Care Law Were All a Mistake, Writers Now Say*, N.Y. Times, May 25, 2015, <http://www.nytimes.com/2015/05/26/us/politics/contested-words-in-affordable-care-act-may-have-been-left-by-mistake.html>.

⁶ 42 U.S.C. 18041(c)(1).

⁷ Transcript of Oral Argument at 16, *King v. Burwell*, No. 14-114 (U.S. Mar. 4, 2015), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-114_1bo2.pdf.

⁸ *Id.*; see also *Id.* at 18, 19-20, 49.

The Treasury regulation was adopted through an appropriate notice-and-comment process, in accordance with authority expressly delegated by the ACA. While some critics of the rule have claimed that it was “not the product of reasoned decision-making,”⁹ this argument has gone nowhere, and not even the *King* petitioners pressed this argument in the Supreme Court.¹⁰ This is because Treasury easily satisfies the Administrative Procedure Act’s standard for assessing the reasonableness of an agency’s decision: “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”¹¹ Treasury “carefully considered the language of the statute and the legislative history and concluded that the better interpretation of Congressional intent was that premium tax credits should be available to taxpayers on any type of Exchange.”¹² This squarely falls within the zone of reasoned decision-making, and a reviewing court may not simply “substitute its judgment for that of the agency.”¹³

It seems the real issue critics of the Treasury rule implementing the ACA’s tax credit provisions have with the regulation is that they just plain don’t like it, which is not surprising, because they fundamentally and passionately dislike the ACA. The legal theory behind the *King v. Burwell* lawsuit was thought up by advocates so opposed to Obamacare that believed it had “to be killed as a matter of political hygiene...any which way....”¹⁴ But as legal scholars from across the ideological spectrum explained in a brief to the Supreme Court in *King*,¹⁵ there is no legitimate theory of statutory interpretation that allows the interpretation of the tax credit provisions asserted by the *King* plaintiffs and their fellow critics of the ACA. These are essentially political disagreements in search of a legal theory, something Chief Justice John Roberts has

⁹ Brief *Amici Curiae* of Sens. Cornyn et al. in Support of Petitioners at 30-33, *King v. Burwell*, No. 14-114 (U.S. Dec. 29, 2014), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/14-114_amicus_pet_Cornyn.authcheckdam.pdf.

¹⁰ Brief of *Amici Curiae* Former Government Officials in Support of Respondents at 22-26, *King v. Burwell*, No. 14-114 (U.S. Dec. 29, 2014), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/14-114_amicus_resp_fgo.authcheckdam.pdf.

¹¹ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

¹² Memorandum from Cameron Arterton, Counsel, Office of Tax Legislative Counsel, U.S. Treasury Dep’t, to Emily McMahon, Deputy Assistant Sec’y, U.S. Treasury Dep’t (May 16, 2012).

¹³ *Volpe*, 401 U.S. at 416.

¹⁴ Joey Meyer, *The Tale of a Political Attack in Search of a Legal Theory*, Constitutional Accountability Ctr. (Aug. 11, 2014), <http://theconstitution.org/text-history/2879/tale-political-attack-search-legal-theory>.

¹⁵ Brief *Amici Curiae* of William N. Eskridge, Jr., et al. in Support of Respondents, *King v. Burwell*, No. 14-114 (U.S. Jan. 28, 2015), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-114_amicus_resp_eskridge.authcheckdam.pdf.

cautioned against for fear that the Supreme Court might be viewed as just another “political entity.” “I worry about people having that perception, because it’s not an accurate one about how we do our work,” the Chief Justice told an audience at the University of Nebraska College of Law.¹⁶ Roberts added, “it’s important for us to make that as clear as we can to the public.”

The Treasury Department’s Regulations Implement the Plain Text of the ACA, Which Makes Tax Credits Available to Eligible Americans Regardless of Whether They Purchase Their Insurance on a State-Run or Federally-Facilitated Exchange

The Internal Revenue Service (IRS), acting within the Secretary of the Treasury’s expressly delegated authority to enforce the provisions of the Internal Revenue Code and, specifically, the tax credit provision of the ACA, 26 U.S.C. § 36B(g), promulgated regulations making premium tax credits available to qualifying individuals who purchase health insurance on both state-run and federally-facilitated exchanges.¹⁷ These regulations provide that tax credits shall be available to individuals “enrolled in one or more qualified health plans through an Exchange,” and then adopt by cross-reference an HHS definition of “Exchange” that includes any Exchange, “regardless of whether the Exchange is established and operated by a State . . . or by HHS.”¹⁸ Because this agency interpretation implements a statutory mandate that tax credits should be available to all consumers regardless of whether a state or federal entity runs their insurance marketplace, the Treasury rule is the correct interpretation of the Act.

The Affordable Care Act’s express goal was to make health care insurance available to all Americans.¹⁹ To achieve that goal, the statute provides for the establishment of Exchanges on which individuals can purchase health insurance. Section 1311 of the ACA provides that “[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange.”²⁰ The Act clarifies, however, that there is “State flexibility” in fulfilling this requirement: a state may “elect[]” to set up the Exchange for itself, or, if a State chooses not to establish an Exchange or cannot set up an exchange that meets the Act’s requirements, then HHS “shall establish and operate such Exchange within the State.”²¹ Federally-facilitated exchanges operate as the same state-specific Exchange the State otherwise would have established under the Act. The ACA also creates tax credits for low- and middle-income Americans to ensure

¹⁶ Elizabeth B. Wydra, *Playing Politics with the Supreme Court Over Obamacare*, Huffington Post (Oct. 23, 2014), http://www.huffingtonpost.com/elizabeth-b-wydra/playing-politics-with-the_b_6035674.html.

¹⁷ See 26 C.F.R. § 1.36B-1(k); Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012).

¹⁸ 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20.

¹⁹ See, e.g., 42 U.S.C. § 18091(2)(D).

²⁰ ACA § 1311(b)(1), 42 U.S.C. § 18031(b)(1).

²¹ *Id.* § 18041(c)(1).

that they can afford to purchase insurance on the Exchanges,²² 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).

Considering commentary that suggested that the words “established by the State” in the provision calculating the tax credit amount essentially create two tiers of health insurance exchanges, in which only consumers purchasing insurance from state-run exchanges are eligible for the credits, Treasury concluded as follows:

Commentators disagreed on whether the language in section 36B(b)(2)(A) limits the availability of the premium tax credit only to taxpayers who enroll in qualified health plans on State Exchanges. The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.²³

The Treasury rule making tax credits available to eligible taxpayers in every state is the correct interpretation of the law when the relevant language is given anything other than the acontextual reading suggested by critics. The phrase “an Exchange established by the State under Section 1311” encompasses both an Exchange a state elects to establish for itself, as well as an Exchange that HHS establishes and operates for the state. Other provisions of the law confirm this meaning, including reporting requirements for federally-facilitated Exchanges,²⁴ and provisions defining a “qualified individual” eligible to shop on an Exchange as a person who “resides in the State that established the Exchange.”²⁵ Under the cramped understanding of the law put forth by the *King* plaintiffs and their allies, a federally-facilitated Exchange would have no qualified customer—an absurd reading of the law that Treasury was right to reject.

Treasury’s interpretation of the ACA’s tax credit provision, making these credits available to eligible taxpayers regardless of whether their state of residence elected to set up their own Exchange or rely on the federal fallback, implements the text of the

²² See *id.* §§ 18081-18082.

²³ 77 Fed. Reg. at 30,378.

²⁴ 26 U.S.C. § 36B(f).

²⁵ 42 U.S.C. § 18032(f)(1)(A).

statute. Opponents' alternative reading focuses on an isolated phrase divorced from context, with absurd results. As discussed further in the next section, critics' asserted interpretation of the law is also inconsistent with its most fundamental purpose to make health insurance affordable for all Americans by providing tax credits for low and middle-income individuals, wherever they reside, and with the ACA's interdependent statutory scheme, which critically depends on the availability of these tax credits for low and middle-income individuals who purchase insurance on the new Exchanges created by the Act. 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.

The Treasury Rule Providing for Tax Credits Nationwide Implements the ACA's Fundamental Purpose and Policy Goals

The Treasury Department's regulation affirming that tax credits are available on federally-facilitated as well as state-run Exchanges advances the purpose and broad policy goals of the Act. As the Supreme Court has recognized, the Act was intended "to increase the number of Americans covered by health insurance and decrease the cost of health care."²⁶ Title I of the Act is titled "Quality, Affordable Health Care for All Americans." Nation-wide availability of premium assistance tax credits is crucial to achieving these goals.

If tax credits were not available in every state, the law's aim to deliver immensely valuable benefits to large numbers of low- and moderate-income individuals and families would be thwarted. Moreover, it would render the Exchanges inoperable, even for participants not entitled to tax credits or subsidies, and thus raise premiums and curtail insurance offerings across the entire market for individual insurance.²⁷ 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.

²⁶ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2580 (2012).

²⁷ Brief *Amici Curiae* for Bipartisan Economic Scholars in Support of Respondents, *King v. Burwell*, No. 14-114 (U.S. Jan. 28, 2015), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-114_amicus_resp_bes.authcheckdam.pdf; Brief *Amicus Curiae* of America's Health Insurance Plans in Support of Respondents, *King v. Burwell*, No. 14-114 (U.S. Jan. 28, 2015), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-114_amicus_resp_ahip.authcheckdam.pdf.

For the interdependent scheme Congress designed to work properly, those tax credits must be available to all Americans, regardless of where they live. As the U.S. Court of Appeals for the Fourth Circuit concluded, “[i]t is therefore clear that widely available tax credits are essential to fulfilling the Act’s primary goals and that Congress was aware of their importance when drafting the bill. The IRS Rule advances this understanding by ensuring that this essential component exists on a sufficiently large scale.”²⁸

Finally, Treasury’s interpretation—in contrast to its critics’ asserted interpretation of the tax credit provision—respects principles of federalism embodied in the design of the ACA’s insurance market reforms. By providing states with a real choice as to whether to operate their own insurance exchange or allow the federal government to do so, the Act—and the Treasury rule—honor the “State Flexibility Relating To Exchanges” suggested by the statute.²⁹ Critics of the Treasury’s tax credit rule would turn the cooperative federalism embodied in the statute into a threat so harsh that during oral argument in the Supreme Court Justice Kennedy suggested that it simply did not present the states with “a rational choice to make.”³⁰

The Treasury Rule Providing Tax Credits to Eligible Americans in Every State Is the Only Interpretation of the ACA Consistent With Congressional Intent

Treasury’s interpretation of § 36B to provide tax credits for eligible individuals purchasing insurance on federally-facilitated as well as state-run exchanges is the only interpretation that is consistent with how everyone involved with the drafting of the ACA understood the law to work. Republican and Democratic members and staffers alike have made clear that no one understood the law to preclude tax credits for residents of states that opted to use the federal fallback provided for in the law instead of setting up and running their own Exchanges. 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.³¹ Specifically, it explained that the Senate bill would “create state-based health insurance Exchanges, for states that

²⁸ *King v. Burwell*, 759 F.3d 358, 374-75 (4th Cir. 2014).

²⁹ ACA Title I, Subtit. D, Pt. 3.

³⁰ Transcript of Oral Argument, *supra* note 6, at 49. See also *id.* at 16, 18, 19-20.

³¹ 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>.

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.”³² The fact sheet also noted that the ACA “[p]rovides premium tax credits,” but did not suggest that they would only be available on state-run Exchanges.³³ To the contrary, the summary stated the only criterion for the tax relief was income level.³⁴

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*.”³⁵ 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).³⁶ Likewise, Senator Dick Durbin, the Senate Majority Whip, described the availability of the tax credit in broad terms that made clear the only qualifying criterion was income level. According to Senator Durbin, “[t]his bill says, if you are making less than \$80,000 a year, we will . . . give you tax breaks to pay [health insurance] premiums.” *Id.* S12,779 (Dec. 9, 2009).³⁷ President Obama, too, indicated that the only criterion for qualifying for the tax credits would be income.³⁸

³² *Id.*

³³ *Id.* at 2.

³⁴ *Id.*

³⁵ 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).

³⁶ Senator Baucus also subsequently noted that “[a]bout 60 percent of those who are getting insurance in the individual market on the exchange will get tax credits,” 155 Cong. Rec. S12,764 (Dec. 9, 2009), an estimate that could only be accurate if tax credits were available in *all* States.

³⁷ 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

Significantly, even ACA opponents in Congress recognized that that the only criterion that determined eligibility for the tax credits would be income. Congressman Paul Ryan, for example, asserted on March 15, 2010, that the tax credits were a “new open-ended entitlement that basically says that just about everybody in this country—people making less than \$100,000, you know what, if your health care expenses exceed anywhere from 2 to 9.8 percent of your adjusted gross income, don’t worry about it, taxpayers got you covered, the government is going to subsidize the rest.”³⁹ 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.”⁴⁰

Tellingly, in response to requests from members of both parties, the Congressional Budget Office performed 68 budgetary impact analyses during the 2009–2010 legislative debate over the ACA, and in each one, it assumed that the tax credit would be available to all individuals who purchased insurance on an Exchange, regardless of whether the Exchange was federally-facilitated or state-run. These CBO analyses were of critical importance because many members of Congress made their vote for the ACA contingent on CBO’s conclusion that the ACA was deficit neutral. Yet “no one in either party objected or asked for alternative estimations assuming partial subsidies at any point in the 111th Congress.”⁴¹ Indeed, 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.”⁴²

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.

³⁸ President Barack Obama Holds a Townhall Event, Nashua, New Hampshire, Roll Call (Feb. 2, 2010), 2010 WL 358122.

³⁹ *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). While Congressman Ryan signed onto an *amici curiae* brief in support of the *King* Petitioners, that brief nowhere disputes the universal congressional understanding that tax credits would be available in all States. Tellingly, that brief does not address at all the question of Congress’s intent or understanding with respect to the issue in this case.

⁴⁰ *Id.*

⁴¹ Theda Skocpol, *Why Congressional Budget Office Reports Are the Best Evidence of Congressional Intent About Health Subsidies*, Scholars Strategy Network (Jan. 2015), <http://www.scholarsstrategynetwork.org/content/why-congressional-budget-office-reports-are-best-evidence-congressional-intent-about-health->

⁴² Letter from CBO Director Douglas W. Elmendorf to Rep. Darrell E. Issa (Dec. 6, 2012), <http://www.cbo.gov/sites/default/files/43752-letterToChairmanIssa.pdf>.

Nor is there a shred of evidence that the 34 states that decided to forego establishing their own exchange understood that doing so would deny significant health care subsidies to people in their states. As Justice Kennedy has explained, the *King* plaintiffs' reading of the statute would put a gun to the head of state officials: establish a state exchange or deprive your citizens of millions or even billions of dollars of desperately needed health care subsidies. If that outcome were considered possible, this point would surely have been at the center of the federal/state-run debate in these 34 states. There is no evidence that this potential outcome was ever considered in these debates.

Nonetheless, recognizing that their myopic reading of the statute needed a narrative of congressional intent to be viable, the *King* plaintiffs and their allies have put together an ad hoc, baseless story about how Congress intended to limit tax credits to state-run exchanges. But no member of Congress has stepped up to claim this narrative as accurate (because it isn't). A recent *New York Times* article, for instance, reported that, according to interviews with "over two dozen" Republican and Democratic senators and staff from the 111th Congress that enacted the ACA, everyone involved in that process, on both sides of the aisle, understood the legislation to prescribe tax credits and subsidies to eligible purchasers of insurance on all state-level insurance marketplaces, whether such exchanges are operated by the state or federal governments. The article recounts, for example, that a staffer for Republican Senator Mike Enzi of Wyoming, a senior member of both Senate committees responsible for the ACA, does not accept the *King* challengers' argument, because it is "so contrary to the intent" of the ACA's drafters. "I don't ever recall any distinction between federal and state exchanges in terms of the availability of subsidies," the article quotes Olympia J. Snowe, a former Republican senator from Maine who helped write the Finance Committee version of the bill, as saying. According to the article, Sen. Snowe continued: "It was never part of our conversations at any point.... Why would we have wanted to deny people subsidies? It was not their fault if their state did not set up an exchange." The Treasury Department was right to conclude in its rulemaking "that the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges."⁴³

⁴³ 77 Fed. Reg. at 30,378.

The Treasury Rule Is Entitled to Deference Under Established Legal Precedent, Even If Critics Disagree With Its Substance As A Political Matter

As a last-ditch effort to undermine the Treasury Rule, some challengers have suggested that the deference given to agency decisions⁴⁴ should not be given to this particular rule. All of these arguments are foreclosed by Supreme Court precedent.

First, the fact that the ACA is jointly administered by HHS and Treasury does not preclude deference to the IRS, acting under the Secretary of the Treasury's authority. The tax credit provision clearly states that "[t]he Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section."⁴⁵ In any event, the Supreme Court has applied traditional agency deference where two agencies jointly administer a statute.⁴⁶

Second, critics contend that deference is not owed to an IRS rule on tax credits because of a canon of statutory construction that requires tax exemptions to be construed narrowly. As a matter of principle, none other than Justice Scalia has argued that this narrow construction canon lacks a sound justification.⁴⁷ Perhaps more important, the Supreme Court has never suggested that this canon displaces traditional agency deference—in fact, it has said quite the opposite, declaring that "the principles underlying our decision in *Chevron* apply with full force in the tax context."⁴⁸

Finally, some have suggested that, because the availability of tax credits nationwide is so crucial to the proper working of the ACA, it is too important a question to be left to agency discretion (of course, I believe the statute clearly provides for such availability of tax credits, but if the statute is found to be ambiguous with regard to that question, then traditional deference to agency expertise is triggered). But the Supreme Court has said that agency deference applies to "big, important" matters just as it does to "humdrum, run-of-the-mill stuff."⁴⁹

The reforms and changes ushered in by the Affordable Care Act, of which the premium assistance tax credits are just one, are unquestionably big and important. And the law is the subject of passionate political disagreement among members of this Committee, and, in some aspects, among the American people. But by trying to shoehorn a political dispute into legal theories that cannot support the weight, the *King* plaintiffs and their allies are attempting to use the courts to achieve what they have thus

⁴⁴ *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁴⁵ 26 U.S.C. § 36B(g).

⁴⁶ *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 277-78 (2009).

⁴⁷ Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 362 (2012).

⁴⁸ *Mayo Found. for Medical Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011).

⁴⁹ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

far been unable to achieve through the democratic process. Chief Justice Roberts has made clear that he does not wish the Supreme Court to be used in such a fashion, telling a law school audience, "That's not the way we do business. We're not Republicans or Democrats."

I agree with Chief Justice Roberts that the federal judicial branch should not be just another "political entity." Under well-established legal precedent previously embraced by judges and lawyers of all ideological stripes, the Treasury regulations providing for tax credits on Exchanges run by the federal government, as well as the states, are a lawful implementation of the ACA.

**PREPARED STATEMENT OF ROBERT N. WEINER
ARNOLD & PORTER LLP
FOR THE
HEARING OF THE SENATE JUDICIARY COMMITTEE, SUBCOMMITTEE ON
OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL COURTS --
“REWRITING THE LAW: EXAMINING THE PROCESS THAT LED TO THE
OBAMACARE SUBSIDY RULE”
JUNE 4, 2015**

Thank you, Chairman Cruz, Ranking Member Coons, and the Members of the Subcommittee, for inviting me to testify today regarding the Internal Revenue Service rule on subsidies under the Affordable Care Act. My name is Robert Weiner. I am a partner at the law firm of Arnold & Porter LLP in Washington, D.C., where I have practiced for more than 30 years, with periodic intervals of government service. From 2010 to 2012, I was an Associate Deputy Attorney General at the U.S. Department of Justice, where I oversaw the legal defense of the Affordable Care Act (“ACA”). Since leaving the Justice Department, I have written, lectured, testified, and debated about the ACA and its implementation. I also taught a course at the Georgetown University Law Center on “The Litigation of Politics and the Politics of Litigation,” based in part on my experience with the ACA. I appear today solely to present my personal views, not as an attorney or spokesman for any individual or organization.

Administrative agencies exercise power delegated by Congress. It is appropriate for this Committee and for the Congress as a whole to conduct oversight to ensure that agencies are properly using that delegated authority. If Congress finds that they are not, it has legislative remedies at its disposal. Proper oversight and legislative action flowing from it are integral to our democratic system of checks and balances.

Opponents of the Affordable Care Act, however, have disrupted and circumvented this system of checks and balances through lawsuits and other efforts to stymie implementation of the law. The President signed the Affordable Care Act on March 23, 2010. The first lawsuit came seven minutes later. Even though the Supreme Court in that lawsuit upheld the constitutionality of the Act, litigation seeking—in the words of one opposition advocate—to “drive a stake through the heart of Obamacare” has continued unabated for every minute, except those first seven, of the five years the Act has been in force. This trench warfare against the ACA includes a case rejected by the Court of Appeals for the Fifth Circuit in April alleging that the ACA violated the Origination Clause of the Constitution. It includes another case, dismissed a few weeks ago, attacking the “transitional policy” and “hardship exemption,” which permit individuals temporarily to maintain health insurance coverage through plans not compliant with the general requirements of the Act. It includes a lawsuit by a Senator rejected in the Seventh Circuit last month, and one by the House of Representatives, presumably under some mythical “one-House lawsuit” power enumerated in Article I, Section 8 of the Constitution. And it includes the pending Supreme Court case, *King v. Burwell*, asking the Court to interpret the ACA in a manner that Congress plainly did not intend and that would take subsidies away from 9.3 million people who need the money to afford health insurance.

Lawsuits, moreover, are only part of the assault. Opponents of the ACA at the state, local, and federal level have sought at every turn to impede its implementation, to discourage organizations from helping people get insurance, and, along the way, to block access to affordable health insurance.

And yet, despite it all, the ACA is working. Since the beginning of open enrollment in October 2013, 14.1 million adults have gained health insurance coverage, not including the 2.3 million young adults who have been able to stay on their parents’ insurance policies until the age

of 26.¹ The uninsured rate has dropped from 20.3 percent of the U.S. population to 13.2 percent.²

But those numbers do not tell the whole story.

In the *King* case, the Hospital Corporation of America (HCA), the nation's largest non-governmental health care provider, filed an *amicus* brief identifying other ways in which the Affordable Care Act is working effectively. HCA reported, for example, that the Act is encouraging personal responsibility. While 90 percent of uninsured patients pay HCA nothing at all for their health care, patients who purchased insurance on the federal exchanges pay an average of \$390 out-of-pocket for their care. This gives them a direct financial stake in maintaining their health, making better health care choices, and using less expensive types of care. HCA reported further that patients on federal exchanges are three times less likely than uninsured patients to seek health care in an emergency room. Reducing the use of emergency rooms for primary care was one of the ACA's objectives, and it both reduces costs and fosters better preventive care.³

That success is currently in jeopardy as a result of the attack on the Treasury Department regulation in *King v. Burwell*. If that attack succeeds, subsidies will no longer be available to enable millions of consumers who need the help to afford health insurance in states with federal exchanges. Further, insurance markets in those states could well descend into a death spiral. In evaluating this attack, it is useful first to consider its etymology. The ACA does not say, and no

¹ See U.S. Department of Health and Human Services, *HEALTH INSURANCE COVERAGE AND THE AFFORDABLE CARE ACT* (May 5, 2015) available at http://aspe.hhs.gov/health/reports/2015/uninsured_change/ib_uninsured_change.pdf.

² *Id.*

³ Brief of HCA Inc. as *Amicus Curiae* in Support of Responds and Affirmance, *King v. Burwell*, No. 14-114 (Jan. 2015), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-114_amicus_resp_hca.authcheckdam.pdf.

one in the debates on the ACA stood up and argued, “If states do not establish an Exchange, their citizens will not get subsidies.” Instead, the ACA opponents’ interpretation was *discovered*, like a pottery shard in an archeological dig, in late 2010, months *after* the statute was enacted, by a lawyer whose announced mission was to unearth some statutory problem -- any statutory problem -- to take down the Affordable Care Act. Nor did the interpretation the opponents now proclaim as obvious and inevitable leap out at those affected by the ACA back in 2011. For example, in early 2011 -- before the IRS proposed its rule -- 21 Republican governors outlined to the HHS Secretary their stringent conditions for establishing a state Exchange. There was no suggestion that subsidies to their citizens were at risk unless they did so. What’s more, the American Legislative Exchange Council (ALEC), an influential conservative group that focuses on state legislation, adopted a resolution in October 2011 entreating states not to establish Exchanges. Notably, the resolution assured the states that, “There is no penalty for a state in allowing the federal government to implement an Exchange.” State after state, in deciding whether to establish an Exchange, assessed the pros and cons without identifying the loss of subsidies for the citizens as a risk. And Michael Cannon of the Cato Institute in his initial writing on this subject, described it as “a *recently discovered glitch*” in the statute.

The unorthodox *post hoc* origin of this interpretation of the ACA has not tempered the vehemence of its proponents. They have characterized the Treasury Department rule as nothing less than an assault on liberty. A dose of reality is in order: the foundation of the Republic is not crumbling. The Constitution is not at risk. And the Treasury Department’s interpretation of the ACA is not nefarious. In fact, it is compelling.

The opponents of the ACA contend that the language of the statute is so clear that there is one and only one interpretation. They need to take that position. It is the way they seek to avoid

Chevron deference to the Treasury Department's interpretation -- although the reasoning assumes the conclusion. Even absent *Chevron*, though, the ACA opponents would still bear the burden of showing that theirs is the one and only permissible reading of the statute, because they confront a strong presumption favoring any textually permissible interpretation that furthers the evident purpose of the law, over an interpretation that obstructs the statutory purpose. In their book advocating a textually focused method of statutory interpretation, Justice Scalia and Brian Garner state that this well-established canon of construction "flows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness."⁴

The central purpose of the ACA is indeed evident. The Act states it over and over again in text that Congress adopted and the President signed -- to make affordable health insurance available to "*all* Americans." The ACA repeats that phrase at least six times. "All" is a singularly inclusive word. It does not mean "some." It does mean "all in some States." It means "all in all States." The interpretation offered by opponents of the ACA would prevent the statute from achieving not only that goal, but any goal. They have conceded -- cheerfully -- that it would gut the statute.

Thus, the self-immolating interpretation that the Treasury Department was supposedly so derelict in rejecting can prevail only if it is *impossible* to construe the statute any other way. But many authoritative readers have done just that, including the Solicitor General, leading experts in statutory interpretation, Senate and House leaders involved in drafting the ACA, key Democratic and Republican staffers participating in the drafting process, the principal association of health insurers, the Hospital Corporation of America, the American Hospital Association, the American

⁴ Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012).

Cancer Society, the American Heart Association, 22 states and the District of Columbia, the former director of the non-partisan Congressional Budget Office, and -- judging from the argument in the *King* case -- at least four Supreme Court Justices. All interpret the statute the same way the Treasury Department does. To deem their interpretation impermissible is to question either the literacy or the candor of *all* of them. Neither is in doubt.

But rather than rest on the compelling inference from this authority, let's look at the textually-based logic behind it. I grant one thing regarding the interpretation advanced by the ACA opponents. It is simple -- "an Exchange established by the federal government is not an Exchange established by the State." End of argument. But this is a faux simplicity, a sleight of hand achieved by relying on ordinary parlance and ignoring the definitions that Congress specified for the terms it used. Congress can define terms however it wants -- it can define cat as dog if it so wishes -- and the definitions enacted into law control. In Section 1563 of the ACA, Congress expressly defined the word Exchange as an "Exchange established by the State under section 1311." The ACA reaffirms that definition twice in other provisions. It is the *only* definition of Exchange, and it applies each of the 282 times the ACA uses the word in this context. Just to remove any doubt about that, Congress capitalized the word "Exchange," 279 times, throughout the statute, to signify that it is a defined term.⁵

Section 1311 of the Act, to which the definition refers, requires States to establish an Exchange. Section 1321 addresses what happens if the State does not establish the "*required* Exchange," that is, the Exchange required by Section 1311. In the event that the State does not do so, Section 1321 directs the Secretary of HHS to establish "such Exchange," that is, the one the State is required to establish under Section 1311. This import of this directive is particularly

⁵ Congress neglected to capitalize this use of the term in the table of contents entry for Section 1413, which appears twice, and in Section 6005 dealing with pharmacy benefit managers.

clear if we substitute the *definition* of “Exchange” for the *word* “Exchange” in Section 1321.

The provision would then read:

the Secretary shall . . . establish and operate such [Exchange established by the State under section 1311] within the State.

It fell to the Treasury Department to interpret the instruction that the HHS Secretary establish an Exchange “established by the State.” Treasury could not write off the provision as commanding a physical impossibility. Agencies must seek to discern what Congress meant. They cannot and do not start with the presumption that Congress intends a nonsensical result. Nor could the Treasury Department use multiple definitions of Exchange. The statute has only one definition of the term. The proper -- certainly the permissible--reading of this section is that the Exchange established by the Secretary qualifies as an Exchange established by the State under Section 1311, which is the same thing as saying that the Secretary steps into the shoes of the State. By contrast, the interpretation offered by the ACA opponents, that the Secretary must establish some new-fangled, different and dysfunctional entity, ignores the definition of Exchange and wreaks havoc throughout other provisions of the statute.

The other way the ACA opponents contrive a false simplicity is by pretending the ACA says, “Tax credits and cost sharing subsidies are available only in states that have established an Exchange under Section 1311.” The Act does not say that. Just the opposite. Subsection (a) of Section 36B of the Internal Revenue Code, the tax credits provision, states that a tax credit “shall be allowed.” for taxpayers who meet the eligibility requirements. The word “shall” is mandatory. The phrase “established by the State” appears later in the next subsections of Section 36B when they set out the formula for calculating the amount and timing of the subsidy. Thus, under the opponents’ reading that the Treasury Department did not adopt, Congress in subsection (a) of Section 36B tells those making less than 400 per cent of the federal poverty level that they *shall*

get a subsidy, but then calculates the amount of the subsidy as zero for millions of eligible consumers. That is not the way Congress rationally would impose such a momentous and self-destructive requirement.

In the face of this unassailable statutory logic, the ACA opponents still claim that the Treasury Department's interpretation of the statute was suspect, that the Department gave the ACA opponents' interpretation short shrift, and that the administrative process was rigged. To a significant degree, as in the law of defamation, truth is a defense. Treasury adopted a reasonable interpretation of the statute that enabled the ACA to achieve its evident purpose, instead of a myopic, hyper-literal interpretation that would gut the law. That is the what administrative agencies are supposed to do.

In any event, the Administrative Procedure Act sets forth the standards by which we judge the adequacy of the process that administrative agencies employ. One key requirement is that administrative agencies must explain their decisions. The Treasury Department did that. The preamble to the final rule specifically analyzed the textual arguments presented by the ACA opponents and concluded that the text of the statute "support[s] the interpretation that credits are available to taxpayers who obtain coverage through ... the Federally-facilitated Exchange." Treasury also addressed the legislative history, finding no evidence "that Congress intended to limit the premium tax credit to State Exchanges."⁶ In attacking this decision-making, the report by the majority staff of the House Committee on Oversight and the House Committee on Ways and Means unwittingly demonstrates that the process was reasoned and procedurally appropriate.⁷ The Report faults an internal Treasury Department memorandum, prepared before

⁶ Health Insurance Premium Tax Credit, 77 Fed. Reg. at 30,378.

⁷ Staff of H. Comm. on Oversight & Govt. Reform and H. Comm. On Ways & Means, 113th Cong., Administration Conducted Inadequate Review of Key Issues Prior To Expanding Health
Footnote continued on next page

the Department issued the regulation at issue, but in fact, the memorandum cogently analyzed the issue:

The term “established by a state” may be read as a restriction on the term “exchange” or it may be read as simply descriptive language. Interpreting the language as a restriction is inconsistent with the broad scheme of the ACA to increase health insurance availability. Denying a premium tax credit to taxpayers enrolled in a QHP through the fed exchange while allowing a credit to those enrolled through state exchanges would be an incongruous result and could not have been Congress’ intent. The term “established by a state” should be interpreted to encompass the federal exchange because under Section 1321 of the ACA, the federal exchange steps into the shoes of a state exchange if a state declines to establish an exchange or if a state’s establishment of the exchange is delayed. A conclusion that the language [of] § 36B(b)(2)(A) is descriptive and not restrictive is further supported by the language of § 36B(f)(3), which imposes information reporting requirements on exchanges, including the federal exchanges, established under [§ 18041(c)] of the ACA.⁸

And that was not the only analysis. Another official further substantiated the Treasury Department’s reading of the statute, again, prior to the issuance of the rule. First, the memorandum explained what Treasury analyzed and how: “[W]e carefully considered the language of the statute and the legislative history. . . .” Based on the text and the legislative history of the Act, the memorandum discussed not policy, but Congressional intent, concluding “that the better interpretation of Congressional intent was that premium tax credits should be available to taxpayers on any type of Exchange.” The memorandum then supported its conclusion with a specific example from the statute demonstrating why the opponents’ interpretation made no sense:

For example, § 36B(f)(3) provides that “Each exchange ... shall provide the following information to the Secretary and to the taxpayer with respect to any

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Law’s Taxes And Subsidies 22 (Feb. 5, 2014), available at <http://oversight.house.gov/wp-content/uploads/2014/02/IRS-Rule-OGR-WM-Staff-Report-Final1.pdf> (“Joint Majority Staff Report”).

⁸ Memorandum, Pre-Final Rule Analysis Memo (Feb. 2012) (quoted in “Joint Majority Staff Report”).

health plan provided through the Exchange ...” The reference to 1321(c) is a reference to the section authorizing the federally-facilitated Exchange. There would be no reason for Congress to include—within the Code section that creates the premium tax credit—an obligation for a federally-facilitated Exchange to report data about enrollments to the Secretary unless the enrolling individuals were eligible for the premium tax credit.⁹

ACA opponents may not like that reasoning. They may not agree with it. But it reflects the process that we want and expect administrative agencies to undertake in faithfully executing the laws. Nor is it relevant that the discussion of this issue was concise. An analysis is not unreasonable because it is brief. Indeed, brevity is much to be desired in government proceedings, so long as the analysis adequately covers the subject. This analysis did. Taken as a whole, the record confirms that Treasury seriously and methodically considered the issue. That satisfies the standards of the APA.

As Professor Grewal observed last January, “controversies related to Treasury regulations usually stem from differences in perspective or judgment. Treasury regulations reflect policy-making, not blatant politicking.”¹⁰ That is the case here.

⁹ Memorandum from Cameron Atherton, Counsel, Office of Tax Legislative Counsel, U.S. Treasury Dept., to Emily McMahon, Deputy Assistant Secy., U.S. Treasury Dept. (May 16, 2012) (quoted in Joint Majority Staff Report 23).

¹⁰ Andy Grewal, “*King v. Burwell* Amicus Briefs: Blackman/Cato Set the Context,” Yale Journal on Regulation Blog, (Jan. 15, 2015), available at <http://www.yalejreg.com/blog/king-v-burwell-amicus-briefs-blackman-cato-set-the-context-by-andy-grewal>.

Senator Cruz Questions for the Record for
Michael F. Cannon, Director of Health Policy Studies at the Cato Institute
Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts
“Rewriting the Law: Examining the Process That Led to the ObamaCare Subsidy Rule”
Thursday, June 4, 2015

I. Potential Economic Savings under Proper Statutory Construction

- 1. If the Supreme Court strikes down the availability of premium tax credits via federal government-run health insurance exchanges, please explain how it will affect:**

a. Federal spending generally.

As you are aware, the Patient Protection and Affordable Care Act (ACA) authorizes refundable “premium assistance tax credits” to certain taxpayers who enroll in coverage “through an Exchange established by the State,”¹ much as it conditioned the renewal of Exchange start-up grants on states taking steps to establish Exchanges and implement other parts of the law,² and conditioned continued federal Medicaid grants on states expanding Medicaid eligibility.³ The Exchange subsidies trigger tax penalties under the ACA’s individual mandate and employer mandate. The plaintiffs in *King v. Burwell* challenged an Internal Revenue Service regulation implementing those taxes and subsidies in the 38 states that refused or otherwise failed to establish Exchanges.

In a 6-3 ruling issued on June 25, 2015, the Supreme Court held the IRS did not have the authority to issue the challenged regulation. Instead, the Court itself interpreted the ACA not only to permit, but to require the IRS to issue “premium assistance tax credits” in states that failed to establish Exchanges.⁴ The Court’s ruling expanded the reach of the ACA’s individual and employer mandates beyond what the Court acknowledged the plain meaning of the operative text allowed. As a result, *King v. Burwell* is subjecting to taxation as many as 100 million individuals and employers whom Congress had expressly exempted.⁵

The finality of the Court’s ruling in *King v. Burwell* does not make that ruling any less incorrect. Jonathan Adler and I examine the flaws in the *King* ruling in the attached article.⁶

Impact of *King v. Burwell* Ruling on Federal Spending

King v. Burwell had an even more dramatic impact on federal spending than most observers or even the Supreme Court knew. The Court’s ruling expanded the availability of Exchange subsidies by authorizing the IRS to implement them in states with federal Exchanges. All sides acknowledged that the federal government had established Exchanges in 34 to 38 states that had failed to establish Exchanges themselves. That would suggest that some \$600 billion (i.e., roughly two-thirds) of the total \$925 billion the federal government will spend on Exchange subsidies from 2015 through 2026 is due entirely to *King*.⁷

In fact, *King* is responsible for all \$925 billion of that spending, because no states took the steps necessary to avoid a federal Exchange. As I have explained elsewhere:

Yet another feature of the ACA, one never raised before any court, is that, in effect, Congress also required the federal government to establish exchanges in all 50 states. Just as the ACA directs the secretary of HHS to establish exchanges in states that fail to establish their own, it also directs her to establish exchanges in states that fail to establish a reinsurance program. Or a risk-adjustment program. Or that fail to implement the ACA's numerous health-insurance regulations.

Indeed, if a state "fail[s]" to "elect" to implement *any* of these "requirements," Congress left the secretary no discretion: "the Secretary shall ... establish and operate such Exchange ... and ... implement such other requirements." Since the most natural reading of the pertinent statutory phrase is that a federal exchange means no subsidies, the ACA as written thus conditions subsidies on the states' implementing each of those requirements...

And as it happens, not a single state elected to meet those requirements. Only Connecticut elected to establish a reinsurance program. Only Massachusetts elected to establish a risk-adjustment program. No state elected to establish both. The ACA, as enacted by Congress, therefore leaves the HHS secretary no discretion. She must establish exchanges in *all* states. That means that premium subsidies are not authorized in *any* state.⁸

The *King* challengers and their amici strategically chose not to highlight this feature of the ACA, though they did allude to it in briefs.⁹ They feared (presciently, as it turns out) that the Court would be even more reluctant to rule against the government if doing so would end Exchange subsidies in all 50 states, as opposed to just 38 states.

b. The employer mandate within states that have opted not to create their own exchanges.

Since the ACA as written requires the Secretary of Health and Human Services to establish Exchanges in all 50 states, and thereby withholds Exchange subsidies in all 50 states, it also exempts employers in all 50 states from the employer mandate, and further exempts roughly 100 million individual workers and taxpayers from the employer mandate and/or the individual mandate. *King v. Burwell* imposed those taxes on those individuals and employers without congressional authorization—indeed, despite the fact that Congress exempted them. As I have written elsewhere:

Had the justices simply upheld the ACA as Congress wrote it, they would have immediately freed 70 million Americans in 34 states from unauthorized taxes, and enabled 30 million Americans in the remaining 16 states (California, New York, etc.) to sue for similar relief — if Congress didn't provide relief first, which is both likely and how democracy is supposed to work. Instead, the Court allowed the IRS to continue

implementing a *nationwide* system of taxes and entitlements in direct conflict with the words Congress chose to govern the question presented.

Now, 100 million Americans are living under taxes no Congress ever authorized, that no Congress had the votes to authorize, and that Congress allowed only if their states met certain requirements. Millions of taxpayers nationwide are buying unwanted coverage or paying penalties under the individual mandate, even though “the most natural reading of the pertinent statutory phrase” exempts them. Every employer who pays a penalty for failing to offer minimum affordable coverage is paying a tax from which Congress exempted them. In effect, so are the millions of workers who lose income when employers take steps to avoid those penalties.¹⁰

The total burden of these never-legislated taxes will approach \$200 billion by 2025.¹¹

c. The economies of states that have opted not to create their own exchanges.

As a result, *King v. Burwell* damaged the economies of all states by imposing taxes that require individuals to divert income toward tax penalties and away from more highly valued uses, and imposed a tax on job creation that has reduced job growth from what it otherwise would have been.¹²

II. General Question

2. Are there any other points or issues that were not explored (or sufficiently explored) during the hearing that you would like to bring to the Subcommittee’s attention?

For a fuller critique of the *King v. Burwell* ruling, I commend to the Subcommittee the attached article I coauthored with Prof. Jonathan Adler.¹³

¹ PPACA § 1401(c)(2)(A)(i); 26 U.S.C. § 36B(c)(2)(A)(i).

² 42 U.S.C. § 18031(a).

³ But see *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

⁴ *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), http://www.supremecourt.gov/opinions/14pdf/14-114_qo11.pdf.

⁵ See Michael F. Cannon, “Benefits Of ‘King v. Burwell’: More Jobs, Higher Incomes & 70 Million Freed From Illegal Taxes,” *Forbes.com*, June 24, 2015, <http://www.forbes.com/sites/michaelcannon/2015/06/24/benefits-of-king-v-burwell-more-jobs-higher-incomes-70-million-freed-from-illegal-taxes/>; and Michael F. Cannon, “King v. Burwell Expanded Obamacare Even More Than You Know,” *National Review Online*, July 29, 2015, <http://www.nationalreview.com/article/421723/king-v-burwell-expanded-obamacare-even-more-you-know-michael-cannon>.

⁶ Jonathan H. Adler and Michael F. Cannon, “*King v. Burwell* and the Triumph of Selective Contextualism,” *Cato Supreme Court Review: 2014-2015* (Ilya Shapiro, ed.), October 1, 2015,

<http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2015/9/2015-supreme-court-review-chapter-2.pdf>.

⁷ See U.S. Congressional Budget Office, *The Budget And Economic Outlook: 2016 To 2026*, January, 2016, p. 182, https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51129-2016Outlook_OneCol-2.pdf.

⁸ Michael F. Cannon, “King v. Burwell Expanded Obamacare Even More Than You Know,” *National Review Online*, July 29, 2015, <http://www.nationalreview.com/article/421723/king-v-burwell-expanded-obamacare-even-more-you-know-michael-cannon> (emphasis in original).

⁹ Brief of Amici Curiae Jonathan H. Adler and Michael F. Cannon, *King v. Burwell*, No. 14-114 (U.S. Dec. 29, 2014), at 17-19, http://object.cato.org/sites/cato.org/files/pubs/pdf/jonathan_h_adler_and_michael_f_cannon_-_brief_1.pdf (“Non-compliance with the requirements detailed in Section 1321(c)” —which go beyond the requirement to establish an Exchange—“*automatically* triggers the federal government’s obligation to establish an Exchange, rendering state residents ineligible for tax credits. Section 1321 is thus the linchpin of a carefully worded statutory scheme that gives states a choice between implementing various provisions of the Act or forgoing tax credits.” Emphasis in original.).

¹⁰ Michael F. Cannon, “King v. Burwell Expanded Obamacare Even More Than You Know,” *National Review Online*, July 29, 2015, <http://www.nationalreview.com/article/421723/king-v-burwell-expanded-obamacare-even-more-you-know-michael-cannon> (emphasis in original). See also Michael F. Cannon, “Benefits Of ‘King v. Burwell’: More Jobs, Higher Incomes & 70 Million Freed From Illegal Taxes,” *Forbes.com*, June 24, 2015, <http://www.forbes.com/sites/michaelcannon/2015/06/24/benefits-of-king-v-burwell-more-jobs-higher-incomes-70-million-freed-from-illegal-taxes/>.

¹¹ The CBO estimates that from 2016 through 2015, individual mandate penalties will total \$43 billion, while employer-mandate penalties will total roughly \$167 billion. While the plain meaning of the ACA would exempt all employers from penalties, an unknown number of individual taxpayers would still subject to penalties under the individual mandate. U.S. Congressional Budget Office, *Insurance Coverage Provisions of the Affordable Care Act—CBO’s March 2015 Baseline*, March 9, 2015, <https://www.cbo.gov/sites/default/files/cbofiles/attachments/43900-2015-03-ACATables.pdf>, p. 2.

¹² See Michael F. Cannon, “Obamacare Is Destroying Jobs--And Here’s The Evidence,” *Forbes.com*, Feb 4, 2016, <http://www.forbes.com/sites/michaelcannon/2016/02/04/obamacare-is-destroying-jobs-and-heres-the-evidence/>; and Michael F. Cannon, “Clean Up Your Act, PolitiFact: Why Ted Cruz Was Right On Obamacare And Jobs,” *Forbes.com*, Feb 4, 2016, <http://www.forbes.com/sites/michaelcannon/2016/02/04/clean-up-your-act-politifact-why-ted-cruz-was-right-on-obamacare-jobs/>.

¹³ Jonathan H. Adler and Michael F. Cannon, “*King v. Burwell* and the Triumph of Selective Contextualism,” *Cato Supreme Court Review: 2014-2015* (Ilya Shapiro, ed.), October 1, 2015, <http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2015/9/2015-supreme-court-review-chapter-2.pdf>.

King v. Burwell and the Triumph of Selective Contextualism

*Jonathan H. Adler and Michael F. Cannon**

I am altering the deal. Pray I don't alter it any further.¹

Introduction

King v. Burwell presented the question of whether the Patient Protection and Affordable Care Act of 2010 (ACA) authorizes the Internal Revenue Service to issue tax credits for the purchase of health insurance through exchanges established by the federal government. The *King* plaintiffs alleged an IRS rule purporting to authorize tax credits in federal exchanges was unlawful because the text of the ACA expressly authorizes tax credits only in exchanges “established by the State.” Led by Chief Justice John Roberts, the Supreme Court conceded the plain meaning of the operative text, and that Congress defined “State” to exclude the federal government. The Court nevertheless disagreed with the plaintiffs, explaining that “the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.”² Voting 6–3, the Court effectively rewrote the

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¹ Star Wars: Episode V - The Empire Strikes Back (Lucasfilm 1980).

² *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015).

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statutory text in order to ensure the ACA would “improve health insurance markets, not . . . destroy them.”³

King was the Supreme Court’s third ACA case in four years. In 2012, the Court upheld the constitutionality of the act in *National Federation of Independent Business v. Sebelius*, but only after rejecting a Commerce Clause justification for the individual mandate (construing it instead to be a use of the taxing power) and eliminating the requirement that states must implement the ACA’s Medicaid expansion in order to keep receiving federal Medicaid grants.⁴ Then, in 2014, in *Hobby Lobby Stores v. Burwell*, the Court concluded the Obama administration had failed to accommodate religious objections to the so-called “contraception mandate” as required under the federal Religious Freedom Restoration Act.⁵

NFIB saved the ACA, but left the statute scarred. *Hobby Lobby* rebuked the Department of Health and Human Services’ implementation of the new law. By comparison, 2015’s *King v. Burwell* was a resounding victory for the Obama administration. This third trip to One First Street was the charm.

While portions of the Court’s *King* opinion may constrain agency interpretive authority in future cases, the opinion green-lighted the administration’s efforts to implement the ACA without regard for the limitations contained in the ACA’s text.⁶ Even if the Court did not accept the specific arguments offered by the solicitor general, it gave

³ *Id.* at 2496.

⁴ 132 S. Ct. 2566 (2012). On *NFIB* see David B. Rivkin, Jr., Lee A. Casey, and Andrew M. Grossman, *NFIB v. Sebelius and the Triumph of Fig-Leaf Federalism*, 2011–2012 Cato Sup. Ct. Rev. 31 (2012); James F. Blumstein, *Enforcing Limits on the Affordable Care Act’s Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011–2012 Cato Sup. Ct. Rev. 67 (2012).

⁵ 134 S. Ct. 2751 (2014). See Richard A. Epstein, *The Defeat of the Contraceptive Mandate in Hobby Lobby: Right Results, Wrong Reasons*, 2013–2014 Cato Sup. Ct. Rev. 35 (2014). See also *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014) (mem.). This order generated opinions, but was not a decision on the merits after oral argument.

⁶ This result is particularly troubling given the administration’s pattern of modifying the meaning of the ACA in the course of implementing it. See Brief of Amici Curiae Cato Institute and Prof. Josh Blackman in Support of Petitioners, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114); see also Jonathan H. Adler, *The Ad Hoc Implementation and Enforcement of Health Care Reform*, in *Liberty’s Nemesis* (D. Reuter & J. Yoo, eds., forthcoming); Grace-Marie Turner, *51 Changes to ObamaCare . . . So Far*, Galen Institute (June 9, 2015), <http://www.galen.org/newsletters/changes-to-obamacare-so-far>.

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the Obama administration nearly everything it wanted. The Court expanded the ACA beyond what its congressional supporters ever had the votes to enact. It just had to disregard portions of the ACA's text and selectively consider statutory structure and context to do it.

This article proceeds as follows. Part I demonstrates, via the ACA's unique legislative history, how having states operate the law's exchanges was an indispensable purpose of the act. The ACA literally would not have become law if the federal government were given primary responsibility for operating exchanges. Part II explains how the statutory language at issue in *King* is clear, unambiguous, and serves that congressional purpose—even if some ACA supporters did not know about or approve of that language. Part III discusses how and why the IRS departed from the plain meaning of that language, and the academic and legal challenges that followed. Part IV gives an overview of the Supreme Court's *King* decision. Part V shows how the majority misused statutory context to find the ACA is ambiguous. Part VI shows the Court's claim that it is "implausible" that Congress intended that language is demonstrably false. Part VII discusses the significance of the Court's decision not to apply the *Chevron* deference-to-agencies doctrine in *King*. Part VIII connects Chief Justice Roberts's approach to *King* to his "saving constructions" in *NFIB v. Sebelius*, which together have produced a law that is now materially different from Congress's plan. Part IX offers concluding thoughts.

I. State-Run Exchanges: An Essential Part of Congress's Plan

After 100 years marked by more failures than successes, advocates of universal health insurance coverage were heartened when a wave election in 2008 gave Democrats control of the presidency and both chambers of Congress. Crucially, one Republican senator's subsequent party switch also gave Democrats a 60-seat, filibuster-proof majority in the U.S. Senate that lasted from July 2009 until January 2010.⁷ The House passed its health care bill in November 2009.⁸ The Senate followed suit, passing the ACA—the merged product of

⁷ This history is recounted in Jonathan H. Adler & Michael F. Cannon, Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA, 23 Health Matrix 119, 124–26 (2013); see also Brief of Amici Curiae Jonathan H. Adler & Michael F. Cannon, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114).

⁸ Affordable Health Care for America Act, H.R. 3962, 111th Cong. (2009).

health care bills passed by the Senate Health, Education, Labor, and Pensions (HELP) Committee and the Senate Finance Committee—on December 24, 2009. The ACA passed the Senate by a vote of 60–39, overcoming a GOP filibuster without a vote to spare.

The ACA's authors never intended it to become the final bill.⁹ Their goal was simply to marshal 60 votes behind something they could later merge with the House bill. A special-election upset put an end to such hopes. In January 2010, Massachusetts voters elected Republican Scott Brown to fill the Senate seat vacated by the death of Sen. Edward M. Kennedy (D-MA). Brown's victory put an end to the Senate Democrats' filibuster-proof majority. At that moment, the ACA became the only health care bill that could become law, because neither a House-Senate compromise nor any other bill could overcome a GOP filibuster.

Whatever the ACA's shortcomings, if Democrats wanted comprehensive health care legislation, it would have to be the ACA, because voters had blocked them from enacting anything more expansive. Despite serious reservations,¹⁰ House Democrats approved the ACA as-is, making only minor changes through the budget reconciliation process, and sent it to the president's desk. One of those reservations would prove significant.

The ACA employed the basic framework House and Senate Democrats had agreed upon before the legislative process began: Medicaid coverage for everyone below a given poverty threshold and heavily regulated private health insurance for everyone else. The latter regulations banned discrimination on the basis of pre-existing conditions, and then, to combat the resulting instability, both required individuals to obtain coverage (an individual mandate) and subsidized premiums for low- and moderate-income households. Economists liken this scheme to a three-legged stool because it has the quality that without each of those three elements in place, the scheme collapses.

⁹ Timothy S. Jost, Yes, the Federal Exchange Can Offer Premium Tax Credits, Health Reform Watch Blog (Sept. 11, 2011), <http://www.healthreformwatch.com/2011/09/11/yes-the-federal-exchange-can-offer-premium-tax-credits> ("No one intended the current ACA to become the final law. It was the Senate bill, enacted after the House bill, which was to go through conference before the final [bill] was enacted.").

¹⁰ See Harold Pollack, 47 (Now 51) Health Policy Experts (Including Me) Say "Sign the Senate Bill," *The New Republic* (Jan. 22, 2010).

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The ACA differed from the House bill in at least one significant respect: it gave states primary responsibility for administering its health-insurance “Exchanges,” allowing the federal government to operate exchanges only where states failed to do so themselves.¹¹ The House bill created a single, nationwide exchange administered by the federal government.

Whatever substantive reasons individual Senate Democrats may have had for preferring state-run exchanges—for example, local control, deflecting criticisms that the ACA was a federal takeover of health care¹²—what matters for our present purposes is that state-run exchanges were an absolute political necessity. Key Democratic senators threatened not to support a final bill unless states operated the exchanges.¹³ All other ACA supporters had no choice but to relent. Defeating a GOP filibuster required 60 votes, and Senate

¹¹ See U.S. Rep. Doggett: Settling for Second-Rate Health Care Doesn’t Serve Texans, *My Harlingen News* (Jan. 11, 2010), <http://www.myharlingennews.com/?p=6426> (letter from 11 House Democrats to President Obama and House Speaker Nancy Pelosi expressing concern about the ACA and “states with indifferent state leadership that are unwilling or unable to administer and properly regulate a health insurance marketplace”); see also Terry Gross, Next Up: Turning Two Health Care Bills into One, *Fresh Air* (WBUR News) (Jan. 12, 2010), <http://www.wbur.org/npr/122483567> (“GROSS: So getting to the exchanges, in the House bill, it’s a national insurance exchange. In the Senate bill, it’s state-oriented . . . Mr. COHN: Absolutely, and this is a very important difference that frankly has gotten little attention.”). See also Julie Rovner, House, Senate View Health Exchanges Differently, *NPR* (Jan. 12, 2010), <http://www.npr.org/templates/story/story.php?storyId=122476051>.

¹² Senate Democratic Policy Comm., Fact Check: Responding to Opponents of Health Insurance Reform (Sept. 21, 2009), <http://dpc.senate.gov/reform/reform-factcheck-092109.pdf> (“There is no government takeover or control of health care in any senate health insurance reform legislation. . . . All the health insurance exchanges, which will create choice and competition for Americans’ business in health care, are run by states” (emphasis added)).

¹³ On the Record (Fox News broadcast, Apr. 13, 2010), <http://www.foxnews.com/story/2010/04/14/sen-ben-nelson-his-side-cornhusker-kickback.html> (“I had requirements. The requirements were no government run plan, no federal exchange, national exchange, and adequate language to deal with abortion. Those were requirements.”). See also Patrick O’Connor & Carrie Brown, Nancy Pelosi’s Uphill Health Bill Battle, *Politico*, Jan. 9, 2010 (“Two key moderates—Sen. Ben Nelson (D-Neb.) and Sen. Joe Lieberman (I-Conn.)—have favored the state-based exchanges over national exchanges.”); Reed Abelson, Proposals Clash on States’ Roles in Health Plans, *N.Y. Times*, Jan. 13, 2010 (“Senator Ben Nelson, Democrat of Nebraska, is a former governor, state insurance commissioner and insurance executive who strongly favors the state approach. His support is considered critical to the passage of any health care bill.”).

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Democrats had no votes to spare. Following Scott Brown's election, no other bill could have cleared Congress. The ACA *would not have passed* without a system of state-run exchanges. This was not only a distinct part of Congress's plan, but indeed a *sine qua non* of the ACA.

This congressional purpose was neither hidden nor its existence in dispute. Democrats in both chambers emphasized the ACA's exchanges would be state-run. They scarcely mentioned the possibility of federal exchanges.¹⁴ Shortly after enactment, HHS Secretary Kathleen Sebelius testified, "I think it will very much be a State-based program."¹⁵ President Obama predicted, "by 2014, each state will set up what we're calling a health insurance exchange."¹⁶ They did not foresee that 34 states would refuse.

II. Clear Language that Serves a Congressional Purpose

The ACA's text reflects Congress's preference for state-run exchanges. Section 1311 directs, "Each State shall . . . establish an . . . Exchange."¹⁷ Like the Finance and HELP bills, the ACA authorized unlimited start-up funds for state-run exchanges.¹⁸ To provide an incentive for states to establish exchanges, it conditioned renewal of those grants on states making progress toward establishing an exchange and implementing other parts of the act.¹⁹ Like the Finance and HELP bills, it provided no start-up funding for federal exchanges.²⁰

¹⁴ See Adler & Cannon, *supra* note 7, at 148–50 (reviewing discussion of exchanges in the Congressional Record).

¹⁵ Departments of Labor, Health & Human Services, Education, & Related Agencies Appropriations for 2011: Hearing Before a Subcomm. on Appropriations, House of Representatives, 111th Cong. 171 (Apr. 21, 2010) (statement of Kathleen Sebelius, Sec'y, Dep't of Health & Hum. Servs.).

¹⁶ Remarks on Health Insurance Reform in Portland, Maine, 2010 Daily Comp. Pres. Doc. 220 (Apr. 1, 2010).

¹⁷ 42 U.S.C. § 18031(b)(1).

¹⁸ *Id.* § 18031(a).

¹⁹ *Id.*

²⁰ In the Health Care and Education Reconciliation Act of 2010, Congress did appropriate \$1 billion "for Federal administrative expenses to carry out [the ACA]." Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1005, 124 Stat. 1029 (2010); but see J. Lester Feder, HHS May Have to Get 'Creative' on Exchange, *Politico* (Aug. 16, 2011), <http://www.politico.com/news/stories/081161513.html> ("The general pot of money that the ACA makes available for implementation is surprisingly

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The statutory language at issue in *King* likewise serves Congress's purpose of encouraging states to establish exchanges. Section 1401 of the ACA created a new Internal Revenue Code Section 36B, which authorizes refundable "premium-assistance tax credits" for "applicable taxpayers" who meet certain criteria. One criterion is that recipients enroll in coverage "through an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act."²¹

Notably, Section 36B's tax-credit eligibility rules bear no mention of exchanges established by the federal government. Indeed, "established by the State under Section 1311" twice distinguishes state-established exchanges from federal exchanges, authority for which appears in Section 1321.²² The eligibility rules contain no language broadly authorizing credits through "an[y]" exchange, as the ACA does with small-business tax credits.²³ Instead, Section 36B's tax-credit eligibility rules are tightly, even artfully worded. Every reference to exchanges is to "an Exchange established by the State under section 1311." That requirement appears twice explicitly and seven more times by cross-reference.²⁴ Section 36B plainly authorizes tax credits solely through state-established exchanges,²⁵ a condition that serves Congress's purpose of encouraging state-run exchanges by creating an incentive for states to establish them.

small, given that it is ushering in a series of new regulations covering a sector that accounts for a major chunk of the American economy. It only appropriates \$1 billion for all federal administrative costs. 'Everyone expects that billion dollars not to be adequate,' said Edwin Park of the Center on Budget and Policy Priorities[.]" In other words, (1) the ACA became law with zero funding for federal exchanges, (2) Congress only later added a general implementation fund that *could* be used for federal exchanges, but (3) that fund was insufficient to fund responsibilities HHS was expected to undertake, much less federal exchanges.

²¹ PPACA § 1401(c)(2)(A)(i); 26 U.S.C. § 36B(c)(2)(A)(i).

²² PPACA § 1321(c); 42 U.S.C. § 18041(c).

²³ PPACA § 1421(b)(1); 26 U.S.C. § 45R(a)(1).

²⁴ See 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i) (direct language); 26 U.S.C. § 36B(b)(3)(B), (b)(3)(B)(i), (b)(3)(C), (b)(3)(D), (b)(3)(E), (c)(2)(A)(ii), (e)(A) (cross-references).

²⁵ Congressional Research Service, Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act, Congressional Distribution Memorandum (Jul. 23, 2012) ("[A] strictly textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS's authority to issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a state-established exchange.").

The broader context of the ACA supports the plain meaning of Section 36B. As noted above, Section 1311 creates a parallel financial incentive for states to establish exchanges.²⁶ The act explicitly defines the District of Columbia as a “State,” bringing a D.C.-established exchange within the meaning of “an Exchange established by the State.”²⁷ It explicitly treats any U.S. territory that establishes a compliant exchange as a “State.”²⁸ The House and HELP bills contained language explicitly creating full equivalence between exchanges established by states and those established by HHS.²⁹ Yet Congress rejected those bills in favor of the ACA, which includes no language defining federal exchanges as having been “established by the State,” or otherwise making federal exchanges equivalent to state-established exchanges for purposes of Section 36B.

Remarkably, there is no discussion of the status of tax credits in federal exchanges in the *Congressional Record*, contemporaneous media reports, or known communications among the ACA’s drafters and supporters. The only exception of which we are aware supports the plain meaning of Section 36B. In January 2010, all 11 House Democrats from Texas complained that, as in other federal programs that condition benefits on state cooperation, residents of states that fail to establish exchanges would not receive “any benefit” from the ACA, and “will be left no better off than before Congress acted.”³⁰

There are several reasons for the lack of publicly available contemporaneous discussion of this issue.³¹ Due to the ACA’s peculiar his-

²⁶ 42 U.S.C. § 18031(a).

²⁷ 42 U.S.C. § 18024(d).

²⁸ 42 U.S.C. § 18043(a)(1).

²⁹ See Adler & Cannon, *supra* note 7, at 158–59.

³⁰ See *supra* note 11.

³¹ Contemporaneous emails, notes, memoranda, and other documents generated by the ACA’s drafters, legislative counsel, and House negotiators in 2009 and 2010 presumably would include at least some discussion of this issue. Unfortunately, congressional Democrats have not made those records available, and the individuals responsible for drafting 36B have not discussed the issue publicly. See Robert Pear, *Four Words That Imperil Health Care Law Were All a Mistake, Writers Now Say*, N.Y. Times, May 25, 2015, available at <http://www.nytimes.com/2015/05/26/us/politics/contested-words-in-affordable-care-act-may-have-been-left-by-mistake.html> (“The words were written by professional drafters—skilled nonpartisan lawyers—from the office of the Senate legislative counsel, then James W. Fransen . . . The language of the Finance Committee bill was written largely by Mr. Fransen and a tax expert, Mark J. Mathiesen

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tory, there was never a conference report. “Congress wrote key parts of the Act behind closed doors,” the *King* majority wrote, “rather than through the traditional legislative process.”³² The public debate was dominated by hot-button issues like a “public option” and abortion funding.³³ A general consensus that all states would establish exchanges made this restriction uninteresting. The fact that nobody expected the ACA to become the final law made it unimportant.

Nevertheless, the limited legislative history that exists suggests this feature was deliberate. The “established by the State” requirement originated in the first draft of the Senate Finance Committee’s bill, appearing once explicitly and five more times by cross-reference. It survived multiple revisions throughout the drafting process, including revisions to the adjacent cross-reference.³⁴ There is no evidence whatsoever that Senate Democrats even considered altering the meaning of that requirement. Instead, under the supervision of Senate leaders and White House officials, drafters inserted *additional* mentions of this requirement—a second explicit mention and two more cross-references to it—shortly before the ACA went to the Senate floor.³⁵

. . . Mr. Fransen did not respond to a message seeking comment, and other attempts to reach him were not successful.” Note that this passage contradicts the article’s title; Section 36B’s writers did not comment.).

³² King, 135 S. Ct. at 2492 (internal quotation marks omitted).

³³ See Gross, *supra* note 11 (noting that exchanges were “not a hot-button issue like abortion or the public option.”).

³⁴ Compare, e.g., S. 1796, 111th Cong. (2009), § 1205, proposing 26 U.S.C. § 36B(b)(2)(A)(i) (“and which were enrolled in through an exchange established by the State under subpart B of title XXII of the Social Security Act” (emphasis added)), with PPACA § 1401, creating 26 U.S.C. § 36B(b)(2)(A) (“and which were enrolled in through an Exchange established by the State under [section] 1311 of the Patient Protection and Affordable Care Act” (emphasis added)).

³⁵ Compare America’s Healthy Future Act of 2009, S. 1796, 111th Cong. (2009), § 1205, proposing 26 U.S.C. § 36B(c)(2)(A)(i) (limiting credits to those “covered by a qualified health benefits plan described in subsection (b)(2)(A)(i),” a cross-reference to plans “enrolled in through an exchange established by the State” (emphasis added)), with PPACA § 1401, 26 U.S.C. § 36B(c)(2)(A)(i) (“covered by a qualified health plan described in subsection (b)(2)(A) that was enrolled in through an Exchange established by the State under section 1311” (emphasis added)). See, e.g., David M. Herszenhorn & Robert Pear, White House Team Joins Talks on Health Care Bill, *N.Y. Times* (Oct. 15, 2009), <http://www.nytimes.com/2009/10/15/health/policy/15health.html>; Perry Bacon Jr., Small Group Now Leads Closed Negotiations on Health-Care Bill, *Wash. Post* (Oct.

Other legislation proposed by the ACA's authors contained similar provisions. The HELP bill—as the government and its amici conceded—created the same three-legged stool yet conditioned exchange subsidies on states implementing that bill's employer mandate.³⁶ Those who drafted and supported this bill were willing to cut off exchange subsidies in intransigent states.

As this history indicates, ACA supporters actively considered conditioning tax credits on state cooperation, and were willing to tolerate the instability that would result from imposing community-rating price controls without offering premium subsidies, in order to serve their purpose of getting states to implement the new federal program.

III. The Road to *King*

Government officials and independent analysts were aware of Section 36B's limitations on tax-credit eligibility when constitutional challenges to the act were still before lower courts. In late 2010, employee-benefits attorney Thomas Christina made a presentation at the American Enterprise Institute highlighting the fact that the ACA authorizes tax credits for those who enroll “through an Exchange established by the State under section 1311,” but not for those who enroll through federal exchanges.³⁷ One of us heard Christina's presentation in early 2011 while researching federal-state relations under the ACA versus other approaches to “cooperative federalism.” The resulting paper, discussing the limitation on tax credits in Section

18, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/17/AR2009101701810.html>.

³⁶ Brief for the Respondents, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114) (“[T]he Senate HELP Committee bill made tax credits conditional on state action in certain respects.”); Brief of Amici Curiae Members of Congress & State Legislatures, *Halbig v. Sebelius*, 758 F.3d 390 (D.C. Cir. 2014) (No. 14-5018), (“[I]f a state chose not to adopt specified insurance reform provisions and make state and local government employers subject to specified provisions of the statute, ‘the residents of such State shall not be eligible for credits.’”); Timothy Jost, Health Insurance Exchanges in Health Care Reform Legal and Policy Issues, Washington & Lee Public Legal Studies Research Paper Series (Oct. 23, 2009) (describing the HELP bill: “A state’s residents will only become eligible for federal premium subsidies...if the state provides health insurance for its state and local government employees.”).

³⁷ Thomas Christina, What to Look for Beyond the Individual Mandate (And How to Look for It), *Am. Enter. Inst.* (Dec. 6, 2010).

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1401 among other aspects of the ACA, was presented at a health law conference that spring.³⁸ None of the numerous health law experts and government officials in attendance, including the Kansas Insurance Commissioner,³⁹ raised any objection to the plain-meaning interpretation of Section 36B.

According to a later congressional investigation, a Treasury official overseeing ACA implementation became aware of this feature of the act in March 2011 via media coverage of Christina's presentation.⁴⁰ This discovery concerned IRS officials. Soon thereafter, the IRS dropped the statutory requirement that tax-credit recipients must enroll "through an Exchange established by the State" from their draft regulations.⁴¹

The IRS's decision to focus more closely on this question was no doubt motivated by growing resistance to ACA implementation in dozens of states.⁴² A wave election in 2010 swept into office many state governors and legislators opposed to implementing the law.⁴³ If states could block tax credits by refusing to establish exchanges, they could expose the full cost of exchange coverage to enrollees, which could affect the act's popularity and viability. Despite the potential

³⁸ See Jonathan H. Adler, Cooperation, Commandeering or Crowding Out? Federal Intervention and State Choices in Health Care Policy, 20 *Kans. J. L. & Pub. Pol'y* 199 (2011).

³⁹ See Sandy Praeger, A View from the Insurance Commissioner on Health Care Reform, 20 *Kan. J.L. & Pub. Pol'y* 186 (2011).

⁴⁰ See Staff of H. Comm. on Oversight and Gov't Reform, 113th Cong., Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies (Comm. Print 2014), <http://oversight.house.gov/wp-content/uploads/2014/02/IRS-Rule-OGR-WM-Staff-Report-Final1.pdf> [hereinafter Oversight Report]; Thomas D. Edmondson, Opponents of New Federal Health Care Law Wage Constitutional War in Courts, *Daily Tax Report*, Bloomberg BNA (Jan. 4, 2011), <http://object.cato.org/sites/cato.org/files/articles/bna-dtr-article.pdf>.

⁴¹ See Oversight Report, *supra* note 40, at 17.

⁴² See David K. Jones, Katharine W. V. Bradley and Jonathan Oberlander, Pascal's Wager: Health Insurance Exchanges, Obamacare, and the Republican Dilemma, 39 *J. Health Pol., Pol'y & L.* 97, 130 (2014) ("The pervasive resistance to Obamacare was so strong that many states decided to cede control of the exchanges to the federal government.").

⁴³ See *id.*; see also Brendan Nyhan, The Effects of Health Care Reform in 2010 and Beyond, *Brendan-Nyhan.com* (Mar. 8, 2012), <http://www.brendan-nyhan.com/blog/2012/03/the-effects-of-health-care-reform-in-2010-and-beyond.html> ("Democratic incumbents who voted yes [on the PPACA] performed significantly worse than those who did not.").

for unlimited start-up funds and other entreaties by HHS, 34 states ultimately refused to establish exchanges.

After consultations with HHS, on August 17, 2011, the IRS proposed a regulation providing “a taxpayer is eligible for the credit . . . through an Exchange established under section 1311 *or* 1321 of the Affordable Care Act”—that is, without regard for whether the exchange was established by a state or the federal government.⁴⁴ Though IRS officials had discussed whether this approach was permissible under Section 36B, the *Federal Register* notice included no mention of the contrary statutory language, much less any basis for the IRS’s departure from it.⁴⁵ Nevertheless, many noticed and raised objections to the proposed rule.⁴⁶

The IRS did not heed these concerns. On May 23, 2012, it promulgated a final regulation purporting to authorize tax credits in exchanges established by HHS under Section 1321.⁴⁷ The rule circumvented the statutory text by (1) declaring eligible taxpayers could obtain a tax credit if a qualifying insurance plan was purchased on “an Exchange”⁴⁸ and then (2) adopting a definition of “Exchange” that HHS had promulgated (in coordination with the IRS) that

⁴⁴ U.S. Dep’t of the Treasury, IRS, Health Insurance Premium Tax Credit, Fed. Reg. 76 (Aug. 17, 2011) (proposed rule), at 50934 (emphasis added).

⁴⁵ See Oversight Report, *supra* note 40; Lisa Rein, Six Words Might Decide the Fate of Obamacare at the Supreme Court, Wash. Post, Mar. 1, 2014, http://www.washingtonpost.com/politics/why-six-words-might-hold-the-fate-of-obamacare-before-the-supreme-court/2015/03/01/437c2836-bd39-11e4-b274-e5209a3bc9a9_story.html.

⁴⁶ See, e.g., David Hogberg, Oops! No Obamacare Tax Credit Via Federal Exchanges?, Inv. Bus. Daily, Sept. 7, 2011, <http://news.investors.com/090711-584085-oops-no-obamacare-tax-credit-via-federal-exchanges-.htm>; Jonathan H. Adler & Michael F. Cannon, Another ObamaCare Glitch, Wall Street J., Nov. 16, 2011, available at <http://online.wsj.com/article/SB10001424052970203687504577006322431330662.html>; see also Rep. David Phil Roe, U.S. House of Reps., Letter to Douglas Shulman, Comm’r, IRS (Nov. 4, 2011), http://roe.house.gov/UploadedFiles/Letter_to_IRS_Commissioner_regarding_tax_credits_under_PPACA_-_11.03.11.pdf; Sen. Orrin G. Hatch, U.S. Senate, Letter to Timothy Geithner, Treasury Sec’y, and Douglas Shulman, Comm’r, IRS (Dec. 1, 2011), http://www.cato.org/sites/cato.org/files/documents/12.1.11_premium_credit_letter_to_geithner_and_shulman.pdf.

⁴⁷ 77 Fed. Reg. 30378 (2012).

⁴⁸ 26 CFR § 1.36B-2 (2013).

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purported to create full equivalence between state-established and federal exchanges.⁴⁹

The IRS acknowledged opposition to its interpretation, yet offered no more than a single conclusory paragraph in response, lacking any reference to relevant statutory text or other legal authority for its action:

The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.⁵⁰

The IRS purported to rely on the “relevant legislative history,” yet cited no legislative history to support the rule, perhaps because no such legislative history exists. This bears emphasis: to this day, neither the government, nor the Supreme Court, nor anyone else has identified even a single contemporaneous statement of any kind asserting that the ACA authorizes, or that its supporters intended for it to authorize, tax credits in federal exchanges.

The IRS rule created two types of legally cognizable injuries. First, the ACA’s employer mandate penalizes large employers if one or more employees are eligible for or receive a tax credit under Section 36B.⁵¹ By offering tax credits in non-establishing states, the IRS rule injures employers in those states by exposing them to penalties. Second, the individual mandate penalizes taxpayers who do not obtain coverage, but only if coverage is “affordable.”⁵² By offering tax credits in non-establishing states, the IRS rule makes coverage “afford-

⁴⁹ 45 CFR § 155.20 (2013) (defining “Exchange” as “an Exchange serving the individual market . . . regardless of whether the Exchange is established and operated by a State . . . or by HHS.”).

⁵⁰ U.S. Dep’t of the Treasury, IRS, Health Insurance Premium Tax Credit, 77 Fed. Reg. 30, 377 (May 23, 2012) (final rule).

⁵¹ 26 U.S.C. § 4980H.

⁵² 26 U.S.C. § 5001A(e)(1).

able” for millions of taxpayers, and thus exposes them to penalties from which they would otherwise be exempt.

Injured parties soon began challenging the IRS rule in federal court. In September 2012, the state of Oklahoma became the first plaintiff, claiming injury as an employer (*Oklahoma v. Burwell*). In May 2013, a group of employers and individuals from multiple states filed a second challenge (*Halbig v. Burwell*). In September 2013, four Virginia residents challenged the rule (*King v. Burwell*). In October 2013, the state of Indiana and dozens of Indiana school districts filed a fourth challenge (*Indiana v. IRS*).

At district court, the government prevailed in *Halbig* and *King*, while the challengers prevailed in *Oklahoma*.⁵³ On July 22, 2014, panels of the D.C. Circuit (*Halbig*) and the Fourth Circuit (*King*) issued conflicting rulings for and against the challengers, respectively, within hours of each other. In *Halbig*, the full D.C. Circuit granted the government’s request for *en banc* review. The *King* plaintiffs appealed their loss to the Supreme Court, which granted certiorari in November 2014.

IV. The Court’s *King* Ruling

The Supreme Court sided with the federal government, though not on the grounds urged by the solicitor general or most commentators. The chief justice’s opinion for the Court was joined by Justice Anthony Kennedy and the Court’s four “liberal” justices—Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan—none of whom concurred separately. The Court’s arch-textualist, Justice Antonin Scalia, authored a sharp, and at times caustic and sarcastic, dissent, joined by Justices Clarence Thomas and Samuel Alito.

Chief Justice Roberts explained that while Section 36B may appear clear, it was actually “ambiguous” when viewed in a broader context.⁵⁴ In the ordinary case, a finding of ambiguity would trigger deference to the implementing agency under the *Chevron* doctrine.⁵⁵

⁵³ *Halbig v. Sebelius*, 27 F. Supp. 3d 1 (D.D.C. 2014); *King v. Sebelius*, 997 F. Supp. 2d 415 (E.D. Va. 2014); *Oklahoma v. Burwell*, No. 6:11-cv-00030 (E.D. Okla. Sept. 30, 2014).

⁵⁴ *King*, 135 S. Ct. at 2490–91.

⁵⁵ See *Chevron USA v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

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King was not an ordinary case, however.⁵⁶ Rather than defer to the IRS's interpretation, the Court resolved the ambiguity itself. Turning again to the broader statutory context, and the potential effects of enforcing Section 36B as written, the Court concluded that the ACA should be read to authorize tax credits in federal exchanges. Though the text of Section 36B authorizes tax credits for insurance purchased on exchanges "established by the State under section 1311," this language will henceforth be read to authorize tax credits for insurance purchased on exchanges established by states under Section 1311 *or* by the federal government under Section 1321.

Roberts's primary rationale was that a "fair construction" of the statute requires more than giving meaning to discrete phrases—and cannot be constrained by the semantic meaning of ordinary terms, or even statutorily defined terms, such as "State." The chief justice wrote that it is the Court's job to avoid, "if at all possible," an interpretation that would undermine the ACA's goal of improving health insurance markets—such as an interpretation that, when combined with the intervening decisions of dozens of states not to establish exchanges, could create a "death spiral" of increasing costs and declining coverage.⁵⁷ Therefore the statutory language was to be stretched so as to conform to "what we see as Congress's plan."⁵⁸ If that required ignoring some portions of the text, or subverting another purpose of the statute, so be it. The chief justice decided where the Court should go and was determined not to let the text get in the way.⁵⁹ But to make it work, the Court's majority would have to find

⁵⁶ *King*, 135 S. Ct. at 2488–89 ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000))).

⁵⁷ *King*, 135 S. Ct. at 2496.

⁵⁸ *Id.*

⁵⁹ As commentators have noted, the chief justice has been similarly aggressive and creative in his interpretation of other statutes. See, e.g., *Nw. Austin Mun. Utility Dist. No. One v. Holder* ("NAMUDNO"), 557 U.S. 193 (2009), Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 Sup Ct. Rev. 181, 182 (2009) ("[I]n *NAMUDNO*, the Court applied the [constitutional avoidance] canon to adopt an implausible reading of a statute that appeared contrary to textual analysis, congressional intent, and administrative action."); *Bond v. United States*, 134 S. Ct. 2077 (2014); Nicholas Quinn Rosenkranz, *Bond v. United States: Concurring in the Judgment*, 2013–2014 Cato Sup. Ct. Rev. 285, 287 (2014) ("[Roberts' opinion is] an object lesson in dodgy statutory interpretation.").

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a way to dispense with “the most natural reading” of the relevant statutory provisions.⁶⁰

Before looking at what the majority did, it is worth noting which arguments the Court did *not* adopt. It did not accept the primary arguments offered by the solicitor general. It did not accept that “established by the State” was a “statutory term of art,”⁶¹ nor did it claim the text clearly compelled its result, as the government also urged. Indeed, not a single justice adopted those arguments. To the contrary, the Court claimed the relevant text was ambiguous. While some critics maintained the plaintiffs’ arguments were frivolous or absurd, not a single justice expressed this view in an opinion.⁶² According to Chief Justice Roberts’s opinion for the Court, the plaintiffs’ “arguments about the plain meaning of Section 36B are strong.”⁶³

Though the Court claimed to be following “Congress’s plan,” it did not rely much on traditional sources of legislative history to determine Congress’s unstated purpose, and was quite selective in the sources of legislative history it did cite. Nor did the Court take the suggestion offered by some commentators that it should rely upon the scoring of the ACA by the Congressional Budget Office⁶⁴ or *ex*

⁶⁰ King, 135 S. Ct. at 2495.

⁶¹ See Brief for the Respondents at 20–25, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114).

⁶² Many commentators were quite dismissive of arguments against the IRS rule. One prominent critic called them “screwy,” “nutty,” and “stupid” (Erika Eichelberger, *Conservatives Insist Obamacare Is on Its Deathbed*, Mother Jones (Jan. 24, 2013), <http://www.motherjones.com/print/214256>). Others charged that the litigation was “frivolous” (Harold Pollack, *If the Latest Obamacare Lawsuit Succeeds, Obamacare Is in Big Trouble*, Wash. Post, Feb. 3, 2014, <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/02/03/if-the-latest-obamacare-lawsuit-succeeds-obamacare-is-in-big-trouble/>); that it was “a conspicuously weak case that should never have reached the Supreme Court”; that it was “obvious” the ACA authorizes those provisions in federal exchanges; or that *King* was nothing but a “trolling exercise” (Harold Pollack, *The Greatest Trolling Exercise in the History of Health Policy Is Over*, Politico (blog) (June 25, 2015), <http://www.politico.com/magazine/story/2015/06/health-care-supreme-court-king-burwell-119446.html>). Not all commentators took this position, however. See Sarah Kliff, *The Accidental Case Against Obamacare*, Vox.com (May 26, 2015) (“‘When I read prominent people saying this case was frivolous, I winced a bit,’ says Nicholas Bagley, an assistant law professor at the University of Michigan who has written extensively on the *King* challenge. ‘This is a serious lawsuit.’”).

⁶³ King, 135 S. Ct. at 2495.

⁶⁴ See, e.g., Abbe Gluck, *The “CBO Canon” and the Debate over Tax Credits on Federally Operated Health Insurance Exchanges*, Balkinization (July 10, 2012), <http://www.balkinization.com/2012/07/10/cbo-canon/>.

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post comments offered by legislators and staff to explain the inconvenient wording of the relevant provisions.⁶⁵ Though the Court admitted the ACA was the result of “inartful drafting,”⁶⁶ it did not claim the relevant language was a scrivener’s error.

Some thought the Court might rely upon federalism principles to side with the government, out of a concern that conditioning tax credits on state cooperation would be unduly coercive.⁶⁷ Several amici raised federalism concerns of various stripes,⁶⁸ and Justice Kennedy seemed amenable to such an approach at oral argument.⁶⁹

balkin.blogspot.com/2012/07/cbo-canon-and-debate-over-tax-credits.html; Dylan Scott, BOOM: The Historic Proof Obamacare Foes Are Dead Wrong on Subsidies, Talking Points Memo (Aug. 1, 2014), <http://talkingpointsmemo.com/dc/obamacare-halbig-cbo-scores>. For an explanation of why the CBO score did not actually establish the correctness of the government’s position see David Ziff, TPM’s Halbig/PPACA “BOOM” Goes Boom, Ziff Blog (Aug. 1, 2014), <https://ziffblog.wordpress.com/2014/08/01/tpms-halbigppaca-boom-goes-boom>.

⁶⁵ See, e.g., Robert Pear, Four Words, *supra* note 31 (“The answer, from interviews with more than two dozen Democrats and Republicans involved in writing the law, is that the words were a product of shifting politics and a sloppy merging of different versions. Some described the words as ‘inadvertent,’ ‘inartful’ or ‘a drafting error.’ But none supported the contention of the plaintiffs, who are from Virginia.”); but see text accompanying note 31, *supra*. Doug Kendall, Carvin’s Cornhusker Quandry in King, Huffington Post (Jan. 30, 2015), http://www.huffingtonpost.com/doug-kendall/carvins-cornhusker-quanda_b_6581690.html (quoting Senator Nelson as saying, “I *always* believed that tax credits should be available in all 50 states regardless of who built the exchange, and the final law also reflects that belief as well.” (emphasis in original)); but see Michael F. Cannon, King v. Burwell: In 2013, Nelson Admitted He Didn’t Know If ACA Offered Subsidies in Fed. Exchanges, *Forbes.com* (Feb. 10, 2015), <http://www.forbes.com/sites/michaelcannon/2015/02/10/king-v-burwell-in-2013-nelson-admitted-he-didnt-know-if-aca-offered-subsidies-in-fed-exchanges/> (“In other words, if we want to know what Nelson *actually* intended to become law, asking Ben Nelson is not an option. Our only option is to read the bill.”).

⁶⁶ King, 135 S. Ct. at 2492.

⁶⁷ See, e.g., David G. Savage, Obamacare Defense Is Tailored for Key Supreme Court Justices, *L.A. Times*, Feb. 26, 2015, available at <http://www.latimes.com/business/healthcare/la-na-court-health-argument-20150226-story.html>.

⁶⁸ See Brief of the Commonwealth of Virginia, et al., as Amici Curiae in Support of Affirmance, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114); Brief for Professor Thomas W. Merrill, et al., as Amici Curiae Supporting Respondents, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114); Brief of Amici Curiae Jewish Alliance for Law & Social Action (JALSA), et al., in Support of Respondents, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114).

⁶⁹ Transcript of Oral argument at 16, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114) (“JUSTICE KENNEDY: Let me say that from the standpoint of the dynam-

Yet there was no mention of federalism in the Court's opinion. If such concerns did influence the justices, they did not see the need to mention them.

Perhaps tellingly, the Court openly adopted a non-textualist approach to interpreting the ACA. As Professor Abbe Gluck observed, "*King* is one of the only major text-oriented statutory interpretation decisions in recent memory in which the majority opinion barely includes a single canon of interpretation."⁷⁰ Moreover, the chief justice's opinion expressly rejects some interpretive canons that textualists hold dear. As Gluck noted, "This is not Antonin Scalia's textualism"⁷¹—a point Justice Scalia's dissent made clear. Instead, the Court adopted a "fair construction" of the statute over the plain meaning of relevant provisions and congressionally provided definitions.⁷²

The problem with the Court's "fair construction" is that it considered only those parts of the statute that, once isolated, could be used to cast doubt on the intentionality of Section 36B, while it dismissed, disregarded, or distorted other provisions that completely dispel those doubts. If this is a "fair construction," it is one that elevates judicial construction over legislative action.⁷³

V. Desperately Seeking Ambiguity

Chief Justice Roberts went to extraordinary lengths to find the act ambiguous. He conceded "the most natural reading of the pertinent statutory phrase"⁷⁴ is that tax credits are available "only" through

ics of Federalism, it does seem to me that there is something very powerful to the point that if your argument is accepted, the States are being told either create your own Exchange, or we'll send your insurance market into a death spiral.").

⁷⁰ Abbe Gluck, Congress Has a "Plan" and the Court Can Understand It—The Court rises to the challenge of statutory complexity in *King v. Burwell*, SCOTUSBlog (June 26, 2015), <http://www.scotusblog.com/2015/06/symposium-congress-has-a-plan-and-the-court-can-understand-it-the-court-rises-to-the-challenge-of-statutory-complexity-in-king-v-burwell>.

⁷¹ *Id.*

⁷² *King*, 135 S. Ct. at 2492.

⁷³ See Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 57 (2012) (noting that for a court to find legislative purpose "in the absence of a clear indication in the text is to provide the judge's answer rather than the text's answer to the question").

⁷⁴ *King*, 135 S. Ct. at 2495.

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“an Exchange established by the State under [Section 1311].”⁷⁵ He implicitly conceded the ACA is otherwise silent on the question presented: the Court failed to identify even a single piece of statutory text or scrap of legislative history in which any member of Congress claimed the ACA *would* offer tax credits in federal exchanges. That should have resolved the matter.⁷⁶ Nevertheless, Roberts still managed to find the operative text ambiguous “when read in context.”⁷⁷

There was no disagreement among the justices that statutory structure, design, and context are useful in *resolving* latent ambiguities in statutory provisions.⁷⁸ As Justice Scalia counseled in dissent, “Statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision.”⁷⁹ Yet the majority not only used statutory context to *resolve* ambiguity, but to *create* the ambiguity in the first place. Worse, the majority considered text selectively and adopted inconsistent presumptions about the applicability of statutory provisions bearing on the question. Though Roberts conceded that “established by the State” is clear on its face and the *only* statutory text that speaks directly to the question presented, by the time he was done, he rendered that provision not only ambiguous but meaningless. It was as if the majority was determined to shoehorn inconvenient statutory text into a preconceived narrative of how the statute should operate. After all, as Roberts explained, the statute *must* be read this way “if at all possible.”

The Court’s judgment ultimately rested on a conclusion that the relevant text was “ambiguous”—or could at least be read as such in context. But what was ambiguous? Not the word “State,” given that Congress took pains to define this term to exclude federal

⁷⁵ *Id.* at 2489.

⁷⁶ See *Brown & Williamson*, 529 U.S. at 133 (noting that contextual interpretation must yield to an “insuperable textual barrier”); *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others . . . courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last.” (citations omitted)).

⁷⁷ *Id.* at 2490.

⁷⁸ See *id.* at 2492 (noting the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme” (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))); *id.* at 2502 (Scalia, J., dissenting).

⁷⁹ See *King*, 135 S. Ct. at 2502. (Scalia, J., dissenting).

exchanges.⁸⁰ Perhaps “establish” is ambiguous, but not in a way that muddies whether it is the state or HHS that is doing the establishing.

Consider in more detail the analysis underlying the majority’s conclusion that the statute is “properly viewed as ambiguous” on the question of whether it authorizes tax credits in federal exchanges.⁸¹ As the Court accepted, “the most natural reading of the pertinent statutory phrase”⁸² is that the ACA authorizes tax credits “only” through “an Exchange established by the State under [Section 1311].”⁸³ Under this language, for tax credits to issue, “three things must be true: First, the individual must enroll in an insurance plan through ‘an Exchange.’ Second, that Exchange must be ‘established by the State.’ And third, that Exchange must be established ‘under [Section 1311].’”⁸⁴

The first requirement, that tax credits are only available for the purchase of insurance through “an Exchange,” is uncontroversial, as is the proposition that both state and federal exchanges satisfy this initial requirement, even though limiting tax credits to exchange-based insurance purchases limits their availability and potentially undermines the legislative purpose of subsidizing insurance.⁸⁵ Section 1321 requires the HHS secretary to “establish” an exchange in any state that fails to do so (or otherwise fails to comply with relevant ACA requirements) and indicates that this exchange should be the practical equivalent of the exchange for which it substitutes. Federal and state exchanges may be “established by different sovereigns,”⁸⁶ the Court wrote, but both enable consumers to engage in comparison shopping and facilitate government regulation of health insurance offerings.⁸⁷

⁸⁰ See 42 U.S.C. § 18024(d).

⁸¹ King, 135 S. Ct. at 2491.

⁸² *Id.* at 2495.

⁸³ *Id.* at 2489.

⁸⁴ *Id.*

⁸⁵ Actually, the government has ignored this tax-credit eligibility requirement as well. Ricardo Alonso-Zaldivar, Health Law Fix for State-Run Websites, Assoc. Press, Feb. 28, 2014 (“HHS said state residents who were unable to sign up because of technical problems may still get federal tax credits if they bought private insurance outside of the new online insurance exchanges.”).

⁸⁶ King, 135 S. Ct. at 2489.

⁸⁷ See Max Baucus, Reforming America’s Health Care System: A Call to Action, S. Fin. Comm., Nov. 12, 2008, at 17 (“The Exchange would be an independent entity, the primary purpose of which would be to organize affordable health insurance options,

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Next the Court turned to the phrase “established by the State.” This language would seem to be clear and unambiguous. Any member of Congress who had bothered to read the relevant provisions would have understood what it meant.⁸⁸ As Chief Justice Roberts conceded, “it might seem that a Federal Exchange cannot fulfill this requirement.”⁸⁹ Lest there be any doubt, as the majority conceded, the ACA defines “State” in a manner “that does not include the Federal Government.”⁹⁰

Despite the plain meaning of “established by the State,” despite the statutory definition of “State,” despite the consistent (and conventional) usage of the word “establish” throughout the statute, and despite the majority’s acknowledgement that the plaintiffs offered “the most natural reading of the pertinent statutory phrase,” the majority asserted that “when read in context, ‘with a view to [its] place in the overall statutory scheme,’ the meaning of that phrase ‘established by the State’ is not so clear.”⁹¹ Other provisions of the statute, the majority wrote, “suggest that the Act may not always use the phrase ‘established by the State’ in its most natural sense.”⁹²

The Court cites just one statutory provision, found in Section 1312, to substantiate its claim that other provisions of the ACA “suggest” that “established by the State” “may not” mean what it says. Yet not only does that provision not contradict or other undermine

create understandable, comparable information about those options, and develop a standard application for enrollment in a chosen plan” (emphasis added)); Praeger, *supra* note 39, at 190 (“The main purpose of the exchanges will be to facilitate the comparison and purchase of coverage by individuals and small businesses.”); see also Michael F. Cannon, *ObamaCare’s Exchanges Perform More than a Dozen Functions Besides Issuing Subsidies* (Updated), *Cato@Liberty*, (June 27, 2014), <http://www.cato.org/blog/obamacares-exchanges-perform-more-dozen-other-functions-besides-issuing-subsidies>.

⁸⁸ Note, however, that not all may have read the statute. For example, Senator Max Baucus, one of the ACA’s chief architects, remarked that it would be a “waste [of his] time to read every page of the bill,” since it’s “statutory language,” and that’s what “experts” are for. Jordan Fabian, *Key Senate Democrat Suggests that He Didn’t Read Entire Healthcare Reform Bill*, *The Hill* (Aug. 25, 2010), <http://thehill.com/blogs/blog-briefing-room/news/115749-sen-baucus-suggests-he-did-not-read-entire-health-bill>.

⁸⁹ King, 135 S. Ct. at 2489–90.

⁹⁰ *Id.* at 2490.

⁹¹ *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

⁹² *Id.*

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a straightforward interpretation of “established by the State,” it does not even utilize that phrase.

Section 1312 defines “qualified individuals,” in relevant part, as those who “reside[] in the State that established the Exchange.”⁹³ The majority thinks this casts doubt on the plain meaning of “established by the State.” Why? If the Court were to interpret such language as drawing distinctions between state-established and federal exchanges, the majority reasoned, then “there would be *no* ‘qualified individuals’ on Federal Exchanges.”⁹⁴ Federal exchanges would therefore not be able to meet several requirements the act imposes with respect to qualified individuals. For example, explains Chief Justice Roberts, “the Act requires all Exchanges to ‘make available qualified health plans to qualified individuals’—something an Exchange could not do if there were no such individuals.”⁹⁵

The majority’s argument fails on three levels. First, as Justice Scalia notes in dissent, it would be perfectly reasonable for Congress to create a category of enrollees that is unique to state-established exchanges:

Imagine that a university sends around a bulletin reminding every professor to take the “interests of graduate students” into account when setting office hours, but that some professors teach only undergraduates. Would anybody reason that the bulletin implicitly presupposes that every professor has “graduate students,” so that “graduate students” must really mean “graduate or undergraduate students”? Surely not. Just as one naturally reads instructions about graduate students to be inapplicable to the extent a particular professor has no such students, so too would one naturally read instructions about qualified individuals to be inapplicable to the extent a particular Exchange has no such individuals.⁹⁶

The majority responds that Congress would have had no reason to detail requirements related to “qualified individuals” if there were to be no qualified individuals in federal exchanges. Yet such reasons abound, both in the ACA and its legislative history. Sections

⁹³ 42 U.S.C. § 18032(f)(1)(A).

⁹⁴ *King*, 135 S. Ct. at 2490.

⁹⁵ *Id.*

⁹⁶ *King*, 135 S. Ct. at 2501 (Scalia, J., dissenting).

1311, 1321, and other provisions make clear that many Senate Democrats feared that states might not implement the ACA as well or as faithfully as the secretary would. The ACA therefore provides wide discretion to the secretary, while states get detailed instructions.⁹⁷ There is thus nothing about the “qualified individuals” definition that casts doubt on the meaning of “established by the State.” Any anomalies the majority identifies flow not from the text, but from the majority’s atextual assumptions about Congress’s plan.

Second, context further shows that the “qualified individuals” definition casts no doubt on what Congress meant by “established by the State,” and instead supports the plain meaning of that phrase. There is a *reason* why Section 1312 defines “qualified individuals” in terms of “the State that established the Exchange.” In Sections 1311, 1312, and 1313, Congress is speaking to states. Those sections direct states to establish exchanges and detail related requirements. Section 1312 defines “qualified individuals” in terms of “the State that established the Exchange” because the whole point of these sections is that Congress is presuming that states *will* establish exchanges.

Context also shows the “qualified individuals” definition still has applicability to federal exchanges, despite the fact that they are not established by states. In the very next section, Section 1321, Congress drops the presumption that each state will establish an exchange, and explains what the secretary “shall” do if states fail to establish exchanges. Section 1321 directs the secretary to “issue regulations setting standards for meeting the requirements under this title,” which encompasses regulations for both state-established and federal exchanges, and to implement “such . . . requirements” if a state fails to do so. That is, if Sections 1311, 1312, or 1313 impose requirements on state-established exchanges that would be inappropriate in the case of a federal exchange, Section 1321 authorizes the secretary to issue and enforce a parallel requirement. In this case, it authorizes the HHS secretary to develop a “qualified individuals” definition appropriate to federal exchanges—that is, that qualified individuals must reside in the state “within” which “the Secretary . . . establish[es]” an Exchange.⁹⁸ The only ambiguity that exists is whether the ACA *requires* the secretary to develop a “qualified individuals” definition

⁹⁷ See PPACA § 1321; 42 U.S.C. § 18041.

⁹⁸ See *id.* at (a), (c).

for federal exchanges or (per Justice Scalia) merely *authorizes* her to do so. In neither case does Section 1321's "qualified individuals" definition cast doubt on the meaning of "established by the State."

Thus it is not true that giving the phrase "established by the State" its plain meaning would mean there would be no qualified individuals in federal exchanges. Context shows that Congress covered that contingency. Unfortunately, the Court only looked to part of the context—the part that supported its preconceived understanding of "Congress's plan."

Third, even if one were to conclude that the provisions relating to "qualified individuals" created an anomaly, this does not "suggest," let alone demonstrate, that other language used in other parts of the statute is ambiguous. The majority's reliance on the "qualified individual" provision on this point is even more curious given the majority's refusal to consider the operation of the phrase "established by the State" in other parts of the ACA. "Because the other provisions cited by the dissent are not at issue here," the majority meekly explains in a footnote, "we do not address them."⁹⁹ The majority did not even address the reference to exchanges "established by the State" in Section 1311, despite that section's obvious relevance to the question at hand.¹⁰⁰ So much for considering the statute as a whole.

When the majority turns to consider whether an exchange established by the federal government as required under Section 1321 could qualify as an exchange established "under Section 1311," it takes further liberties with the statutory text. Here, the majority claims that the statutory definition of an "Exchange" forces the conclusion that Section 1321 "authorizes the Secretary to establish an Exchange under Section [1311], not (or not only) under Section [1321]."¹⁰¹ The relevant text does nothing of the kind.

The linchpin of the majority's argument here is the statutory definition of "Exchange" provided for in ACA Section 1563: "The term 'Exchange' means an American Health Benefit Exchange established under section 1311 of the Patient Protection and Affordable Care

⁹⁹ King, 135 S. Ct. at 2493 n.3.

¹⁰⁰ 42 U.S.C. § 18031(f)(3) ("AUTHORITY TO CONTRACT.—(A) IN GENERAL.—A State may elect to authorize an Exchange *established by the State* under this section to enter into an agreement with an eligible entity to carry out 1 or more responsibilities of the Exchange." (emphasis added)). See *infra* note 112 and accompanying text.

¹⁰¹ King, 135 S. Ct. at 2490–91.

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Act.”¹⁰² According to the majority, “every time the Act uses the word ‘Exchange,’ the definitional provision *requires* that we substitute the phrase ‘Exchange established under section [1311].’”¹⁰³ The statute flatly contradicts this claim.

Section 1563 adds that definition of “Exchange” to the Public Health Service Act to conform that statute to the ACA. Section 1551 then conforms the ACA to the PHSA by circuitously importing that and other PHSA definitions back into the ACA. Contrary to the majority opinion, however, Section 1551 expressly provides that PHSA definitions are *not* to be applied “every time” the relevant terms are mentioned in the ACA. Section 1551 provides that PHSA definitions “shall apply” to the ACA “unless specifically provided for otherwise.”¹⁰⁴ With respect to federal exchanges, the ACA specifically provides that they are established under Section 1321.¹⁰⁵ Thus the PHSA definition that exchanges are “established under Section 1311” does not apply. The majority’s claim that the ACA “requires” the Court to insert this definition of “Exchange” into Section 1321 is simply false. The majority erases the distinction between Section 1311 exchanges and Section 1321 exchanges only by ignoring Congress’s express instructions. After it cavalierly interprets a universal definition of “State” to be conditional, the majority then interprets a conditional definition of “Exchange” to be universal—all in the name of “what we see as Congress’s plan.”

Having sufficiently tampered with two statutory definitions, the majority then proceeds to claim that federal exchanges established under Section 1321 are also established under Section 1311. “All of the requirements that an Exchange must meet are in Section [1311],” the majority asserts.¹⁰⁶ Therefore, a federal exchange must be “established under Section 1311” or else “literally none of the Act’s requirements would apply to them.”¹⁰⁷ Again, the statute flatly contradicts the majority’s claims.

¹⁰² 42 U.S.C. § 300gg-91(d)(21).

¹⁰³ King, 135 S. Ct. at 2491 (emphasis added).

¹⁰⁴ PPACA § 1551.

¹⁰⁵ 42 U.S.C. § 18041(c)(1). See also 45 CFR § 155.20 (2013) (“*Federally-facilitated Exchange* means an Exchange established and operated within a State by the Secretary under section 1321(c)(1) of the Affordable Care Act.”).

¹⁰⁶ King, 135 S. Ct. at 2491.

¹⁰⁷ *Id.*

It is not true that “all of the requirements” for exchanges are contained in Section 1311. Sections 1312 and 1313 also impose requirements on exchanges.¹⁰⁸ The reconciliation amendments imposed reporting requirements on exchanges codified in Section 36B of the Internal Revenue Code—the provisions created by Section 1401—and those requirements *distinguished* between Section 1311 and Section 1321 exchanges.¹⁰⁹ Section 1321 imposes requirements on exchanges when it obligates the HHS secretary to “issue regulations setting standards” for exchanges to meet “the requirements under this *title*” (that is, not just Section 1311), and further authorizes the secretary to impose “such *other* requirements as the Secretary determines appropriate” (that is, beyond what the ACA itself requires).¹¹⁰

Indeed, far from conflating state-run and federal exchanges, Section 1321 draws a bright line between the two. It authorizes the secretary to write rules for both Section 1311 exchanges and Section 1321 exchanges, which remain distinct. This authority includes the ability to write separate rules for federal exchanges in cases where the rules for state-established exchanges would make no sense.

The majority’s selective contextualism creates anomalies that exist nowhere under a plain-meaning interpretation of Section 36B and the act’s broader context. For example, the ACA prohibits the use of federal funds for the operating expenses of Section 1311 exchanges.¹¹¹ Under a plain-meaning interpretation, where Section 1311 and 1321 exchanges are distinct, this poses no problems. Section 1321 authorizes the secretary to draft a parallel rule appropriate to federally administered exchanges (for example, that they may use federal funds, but must be self-sufficient). If the majority were correct that federal exchanges *are* Section 1311 exchanges, however, it would create the anomaly that federal exchanges must somehow operate with no federal funds. Likewise, Section 1311 grants states the power to choose whether “an Exchange established by the State” may contract out certain exchange functions. If the majority were correct that federal exchanges are “established by the State under Section 1311,” it would create an anomaly where states that did not

¹⁰⁸ See, e.g., 42 U.S.C. § 18032(d)(4), § 18033(a)(1).

¹⁰⁹ 26 U.S.C. § 36B(f)(3).

¹¹⁰ 42 U.S.C. § 18041(a), (c) (emphasis added).

¹¹¹ 42 U.S.C. § 18031(d)(5).

establish exchanges could dictate whether a federal agency may contract with outside entities.¹¹² The majority's selective contextualism creates such anomalies by ignoring these and other provisions that reveal Congress's actual plan to be quite different from what the majority imagines.

True to form, the majority does devote attention to a part of Section 1321 that, once isolated, it uses to cast doubt on the clear line Section 36B draws between state-established and federal exchanges. To support its conclusion that the phrase "Exchange established by the State under Section [1311]" could refer to "*all* Exchanges—both State and Federal—at least for purposes of the tax credits," it points to Section 1321's instructions to the HHS secretary.¹¹³ This provision provides that should a state fail to create the "required Exchange," the secretary shall "establish and operate such Exchange within the State."¹¹⁴

According to the majority, "by using the words 'such Exchange,' the Act indicates that State and Federal Exchanges should be the same."¹¹⁵ The majority is correct in that this language indicates the exchange established by the secretary should perform the same general functions as those established by states under Section 1311. Section 1321 anticipates this by expressly authorizing the secretary to adopt regulations providing that HHS exchanges will operate like state exchanges. Yet this is not enough to fulfill the requirements of Section 36B, as the relevant language speaks both to the type of exchange in which tax credits are to be available, as well as the sovereign that has established it.¹¹⁶ So even if "such Exchange" could be read to make a Section 1321 exchange legally equivalent to a Section 1311 exchange, it is still not an exchange "established by the State."

This understanding is confirmed by consideration of other relevant provisions of the statute. Section 1323 provides that when a U.S. territory creates "such an Exchange," the territory "shall be treated

¹¹² 42 U.S.C. § 18031(f)(3). See *supra* note 100.

¹¹³ King, 135 S. Ct. at 2491.

¹¹⁴ 42 U.S.C. § 18041 (c).

¹¹⁵ King, 135 S. Ct. at 2491.

¹¹⁶ See *id.* at 2489–90 ("State and Federal Exchanges are established by different sovereigns"); see also Halbig v. Burwell, 758 F.3d 390, 400 (D.C. Cir. 2014) ("[S]ubsidies also turn on a third attribute of Exchanges: who established them.").

as a State.”¹¹⁷ The fact that Congress considered it necessary to insert that explicit equivalence language shows that Congress did not consider the word “such” to have the meaning the majority claims. Similarly, when Congress sought to create full equivalence between actions undertaken by the federal and state governments it did so explicitly. Section 1322, for instance, conditions recognition of an organization as a “qualified nonprofit health insurance issuer,” in part, on the state adopting insurance market reforms or “the Secretary ha[ving] implemented [the reforms] for the State.”¹¹⁸ Congress knew full well how to authorize the federal government to stand in the state’s shoes. It did not do so here. The phrase “such Exchange” may indicate that federal exchanges have the same intrinsic characteristics as a state-established exchange, but tax-credit eligibility hinges on the extrinsic characteristic of *which* sovereign established the exchange.

The majority seeks further support for its conclusion that the relevant language is ambiguous by pointing to “several provisions that assume tax credits will be available on both State and Federal Exchanges.”¹¹⁹ Yet the first two provisions the majority cites in support of this proposition are taken from Section 1311—the very section that instructs states to create exchanges in the first place. That Section 1311 includes provisions that assume tax credits will be available in Section 1311 exchanges is hardly surprising given that Section 1401 provides tax credits in exchanges “established by the State under Section 1311.” These provisions lend no support for the majority’s position. At best, they beg the question.

The majority also points to Section 36B’s requirements that both state and federal exchanges report information on health insurance purchases, including information about any tax credits provided.”¹²⁰ In the majority’s view it “would make little sense” to require reporting on tax credits were such credits not available in federal exchanges.¹²¹ Yet even under the majority’s interpretation, these reporting requirements apply to instances where tax credits are not available.

¹¹⁷ 42 U.S.C. § 18043(a)(1).

¹¹⁸ 42 U.S.C. § 18042(c)(6).

¹¹⁹ King, 135 S. Ct. at 2491.

¹²⁰ 26 U.S.C. § 36B(f)(3).

¹²¹ King, 135 S. Ct. at 2492.

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This requirement obligates all exchanges to report information on all enrollees, yet not all those who purchase insurance on exchanges are eligible for tax credits due to income or other characteristics. Further, as the D.C. Circuit noted in *Halbig*, “even if credits are unavailable on federal Exchanges, reporting by those Exchanges still serves the purpose of enforcing the individual mandate—a point the IRS, in fact, acknowledged.”¹²²

Having walked through “Exchange established by the State under Section [1311],” the majority now concludes that this phrase “is properly viewed as ambiguous.”¹²³ Yet the majority’s tortured path came at the expense of plain language and Congress’s express commands. That’s not all. In his dissent, Justice Scalia summarized some of the other steps the majority took in its quest to find ambiguity:

To mention just the highlights, the Court’s interpretation clashes with a statutory definition, renders words inoperative in at least seven separate provisions of the Act, overlooks the contrast between provisions that say “Exchange” and those that say “Exchange established by the State,” gives the same phrase one meaning for purposes of tax credits but an entirely different meaning for other purposes, and (let us not forget) contradicts the ordinary meaning of the words Congress used. On the other side of the ledger, the Court has come up with nothing more than a general provision that turns out to be controlled by a specific one, a handful of clauses that are consistent with either understanding of establishment by the State, and a resemblance between the tax-credit provision and the rest of the Tax Code. If that is all it takes to make something ambiguous, everything is ambiguous.¹²⁴

Indeed.

VI. A Most Plausible Implausibility

Having concluded that the relevant statutory text is “ambiguous,” the majority turns “to the broader structure of the Act to determine the meaning of Section 36B.”¹²⁵ Rather than consider the text of

¹²² 758 F. 3d. at 403.

¹²³ *King*, 135 S. Ct. at 2491.

¹²⁴ *Id.* at 2502–03 (Scalia, J., dissenting).

¹²⁵ *Id.* at 2492.

the ACA, however, the majority focused instead on the “statutory scheme”—the aforementioned three-legged stool—and concluded that tax credits simply must be available in federal exchanges. Otherwise, the act would threaten to “destabilize” the individual insurance market in any state that failed to establish its own exchange. The idea that Congress would allow such a result, the majority reasoned, was “implausible.”¹²⁶ Section 36B’s tax credits “are necessary for Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.”¹²⁷

The majority hangs its resolution of this purported ambiguity upon its assumption that Congress would not have enacted a provision that threatened to undermine its goal of expanding health insurance coverage. More specifically, the majority concluded that Congress would not have imposed costly restrictions on health insurance providers, such as community-rated premiums, without also imposing mandates and providing subsidies to stabilize markets. However reasonable this assumption may seem in the abstract, the ACA’s legislative history flatly contradicts it. The ACA’s leading advocates considered, supported, and in some cases enacted provisions that would undermine the very coverage expansions the majority claims Congress would never undermine. While the majority assumes ACA supporters would not support community rating without also providing for subsidies and a mandate to combat the resulting instability, they did exactly that, over and over again, including where the Court claimed Congress wouldn’t.

Both the ACA and the House bill created a long-term-care entitlement program called the Community Living Assistance Services and Supports (CLASS) Act. Each bill imposed community-rated premiums *and* an explicit prohibition on subsidies that might reduce the resulting instability.¹²⁸ ACA supporters enacted these provisions

¹²⁶ *Id.* at 2493–94.

¹²⁷ *Id.* at 2496.

¹²⁸ 42 U.S.C. § 30011-7(b) (“No taxpayer funds shall be used for payment of benefits under a CLASS Independent Benefit Plan. For purposes of this subsection, the term ‘taxpayer funds’ means any Federal funds from a source other than premium.”). Richard S. Foster, Ctr. for Medicare & Medicaid Servs., *Estimated Financial Effects of the “America’s Affordable Health Choices Act of 2009”* (H.R. 3962), as Passed by the House on November 7, 2009 (2009), at 10.

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despite repeated warnings that “voluntary, unsubsidized, and non-underwritten insurance programs such as CLASS face a significant risk of failure as a result of adverse selection by participants.”¹²⁹ The CLASS Act promptly collapsed, and Congress repealed it.¹³⁰ According to Chief Justice Roberts, the CLASS Act doesn’t count because it is “a comparatively minor program” and not part of “the general health insurance program—the very heart of the Act.”¹³¹ Again, so much for reading the statute as a whole.

That objection cannot be raised against Congress’s imposition of the ACA’s prohibitions on pre-existing-condition exclusions and discrimination based on health status with respect to children. In the market for child-only health insurance policies, the ACA imposed these measures beginning September 23, 2010—more than *three years* before it provided subsidies or imposed a purchase mandate.¹³² Those markets either constricted or completely collapsed in two-thirds of the states.¹³³ These facts belie the majority’s claims that Congress deemed all three legs of the stool “should take effect on the same day—January 1, 2014,”¹³⁴ and that ACA supporters subordinated *everything* to their desire “to avoid adverse selection in the health insurance markets.”¹³⁵

Moreover, in developing the ACA, Congress indisputably considered provisions that would condition tax credits and other subsidies for the purchase of insurance on state cooperation, and advanced legislation that could force exchanges to operate without the benefit of premium subsidies. The HELP bill, for example, withheld premium subsidies in any state that refused to implement that bill’s employer

¹²⁹ *Id.* at 11. See also Am. Academy of Actuaries, Critical Issues in Health Reform: Community Living Assistance Service and Supports Act (CLASS) (2009).

¹³⁰ American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 642, 126 Stat. 2313, 2358 (2013) (repealing the CLASS Act).

¹³¹ King, 135 S. Ct. at 2494 n.4.

¹³² Pub. L. 111-148, § 1255 (“the provisions of [42 U.S.C. 300gg-3] (as amended by section 1201), as they apply to enrollees who are under 19 years of age, shall become effective for plan years beginning on or after the date that is 6 months after the date of enactment of this Act”).

¹³³ S. Comm. on Health, Educ., Labor & Pensions, 112th Cong., Ranking Member Rep. Enzi: Health Care Reform Law’s Impact on Child-Only Health Insurance Policies 5 (Aug. 2, 2011).

¹³⁴ King, 135 S. Ct. at 2487.

¹³⁵ *Id.* at 2494 n.4 (emphasis in original).

mandate. The result, in non-cooperating states, would have been exchanges selling health insurance subject to even more destabilizing community-rating price controls than the ACA imposes, but without any subsidies to rescue those markets. All 12 HELP Committee Democrats, a group that included several of the ACA's authors, voted in favor of that bill and that provision. One cannot reasonably argue the plain meaning of Section 36B is *implausible* when even the government and its amici concede that the ACA's authors supported another bill that also could have destroyed health insurance markets in uncooperative states.¹³⁶ And yet, to determine what ACA supporters were thinking, the Court relied on testimony delivered by a non-member of Congress to the HELP Committee, and *ignored* legislation produced *by* the HELP Committee—that is, by a dozen of the ACA's authors and supporters—that dispositively shows ACA supporters accepted conditioning exchange subsidies on state cooperation.¹³⁷

Similarly, the Finance bill conditioned small-business tax credits on states implementing that bill's community-rating price controls.¹³⁸ Senate Democrats dropped these provisions from the Finance and HELP bills at the same time they reinforced the Finance provisions conditioning tax credits on states establishing exchanges.

Congress was willing to risk even more destruction with the ACA's Medicaid expansion. As the ACA was originally drafted, state refusal to expand Medicaid would result in the loss of health insurance subsidies for the most vulnerable segments of society. Even after the Court severed the Medicaid expansion from traditional Medicaid in *NFIB*, it remains the case that a state's refusal to accept the expansion exposes the poorest of the working poor to higher health insurance

¹³⁶ See *supra* note 36.

¹³⁷ King, 135 S. Ct. at 2486. See also Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States, Hearing Before the Committee on the Judiciary, U.S. Senate, 109th Cong., First Session, S. HRG. 109-158, (Sept. 12-15, 2005) (explaining the use of legislative history to resolve textual ambiguities “requires a certain sensitivity All legislative history is not created equal.”).

¹³⁸ See S. 1796, 111th Cong. (2009), § 1221(a), proposing 26 U.S.C. § 45R(c)(2) (“STATE FAILURE TO ADOPT INSURANCE RATING REFORMS. — No credit shall be determined under this section . . . for any month of coverage before the first month the State establishing the exchange has in effect the insurance rating reforms”); S. Rep. No. 111-89, at 48 (2009), <http://www.gpo.gov/fdsys/pkg/CRPT-111srpt89/pdf/CRPT-111srpt89.pdf> (“If a State has not yet adopted the reformed rating rules, qualifying small business employers in the State are not eligible to receive the credit.”).

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costs in the individual market, while depriving them of tax credits to subsidize insurance purchases. This is because Section 36B requires individuals to earn at least 100 percent of the federal poverty line to be eligible for subsidies.¹³⁹ It also remains the case that a state's refusal to participate in traditional Medicaid would eliminate subsidies for the poorest of the poor. One cannot reasonably argue it is *implausible* that Congress would give states the power to "destroy" coverage for 8.5 million *moderate*-income individuals when it is undisputed that Congress gave and continues to give states the power to destroy coverage for 50 million *low*-income individuals.

Chief Justice Roberts's conclusion that it is "implausible" that Congress could have intended Section 36B to work as written is simply false. ACA supporters offered too many similar proposals to claim Congress could not have meant what it said in Section 36B.¹⁴⁰

Beyond the health care context, Congress often enacts laws that rely upon state cooperation, and that risk severe adverse consequences should states fail to comply. It often enacts statutes with conflicting goals; the ACA contains conflicting goals in its very title. It often enacts legislation that undermines its stated goals or upsets the expectations of individual legislators.¹⁴¹ Environmental law is replete with such examples, including pollution-control laws that increase pollution¹⁴² and species-conservation laws that undermine species conservation.¹⁴³ It is indisputable that portions of the ACA undermine other stated goals and produce results that some

¹³⁹ See *King*, 135 S. Ct. at 2495 (quoting definition of "applicable taxpayer" eligible for tax credits).

¹⁴⁰ See Brief of Amici Curiae Jonathan H. Adler and Michael F. Cannon at 22–28, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114).

¹⁴¹ See generally, Steven M. Gillon, *That's Not What We Meant to Do: Reform and Its Unintended Consequences in the Twentieth Century* (2000).

¹⁴² One of the best-known examples is documented in Bruce Ackerman & William Hassler, *Clean Coal, Dirty Air: Or How the Clean Air Act Became a Multibillion-Dollar Bail-Out for High-Sulfur Coal Producers* (1981); see also Jonathan H. Adler, *Clean Fuels, Dirty Air*, in *Environmental Politics: Public Costs, Private Rewards* (1992).

¹⁴³ See, e.g., Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 B.C. L. Rev. (2008); Jonathan H. Adler, *Introduction to Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* (Jonathan H. Adler, ed., 2011).

supporters failed to anticipate, such as when the law threw millions out of their existing insurance plans.¹⁴⁴

What is unique about the ACA was not that Congress passed a law with conflicting goals, or that the law threatened to withhold valuable benefits and impose a more punitive regulatory structure on non-cooperating states, but that so many states refused to cooperate. Moreover, as the large number of state amici supporting the *King* petitioners illustrates, many states preferred that deal to the one the majority offers them.¹⁴⁵

Ironically, the Court's reliance upon its predetermined sense of "Congress's plan" may doom one of Congress's goals. As the *New York Times* noted just after the decision was released, *King* may have "killed state-based exchanges."¹⁴⁶ This is because, absent the threat of losing tax credits, the ACA offers states minimal inducement for the difficult and thankless task of creating and operating exchanges.¹⁴⁷ The idea that Congress conditioned tax credits on state cooperation, under the assumption that most (if not all) states would fall quickly into line, is more plausible than the idea Congress enacted a law encouraging federal exchanges in every state. Indeed, some senators

¹⁴⁴ See Angie Drobnic Holan, Lie of the Year: 'If You Like Your Health Care Plan, You Can Keep It,' PolitiFact (Dec. 12, 2013, 4:44 PM). This example, in particular, shows that many who supported the ACA in Congress either did not understand the law for which they voted, or were willing to deliberately misrepresent it in order to ensure its passage. Either way, the frequency with which members of Congress and the president were willing to say "if you like your health insurance plan, you can keep it" should illustrate the danger of relying upon "Congress's plan" when it is not embodied in the text of the statute at issue.

¹⁴⁵ See, e.g., Brief of Amici Curiae Indiana and 39 Indiana Public School Corporations, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114); Brief of Amici Curiae Oklahoma, et al., *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114).

¹⁴⁶ See Margot Sanger-Katz, Obamacare Ruling May Have Just Killed State-Based Exchanges, *The Upshot*, N.Y. Times, June 25, 2015, available at <http://www.nytimes.com/2015/06/26/upshot/obamacare-ruling-may-have-just-killed-state-based-exchanges.html?abt=0002&abg=0>.

¹⁴⁷ Ricardo Alonso-Zaldivar, High Costs Plague Some State-Run Health Insurance Markets, *Associated Press* (Jul. 27, 2015) ("Now that the Supreme Court has ruled the Obama administration can keep subsidizing premiums in all 50 states through HealthCare.gov, no longer is there a downside for states turning to Washington . . . The pendulum probably will swing toward a greater federal role in the next couple of years, said Jim Wadleigh, director of Connecticut's Access Health.").

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who voted for the ACA made clear that was an option they would not support. And yet that is the law *King* gives us.¹⁴⁸

VII. *Chevron's Domain vs. King's Dominion*

As noted above, the Court's *King* opinion rests on its conclusion that the relevant statutory language, when read in context, is ambiguous. Under normal circumstances, this would mean the government wins under step two of the *Chevron* doctrine, which provides that when a statute is ambiguous, courts should defer to the interpretation of the implementing agency. Not here. Instead, the chief justice explained, resolving the ambiguity was the job of the Court because the underlying question—whether tax credits are available for the purchase of health insurance in federally established exchanges—was sufficiently “extraordinary,” and of such “deep economic and political significance,” that it should not be left to an administrative agency, particularly one (like the IRS) lacking “expertise in crafting health insurance policy of this sort.”¹⁴⁹ This meant that it was up to the Court to resolve the ambiguity it had discovered in the ACA, in this case by molding the relevant language to conform to the Court's understanding of Congress's plan.

There was precedent for the Court's refusal to apply *Chevron* deference. The Supreme Court similarly refused to defer to the Food and Drug Administration on whether tobacco could be regulated under the Food, Drug, and Cosmetic Act¹⁵⁰ and the Environmental Protection Agency on whether greenhouse gases constituted “pollutants” under the Clean Air Act.¹⁵¹ The chief justice had also urged a narrow conception of *Chevron's* domain in *City of Arlington v. Federal Communications Commission*, though in dissent.¹⁵²

¹⁴⁸ See Marc Levy, Penn. Withdraws Its Healthcare Marketplace Plan After Supreme Court Ruling, *Insurance Journal* (June 26, 2015), <http://www.insurancejournal.com/news/east/2015/06/26/373202.htm>; Randall Chase, Delaware Opts Against Setting Up State Health Insurance Exchange, *Insurance Journal* (Aug. 10, 2015), <http://www.insurancejournal.com/news/east/2015/08/10/378007.htm> (“The court's ruling upholding the subsidies in all states—not just those operating their own exchanges—was a major factor”).

¹⁴⁹ *King*, 135 S. Ct. at 2489 (citation omitted).

¹⁵⁰ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

¹⁵¹ *Massachusetts v. EPA*, 549 U.S. 497, 528–32 (2007).

¹⁵² *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting).

The rationale for refusing to apply *Chevron* deference in such cases is that such deference is only appropriate where Congress would have wanted the implementing agency to exercise such authority. That is, agencies get *Chevron* deference when a statute is ambiguous *and* it is reasonable to believe Congress meant to delegate interpretive authority to the agency. Based on his *City of Arlington* dissent, it seems that the chief justice is committed to this principle. Whether a consistent majority of the Court concurs is an open question.¹⁵³

The chief justice was unwilling to presume Congress had delegated the IRS authority to construe provisions of the Internal Revenue Code, because Congress had failed to expressly delegate such authority. Yet he had little difficulty presuming that Congress had authorized the payment of billions of dollars in refundable tax credits, not to mention the resulting penalties, without expressly providing so. Such authorization was to be found, if at all, in Congress's unstated "plan." What makes this inconsistency all the more striking is the Court's failure to engage with the precedents expressly counseling against assuming that Congress authorizes expenditures or tax benefits obliquely.¹⁵⁴

Electing not to apply *Chevron* in *King* also allowed the majority to sidestep the fact that the IRS had never provided much of an explanation for its rule. As noted above, the IRS offered no more than a cursory and conclusory justification for its interpretation of Section 36B, failing to provide any substantive response to critical public comments on the proposed rule. Compared with the sort of legal analysis that typically accompanies important rulemakings of this type, the IRS's concise statement was utterly lacking. Under the

¹⁵³ The same may be true of Justice Kennedy, who authored *Gonzales v. Oregon*, 546 U.S. 243 (2006) (holding that the Attorney General's interpretation of "legitimate medical purpose" under the Controlled Substance Act did not merit *Chevron* deference). Justices Ginsburg, Kagan, and Sotomayor joined Justice Scalia's broad application of *Chevron* deference in *City of Arlington v. FCC* and Justice Breyer concurred in the result. Of those joining the *King* majority, only Justice Kennedy joined Chief Justice Roberts's dissent.

¹⁵⁴ See, e.g., *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988) (citing "the settled principle that exemptions from taxation are not to be implied; they must be unambiguously proved"); see also *Yazoo & Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 183 (1889) (holding that tax credits and the like "must be expressed in clear and unambiguous terms").

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traditional standards of judicial review of agency action, it is hard to see how what the IRS did could constitute reasoned decisionmaking.

In other words, the IRS expanded its power by doing the opposite of what the ACA says, provided no justification until forced to do so by Congress and the courts, for years thereafter offered a constantly shifting series of post-hoc rationalizations, and still got away with it. The solicitor general's claim that "established by the State" was an undefined statutory term of art, for example, made its first appearance in the government's merits brief before the Supreme Court, years after the IRS rule was finalized. By assuming the role of final interpreter for itself, the Court was able to uphold the substance of the IRS rule without passing judgment on the IRS's manifestly unreasonable rulemaking.¹⁵⁵

While this approach to *Chevron* did not come at the expense of the administration's preferred outcome in *King*, it may hamper other administrative initiatives in the future. As commentators have already noted, this aspect of the *King* decision gives opponents of agency action a new arrow for their legal quivers.¹⁵⁶ When confronted with particularly ambitious agency interpretations, challengers can argue the question at issue should not be left to the agency—and the higher the stakes, the more compelling this argument will be. One example of where *King* could affect other agencies is the Environmental

¹⁵⁵ This also enabled the Court to avoid confronting the "fundamental rule of administrative law" that courts "must judge the propriety" of agency actions "solely by the grounds invoked by the agency." See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). As the *Chenery* Court explained, courts have no warrant for substituting their arguments for those offered by the agency:

If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Id. at 196.

¹⁵⁶ See Chris Walker, What *King v. Burwell* Means for Administrative Law, Notice & Comment, Yale J. Reg. (June 25, 2015), <http://www.yalejreg.com/blog/what-king-v-burwell-means-for-administrative-law-by-chris-walker>; The Obamacare Sidestep: Professor Freedman on *King v. Burwell*, Environmental Law Program (June 2015), <http://environment.law.harvard.edu/2015/06/the-chevron-sidestep/>; Cass R. Sunstein, The Catch in the Obamacare Opinion, Bloomberg View (June 25, 2015), <http://www.bloombergvew.com/articles/2015-06-25/the-catch-in-the-obamacare-opinion>.

Protection Agency's Clean Power Plan.¹⁵⁷ So while many in the Obama administration cheered the outcome in *King*, the Court's rationale may have given officials in some agencies something to worry about. Then again, it remains to be seen whether there really are five consistent votes on the Court for this approach.

VIII. Altering the Deal

King was not the first time that the chief justice would stretch the ACA's text in service of his notion of how the statute should read. Roberts's opinion in *NFIB* adopted multiple saving constructions of the statutory text so as to overcome potential constitutional infirmities. The result, as in *King*, was a statute quite different from the one Congress actually enacted.

One of the most controversial aspects of the ACA is the so-called "individual mandate"—a requirement that individuals obtain qualifying health insurance or pay a penalty. Roberts's controlling opinion in *NFIB* found the individual mandate as written—a command imposed under Congress's power to regulate interstate commerce—to be unconstitutional.¹⁵⁸ Roberts nevertheless declined to invalidate the provision because he concluded that the assessment for noncompliance could be characterized as a "tax" and therefore justified as a use of Congress's taxing power.¹⁵⁹ That Congress termed the assessment a penalty instead of a tax—and that the ACA's supporters repeatedly disclaimed that the penalty was a "tax" because it would not have passed otherwise—was not enough to let the plain text of the law guide Roberts's understanding.

Nor did it matter that this interpretation could constrain the individual mandate's operation in the future: Roberts concluded that the assessment could be considered a tax rather than a penalty because the amount was significantly less than the cost of buying coverage, and therefore was not large enough to coerce individuals into purchasing health insurance.¹⁶⁰ But that means that the mandate will be

¹⁵⁷ See Jonathan H. Adler, *Could King v. Burwell Spell Bad News for the EPA?*, *The Volokh Conspiracy*, Wash. Post (July 3, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/03/could-king-v-burwell-spell-bad-news-for-the-epa/>.

¹⁵⁸ *NFIB*, 132 S. Ct. 2566, 2600–01 (2012).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2595–96.

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less effective in fulfilling its stated purpose of preventing adverse selection.¹⁶¹ If the assessment is significantly less than the cost of purchasing qualifying health insurance, many uninsured individuals will lack a sufficient incentive to purchase insurance before they are sick. The logical response to this problem would be to increase the assessment, but Roberts's *NFIB* opinion limits Congress's ability to do so because—at some unknown amount—a higher assessment ceases to be a constitutional tax and becomes an unconstitutional penalty.¹⁶² This may have made sense to the chief justice at the time, but it is hard to square with either the statutory text or the statutory purpose he described in *King*.¹⁶³

Roberts also took liberties with the ACA's text in upholding the Medicaid expansion. Like six of his colleagues, the chief justice concluded that it was unconstitutional for Congress to condition a state's receipt of all Medicaid funding on acceptance of the ACA's Medicaid expansion.¹⁶⁴ Leveraging longstanding state participation in the Medicaid program, and reliance upon significant federal support, was impermissibly coercive.

Rather than invalidate the Medicaid expansion in its entirety, however—let alone the ACA as a whole—the chief justice opted to rewrite the relevant ACA provisions to separate the old Medicaid program from the new. Although Congress had constructed the Medicaid expansion as an extension of the existing program by simply including the expansion among the conditions imposed on receipt of all Medicaid funds, the chief justice concluded that these were in fact two separate programs that states could consider separately. The relevant statutory language was effectively replicated, with one version continuing to set conditions on receipt of old Medicaid funds and another version incorporating the conditions of the Medicaid expansion. Here again, the chief justice's opinion adopted an interpretation of the ACA at odds with the relevant statutory language in the

¹⁶¹ *King*, 135 S. Ct. at 2486 (“Congress adopted a coverage requirement to ‘minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.’” (citing 42 U. S. C. § 18091(2)(I))).

¹⁶² See Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did so Many Law Professors Miss the Boat?)*, 65 Fla. L. Rev. 1331, 1339 (2013).

¹⁶³ Cf. *King*, 135 S. Ct. at 2485–87.

¹⁶⁴ *NFIB*, 132 S. Ct. at 2601–07.

name of a never-expressed congressional plan. Again, Roberts adopted an interpretation that undermined the purpose of the relevant provisions; since *NFIB*, dozens of states have declined to implement the ACA's Medicaid expansion—which the ACA's supporters clearly sought to ensure in all 50 states.¹⁶⁵ By decoupling the Medicaid expansion from the continued receipt of traditional Medicaid funding, the chief justice made it much easier for states to refuse to participate in the expansion.¹⁶⁶

In *NFIB* the chief justice took liberties with the statutory text, even at the expense of statutory purpose, to prevent the ACA's constitutional infirmities from dooming the statute. In *King*, he took liberties with the text to prevent the ACA's political and operational infirmities from frustrating "Congress's plan." In so doing, the chief justice revealed that his willingness to stretch statutory text is not confined to cases of constitutional avoidance, and that providing a statute that "works" is as much a job for the courts as it is for Congress.

There is no indication in the statute or its legislative history that it was part of Congress's plan to enact an inflexible tax rather than a flexible penalty; or to offer states a choice of either implementing the Medicaid expansion or preserving the status quo ante; or to make tax credits available in federal exchanges. The only "plan" that makes sense of Roberts's saving constructions is a desire to prevent the ACA's constitutional, political, and operational infirmities from threatening its survival.

¹⁶⁵ PPACA proponents emphasized that the Medicaid expansion was not a new program, but a change to the existing Medicaid program, which every state had implemented. See Brief of Senate Majority Leader Harry Reid, House Democratic Leader Nancy Pelosi, and Congressional Leaders and Leaders of Committees of Relevant Jurisdiction as Amici Curiae in Support of Respondents (Medicaid) at 6, *NFIB v. Sebelius*, 132 S. Ct. 2566, (2012) (No. 11-400). This is the only way to understand the purpose of the minimum income requirement for tax credit eligibility. See 26 U.S.C. § 36B.

¹⁶⁶ See Noam N. Levey, *Court's Decision Could Widen Medicaid Gap*, L.A. Times, June 29, 2012, available at <http://articles.latimes.com/2012/jun/29/nation/la-na-court-impact-20120629>; Stacey Butterfield, *Changes to Medicaid Divide States, Doctors*, ACP Internist (2013), <http://www.acpinternist.org/archives/2013/10/medicaid.htm> (quoting Sara Wilensky as saying "the toughest thing about Medicaid expansion, post-Supreme Court decision, is that what was supposed to be uniform across the country is now being decided on a state-by-state basis."). As of July 20, 2105, 19 states had refused to expand Medicaid under the PPACA.

IX. Conclusion

Whether the members of Congress who supported the ACA were aware of it or not, “the most natural reading of the pertinent statutory phrase” shows they voted to present states with a choice. States could either create health insurance exchanges, in which case eligible citizens would receive tax credits, and many individuals and employers who failed to purchase coverage would face penalties, or states could choose not to create exchanges, in which case residents would receive no subsidies, but face fewer penalties. Like the choice Congress presented states via the Medicaid expansion, this choice was stark. No doubt few in Congress anticipated states would act like “separate and independent sovereigns” and “defend their prerogatives by adopting the simple expedient of not yielding to federal blandishments.”¹⁶⁷ What makes the ACA unique is not that it offered states this sort of choice, but that a majority of states chose not to cooperate.

Chief Justice Roberts framed the Court’s *King* ruling as a service to “democracy.” “[I]n every case,” he wrote, the Court “must respect the role of the Legislature, and take care not to undo what it has done.”¹⁶⁸ Yet that is precisely what the majority did. By elevating an unexpressed congressional plan over the plan Congress expressly laid out in statute, the majority altered the deal Congress offered states. Indeed, the Court went to great lengths to do so.

Reaching its conception of Congress’s plan required the majority to change the meaning of “established by the State” from its natural or plain meaning; to change the meaning of that phrase in some parts of the statute but not others; to treat a universal definition as conditional, and a conditional definition as universal; to conclude that Congress would allow adverse selection in long-term-care insurance, but not health insurance; to ignore that Congress indeed tolerated significant adverse selection in health insurance; to isolate select statutory text for the purpose of casting doubt on the operative text; to ignore all other text and context that eliminate such doubts; to rely on legislative history that supported its understanding of Congress’s plan, but ignore legislative history that supports the plain

¹⁶⁷ NFIB, 132 S. Ct. 2566, 2603 (2012) (internal quotation marks omitted).

¹⁶⁸ *King*, 135 S. Ct. at 2496.

meaning; and to make broad assumptions about the way Congress legislates that are contrary to what we actually observe.

If it is “possible” to interpret “established by the State” to mean “established by the State or federal government,” are there any provisions of the ACA that cannot be rewritten to fulfill “what we see as Congress’s plan”? The ACA explicitly denies tax credits to those who purchase coverage outside of an exchange, to many dependents who do not have access to “affordable” employer coverage,¹⁶⁹ and even to those with incomes below 100 percent of the poverty line, many of whom aren’t eligible for Medicaid. If “Congress’s plan” is simply to “improve health insurance markets,” should those limitations on tax-credit eligibility stand in the way? Should the IRS disregard all ACA provisions that limit eligibility for tax credits? Will the Court ratify those revisions of the statute?

These questions are not academic. The IRS has already expanded eligibility for tax credits to certain undocumented immigrants, individuals below 100 percent of the poverty line, and others in direct contravention of the clear limits imposed by Section 36B.¹⁷⁰ Is pretending that 99 percent is greater than 100 percent also part of Congress’s plan? Those tax credits will trigger penalties against employers. Must those employers also pay taxes from which the ACA clearly exempts them?

The only answer the majority provides—the only limitation it envisions on the judicial power to override plain text in the service of “what we see as Congress’s plan”—is what is “at all possible.” That stands in stark contrast to the rule laid out by five of the six justices in the *King* majority just one year earlier:

[T]his Court does not revise legislation...just because the text as written creates an apparent anomaly as to some subject it does not address. Truth be told, such anomalies often arise from statutes...Rejecting a similar argument that a statutory anomaly...made “not a whit of sense,” we explained in one recent case that “Congress wrote the statute it wrote”—

¹⁶⁹ Tricia Brooks, *The Family Glitch*, Health Affairs, Nov. 10, 2014, available at http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=129 (“Some low-to-moderate-income families may be locked out of receiving financial assistance to purchase health coverage through the Marketplaces.”).

¹⁷⁰ See, e.g., Andy S. Grewal, *Lurking Challenges to the ACA Tax Credit Regulations*, Bloomberg BNA Tax Insights, 98 DTR J-1 (May 2015).

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meaning, a statute going so far and no further. . . . This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that...Congress “must have intended” something broader.¹⁷¹

It is also not much of a limitation. If judges may deprive select words of all meaning, construe select phrases to mean their opposite, ignore Congress’s express instructions, and treat text, context, legislative history, and a statute’s competing purposes as buffets from which they may select only the items that serve “what we see as Congress’s plan,” then judges will find very little is impossible. It remains to be seen whether this approach to statutory interpretation will be applied across the board, or is limited to the law “[w]e should start calling . . . SCOTUSCare.”¹⁷²

The Court’s decision to disregard Congress’s express plan has deprived states of a power Congress granted them, and that many states were eager to use. It has altered the balance of power between the federal government and the states. It has reduced democratic accountability for the ACA, and perhaps other acts of Congress. It has subjected tens of millions of employers and individuals to penalties from which the ACA plainly exempts them.¹⁷³ And it creates uncertainty about whether citizens can trust that federal statutes mean what they say.¹⁷⁴

¹⁷¹ *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2033–34 (2014) (internal citations omitted).

¹⁷² *King*, 135 S. Ct. at 2507 (Scalia, J., dissenting); see also *id.* at 2497 (“[N]ormal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.”). Cf. Ilya Shapiro, *Scalia’s Obamacare Argument Is Stronger Than Roberts’*, CNN.com, June 26, 2015, <http://www.cnn.com/2015/06/26/opinions/shapiro-supreme-court-obamacare> (“Scalia renamed the law at issue ‘SCOTUScare,’ but really it deserves the moniker RobertsCare.”).

¹⁷³ See Michael F. Cannon, *Benefits Of ‘King v. Burwell’: More Jobs, Higher Incomes & 70 Million Freed From Illegal Taxes*, *Forbes.com* (June 24, 2015); Michael F. Cannon, *King v. Burwell Expanded Obamacare Even More Than You Know*, *National Review Online* (July 29, 2015).

¹⁷⁴ See *Star Wars* *supra* note 1 (“This deal is getting worse all the time.”); see also *Robot Chicken: Star Wars Episode II* (Adult Swim broadcast, Nov. 16, 2008), https://youtu.be/WpE_xMRiCLE (illustrating the perils of *post hoc* deal alterations).

Responses by Michael A. Carvin (Jones Day) to Questions for the Record
Senate Judiciary Committee
Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts
Hearing: “Rewriting the Law: Examining the Process that Led to
the Obamacare Subsidy Rule”
Thursday, June 4, 2015

I. Question from Senator Vitter.

Q: Ms. Wydra and Mr. Weiner invoked Principles of Interpretation, particularly the Presumption Against Ineffectiveness and the Presumption Against Absurdity, in their justifications for the IRS rule subsidizing coverage for individuals from States that opted not to create exchanges. Do you think these principles are applicable in this circumstance? Why or why not?

A: The principle of interpretation that controls this case is a fundamental one: “If the statute is clear and unambiguous ‘that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’” *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (quoting *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984)). The text of 26 U.S.C. § 36B is clear and unambiguous that ACA subsidies are available only for insurance purchased through an Exchange “established by the State under § 1311” of the ACA, and not through an Exchange established by HHS under § 1321 of the Act. That is therefore the end of the matter.

Ms. Wydra and Mr. Weiner invoked the principle that departure from statutory text is permitted in the “extraordinary” circumstance in which that text creates an objectively absurd result. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 494 (D.C. Cir. 2004) (Roberts, J.). The absurdity must be “so clear as to be obvious to most anyone,” such that it is “quite *impossible* that Congress could have intended the result.” *Pub. Citizen v. Dep’t of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring in judgment) (emphasis added). That principle is completely inapplicable here. Providing subsidies only for coverage through state-established Exchanges is plainly not absurd. Given the plausible concern that at least some states would be reluctant to undertake the thankless job of establishing and operating Exchanges, offering them an incentive—billions of dollars in “free” federal subsidies to their citizens—is a most sensible tactic, and one that Congress often uses and used elsewhere in the ACA itself (such as with respect to its expansion of Medicaid). Put differently, it makes good sense not to treat states that reject the request to establish Exchanges just as favorably as those who agree to bear that burden. Indeed, treating them equally is plainly not sensible, as it eliminates any incentive to establish Exchanges and thus lead to most states declining to do so.

For the same reason, construing the ACA in accordance with its plain text does not render any part of the Act “ineffective.” To the contrary, § 36B’s subsidy condition serves the eminently sensible purpose of inducing states to create Exchanges, as Congress wanted.

II. Question from Senator Coons

Q: You testified that Treasury’s rulemaking qualified as “arbitrary and capricious” and therefore, in your view, not subject to *Chevron* deference, because you asserted that Treasury was motivated to achieve the preferred policy outcome of the administration when developing its rule. There remains, however, overwhelming evidence that Congress both intended the bill to assure “Quality, Affordable Health Care For All Americans” and understood the tax subsidies to be available to all Americans, regardless of whether they access coverage through HealthCare.gov.

Is it ever appropriate for agencies, when interpreting statutes, to be guided by Congress’ preferred policy outcome? When Congress’ preferred policy outcome is in accord with that of the administration, does taking guidance from that policy preference become inappropriate?

A: Contrary to the premise of the question, there is *no* evidence whatsoever that anyone in Congress intended, at the time of the ACA’s enactment, that tax subsidies would be available through the federal Exchange. The best evidence of Congress’s intent is, of course, the language that it used in the statute. And nobody, including the Solicitor General during the Supreme Court argument, has been able to explain why Congress used the language it did in § 36B (limiting subsidies to Exchanges “established by the State under § 1311” of the ACA) if Congress actually “intended” just the opposite. Nor has anyone been able to explain how Congress could have expected states to establish the Exchanges—as many Senators insisted that they do—without offering them any incentives to do so. Nor is there *any* contemporaneous legislative history in which *any* Member of Congress says that subsidies will be available through the Exchange established by HHS. The only person involved in the drafting of the Act who addressed this issue prior to institution of litigation was Jonathan Gruber, one of the leading ACA architects and an HHS consultant, who affirmed that “if you’re a state and you don’t set up an Exchange, that means your citizens don’t get their tax credits.” Jonathan Gruber at Noblis, at 32:00, Jan. 18, 2012, <https://www.youtube.com/watch?v=GtnEmPXep0&t=31m25s>. Of course it is true that Congress in general wanted “Quality, Affordable Health Care For All Americans,” but the way it chose to achieve that goal was to incentivize states to establish Exchanges by limiting subsidies to coverage purchased through such state-established Exchanges. The plain text of the Act is therefore fully consistent with that general purpose.

To answer your question directly, it may sometimes be appropriate for agencies to be guided by Congress’s *expressed* policy views *when construing ambiguity* in statutes. But when a statute’s text is clear, “vague notions of a statute’s ‘basic purpose’ are ... inadequate to overcome the words of its text.” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). Rather, the critical question is “not what Congress ‘would have wanted’ but what Congress enacted.” *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). Because § 36B is clear that subsidies are only available through Exchanges “established by the state,” rejecting that text to achieve a policy goal desired by the Administration is lawless and illegitimate.

III. Question from Senator Hatch

Q: You're no doubt familiar with the *Chenery* doctrine, which says that government lawyers may not rely on post hoc rationalizations to defend agency decisions. That is, government lawyers may not defend agency judgments on grounds that the agency did not originally—and explicitly—rely upon when making its decision. In your written testimony, you say that nothing in the IRS subsidy rule resembles the “term of art” theory the government advanced in *King v. Burwell*. Can you elaborate on what you mean by this? And if you're right, does that mean the subsidy rule fails under *Chenery*?

A: You have correctly stated the venerable *Chenery* principle, which the IRS certainly violated in this case. When the IRS promulgated its rule, it explained in conclusory terms that the “statutory language of section 36B and other provisions of the [ACA]” support its interpretation, and further stated that “the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit” to Exchanges established by states. 77 Fed. Reg. 30,377, 30,378 (May 23, 2012). But when the *King v. Burwell* legislation reached the Supreme Court nearly three years later, the Solicitor General had devised the mind-bending theory that the phrase “established by the State” in the ACA is somehow a “term of art” that includes Exchanges created by HHS (Govt. Br. 20-23)—even though the ACA nowhere says anything of the sort and even though the IRS had never adopted that strange construction previously as to any use of that phrase in the ACA. This was a *post hoc* invention, contrary to *Chenery*.

But the flaws in the IRS subsidy rule run deeper than *Chenery*, because even if the IRS *had* relied on the Solicitor General's new “term of art” theory from the start, that theory is meritless and contrary to the statutory text. While it would be convenient, for an agency seeking to rewrite a statute, to treat an English phrase as a term of art on the Government's mere say-so, it cannot. Departure from ordinary meaning is legitimate only if Congress invoked a phrase with “a well-known meaning at common law or in the law of this country.” *Standard Oil v. United States*, 221 U.S. 1, 59 (1911). Of course, “established by the State” has no such “well-known meaning” distinct from its plain-English one. And nothing in the ACA itself indicates that Congress intended to use the phrase in that counterintuitive, countertextual way in that law—even though other ACA provisions adopt special “definitions” of words or phrases. *E.g.*, 42 U.S.C. § 18024(d) (“‘State’ means each of the 50 States and the District of Columbia.”); 42 U.S.C. § 18043(a)(1) (territory that establishes Exchange “shall be treated as a State”).

Accordingly, unlike the typical *Chenery* case, there is no basis here to remand the rule to the IRS for any further consideration: That rule is clearly foreclosed by the ACA's plain text and could not be revived under *any* agency rationale or theory.

IV. Questions from Senator Cruz

Q: During her live hearing testimony on June 4, 2015, Elizabeth B. Wydra, chief counsel for the Constitutional Accountability Center, made several arguably questionable claims, including the following:

- That no one involved in drafting PPACA “understood the law to preclude tax credits for residents of states that opted to use the federal fallback provided to them in the law instead of electing to set up an exchange for themselves.”
- That members of Congress and the relevant committees “all assumed that tax credits would be available in every state on any exchange without making a distinction between state-run and federally-facilitated exchanges.”
- That the context of the language at issue in this case supports a reading that would necessarily extend premium tax credits to individuals who obtained their health insurance from federally run exchanges.
- That any claim that PPACA requires tax premium credits only go to individuals who purchased their health insurance via state-run exchanges would “subvert[PPACA’s] structure and design and basic purpose and render[] important provisions absurd.”
- That the “plain text” of PPACA requires the extension of premium tax credits to all individuals who purchase their health insurance on any exchange, regardless of whether that exchange was created by a state or the federal government.

Please respond to Ms. Wydra’s above assertions, as necessary.

A: None of those assertions is accurate. Notably, the only person involved in drafting the ACA who spoke out about the availability of subsidies on federal Exchanges prior to the institution of litigation was Jonathan Gruber, one of the leading ACA architects and an HHS consultant, and he affirmed that “if you’re a state and you don’t set up an Exchange, that means your citizens don’t get their tax credits.” Jonathan Gruber at Noblis, at 32:00, Jan. 18, 2012, <https://www.youtube.com/watch?v=GtnEmPXEP0&t=31m25s>. There are no contrary contemporaneous indications from any Member of Congress or committee (perhaps in part because the ACA was constructed largely behind closed doors, without much meaningful substantive participation by Members of Congress). If anything, however, the Senate Health, Education, Labor, and Pensions Committee confirmed that Congress was contemplating conditions on subsidies; its version of the bill would have conditioned subsidies for a state’s residents on the state’s adoption of certain “insurance reform provisions” and agreement to sponsor coverage for state and local employees. S. 1679, § 3104(a), (d), 111th Cong. (2009). If a state did not take those steps, “the residents of such State shall not be eligible for credits.” Id. § 3104(d)(2).

As to the “context” of the language at issue, it only *confirms* § 36B’s plain text. Context shows that Congress elsewhere used broader phrases that clearly encompass HHS Exchanges, but did not do so in § 36B. *E.g.*, 42 U.S.C. § 18032(d)(3)(D)(i)(II) (ACA § 1312(d)(3)(D)(i)(II)). Context shows that Congress expressly deemed other non-state entities to be “states,” but again, chose not to do so for HHS. 42 U.S.C. § 18043(a)(1) (ACA § 1323(a)(1)) (a territory “shall be treated as a State” for certain purposes). Context shows that Congress did not treat state and HHS Exchanges as indistinguishable; it referred distinctly to both types of Exchanges in another subpart of § 36B itself. 26 U.S.C. § 36B(f)(3) (referring to an “Exchange under Section 1311(f)(3) or 1321(c)”). Finally, context shows that § 36B’s formula for computing the value of the subsidy, far from being a “mousehole” in which Congress would not have naturally limited subsidies, is the provision that sets the substantive parameters of the subsidy in *all* relevant respects.

Ms. Wydra’s claim about the ACA’s purpose is doubly wrong. At the outset, “vague notions of a statute’s ‘basic purpose’ are . . . inadequate to overcome the words of its text.” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). In any event, the plain text of the ACA is fully consistent with Congress’s purposes. While Congress surely wanted subsidies, § 36B’s plain text is not at all inconsistent with this desire because it does not *eliminate* such subsidies; it merely *conditions* them on states creating Exchanges. Such a condition is the best (and probably only) way to accomplish *both* the Act’s goals of widely available subsidies *and* state-established Exchanges. Nor does this reading render any other provision of the Act absurd or unworkable.

Finally, Ms. Wydra’s claim about the ACA’s plain text is mystifying. The Act could hardly be any clearer that subsidies are available only for coverage purchased through an Exchange “established by the State under § 1311” of the ACA. There is simply no way to read those words, consistent with the English language, as authorizing any subsidies for coverage purchased through an Exchange established by the HHS under § 1321 of the Act.

- Q: Are there any other points or issues that were not explored (or sufficiently explored) during the hearing that you would like to bring to the Subcommittee’s attention?
- A: No. I am grateful to the Subcommittee for the opportunity to testify regarding this important rule-of-law issue.

Senator Cruz Questions for the Record for
Andy Grewal, Associate Professor of Law, University of Iowa College of Law
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
“Rewriting the Law: Examining the Process That Led to the ObamaCare Subsidy Rule”
Thursday, June 4, 2015

General Question

1. Are there any other points or issues that were not explored (or sufficiently explored) during the hearing that you would like to bring to the Subcommittee’s attention?

Response of Professor Andy Grewal

At the hearing, Senator Sessions correctly pointed out that the law (i.e., the ACA) does not broadly command the President to provide health coverage to "all Americans." In her testimony, Ms. Wydra purportedly refuted Senator Sessions' comments, observing that the heading of Title I refers to coverage for "all Americans."¹

The Subcommittee should be aware that heading or other descriptors in an Act do not reflect positive law. The President cannot merely look at an Act's almost-always broad and aspirational heading and enforce that heading, to the exclusion of the law's operative provisions.

It would be a strange world if thousands of pages of legislative text could be ignored in favor of the soundbite captured in the heading of a bill. I am not aware of any legal scholar or jurist, from any part of the ideological spectrum, who disputes this. Senator Sessions correctly noted that the ACA does not blindly command the President to provide health care to all Americans, but instead contains actual laws that must be observed. Ms. Wydra's response to Senator Sessions was misguided.

Because *King v. Burwell* is a tax case, I will also bring Section 7806 of the tax code to the Subcommittee's attention. That statute flatly denies legal effect to descriptive material in the tax code. This provides analogous support for the commonsense view that the ACA's provisions, not its headings, reflect the law of the land.

¹ See also <http://www.msnbc.com/rachel-maddow-show/the-importance-setting-sessions-straight> (discussing Sessions - Wydra interaction).

- Ms. Wydra and Mr. Weiner invoked Principles of Interpretation, particularly the Presumption Against Ineffectiveness and the Presumption Against Absurdity, in their justifications for the IRS rule subsidizing coverage for individuals from States that opted not to create exchanges. Do you think these principles are applicable in this circumstance? Why or why not?

Response of Prof. Andy Grewal

Neither of the suggested canons should play any role. If credits were denied for participants on federally-run exchanges, Section 36B would not be ineffective. It would continue to allow credits for participants on State-established exchanges. Consequently, the IRS rule is simply not needed to give effect to the statute.

The absurdity canon also plays no role. As Chief Justice Marshall long ago explained, that canon allows for a court to ignore the plain meaning of a statute when "the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Sturges v. Crowninshield*, 17 U.S. 122, 203 (1819) (Marshall, Ch. J.)).

I do not think that all of humanity would unite in condemning a holding for the challengers in *King v. Burwell*. Denying credits to participants on federally-run exchanges may reflect bad policy, but it's not an absurd result, given that credits could be obtained if States were to establish insurance exchanges. Additionally, the challengers raise concerns regarding the imposition of penalties, and a holding that protects them from such penalties does not come close to the level of absurdity outlined by C.J. Marshall.

A holding against the IRS would lead to a difficult, but not absurd, result for many participants on federally-run exchanges. As I've previously written, I believe that the legislature should act quickly to address the hardships faced by these innocent consumers. However, a legal decision that favors the challengers would not be absurd.

Questions for the Record from Senator Coons

June 4, 2104 Hearing of the Senate Judiciary Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

Questions for Professor Grewal

You testified that you “do not take any position on the validity of the ObamaCare subsidy rule.”

You have, however, extensively studied and written about §36B.

1. Do you dispute that the ACA was broadly and perhaps unanimously understood to mean what Treasury says it means at the time the law was passed?

- A. I have not studied whether statements made contemporaneously with the ACA's enactment are consistent with the Treasury regulation. So, I cannot opine whether Treasury's approach is consistent with the contemporary understanding. In any event, I am not inclined to make inquiries into that issue, because I do not believe that the subjective statements of individual legislators or legislative committees can bear on the objective meaning of a statute enacted by the whole Congress and signed by the President.

If a Gallup poll showed that each legislator wanted to restrict subsidies to State-established exchanges, I would give those statements no weight, except to the extent that those sentiments were expressed in the text. I would similarly dismiss a poll showing that the legislators wanted to extend subsidies to federally-established exchanges, again except to the extent that those sentiments were expressed in the text. I also attach no interpretive weight to statements made by purported architects of the ACA.

2. Have you considered or studied the arguments made by the government and amici, insofar as they conclude that the text of the statute permits the availability of premium tax credits to participants on federally-run Exchanges?

- A. I have generally considered the arguments, but not in the same level of detail that I have studied other issues related to Section 36B.

3. Do you have an opinion as to whether to text of the statute permit the availability of premium tax credits to participants on federal-run Exchanges? If so, what is your opinion? If you, as an expert in §36B, cannot conclude that the text forecloses such an interpretation, does that not strongly suggest that such an interpretation is reasonable?

- A. I do not have any final opinion on whether the text of the statute permits the availability of premium tax credits to participants on federal-run Exchanges. I have studied Section 36B in considerable detail and believe that that statute, standing alone, allows for credits only on State-established exchanges. However, the IRS argues that Sections 1311 and 1321 of the ACA, read in conjunction with Section 36B, grants credits

to participants on federal-run exchanges. I have not studied Sections 1311 and 1321 in fine detail and thus cannot offer a scholarly assessment of the government's arguments.

I started following *King v. Burwell* by accident, when last winter I was consulted on a retroactivity issue related to the Court's eventual decision.¹ By this point, I did not think it worthwhile to focus my scholarly efforts on the Question Presented in that case. There was already much scholarly commentary on the *King v. Burwell* issue, and it was too late for me to prepare an *amicus* brief. But with my interest in Section 36B triggered, I decided to comment on the case generally and later exhaustively studied the statute for new, lurking issues.

If I closely studied Sections 36B, Sections 1311, and 1321 and was unable to reach a decision about the unambiguous meaning of the statute, that would certainly lead me to support *Chevron* deference for the Government's position. But I have not made that study and my hesitation to opine on that issue should establish no inferences. If I were forced to decide *King v. Burwell*, notwithstanding my incomplete analysis of all relevant authorities, I would probably conclude that the challengers' interpretation was better than the IRS's, but that the IRS's interpretation could nonetheless be a reasonable one.

I prefer to definitively opine on major issues only after having extensively studied them, as I have done so regarding the 3 circumstances of IRS overreach that I presented in my original testimony. I also repeat my skepticism that, whether or not the Treasury regulation on the federal-exchange issue reflects a valid interpretation of the statute, it seems unlikely that the IRS considered itself bound by the statutory language, given its open re-writing of Section 36B in other contexts.

I thank Senator Coons for his thoughtful attention to these important matters.

¹ That consultation triggered a scholarly interest in *King v. Burwell*, which resulted in a published article. See Grewal, *How King v. Burwell Creates Tax Problems for Consumers and What The Treasury Can Do About It*, 32 Yale Journal of Reg. Online (2015).

Questions for the Record from Senator Coons
June 4, 2104 Hearing of the Senate Judiciary Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

Question for. Mr. Weiner

- During the hearing, multiple members and witnesses claimed that the premium tax credit eligibility requirements in §36B illegally impose taxes on millions of Americans. Can you evaluate that assertion?

RESPONSE:

The claim is untrue, for at least four reasons.

First, the Treasury Department's rule on premium tax credits is not merely a reasonable interpretation of the ACA. It is the right interpretation. There is no illegal imposition of any sort.

Second, the Treasury Department rule provide tax credits. It does not tax anyone.

Third, if the claim is that making credits available to individuals subjects millions of employers to a tax penalty for not providing minimum coverage, it is still wrong. The employer mandate applies only to businesses employing 50 or more people. In 2010, there were 211,000 such businesses. Let's assume, conservatively, that half of those businesses were in States that established their own Exchanges. On that assumption, 105,000 businesses are subject to the employer mandate in States with Federal Exchanges. Of those businesses, 96 percent offer insurance. Thus, some 4200 do not offer minimum coverage and are potentially subject to a penalty if an employee qualifies for a subsidy on an federal exchange. That falls far short of millions. Most importantly, those employers *should* be making insurance available to their employees.

Fourth, if the claim is that the subsidies, by bringing the cost of insurance below the statutory exemption from the individual mandate, subjects them to the a tax penalty, the answer is that they only pay a tax if they do not obtain insurance. The ACA is fulfilling its goal to make insurance affordable to such individuals and families, and the vast majority of them will jump at the opportunity to become insured.

Senate Committee on the Judiciary
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
“Rewriting the Law: Examining the Process That Led to the ObamaCare Subsidy Rule”

Questions for the Record: Senator Amy Klobuchar

1) Question for Mr. Weiner and Ms. Wydra:

A main goal of the Affordable Care Act is to expand coverage to all Americans.

- How would only allowing subsidies in state-based exchanges and not in the federal exchange affect coverage?

RESPONSE OF ROBERT N. WEINER:

Allowing subsidies in only state-based exchanges and not federal exchanges would contract, rather than expand health insurance coverage. A study by the Urban Institute showed that 6.3 million people in States with Federal Exchanges would lose the ACA subsidies they receive to enable them to afford health insurance. Without the subsidy, the cost of insurance for most of these people would then exceed 8% of their income, exempting them from the individual mandate. No longer able to afford insurance, millions of people would give it up. The individual market for insurance in those States would decline by 70 percent.¹

But that is merely the initial impact. The youngest, healthiest people would be the most likely to drop their insurance. The sickest people would be most likely to keep it. The ACA bars insurers from terminating the coverage of sick patients or denying coverage to anyone based on their pre-existing illness. Those reforms were among the most important and popular adopted in the ACA, and it is unlikely to be repealed. Thus, extinguishing subsidies in States with Federal Exchanges would leave insurers locked into covering a less healthy population that incurs greater medical costs and is consequently more expensive to insure. According to the Urban Institute, these changes in the insurance risk pool would increase the price of insurance by 55% in the individual market, putting coverage beyond the reach even of those who were previously received no subsidies because their incomes were too high. They, too, would have to drop their coverage. All in all, more than 8.3 million people would lose their insurance, leaving them sicker, less secure financially, and more burdened by health care costs.²

¹ Linda Blumberg, Matthew Bueltegens, and John Holahan, “Overview of the Potential Effects of a Supreme Court Finding for the Plaintiffs in the Pending *King v. Burwell* Case,” Urban Institute (June 2015) available at <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000261-Overview-of-the-Potential-Effects-of-a-Supreme-Court-Finding-for%20the%20Plaintiffs-in-the-Pending-King-v.-Burwell-Case.pdf>

² See U.S. Department of Health and Human Services, *HEALTH INSURANCE COVERAGE AND THE AFFORDABLE CARE ACT* (May 5, 2015) available at http://aspe.hhs.gov/health/reports/2015/uninsured_change/ib_uninsured_change.pdf

- Would such a change run counter to the stated goal of the Affordable Care Act?

Yes. Congress manifestly did not intend the mean-spirited, self-destructive result that the ACA opponents advocate. The goals that Congress articulated for the ACA.

- The name of the law is the “Patient Protection and *Affordable Care Act*.” The opponents’ interpretation makes care less affordable.
- The heading for Title I of the Act is “Quality, Affordable Care for *All* Americans.”
- Subtitle A of Title I bears the heading, “Immediate Improvements in Health Care Coverage for *All* Americans.”
- Subtitle C is “Quality Health Insurance Coverage for *All* Americans.
- Subtitle D is, “Available Coverage Choices for *All* Americans.”
- Subtitle E is called, “Affordable Coverage Choice for *All* Americans
- Title X of the Act is headed, “Strengthening Quality Affordable Health Care for *All* Americans.”

“All Americans” does not mean “some Americans.” It does not mean Americans only in States that run their own Exchanges. “All” means all, without geographic limitation.

Congress also stated its purpose clearly in the findings it adopted supporting the individual mandate. The ACA says in Section 1501(a)(1)(D) that the mandate “achieves near-universal coverage.” Subsection (E) predicts that the poorer health and shorter lifespan of the uninsured causes economic losses of \$207 billion a year, which the mandate will lessen “by significantly reducing the number of the insured.” Likewise, Subsection (F) posits that the mandate will lower health insurance premiums, also by “reducing the number of the uninsured,” while Subsection (G) forecasts that the Act will improve financial security by “significantly increasing health insurance coverage.” Subsections (I) and (J) declare the objective of the Act to broaden the health insurance risk pool and lower administrative costs, again, by “significantly increasing health insurance coverage.”

The school of statutory interpretation known as textualism focuses on the text of the statute as the sole indicator of Congressional intent. Whether one accepts that approach totally, partially, or not at all is irrelevant in this case, because the text of the statute leaves no doubt of Congress’s intent. The ACA stated its purposes over and over again, in statutory language that both Houses enacted and that the President endorsed. No legitimate mode of statutory interpretation permits, much less dictates, the ACA opponents’ willful blindness to expressly codified statutory goals

2) Question for Mr. Weiner

In your written testimony you cite previous work by Justice Scalia that argues that statutory interpretation depends on context.

- Based on your experience with statutory interpretation, would limiting subsidies to state-run exchanges make sense in the context of the full law?
- Is it reasonable that the IRS would interpret the law to allow for people in all states to have access to subsidies?

The Treasury Department's interpretation of the law is reasonable because it implements the definitions Congress adopted and thereby enables the statute to function.

Congress defined "Exchange," as an "Exchange established by the State under Section 1311." To show that "Exchange" was a defined term, Congress capitalized the word throughout the ACA.

Section 1321 of the Act states that if a State does not establish an Exchange, as Section 1311 requires, the Secretary of HHS shall "establish such Exchange." To see what this provision means, we need only substitute the definition of "Exchange" for the word itself in Section 1321. The Section would then provide that if a State does not establish an Exchange, the Secretary shall establish "such Exchange established by the State under Section 1311." The reasonable conclusion this language supports is that an Exchange established by the Secretary *qualifies* as an Exchange established by the State. The State, in other words, fulfills the requirement under 1311 to establish an Exchange by opting to have the Federal Government step into its shoes. To read the provision otherwise, as the opponents of the ACA do, would require the Secretary to perform an impossible act -- establishing an entity established by the State.

Such a reading not only makes 1321 itself nonsensical, but renders many other provisions of the ACA inoperative. For example, under Section 1312(d)(3)(C), only "qualified individuals" may purchase insurance on an Exchange. Section 1321(f)(1)(A)(ii) provides that a "qualified individual" is one who resides in the State "that established the Exchange." Unless we recognize that a State establishes an Exchange by having the Federal Government step into the State's shoes, then there can be no qualified individuals in States with Federal Exchanges. Applying logic rather than ideology, no one can seriously argue that Congress intended to create Exchanges with no customers.

The interpretation of the ACA opponents results in at least 50 similar anomalies, ably chronicled in an article by Professors Timothy Jost and James Engstrand.³

³ Timothy Jost and James Engstrand, "Anomalies in the Affordable Care Act that Arise from Reading the Phrase 'Exchange Established by the State' Out of Context," 23 *U. Miami Bus. L. Rev.* 249 (2015).

- You mentioned in your testimony that there is a strong presumption for courts to read statutes to be effective, citing a book by Justice Antonin Scalia.
 - Is the book you e entitled *Reading Law: The Interpretation of Legal Texts*?

Yes

- If so, Justice Scalia and coauthor Brian Garner discuss the Presumption Against Ineffectiveness as a Principle of Interpretation. Is this the portion of the book you are referencing?

Yes

- If so, this presumption is described in the book as, “*A textually permissible interpretation* that furthers rather than obstructs the document’s purpose...” Because the plain meaning of the statute in question clearly states that only States that create their own exchanges may gain federal subsidies, which precludes any other interpretation without ambiguity, how do you reconcile your contention with Justice Scalia’s description of this principle that you cited in your testimony?

RESPONSE:

As I stated in my testimony, the presumption in favor of effectiveness dictates adoption of a “*textually permissible* interpretation that furthers rather than obstructs” the statutory purpose. The qualifying phrase “textually permissible” precisely embodied my point. Under the rule articulated by Scalia and Garner, the ACA opponents must show that the Treasury Department’s interpretation is *impermissible* – not undesirable, not awkward or suboptimal, but impossible. They must show that no one could rationally read the statute that way. Here, not only the Treasury Department, but also six Judges, at least four Justices, five leading experts on statutory interpretation, the Senate and House sponsors of the ACA, key Republican and Democratic staffers involved in drafting it, 22 states and the District of Columbia, the American Cancer Society, the largest association of health insurers, the American Heart Association, and many, many others read the statute the same way the Treasury Department does. How could all these individuals and institutions read the statute in a way that it cannot conceivably be read? There are only three possible answers. Either none of them can read, or all of them are dishonest, or the premise of the question is wrong. The first two options are implausible, leaving the third option as the answer -- the premise of the question is wrong. The Treasury Department’s reading of the statute *is* permissible.

- You said that healthcare price inflation is at its lowest point in fifty years and the rate of increase in insurance premiums has declined under the Affordable Care Act, however, that data is cushioned by the substantial increase in newly covered individuals that receive subsidies. The Obama administration released data showing that many middle-class Americans and their families with health insurance bought under the Affordable Care Act could face substantial price increases this year (as much as 20 percent). Isn't it true that the marker for the success of this act is its effect on the middle class, the strength of which is the leading indicator for economic health?

The vast majority of middle class Americans obtain insurance through their workplace. The prices in that market are largely unaffected by the ACA's reforms, because most of that insurance was already compliant.

Claims of double-digit increases in the cost of insurance sold on the Exchanges reflect an exercise in cherry-picking. For example, one legislator claimed that BlueCross/Blue Shield in Montana was increasing its rates by 23% in 2016. In fact, the company is asking for large increases on only two plans it intends to offer in Montana. Currently, BlueCross/BlueShield sells 50 plans in the State.¹ In addition, a recent study shows that in fact, the proposed 2016 price increases for health insurance sold on the Exchanges are relatively modest.²

- What is your response to Mr. Carvin's contention that the model that was followed in the ACA for the subsidies was precisely the model for Medicaid expansion and that the logic was the same, meaning that subsidies were conditioned on the States setting up their own exchanges just like Medicaid expansion was conditioned on States doing certain things?

The contention is wrong. Under Medicaid, HHS has the right to cut off or not grant Medicaid funds if a State does not comply with the conditions of the grant. In other words, with regard to HHS's authority, if a State does not have a compliant Medicaid program, it has *no* Medicaid program. There is no federal backup system.

¹Eric Whitney, "Health Insurance Premiums Will Go Up in 2016, But by How Much?" NATIONAL PUBLIC RADIO (June 12, 2015) available at <http://www.npr.org/sections/health-shots/2015/06/12/413073921/health-insurance-premiums-will-go-up-in-2016-but-by-how-much>

² Caroline Pearson, "Lowest-Cost Exchange Premiums Remain Competitive in 2016; Consumers may be able to keep increases small by selecting a low-cost silver option," Avalere Health LLC (June 11, 2015), available at <http://avalere.com/expertise/managed-care/insights/lowest-cost-exchange-premiums-remain-competitive-in-2016-consumers-may-be-a>

By contrast, under the ACA, if a State does not set up its own Exchange, the Federal Government establishes one for it. The Federal Exchange is the backup absent from Medicaid. As ACA opponents have conceded, without the subsidies, the backup does not work. Supposedly, Congress anticipated that the prospect of such dysfunction would coerce States to establish their own Exchanges.

That makes no sense. If Congress wanted to set up a system like Medicaid, where funding would be cut off to States that did not set up their own Exchange, it knew how to say so clearly and directly. Congress would not have provided for a Federal backup that was doomed to fail.

Questions for the Record from Senator Coons

June 4, 2104 Hearing of the Senate Judiciary Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

Questions for Ms. Wydra

- Under the Administrative Procedure Act, what consideration is an agency required to give a public comment that a proposed rule is contrary to statute? Does the public record reflect that Treasury met its obligation?
- There is very little legislative history that supports the view that Congress intended to limit subsidy eligibility as a manner of coercing the states to establish their own Exchanges. Can you address the reliability and persuasiveness of the legislative history that has been said to do so?

Congress of the United States

Washington, DC 20510

June 29, 2012

National Governors Association
Hall of States
444 N. Capitol St., Ste. 267
Washington D.C. 20001-1512

Dear Governors:

The Supreme Court has ruled significant parts of the Medicaid expansion of the President's health care law unconstitutional as well as ruling that the individual mandate violated the Commerce Clause and will therefore be implemented as a punitive tax on the middle class. This presents us with a critical choice: Do we allow this reprehensible law to move forward or do we fully repeal it and start over with commonsense solutions? The American people have made it clear that they want us to throw this law out in its entirety.

As members of the U.S. Congress, we are dedicated to the full repeal of this government takeover of healthcare and we ask you to join us to oppose its implementation.

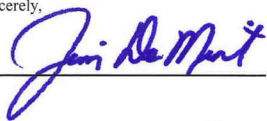
Most importantly, we encourage you to oppose any creation of a state health care exchange mandated under the President's discredited health care law.

These expensive, complex, and intrusive exchanges impose a threat to the financial stability of our already-fragile state economies with no certainty of a limit to total enrollment numbers. Resisting the implementation of exchanges is good for hiring and investment. The law's employer mandate assesses penalties - up to \$3,000 per employee - only to businesses who don't satisfy federally-approved health insurance standards and whose employees receive "premium assistance" *through the exchanges*. The clear language of the statute only permits federal premium assistance to citizens of states who create a state-based exchange. However, the IRS recently finalized a regulation that contradicts the law by allowing the federal government to provide premium assistance to citizens in those states that have not created exchanges. The IRS had no authority to finalize such a regulation. **By refusing to create an exchange, you will assist us in Congress to repeal this violation which will help lower the costs of doing business in your state**, relative to other states that keep these financially draining exchanges in place.

State-run exchanges are subject to all of the same coverage mandates and rules as the federally-run exchange. Clearing the hurdles of crafting an exchange that complies with the 600 plus pages of federal exchange regulations will only result in wasted state resources and higher premiums for your constituents.

Implementation of this law is *not* inevitable and considering more than half of the American people oppose the law, it is improbable. Join us in resisting a centralized government approach to health care reform and instead focus on solutions that make health care more affordable and accessible for every American. Let's work to create a health care system of, for, and by the people, not government or special interests.

Sincerely,





Tom Cohen

Randy Paul

Z. R.

Ron Johnson

Paul (FL)

Rob Rooney

Bill Vitter

John Conyer

William J. E.

Jeff Sessions

Richard Shelby

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Alfonso	Tim Huelkamp
Cliff Stearns	Frank Paul
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Allen Brant FL-22	Ch. TN-3

<u>Alan Hansen MO-8</u>	<u>Steve King IA-5</u>
<u>May Bowmick CA-45</u>	<u>Paul Pan</u>
<u>Donald A. Manzullo IL-16</u>	<u>Jim Hansen Hawaii HI-5</u>
<u>Brett Wallace KY-2</u>	<u>Marshall Bruce NY-25</u>
<u>Reggie NC-2</u>	<u>Scott Starks</u>
<u>Jeff Pitts PA-16</u>	<u>Bob CA-19</u>
<u>Kenrick MI-01</u>	<u>David E. Ferguson CO-5</u>
<u>Scott Davis NJ-05</u>	<u>Marsha Blackburn TN</u>
<u>Ken Calvert</u>	<u>Steve Scalise, LA-1</u>
<u>L.R. Cles CA-4</u>	<u>XXXXXXXXXX</u>
<u>Bryan Jenkins KS-02</u>	<u>TN-4</u>
<u>TX-1</u>	<u>Jill Miller</u>
<u>TX-17</u>	<u>Robert B. Adair</u>
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United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

RUSSELL SULLIVAN, STAFF DIRECTOR
 CHRIS CAMPBELL, REPUBLICAN STAFF DIRECTOR

December 1, 2011

The Honorable Timothy F. Geithner
 Secretary
 Department of the Treasury
 1500 Pennsylvania Avenue, NW
 Washington, DC 20220

The Honorable Douglas H. Shulman
 Commissioner
 Internal Revenue Service
 10th St. & Pennsylvania Avenue, NW
 Washington, DC 20004

Dear Secretary Geithner and Commissioner Shulman:

As the Ranking Republican on the United States Senate's Committee on Finance, I am closely overseeing the implementation of the Patient Protection and Affordable Care Act (PPACA) (Pub. L. 111-148) and the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111-152). The Treasury Department and the Internal Revenue Service have promulgated proposed regulations regarding the new premium credits established in Section 1311 of PPACA. It appears that these regulations, implementing Section 36B of the Internal Revenue Code, are inconsistent with the relevant statutory language. I am concerned that if finalized, these rules would exceed your regulatory authority, violating the Constitution's separation of powers.

Internal Revenue Code section 36B provides for a refundable credit for coverage under a qualified health plan. The amount of the credit equals the "premium assistance credit amount,"¹ which in turn equals the annual sum of the monthly "premium assistance amounts."² The Premium Assistance Amount equals the lesser of ... (A) "the monthly premiums for such month for 1 or more qualified health plans offered in the individual market within a State which cover the taxpayer, the taxpayer's spouse, or any dependent ... and which were enrolled in through *an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act*" or (B) an amount calculated with reference to the "applicable second lowest cost silver plan."³ An applicable second lowest cost silver plan must be a plan offered "through the same Exchange through which the qualified health plans taken into account under" the immediately-*aforementioned* subparagraph (A)⁴ – that is, through "an Exchange established by the State under [section] 1311" of PPACA.

So, to the extent there is not "an Exchange established by the State under [section] 1311" of PPACA, there are no premium assistance amounts and thus the section 36B Health Insurance Premium Tax Credit would be zero.

¹ IRC § 36B(a).

² See IRC § 36B(b)(1).

³ IRC § 36B(b)(2) (emphasis added).

⁴ IRC § 36B(b)(3)(B)(i).

However, your proposed regulations provide that a section 36B Health Insurance Premium Tax Credit would be available if, among other conditions, the taxpayer or a member of the taxpayer's family is enrolled in a "qualified health plan through an Exchange established under section 1311 *or* 1321 of the Affordable Care Act."⁵ Section 1321(c) provides that if a State does not establish an Exchange, then the Federal government can establish a "Federally-facilitated Exchange."⁶ A section 1321(c) Federally-facilitated Exchange is not "an Exchange established by the State" and thus cannot satisfy the language of Code section 36B(b)(2)(A).

Even the relevant recent HHS proposed regulations recognize that a "Federally-facilitated Exchange" is different from an Exchange established by the State under section 1311: "Section 1321(c)(1) requires the Secretary [of Health & Human Services] to establish and operate such Exchange within States that ... [d]o not elect to establish an Exchange."⁷ That is, these HHS proposed regulations confirm that States may elect to not establish an exchange, and that the HHS Secretary is required to establish an Exchange if the State does not do so.

Simply put, under current statutory law, there is no premium assistance amount, hence no section 36B Health Insurance Premium Tax Credit, to the extent that an Exchange is a Federally-facilitated Exchange. But contrary to the clear wording of the statute, your proposed regulations suggest otherwise, extending the availability of premium credits to those participating in federal exchanges.

It is worth noting that even the grant of regulatory authority in section 1401 of PPACA does not authorize your extension of premium credits to the federal exchange.⁸ That section provides that "[t]he Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section." However, as discussed earlier, providing Health Insurance Premium Tax Credits based on Federally-facilitated Exchanges is not a "provision of this section."

I appreciate that some in your agencies and in the Administration might have found the language creating the premium credits, as passed by both the House and the Senate and signed by the President, problematic, since it precludes the application of premium credits to any federal exchanges. I would suggest that the failure to draft this language differently was the result of the highly partisan nature by which PPACA was pushed through Congress. Whatever the case, if the wording and effect of section 36B should somehow be different, then legislation is the appropriate means of changing section 36B. The legislative function, under the Constitution, is exclusively granted to Congress.

This excessive use of regulatory authority is only the continuation of a trend by the Treasury Department and the IRS of violating the constitutional principle of separation of powers by usurping Congress' exclusive role in law-making. Other examples include IRS

⁵ Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,934 (Aug. 17, 2011) (emphasis added).

⁶ 42 USC sec. 18041(c); Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. 41,866 (Jul. 15, 2011).

⁷ Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. 41,866, 41,867 (Jul. 15, 2011).

⁸ PPACA Section 1401; Internal Revenue Code Section 36B(g).

Notice 2008-83.⁹ I also have real concerns about the Treasury Department not getting the required OMB Office of Information and Regulatory Affairs (OIRA) review for all final rules as required by the Congressional Review Act, 5 USC secs. 801-808. Over the last 15 years, literally thousands of IRS rules have not received the required OMB OIRA review, calling into question whether such rules have taken effect.

Given these concerns, I respectfully request:

- 1) That any final regulations regarding Code section 36B clarify that the section 36B Health Insurance Premium Tax Credit will not be available based upon enrollment in a Federally-facilitated Exchange;
- 2) That before any final regulations regarding Code section 36B become effective, they receive the review of the Administrator of OMB's OIRA, as referred to by 5 USC sec. 804(2); and
- 3) That you provide my office with any correspondence (including emails, memoranda, written notes, and electronic documents) addressing your agencies' legal authority to issue a regulation that expands the section 36B Health Insurance Premium Tax Credit so as to be available for participation in Federally-facilitated Exchanges.

I appreciate your expeditious consideration of this matter, and ask that you respond to this request by December 31, 2011. Should you have any questions regarding this letter, please contact Tony Coughlan or Brendan Dunn of the Committee staff at 202-224-4515.

Sincerely,



Orrin G. Hatch
Ranking Member

⁹ Congress eventually overturned Notice 2008-83. See section 1261(a) of the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5.

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October 18, 2012

The Honorable Timothy F. Geithner
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
10th St. & Pennsylvania Avenue, NW
Washington, DC 20004

Dear Secretary Geithner and Commissioner Shulman:

On August 20, 2012, we sent Commissioner Shulman a letter asking for information related to IRS's rule that extended Obamacare's premium-assistance tax credits to individuals purchasing insurance in federal exchanges.¹ We wrote out of concern that IRS's rule was inconsistent with the language Obamacare added to the Internal Revenue Code, which explicitly states that only individuals in state exchanges would be eligible for the tax credits.² Since you have failed to provide documents and information that we requested, we are writing to reiterate our earlier request.

Michael Cannon, director of health policy studies at the CATO Institute, and Jonathan Adler, law professor at Case-Western University, stated in their article "Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the Patient Protection and Affordable Care Act," that IRS's rule not only violates the statute, but the rule also represents a massive tax increase on individuals and businesses.³ A review by legal experts at the Congressional Research Service found that "[t]he plain language of Section 36B suggests that premium tax credits are available only where a taxpayer is enrolled in an 'Exchange established by the State.'"⁴ CRS's experts noted:

[A] strictly textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS's authority to issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a state-established

¹ Letter from Rep. Darrell Issa, Rep. Trey Gowdy, and Rep. Scott DesJarlais to Douglas Shulman, Commissioner of the IRS (August 20, 2012) (on file with Committee) [hereinafter Letter].

² PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010, PUB. LAW 111-148; HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010, PUB. LAW 111-152 § 1401, 124 Stat. 119, 213.

³ Jonathan Adler and Michael Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA*, Case Research Paper Series in Legal Studies Working Paper 2012-27 (July 2012).

⁴ Jennifer Staman and Todd Garvey, CONG. RESEARCH SERV., MEMORANDUM, LEGAL ANALYSIS OF AVAILABILITY OF PREMIUM TAX CREDITS IN STATE AND FEDERALLY CREATED EXCHANGES PURSUANT TO THE AFFORDABLE CARE ACT, (July 23, 2012).

The Honorable Timothy Geithner
 The Honorable Douglas Shulman
 October 18, 2012
 Page 2

exchange. Therefore, an IRS interpretation that extended tax credits to those enrolled in federally facilitated exchanges would be contrary to clear congressional intent, receive no *Chevron* deference, and likely be deemed invalid.⁵

As we wrote in our August 20, 2012, letter, since most states have opted not to create exchanges, the IRS's extension of the tax credits beyond what the statute authorizes likely increases Obamacare's cost in excess of \$500 billion over the next decade.⁶ Moreover, since employers are only subject to Obamacare's employer mandate tax penalties if their workers receive a premium-assistance tax credit,⁷ IRS's rule will subject employers in every state to the employer mandate tax penalty. Our August 20, 2012, letter⁸ asked for all legal analysis produced by the IRS which authorizes the extension of the premium-assistance tax credits for individuals purchasing insurance in federal exchanges and for all documents and communications referring or relating to both the proposed rule⁹ and the final rule.¹⁰

On October 12, 2012, Treasury responded to the Committee's letter on behalf of IRS.¹¹ According to the response, the regulations implementing section 36B, the section of the Internal Revenue Code added by Obamacare and which authorizes the tax credits, were developed "in accordance with our standard process for drafting, approving, and publishing tax regulations."¹² Treasury's response then listed the steps that make up the "standard process", including an initial review of the statute by IRS lawyers, a subsequent review of IRS's legal analysis by Treasury lawyers, a conferral between the two sets of lawyers before a consensus is reached and the proposed rule is published in the Federal Register.¹³

Treasury's response failed to include a single document or communication created before the publication of the proposed rule on August 17, 2011, and thus no evidence to support the bald assertion that the IRS developed this rule "in accordance with our standard process."¹⁴

⁵ *Id.*

⁶ According to the Kaiser Family Foundation, as of June 2012, only 14 states have taken affirmative steps to create a PPACA-compliant State Exchange. According to CBO's estimates, the cost of the premium tax credits and cost sharing subsidies will exceed \$1 trillion over the next decade. Given only a few states have created exchanges, expanding the tax credits and cost sharing subsidies to individuals in states that fail to operate their own exchanges will certainly cost at least a few hundred billions of dollars over the next decade.

⁷ 26 U.S.C. § 4980H.

⁸ See Letter, *supra* note 1.

⁹ Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 76 FEDERAL REGISTER 50935 (August 17, 2011) available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-08-17/pdf/2011-20728.pdf>.

¹⁰ Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 77 FEDERAL REGISTER 30378 (May 23, 2012) available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf>.

¹¹ Letter from Mark Mazur, Treasury Department Assistant Secretary for Tax Policy to Rep. Darrell Issa (October 12, 2012) (on file with Committee).

¹² *Id.*

¹³ *Id.*

¹⁴ Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 76 FEDERAL REGISTER 50935 (August 17, 2011) available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-08-17/pdf/2011-20728.pdf>.

The Honorable Timothy Geithner
The Honorable Douglas Shulman
October 18, 2012
Page 3

Thus, we are left to conclude that you are either willfully misleading the Committee or that you are purposefully withholding information that is essential to the Committee's oversight effort.

If you do not provide all of the requested information by Thursday, October 25, 2012, the Committee will consider the use of compulsory process.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions about this request, please contact Brian Blase with the Committee staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman



Trey Gowdy
Chairman
Subcommittee on Health Care,
District of Columbia, Census
and the National Archives



Scott DesJarlais
Member of Congress

Enclosure

cc: The Honorable Elijah Cummings, Ranking Minority Member

The Honorable Danny Davis, Ranking Member
Subcommittee on Health Care, District of Columbia, Census and the National Archives

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Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDDTIME, AUTHOR, FROM,

CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE,
DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,
INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,
BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been

located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

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November 30, 2012

The Honorable Douglas Elmendorf
Director
Congressional Budget Office
Ford House Office Building, 4th Floor
Second and D Streets, SW
Washington, D.C. 20515-6925

Dear Mr. Elmendorf:

The Committee on Oversight and Government Reform is conducting oversight of the implementation of the Patient Protection and Affordable Care Act (PPACA).¹ In May of 2012, the Internal Revenue Service (IRS) and the Treasury Department issued a final rule (rule) that will extend PPACA's premium-assistance tax credits to individuals who purchase insurance in exchanges established by the federal government.² Outside experts believe the rule violates the law.³ A review by legal experts at the Congressional Research Service found that "[t]he plain language of Section 36B suggests that premium tax credits are available only where a taxpayer is enrolled in an 'Exchange established by the State.'"⁴ CRS's experts noted:

[A] strictly textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS's authority to issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a state-established exchange. Therefore, an IRS interpretation that extended tax credits to those enrolled in federally facilitated exchanges would be contrary to clear congressional intent, receive no *Chevron* deference, and likely be deemed invalid.⁵

¹ PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010, PUB. LAW 111-148; HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010, PUB. LAW 111-152 § 1401, 124 STAT. 119, 213.

² Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 77 FEDERAL REGISTER 30378 (May 23, 2012).

³ Jonathan Adler and Michael Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA*, Case Research Paper Series in Legal Studies Working Paper 2012-27 (July 2012).

⁴ Jennifer Staman and Todd Garvey, CONG. RESEARCH SERV., MEMORANDUM, LEGAL ANALYSIS OF AVAILABILITY OF PREMIUM TAX CREDITS IN STATE AND FEDERALLY CREATED EXCHANGES PURSUANT TO THE AFFORDABLE CARE ACT, (July 23, 2012).

⁵ *Id.*

The Honorable Douglas Elmendorf
November 30, 2012
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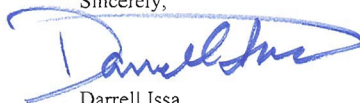
Treasury officials are using Congressional Budget Office (CBO) assumptions as a defense of the rule. In a letter to the Committee on October 12, 2012, the Assistant Secretary at Treasury for Tax Policy, Mark Mazur, wrote, "Our interpretation is consistent with the explanation of the ACA released by the non-partisan Congressional Joint Committee on Taxation and with the assumptions made by the Congressional Budget Office in estimating the effects of the ACA."⁶ Moreover, at a Congressional briefing on November 2, 2012, Committee staff asked Treasury officials the relevant components of the legislative history that supported IRS's rule. The only response given by Treasury officials to the question was the CBO and JCT estimates of the bill.

CBO employees, who were involved with estimating the budgetary impact of PPACA, however, informed Committee staff that CBO never prepared a separate legal analysis or assessment of whether PPACA's tax credits would be available in states that failed to create their own health insurance exchanges.⁷ Moreover, CBO staff informed Committee staff that CBO used the same assumption about the availability of the premium tax credits for residents in every state for all the earlier House and Senate bills that preceded PPACA.⁸ Staff for the Joint Committee on Taxation (JCT) informed Committee staff that its experts also never prepared a legal opinion of whether PPACA's tax credits would be available in states that failed to create their own health insurance exchanges.⁹

In order to assist the Committee's continued oversight of the rule, I respectfully request a description and explanation of CBO's assumption that the premium assistance tax credits would be available in every state in the cost estimate of H.R. 4872 released on March 19, 2010.

Please contact Brian Blase with the Committee on Oversight and Government Reform staff at 202-225-5074 if you have questions about this request. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

⁶ Letter from Mark Mazur, Assistant Secretary (Tax Policy) of Treasury of the Department of Treasury, to Darrell Issa, Chairman of the Committee on Oversight and Government Reform, October 12, 2012.

⁷ Email exchange between staff of the Committee on Oversight and Government Reform and staff of the Congressional Budget Office, September 26, 2012.

⁸ Phone conversation between staff of the Committee on Oversight and Government Reform and staff of the Congressional Budget Office, November 13, 2012.

⁹ Phone conversation between staff of the Committee on Oversight and Government Reform and staff of the Joint Committee on Taxation, September 28, 2012.

Congress of the United States
Washington, DC 20515

July 25, 2013

The Honorable Jacob J. Lew
 Secretary
 U.S. Department of the Treasury
 1500 Pennsylvania Avenue NW
 Washington, D.C. 20220

Dear Mr. Secretary:

For the past several months, the Committee on Ways and Means and the Committee on Oversight and Government Reform have been conducting oversight of the Administration's decision to expand several taxes and subsidies created by the Patient Protection and Affordable Care Act (PPACA) ¹ to individuals in states that have opted not to create state health insurance exchanges. In particular, the Committees have sought information relating to the joint Treasury Department and Internal Revenue Service proposed rule² and final rule³ regarding the health insurance premium tax credits contained in PPACA. We write to request your assistance with the Committees' oversight efforts.

Legal experts at the Congressional Research Service raised questions about the legal basis for the Administration's decision, finding that "[t]he plain language of Section 36B (the section of the Internal Revenue Code, added by PPACA, that authorizes premium tax credits) suggests that premium tax credits are available only where a taxpayer is enrolled in an 'Exchange **established by the State** [emphasis added]'".⁴ They stated:

[A] strictly textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS's authority to issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a state-established exchange. Therefore, an IRS interpretation that extended tax credits to those enrolled in federally facilitated exchanges would be contrary to clear

¹ PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010, PUB. LAW 111-148; HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010; PUB. LAW 111-152.

² Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 76 Fed. Reg. 50935 (Aug. 17, 2011), available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-08-17/pdf/2011-20728.pdf> (last accessed May 30, 2013).

³ Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 77 Fed. Reg. 30378 (May 23, 2012), available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf> (last accessed May 30, 2013).

⁴ Jennifer Staman and Todd Garvey, *Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act*, CONG. RESEARCH SERV. (Jul. 23, 2012). [emphasis added]

The Honorable Jacob J. Lew
 July 25, 2013
 Page 2

congressional intent, receive no *Chevron* deference, and likely be deemed invalid.⁵

Given the fact that IRS's rule is contrary to the plain text of the law passed by Congress and signed by President Obama, the Committees have sought information related to IRS and Treasury's rationale for the rule. To date, Committee staff have conducted two *in camera* reviews of four internal Treasury documents related to the rule.⁶ IRS and Treasury Department staff also provided three briefings -- on November 3, 2012, April 4, 2013, and June 13, 2013 -- regarding the decision to extend PPACA's premium tax credits, which amount to several hundreds of billions of dollars in new and unauthorized federal spending, to individuals enrolled in exchanges created by the federal government.⁷ The Administration's decision also extends the employer mandate penalty and individual mandate penalty to individuals in states that have chosen not to create an exchange.

Although IRS's rule has significant implications for individuals and the nation's finances, IRS and Treasury have not been able to provide the Committees with detailed information about the factors considered by IRS and Treasury that expanded the availability of PPACA's tax credits to federal exchanges. Treasury officials previously informed Congress that, with the exception of approximately 50 e-mails, all relevant documents and communications have been produced to the Committee.⁸ We request that you produce these e-mails as soon as possible, but by no later than 5:00 p.m. on July 30, 2013. In addition, please produce the following information by August 13, 2013.

1. All documents and communications created between March 23, 2010, and May 23, 2012, referring or relating to the position of IRS or Treasury that there is not a discernible pattern as to how PPACA references exchanges.
2. All documents and communications created prior to the issuance of the proposed rule on August 17, 2011, referring or relating to additional factors IRS or Treasury considered in extending PPACA's tax credits to federal exchanges other than the "such Exchange" language.

⁵ *Id.*

⁶ Briefing paper prepared by IRS Chief Counsel for a meeting between IRS Chief Counsel and Office of Tax Policy staff; "Pre-Proposed Legal Analysis" (Mar. 2011); "Proposed Regulatory Clearance Package" (Aug. 2011); "Pre-Final Legal Analysis" (Feb. 2012); "Final Regulatory Clearance Package" (May 2012).

⁷ According to the Kaiser Family Foundation, as of May 2013, 17 states (including the District of Columbia) have received conditional approval to operate a state-based Exchange. According to the CBO's estimates, the premium tax credits and cost-sharing subsidies will exceed one trillion dollars in federal spending over the next ten years. Given only a few states have created state-based Exchanges, expanding the tax credits and cost-sharing subsidies to individuals in states that fail to operate their own Exchanges will certainly cost at least a hundreds of billions of dollars over the next decade.

⁸ Phone call between U.S. Dep't of the Treasury staff and staff for the Ways and Means Committee and the Committee on Oversight and Government Reform (March 20, 2013).

The Honorable Jacob J. Lew
July 25, 2013
Page 3

3. All documents and communications referring or relating to IRS or Treasury's review or consideration of PPACA's legislative history.
4. All documents and communications referring or relating to IRS or Treasury's review or consideration of the purpose of PPACA with respect to whether tax credits should be available in federal Exchanges.
5. All documents and communications referring or relating to any activities or analysis of the 36B Working Group, including but not limited to the e-mail invitations to Working Group members sent by Donna Crisalli (referenced in the June 13, 2013, briefing between Treasury and IRS employees and Committee staff).
6. All documents and communications produced for, or as a result of, the large group meeting between IRS and Treasury employees held at or near the end of March 2011 (and referenced by IRS employees at the June 13, 2013 briefing) in which the availability of tax credits in federal exchanges was discussed.

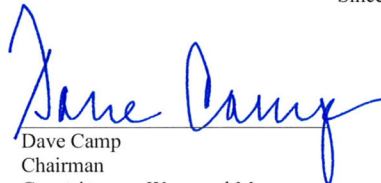
The Committee on Ways and Means has jurisdiction over federal revenue measures, including tax credits, as well as the Medicare program. The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committees' request.

When producing documents, please deliver production sets to the Committee on Ways and Means in Room 1102 of the Longworth House Office Building, and to the Committee on Oversight and Government Reform Majority Staff in Room 2157 of the Rayburn House Office Building, and to the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committees prefer to receive documents in electronic format.

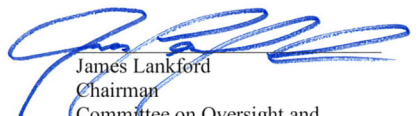
Please contact Chris Armstrong of the Committee on Ways and Means at (202) 225-5522 or Brian Blase of the Committee on Oversight and Government Reform at (202) 225-5074 if you have any questions about this request. Thank you for your prompt attention to this matter.

The Honorable Jacob J. Lew
July 25, 2013
Page 4

Sincerely,


Dave Camp
Chairman
Committee on Ways and Means


Darrell Issa
Chairman
Committee on Oversight
and Government Reform


James Lankford
Chairman
Committee on Oversight and
Government Reform
Subcommittee on Energy Policy, Health
Care & Entitlements


Charles W. Boustany, Jr., M.D.
Chairman
Committee on Ways and Means
Subcommittee on Oversight

Enclosure

cc: The Honorable Sander Levin, Ranking Minority Member
Committee on Ways and Means

The Honorable Elijah E. Cummings, Ranking Minority Member
Committee on Oversight and Government Reform

The Honorable Jackie Speier, Ranking Minority Member
Committee on Oversight and Government Reform Subcommittee on Energy
Policy, Health Care & Entitlements

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LAWRENCE J. BRADY
STAFF DIRECTOR

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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August 15, 2013

The Honorable Jacob J. Lew
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Mr. Secretary:

On July 25, 2013, we wrote you for the second time to request information related to the joint Internal Revenue Service and Treasury Department proposed rule¹ and final rule² regarding the health insurance premium tax credits contained in ObamaCare.³ For nearly a year, the Committee on Oversight and Government Reform and the Committee on Ways and Means have sought information related to IRS and Treasury's controversial decision to extend tax credits and subsidies to individuals who will purchase insurance in new federal exchanges. Treasury's decision is inconsistent with the plain statutory language that restricted the availability of tax credits to exchanges established by States.⁴ To date, the Treasury Department has provided very little information to support the Administration's assertion that it "carefully considered the language of the statute and the legislative history" in coming to its decision to expand ObamaCare.⁵ We write to clarify the information provided by Treasury and to request that you provide all remaining relevant documents and communications.

On October 12, 2012, the Committee received 386 pages of documents, almost all of which are publicly available documents or documents that are not relevant to the Committee's request. For example, 154 pages of the document production consisted of the proposed rule (which contains one sentence on the issue of tax credit availability in

¹ Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 76 Fed. Reg. 50935 (Aug. 17, 2011), available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-08-17/pdf/2011-20728.pdf> (last accessed May 30, 2013).

² Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 77 Fed. Reg. 30378 (May 23, 2012), available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf> (last accessed May 30, 2013).

³ PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010, PUB. LAW 111-148; HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010; PUB. LAW 111-152.

⁴ *Id.*

⁵ Final Regs Clearance Package.

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federal exchanges)⁶; 70 pages were a draft of Michael Cannon and Jonathan Adler's law review article⁷; 45 pages were from the public hearings on the 36B regulation (the section of the Internal Revenue Code, added by ObamaCare, that authorizes premium tax credits) where the availability of tax credits in federal exchanges merited less than a half page discussion⁸; and 59 pages of a Supreme Court opinion and a Tenth Circuit Court of Appeals decision found after a senior Treasury official requested information about Chevron's⁹ applicability to Treasury's decision.¹⁰

In total, Treasury only produced 17 pages of material relevant to the Committees' oversight. Most of these pages consisted of e-mails from Treasury staff forwarding or commenting on various news articles or blog posts. **Treasury's production does not include a single document or communication created prior to the publication of the proposed rule on August 17, 2011.** On November 19, 2012, Committee staff conducted an *in-camera* of four memoranda related to the availability of tax credits in federal exchanges. One of the documents reviewed was your Department's only written analysis of its decision to extend tax credits to federal exchanges prior to the issuance of the proposed rule. This analysis, drafted in March 2011 by IRS Chief Counsel staff, consisted of a single paragraph with a single reason listed to justify Treasury's decision.

Treasury's one-paragraph analysis did not contain a substantive discussion of the many sections of the law relevant to the issue of whether the statute authorized tax credits in federal exchanges. Treasury's analysis compares poorly to a much more thorough analysis conducted by the Congressional Research Service of this issue.¹¹ As you know, legal experts at the Congressional Research Service raised significant questions about the legal basis for the Administration's decision, finding that "[t]he plain language of Section 36B suggests that premium tax credits are available only where a taxpayer is enrolled in an 'Exchange established by the State [emphasis added].'"¹²

As stated in your letter, in addition to the one document production and *in-camera* review of the four additional memoranda, IRS and Treasury employees have provided Committee staff with three briefings related to the decision to extend tax credits in federal

⁶ Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377 (proposed May 23, 2012) (to be codified at 26 C.F.R. pt. 1).

⁷ Jonathan H. Adler and Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, HEALTH MATRIX: J. OF LAW-MEDICINE, Spring 2013 at 119.

⁸ INTERNAL REVENUE SERVICE, U.S. DEPT. OF THE TREASURY, PUBLIC HEARING ON PROPOSED REGULATIONS 26 CFR PART 1 "HEALTH INSURANCE TAX CREDIT" (2011).

⁹ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹⁰ *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007); *Herrera-Castillo v. Holder* 573 F.3d 1004 (10th Cir. 2009).

¹¹ Jennifer Staman and Todd Garvey, *Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act*, CONG. RESEARCH SERV. (Jul. 23, 2012).

¹² *Id.*

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exchanges.¹³ However, these briefings have consisted of IRS and Treasury employees' inability to remember key factors they considered, a lack of familiarity among IRS and Treasury employees with how particular parts of the statute related to the rule, and a failure of IRS and Treasury employees to provide supporting evidence to this potentially illegal decision. At the Committee's hearing on July 31, 2013, Emily McMahon, Deputy Assistant Secretary for Tax Policy, was also unable to answer many Members' important questions about IRS and Treasury's decision to extend tax credits in federal exchanges.¹⁴

Treasury employees, including your Chief of Staff, Chris Weideman, have told the Committees that the only outstanding information related to IRS and Treasury's decision to extend tax credits in federal exchanges is approximately 50 e-mails.¹⁵ Treasury has withheld this material from the Committees. In addition to this material, we believe, based on briefings with IRS and Treasury employees, there are additional documents, including e-mails, which may exist that have not yet been provided to the Committee. We requested this additional material in our July 25, 2013, letter.

You have claimed executive branch confidentiality interests in refusing to provide information to the Committee. Given Congress' constitutional responsibility to conduct oversight of the executive branch, the significant budgetary impact of Treasury's decision to extend the tax credits in federal exchanges (estimated to be upwards of \$600 billion over the next decade), and the failure of Treasury and IRS employees to remember details about the rule-making process, we ask you to provide the Committee with the approximately 50 e-mails already compiled by IRS or Treasury staff as well as any of the following documents or communications by August 29, 2013, if they exist:

1. All documents and communications referring or relating to IRS or Treasury's review or consideration of PPACA's legislative history;
2. All documents and communications referring or relating to IRS or Treasury's review or consideration of the purpose of PPACA with respect to whether tax credits should be available in federal Exchanges;
3. All documents and communications referring or relating to any activities or analysis of the 36B Working Group, including but not limited to the e-mail invitations to Working Group members sent by Donna Crisalli (referenced in the June 13, 2013, briefing between Treasury and IRS employees and Committee staff); and

¹³ Letter from Mark Mazur, Assistant Secretary Tax Policy, Dept. of the Treasury, to the Honorable Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform (Oct. 12, 2012) (on file with author).

¹⁴ *Oversight of IRS's Legal Basis for Expanding ObamaCare's Taxes and Subsidies: Hearing Before the Subcomm. on Energy Policy, Health Care, and Entitlements of the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013) available at <http://oversight.house.gov/hearing/oversight-of-irss-legal-basis-for-expanding-obamacares-taxes-and-subsidies/> (questioning of Ms. Emily S. McMahon, Deputy Assistant Sec'y for Tax Policy, U.S. Dep't of the Treasury).

¹⁵ Phone call between U.S. Dep't of the Treasury staff and staff for the Ways and Means Committee and the Committee on Oversight and Government Reform (March 20, 2013).

The Honorable Jacob J. Lew
August 15, 2013
Page 4

4. All documents and communications produced for, or as a result of, the large group meeting between IRS and Treasury employees held at or near the end of March 2011 (and referenced by IRS employees at the June 13, 2013, briefing) in which the availability of tax credits in federal exchanges was discussed.

If you do not comply with the Committee's request by Thursday, August 29, 2013, the Committee will be forced to consider use of compulsory process.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committees' request.

Please contact Brian Blase of the Committee on Oversight and Government Reform at (202) 225-5074 if you have any questions about this request. Thank you for your prompt attention to this matter.

Sincerely,


Darrell Issa
Chairman


James Hankford
Chairman
Subcommittee on Energy Policy,
Health Care and Entitlements

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Jackie Speier, Ranking Minority Member
Subcommittee on Energy Policy, Health Care and Entitlements

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VACANCY

September 23, 2014

The Honorable Jacob J. Lew
Secretary
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Secretary Lew:

The Committee on Oversight and Government Reform continues to conduct oversight of the Administration's implementation of ObamaCare. This effort includes oversight of the Internal Revenue Service 36B regulation that authorized ObamaCare's premium tax credits and associated tax penalties in states that chose not to establish their own exchanges. Since the Committee's previous letters on this matter, significant developments necessitate that the Treasury Department permanently produce all documents related to the development of the 36B regulation. Despite numerous requests, the Treasury Department has repeatedly demonstrated an unwillingness to voluntarily provide these documents. As a result, I am forced to issue the enclosed subpoena to compel the Department to turn them over.

On July 22, 2014, the D.C. Circuit Court of Appeals ruled that the IRS regulation was illegal, concluding that a "federal Exchange is not an 'Exchange established by the State,' and section 36B does not authorize the IRS to provide tax credits for insurance purchased on federal Exchanges."¹ According to the court's ruling, premium tax credits should not have been authorized in states that opted to use the federal Exchange.²

According to the non-partisan Congressional Research Service, "[t]he plain language of Section 36B suggests that premium tax credits are available only where a taxpayer is enrolled in an 'Exchange established by the State.'"³ [emphasis added]. Despite this clear statutory language, the Department of the Treasury and IRS ignored the

¹ *Halbig v. Burwell*, No. 14-5018, 2014 WL3579745, at *7 (D.C.Cir. 2014).

² *Id.* at *17.

³ Jennifer Staman & Todd Garvey, CONG. RESEARCH SERV., *Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act* (2012).

The Honorable Jacob J. Lew
 September 23, 2014
 Page 2

plain text of the law and issued a rule on May 23, 2012, providing tax credits though an exchange established by the federal government.⁴

On August 20, 2012, I, along with Representatives Trey Gowdy and Scott DesJarlais, first wrote Treasury requesting “all legal analysis, internal or external, conducted by the IRS which authorizes IRS to grant premium-assistance tax credits in federal Exchanges.”⁵ Treasury delivered only a limited set of documents to the Committee on October 12, 2012, consisting primarily of publicly available documents. Committee staff also conducted an *in camera* review of a limited set of heavily redacted documents at Treasury.

On January 29, 2013, Chairman Camp and I sent a letter to Treasury on the failure of Treasury officials to provide documents responsive to the Committees’ oversight of the 36B rule.⁶ It was only after this letter, and the threat of a subpoena, that Treasury allowed Committee staff to review the unredacted documents *in camera*. This *in camera* review showed several problems with IRS’s and Treasury’s legal analysis. For example, the Committees found that:

- In March 2011, the IRS Chief Counsel’s office drafted the only written explanation by IRS or Treasury prior to the publication of the proposed rule regarding their decision to extend PPACA’s premium subsidies in federal exchanges. The written explanation contained a single paragraph with a single reason. This single reason apparently served as the Administration’s entire legal basis for providing subsidies in federal exchanges prior to the proposed rule.⁷
- Prior to the promulgation of the proposed rule, IRS downplayed the significance that the lack of statutory authority for providing subsidies in federal exchanges presented. David Gamage, a counsel in Treasury’s Office of Tax Policy, who wrote the policy memo that accompanied the proposed rule for clearance, included a section in the titled “Significant Issues and Considerations,” with four areas highlighted. Notably absent in this section was any reference to whether tax credits would be available on the federal exchange.⁸

⁴ Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,378 (May 23, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf>.

⁵ Letter from Darrell Issa, Chairman H. Comm. on Oversight & Gov’t Reform, Trey Gowdy, Chairman H. Subcomm. Health Care, D.C., and Census and the National Archives, & Scott DesJarlais, Member of Congress, to Douglas H. Shulman, Comm’r, Internal Revenue Ser. (Aug. 20, 2012) (on file with H. Comm. on Oversight & Gov’t Reform).

⁶ Letter from Dave Camp, Chairman H. Comm. on Ways & Means, & Darrell Issa, Chairman H. Comm. on Oversight & Gov’t Reform, to Neal Wolin, Acting Sec’y, Dep’t of the Treasury, and Steve Miller, Acting Comm’r, Internal Revenue Serv. (Jan. 29, 2013) (on file with H. Comm. on Oversight & Gov’t Reform).

⁷ STAFF OF H. COMM. ON OVERSIGHT & GOV’T REFORM AND H. COMM. ON WAYS AND MEANS, ADMINISTRATION CONDUCTED INADEQUATE REVIEW OF KEY ISSUES PRIOR TO EXPANDING HEALTH LAW’S TAXES AND SUBSIDIES (Feb. 5, 2014) [hereinafter *Staff Report*].

⁸ *Id.*

The Honorable Jacob J. Lew
 September 23, 2014
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In addition to these *in camera* reviews, the Committees conducted three briefings on November 2, 2012, April 4, 2013, and June 13, 2013, with IRS and Treasury personnel and held a hearing with Emily McMahon, Deputy Assistant Secretary for Tax Policy, on July 31, 2013.⁹ This Committee also conducted a transcribed interview of Mark Mazur, Treasury's Assistant Secretary for Tax Policy, on January 16, 2014.¹⁰

Unfortunately, IRS and Treasury personnel were unable or unwilling to provide many key answers to the Committees' questions about the factors Treasury considered during the development of the rule. The information provided by these officials at briefings, interviews, and hearings, indicate that IRS and Treasury never seriously attempted to reconcile the plain text of the statute and ObamaCare's legislative history with their interpretation. For example, the Committees uncovered several additional problems with IRS and Treasury's legal analysis, such as:

- Mark Mazur, who defended IRS and Treasury's interpretation, testified that he never saw any analysis of the decision to authorize tax credits in federal exchanges that was produced prior to May 2012, when the 36B final rule was published. Mr. Mazur also could not recall the basis for key statements he made within a previous letter he sent about Treasury's interpretation.¹¹
- Treasury officials did not consider that ObamaCare also conditioned other provisions on state cooperation, such as the law's Medicaid expansion, in deciding whether the absence of authorization for premium subsidies in federal exchanges was intentional.¹²
- Treasury's review of the legislative history did not consider evidence that the Senate had a clear preference for state exchanges.¹³ Treasury's review of the legislative history did not consider evidence that PPACA's antecedent bills in the Senate conditioned premium subsidies on state compliance.¹⁴
- Treasury's review of the relevant legislative history considered statements made by Members of the House of Representatives prior to the Senate passage of PPACA on December 24, 2009, despite the fact that such statements do not represent the relevant legislative history because they addressed different bills

⁹ Briefing from Internal Revenue Serv. & Dep't of the Treasury Officials to H. Comm. on Oversight & Gov't Reform and H. Comm. on Ways & Means Staff (Nov. 2, 2012); Briefing from Internal Revenue Serv. & Dep't of the Treasury Officials to H. Comm. on Oversight & Gov't Reform and H. Comm. on Ways & Means Staff (Apr. 4, 2013); Briefing from Internal Revenue Serv. & Dep't of the Treasury Officials to H. Comm. on Oversight & Gov't Reform and H. Comm. on Ways & Means Staff (June 13, 2013).

¹⁰ Transcribed Interview with Mark Mazur, Assistant Sec'y for Tax Policy, U.S. Dep't of the Treasury, in Washington, D.C. (Jan. 16, 2014).

¹¹ See *Staff Report*, *supra* note 7.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

The Honorable Jacob J. Lew
 September 23, 2014
 Page 4

with different approaches to exchanges and premium subsidies that could not pass both chambers of Congress.¹⁵

On August 15, 2013, one year after I first wrote IRS concerning this issue, I, along with Subcommittee Chairman James Lankford, wrote to you requesting approximately 50 emails and other documents that Treasury had withheld from this Committee's investigation.¹⁶ Your staff had previously indicated that these were the only documents Treasury had identified as responsive beyond the limited materials already produced to the Committees.¹⁷ Finally, on September 24, 2013, again after we were forced to consider a subpoena to obtain the documents, Committee staff conducted an *in camera* review of these documents. During this review, Committee staff viewed documents that showed serious concerns with the 36B regulation, such as:

- Early drafts of the proposed premium subsidy regulation contained the statutory language restricting tax credits to Exchanges "established by the State." This language was removed from those drafts in early March 2011.¹⁸
- In March 2011, IRS and Treasury officials expressed concern that there was no direct statutory authority to interpret federal exchanges as an "Exchange established by the State." IRS personnel emailed many senior HHS personnel seeking clarification of the issue in HHS's rulemaking.¹⁹

You have a responsibility to be open and transparent with the American people about the regulatory process, especially for regulations that greatly expand government reach by imposing new taxes and generate spending far beyond the plain reading of the statute.

On several occasions in 2012, Jonathan Gruber, a paid consultant to the Administration who is considered by many to be an architect of the law, confirmed that these tax credits would only be available in state exchanges.²⁰ For example, speaking in San Francisco on January 10, 2012, Mr. Gruber stated:

Now, I guess I'm enough of a believer in democracy to think that when the voters in states see that by not setting up an exchange the politicians of a state are costing state residents hundreds and millions and billions of dollars, that they'll eventually throw the

¹⁵ *Id.*

¹⁶ Letter from Darrell Issa, Chairman H. Comm. on Oversight & Gov't Reform and James Lankford, Chairman H. Subcomm. on Energy Policy, Health Care and Entitlements, to Jacob Lew, Secretary, Department of the Treasury (Aug. 15, 2013) (on file with H. Comm. on Oversight & Gov't Reform).

¹⁷ Phone call between Staff of the U.S. Dep't of the Treasury and H. Comm. on Oversight & Gov't Reform and H. Comm. on Ways & Means Staff (Mar. 20, 2013).

¹⁸ See *Staff Report*, *supra* note 7.

¹⁹ *Id.*

²⁰ Michael James, *On Jonathan Gruber and Disclosure*, ABC NEWS (Jan. 9, 2010), <http://abcnews.go.com/blogs/politics/2010/01/on-jonathan-gruber-and-disclosure/>.

The Honorable Jacob J. Lew
September 23, 2014
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guys out. But I don't know that for sure. *And that is really the ultimate threat, is, will people understand that, gee, if your governor doesn't set up an exchange, you're losing hundreds of millions of dollars of tax credits to be delivered to your citizens.* [emphasis added]²¹

In order to have a complete and accurate public record, and to correct any misinformation, I am issuing the enclosed subpoena to compel the Treasury Department to produce the documents that will answer the Committee's outstanding questions. The subpoena requires Treasury and the IRS provide four categories of documents that have—other than a series of limited *in camera reviews*—been withheld from the Committee.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at “any time” investigate “any matter” as set forth in House Rule X.

If you have any questions, please contact the Committee at 202-225-5074. Thank you for your attention to this matter.

Sincerely,


Darrell Issa
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

Enclosure

²¹ Megan McArdle, *Obamacare's Smoking Gun Fires Again*, BLOOMBERG VIEW (July 25, 2014), <http://www.bloombergview.com/articles/2014-07-25/obamacare-s-smoking-gun-fires-again>.



A not-for-profit health and tax policy research organization

Fifty-one Changes to ObamaCare...So Far

Grace-Marie Turner
June 9, 2013

For updates to this list visit: www.galen.org/newsletters/changes-to-obamacare-so-far/

By our count at the Galen Institute, more than 51 significant changes have been made to the Patient Protection and Affordable Care Act, at least 32 that the Obama administration has made unilaterally, 17 that Congress has passed and the president has signed, and two by the Supreme Court.

CHANGES BY ADMINISTRATIVE ACTION

1. *Employee reporting:* The IRS [announced](#) that, contrary to statutory language, it was [delaying](#) the ACA requirement that employers must report to their employees on their W-2 forms the full cost of their employer-provided health insurance. (March 29, 2011)
2. *Medicare Advantage patch:* The administration [ordered](#) an advance draw on funds from a Medicare bonus program to provide payments to Medicare Advantage plans to temporarily forestall payment cuts called for in the ACA that could have led to cuts in benefits and an early exodus of MA plans from Medicare. (April 19, 2011)
3. *Tax credit subsidies for some people under 100% FPL and for unlawful immigrants:* The ACA [provides refundable tax credits](#) to U.S. citizens with incomes between 100 and 400% of poverty, but [IRS regulations](#) give credits to citizens below 100% FPL in some cases. Also, Section 36B of the ACA grants credits to some non-citizens with low-incomes only if they are themselves lawfully present in the U.S. and cannot obtain Medicaid coverage. [IRS regulations](#) contradict the statute and [allow](#) subsidies if "the taxpayer or a member of the taxpayer's family is lawfully present in the United States," and "the lawfully present taxpayer or family member is not eligible for the Medicaid program." (August 17, 2011)
4. *Extension of credits to people receiving employer-sponsored coverage.* Section 1511 of the ACA instructs the Labor Department to issue regulations requiring businesses with more than 200 employees to automatically enroll their employees in any health benefits plan offered by the employer. Section 36B correspondingly denies credits to employees covered by an employer plan. IRS regulations [contradict](#) the statutory language and allow credits to taxpayers when they are automatically enrolled in employer minimum essential coverage. Treasury implicitly acknowledges there is [no statutory authority](#) for its regulatory change.
5. *Subsidies may flow through federal exchanges:* The IRS [issued](#) a rule that allows premium assistance tax credits to be available in federal exchanges although the law specified that they only would be available through an "Exchange established by the State." (May 23, 2012)
6. *Delaying a low-income plan:* The administration [delayed](#) implementation of the Basic Health Program until 2015. It would have provided more-affordable health coverage for certain low-income individuals not eligible for Medicaid. (February 7, 2013)
7. *Closing the high-risk pool:* The [administration decided](#) to prematurely halt enrollment in transitional federal high-risk pools created by the law, blocking coverage for an estimated 40,000 new applicants, citing a lack of funds. The administration had money from a fund under HHS Secretary Sebelius's control to extend the pools, but instead used the money to pay for advertising for Obamacare enrollment and other purposes. (February 15, 2013)
8. *Doubling allowed deductibles:* Because some group health plans use more than one benefits administrator, plans [were allowed](#) to apply separate patient cost-sharing limits to different services, such as doctor/hospital and prescription

- drugs, allowing maximum out-of-pocket costs to be twice as high as the law intended. (February 20, 2013)
9. *Small businesses on hold:* The administration said federal exchanges for small businesses will not be ready by the 2014 statutory deadline, and instead [delayed](#) until 2015 the provision of SHOP (Small-Employer Health Option Program) that requires exchanges to offer a choice of qualified health plans. (March 11, 2013)
 10. *Employer-mandate delay:* By an administrative action that is contrary to language of the ACA, enforcement and reporting requirements for the employer mandate were [delayed](#) by one year until 2015. (July 2, 2013)
 11. *Self-attestation:* Because of the difficulty of verifying income after the employer-reporting requirement was delayed, the administration it would [allow](#) "self-attestation" of income and eligibility by applicants for health insurance in the exchanges. (July 15, 2013)
 12. *Congressional opt-out:* The administration [decided](#) to offer employer contributions to Members of Congress and their staffs when they purchase insurance on the exchanges created by the ACA, a subsidy the law doesn't provide. (September 30, 2013)
 13. *Delaying the individual mandate:* The administration [changed](#) the deadline for the individual mandate by declaring that customers who purchased health insurance by March 31, 2014, would avoid the tax penalty. The law says they would have had to purchase a plan by mid-February to avoid penalties. (October 23, 2013)
 14. *Insurance companies may offer canceled plans:* The administration announced that insurance companies may [reoffer](#) plans that previous regulations had forced them to cancel. (November 14, 2013)
 15. *Delaying the online SHOP exchange:* The administration first [delayed](#) for a month and later for a year until [November 2014](#) the launch of the online insurance marketplace for small businesses that originally was scheduled to launch on October 1, 2013. (September 26, 2013) (November 27, 2013)
 16. *Exempting unions from reinsurance fee:* The administration gave unions an [exemption](#) from the reinsurance fee. To make up for this exemption, non-exempt plans will have to pay a higher fee, which will likely be passed onto consumers in the form of higher premiums and deductibles. (December 2, 2013)
 17. *Extending Preexisting Condition Insurance Plan:* The administration [extended](#) the federal high risk pool until January 31, 2014 and again until [March 15, 2014](#) to prevent a coverage gap for the most vulnerable. The plans were scheduled to expire on December 31, but were extended because it has been impossible for some to sign up for new coverage on [healthcare.gov](#). (December 12, 2013) (January 14, 2014)
 18. *Expanding hardship waiver to those with canceled plans:* The administration [expanded](#) the hardship waiver – which exempts people from the individual mandate and allows some to purchase catastrophic health insurance – to people who have had their plans canceled because of ObamaCare regulations. The administration later [extended](#) this waiver until October 1, 2016. (December 19, 2013) (March 5, 2014)
 19. *Bay State bailout:* More than 300,000 people in Massachusetts gained temporary Medicaid [coverage](#) in 2014 without verification of eligibility, with the Obama and Patrick administrations using a taxpayer-funded bailout to mask the failure of the commonwealth's disastrously malfunctioning website. (January 2014)
 20. *Equal employer coverage delayed:* Tax officials will not be [enforcing](#) in 2014 the mandate requiring employers to offer equal coverage to all their employees. This provision of the law was supposed to go into effect in 2010, but IRS officials have "yet to issue regulations for employers to follow." (January 18, 2013)
 21. *Employer-mandate delayed again:* The administration [delayed](#) for an additional year provisions of the employer mandate, postponing enforcement of the requirement for medium-size employers until 2016 and relaxing some requirements for larger employers. Businesses with 100 or more employees must offer coverage to 70% of their full-time employees in 2015 and 95% in 2016 and beyond. (February 10, 2014)

22. *Extending subsidies to non-exchange plans:* The administration released a bulletin through CMS [extending](#) subsidies to individuals who purchased health insurance plans outside of the federal or state exchanges. The bulletin also requires retroactive coverage and subsidies for individuals from the date they applied on the marketplace rather than the date they actually enrolled in a plan. (February 27, 2014)
23. *Non-compliant health plans get two year extension:* The administration [pushed](#) forward by two years the deadline requiring health insurers to cancel plans that are not compliant with ACA mandates. These "illegal" plans can be offered until 2017. This extension prevented a wave of cancellation notices from going out before the 2014 midterm elections. (March 5, 2014)
24. *Reducing cost sharing reductions.* The ACA calls for out-of-pocket maximums to be lowered for enrollees with incomes between 100-400% FPL (Sec. 1402), but the provision proved unworkable for those 250-400% of FPL in combination with prescribed actuarial value requirements. The law was changed through [regulation](#) to apply to only those [100-250% of poverty](#). (March 11, 2014)
25. *Delaying the sign-up deadline:* The administration [delayed](#) until mid-April the March 31 deadline to sign up for insurance without penalty. Applicants simply need to check a box on their application to qualify for this extended sign-up period. (March 26, 2014)
26. *Cancelling Medicare Advantage cuts:* The administration [canceled](#) further scheduled cuts to Medicare Advantage. The ACA calls for \$200 billion in cuts to Medicare Advantage over 10 years. (April 7, 2014)
27. *More Funds for Insurer Bailout:* The administration [said](#) it will supplement risk corridor payments to health insurance plans with "other sources of funding" if the higher risk profile of enrollees means the plans would lose money. (May 16, 2014)
28. *Exempting U.S. territories:* Despite earlier administration claims that "HHS is not authorized to choose which provisions [of the ACA] might apply to the territories," HHS [waived](#) six major requirements – such as guaranteed issue, community rating, and essential benefit mandates – that were causing serious disruption to health insurance markets covering 4.5 million residents of U.S. territories. (July 18, 2014)
29. *Failure to enforce abortion restrictions.* A GAO [report](#) found that many exchange insurance plans don't separate charges for abortion services as required by the ACA, showing the administration is not enforcing the law. In 2014, abortions were being financed with taxpayer funds in more than 1,000 exchange plans. (Sept. 16, 2014)
30. *Risk Corridor coverage:* The Obama administration plans to illegally distribute risk corridor payments to insurers, despite studies by both the [Congressional Research Service](#) and the [GAO](#) saying a congressional appropriation is required before federal agencies can make the payments. (Sept. 30, 2014)
31. *Transparency of coverage:* CMS [delays](#) statutory requirements on insurance companies to disclose data on the number of people enrolled, disenrollment, number of claims denied, costs to consumers of certain services, etc. (Oct. 20, 2014)
32. *Tax penalty pass:* Taxpayers who filed returns based upon inaccurate subsidy data they received from the federal government [will not have to repay](#) the government if they received too large of a subsidy, the [IRS ruled](#). (February 24, 2015)

CHANGES BY CONGRESS, SIGNED BY PRESIDENT OBAMA:

33. *Military benefits:* [Congress clarified](#) that plans provided by TRICARE, the military's health-insurance program, constitutes minimal essential health-care coverage as required by the ACA; its benefits and plans wouldn't normally meet ACA requirements. (April 26, 2010)
34. *VA benefits:* [Congress also clarified](#) that health care provided by the Department of Veterans Affairs constitutes minimum essential health-care coverage as required by the ACA. (May 27, 2010)
35. *Drug-price clarification:* [Congress modified](#) the definition of average manufacturer price (AMP) to include inhalation, infusion, implanted, or injectable drugs that are not generally dispensed through a retail pharmacy. (August 10, 2010)

36. *Doc-fix tax*: [Congress modified](#) the amount of premium tax credits that individuals would have to repay if they are over-allotted, an action designed to help offset the costs of the postponement of cuts in Medicare physician payments called for in the ACA. (December 15, 2010)
37. *Extending the adoption credit*: [Congress extended](#) the nonrefundable adoption tax credit, which happened to be included in the ACA, through tax year 2012. (Dec. 17, 2010)
38. *TRICARE for adult children*: [Congress extended](#) TRICARE coverage to dependent adult children up to age 26 when it had previously only covered those up to the age of 21 — though beneficiaries still have to pay premiums for them. (January 7, 2011)
39. *1099 repealed*: [Congress repealed](#) the paperwork ("1099") mandate that would have required businesses to report to the IRS all of their transactions with vendors totaling \$600 or more in a year. (April 14, 2011)
40. *No free-choice vouchers*: [Congress repealed](#) a program, supported by Senator Ron Wyden (D., Ore.) that would have allowed "free-choice vouchers," that *The Hill* warned "could lead young, healthy workers to opt out" of their employer plans, "driving up costs for everybody else." The same law barred additional funds for the IRS to hire new agents to enforce the health-care law. (April 15, 2011)
41. *No Medicaid for well-to-do seniors*: Congress saved taxpayers \$13 billion by [changing](#) how the eligibility for certain programs is calculated under Obamacare. Without the change, a couple earning as much as \$64,000 a year would have been able to qualify for Medicaid. (November 21, 2011)
42. *CO-OPs, IPAB, IRS defunded*: Congress [made cuts](#) in funding to [programs and agencies](#) implementing the ACA including the IRS, and the controversial Independent Payment Advisory Board. (December 23, 2011; March 26, 2013)
43. *Slush-fund savings*: Congress [cut](#) \$6.25 billion from the Prevention and Public Health slush fund through 2021, and \$2 billion each year thereafter. (February 22, 2012)
44. *Less cash for Louisiana*: One of the tricks used to get Obamacare through the Senate was the special "[Louisiana Purchase](#)" deal to win the vote of then-Sen. Mary Landrieu. [Congress saved](#) taxpayers \$2.5 billion by rescinding some funds from this deal. (February 22, 2012)
45. *CLASS Act eliminated*: Congress [repealed](#) the unsustainable CLASS (Community Living Assistance Services and Supports) program of government-subsidized long-term-care insurance, which Sen. Kent Conrad (D-ND) [dubbed](#) a "Ponzi scheme of the first order." (January 2, 2013)
46. *Defunding CO-OPs*: [Congress cut](#) an additional \$2.2 billion from the "Consumer Operated and Oriented Plan" (CO-OP), which some saw as a stealth public option, blocking creation of new government-subsidized co-op programs. Early reports showed many co-ops, which had received federal loans, had run into serious financial trouble. (January 2, 2013)
47. *Trimming the Medicare trust-fund transfer*: [Congress rescinded](#) \$200 million of the \$500 million transfer from the Medicare Part A and Part B trust funds for the 5 year Community-Based Care Transition Program and rescinded \$10 million of IPAB's FY2013 appropriation. (March 26, 2013)
48. *Eliminating caps on deductibles for small group plans*: [Congress eliminated](#) the cap on deductibles for small group plans as part of the SGR "doc fix." This gives small businesses the freedom to offer high deductible plans that may be paired with a Health Savings Account. (April 1, 2014)
49. *Making the risk corridor program budget neutral*. The [Consolidated and Further Continuing Appropriations Act of 2015](#) provides that CMS may not transfer funds from other accounts to pay for the risk corridor program. Expenditures cannot exceed the funds collected in 2014, blocking CMS from making multi-year calculations. (December 16, 2014)

CHANGES BY THE SUPREME COURT

50. *Medicare expansion made voluntary*: The court ruled it was voluntary, rather than mandatory, for states to expand Medicaid

eligibility to people with incomes up to 138% of poverty by ruling the federal government couldn't block funds for existing state Medicaid programs if states chose not to expand the program. (June 28, 2012)

51. *The individual mandate made a tax:* The court determined that violating the mandate that Americans must purchase government-approved health insurance would only result in individuals' paying a "tax," making it, legally speaking, optional for people to comply. (June 28, 2012)

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COMMENTARY

Another ObamaCare Glitch

Congress made a legal mistake while rushing through the health law. Now it's come back to haunt the administration.

By JONATHAN H. ADLER AND MICHAEL F. CANNON

November 16, 2011

Even if ObamaCare survives Supreme Court scrutiny next spring, its trials will be far from over. That's because the law has a major glitch that threatens its basic functioning. It's so problematic, in fact, that the Obama administration is now brazenly trying to rewrite the law without involving Congress.

The Patient Protection and Affordable Care Act offers "premium assistance"—tax credits and subsidies—to households purchasing coverage through new health-insurance exchanges. This assistance was designed to hide a portion of the law's cost to individuals by reducing the premium hikes that individuals will face after ObamaCare goes into effect in 2014. (If consumers face the law's full cost, support for repeal will grow.)

The law encourages states to create health-insurance exchanges, but it permits Washington to create them if states decline. So far, only 17 states have passed legislation to create an exchange.

This is where the glitch comes in: ObamaCare authorizes premium assistance in state-run exchanges (Section 1311) but not federal ones (Section 1321). In other words, states that refuse to create an exchange can block much of ObamaCare's spending and practically force Congress to reopen the law for revisions.

The Obama administration wants to avoid that legislative debacle, so this summer it proposed an IRS rule to offer premium assistance in all exchanges "whether established under section 1311 or 1321." On Nov. 17 the IRS will hold a public hearing on that proposal. According to a Treasury Department spokeswoman, the administration is



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"confident" that offering premium assistance where Congress has not authorized it "is consistent with the intent of the law and our ability to interpret and implement it."

Such confidence is misplaced. The text of the law is perfectly clear. And without congressional authorization, the IRS lacks the power to dispense tax credits or spend money.

What about congressional intent? Law professor Timothy Jost suggests that since ObamaCare requires all exchanges to report information about premium assistance, and it would be silly to impose that requirement on

federal exchanges if their enrollees were not eligible, that shows Congress could not have intended anything but to provide assistance in federal exchanges. At least, he argues, there's enough ambiguity here about Congress's intent that federal courts will permit the administration to resolve it.

Not so fast. The Supreme Court has increasingly limited such deference to cases where the text of the law—rather than Congress's intent—is ambiguous. In this case the language of the law is clear, as even Mr. Jost admits.

The health law's authors in Congress deliberately chose to pass the bill with known imperfections and to use the reconciliation process to make only limited amendments. Writing a perfect bill would have required too many votes and risked failure. If what they passed was an imperfect bill with no premium assistance in federal exchanges, then that is what Congress intended.

And there are plausible reasons why Congress may have wanted to limit assistance to state-run exchanges—including encouraging states to create exchanges so that the federal government doesn't have the burden.

Supporters of ObamaCare, including George Washington University's Sarah Rosenbaum, have argued that nobody will have standing to challenge the IRS rule in court. That's not the case.

Under the law, employers must pay penalties when their employees receive premium assistance—a measure designed to encourage employers to keep offering coverage. Any

employer whose employees receive premium assistance through a federal exchange would therefore suffer harm from the IRS rule and would have standing to challenge these illegal tax credits and outlays.

Public-interest lawyers could file suit as soon as the IRS rule becomes final and they find an employer that will be harmed. Any firm that doesn't offer health benefits and that employs lots of full-time, low-skilled, young workers in a state that fails to create an exchange should suffice. A successful challenge would block the law's employer mandate in that state.

In addition, under the Congressional Review Act, a simple (filibuster-proof) majority vote in each chamber of Congress could send to President Obama's desk a resolution blocking this IRS rule. Even if Mr. Obama vetoed the resolution (taking personal responsibility for this assault on the rule of law), a future president could still rescind the rule. Quite a perilous situation in which to leave the president's signature accomplishment.

Like the rest of the nation, the Obama administration wants a different health-care law than the one we got. But that doesn't give it the authority to rewrite the law by fiat.

Mr. Adler is professor of law and director of the Center for Business Law and Regulation at Case Western Reserve University. Mr. Cannon is director of health policy studies at the Cato Institute.

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The Washington Post

Health & Science

Health-care law is tied to new caps on work hours for part-timers

By **Sandhya Somashekhar** July 23, 2013

For Kevin Pace, the president's health-care law could have meant better health insurance. Instead, it produced a pay cut.

Like many of his colleagues, the adjunct music professor at Northern Virginia Community College had managed to assemble a hefty course load despite his official status as a part-time employee. But his employer, the state, slashed his hours this spring to avoid a Jan. 1 requirement that all full-time workers for large employers be offered health insurance. The law defines "full time" as 30 hours a week or more.

"We work so hard for so little pay," he said. "You would think they would want to make an investment in society, pay the teachers back and give us health care."

This month, the Obama administration delayed the employer insurance requirement until January 2015. But Virginia, like some other employers around the country that capped part-timers' hours in anticipation of the initial deadline, has no plans to abandon its new 29-hour-a-week limit.

The impact on Pace and thousands of other workers in Virginia is an unintended consequence of the health law, which, as the most sweeping new social program in decades, is beginning to reshape aspects of American life.

Under the law, companies with 50 or more workers will be required to provide health insurance to all their full-time employees or face significant fines.

The decision to delay that requirement was welcomed by business groups, which said companies needed more time to adapt to the law. But the delay has emboldened the law's critics, who say it is evidence that the statute is ill-conceived and should be repealed.

A new Washington Post-ABC News poll finds that the country, which remains deeply divided about the law, is similarly split about the delay in the employer requirement. Fifty-one percent say they support the delay, while 45 percent say they do not. The public is also divided over whether the setback means the law is fatally flawed.

Weakening support

The poll, taken at a time of heightened criticism of the law, also finds that support has weakened among Democrats since last year. Just under six in 10 Democrats say they support the law, the lowest point for Post-ABC surveys since the law was passed in 2010.

When the law was written, advocates hoped the employer requirement would help reduce the ranks of the uninsured. Some employers have said they would offer insurance to additional workers, but others have gone in the opposite direction.

Virginia's situation provides a good lens on why. The state has more than 37,000 part-time, hourly wage employees, with as many as 10,000 working more than 30 hours a week. Offering coverage to those workers, who include nurses, park rangers and adjunct professors, would have been prohibitively expensive, state officials said, costing as much as \$110 million annually.

"It was all about the money," said Sara Redding Wilson, director of Virginia's Department of Human Resource Management. "If we could cover everyone, we would."

It is unclear how many companies have cut staffing hours this year in anticipation of the law. Mercer, a human-relations-consulting firm that regularly queries public and private entities, found that 12 percent of employers in a survey last year planned to cut staff hours to avoid a jump in costs under the new rules.

However, the numbers are higher for the retail and hospitality industries, as well as for governments, because those employers often rely on a large number of part-timers but do not offer them benefits, the firm said.

Obama administration officials say there is no evidence that large numbers of businesses are cutting their workers' hours this year. Rather, they say, Bureau of Labor Statistics numbers suggest that full-time hiring has grown despite the employer mandate.

"We are seeing no systematic evidence that the Affordable Care Act is having an adverse impact on job growth or the number of hours employees are working," said Alan Krueger, chairman of the White House Council of Economic Advisers, adding that "the law is helping make health-insurance coverage more affordable."

Public blowback

While a number of private businesses cut worker hours this year because of the health-care law, they have been loath to do it because of fears of public blowback, said Jared Pope, a Texas consultant whose clients include local governments and businesses. Governments have been more open because they must make their decisions publicly,

he said.

He estimated that seven of his 62 clients had capped hours and that 18 were considering it. Those that curbed part-time hours are not likely to reverse course, only to have to reinstate the limit next year, he said.

“They kind of somewhat [ticked] people off already,” he said. “They don’t want to undo it and become a good guy now, only to do it all over again to be the bad guy.”

At a Capitol Hill hearing on the employer mandate Tuesday, Jamie T. Richardson, vice president of White Castle System, the Columbus, Ohio-based burger chain, said complying with the 30-hour rule would mean a 35 percent increase in the company’s health-care costs. He said White Castle would probably adopt a policy ensuring that new hires work no more than 25 hours a week if the mandate goes forward as expected in 2015.

Part of the issue for employers lies in the definition of “full time,” which diverges from the industry standard of 40 hours a week. Advocates say the 30-hour bar was supposed to discourage employers from shaving a few minutes off a full-time worker’s hours to skirt the law. But it turns out that “an awful lot of people work less than 40 hours a week,” said Timothy Jost, a health-policy expert and consumer advocate.

Now, business groups and unions are urging Congress to change the rule to define full time as 40 hours, but they face long odds given both parties’ reluctance to tinker with the law.

Maryland and the District offer health insurance to workers who log 20 or more hours a week. But some Democratic-leaning communities, including Dearborn, Mich., and Long Beach, Calif., have imposed caps on part-time workers to keep them below the 30-hour threshold.

Officials in Utah’s Granite School District, which includes about 70,000 students in the Salt Lake City area, said their new policy limiting part-timers to 29 hours a week affected about 1,200 workers. Extending benefits to all of them would have cost the district \$14 million annually, officials estimated.

The biggest impact was felt by substitute teachers, said Gayleen Gandy, president of the school board. The best ones, she said, regularly work more than 30 hours a week. The administration’s delay is unlikely to cause the district to review the new cap on hours.

“From what I understood, the change simply extended the implementation timeline,” she said. “That really doesn’t change anything about what we decided. It just put us ahead of the game for next year.”

Pace, the music professor, said it will be a challenge to make ends meet, even with the odd jobs he does to supplement his college income, which has been cut to \$17,000 a year. He gives bass and guitar lessons in his Del Ray

home, plays live gigs around the Washington area and runs a nonprofit group called the D.C. Jazz Composers Collective.

He said the state should have recognized the contribution of workers such as himself and coughed up the extra money to offer insurance. Because that didn't happen, he said, he would have preferred to keep the status quo rather than to end up with reduced hours and an \$8,000 pay cut.

"We treat this as our job," Pace, 34, said. "We devote all of our time and love and hours to teaching our adjunct classes. This isn't right on any level."

Scott Clement contributed to this report.

Sandhya Somashekhar is the social change reporter for the Washington Post.

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Journal of Health Politics, Policy and Law

The Halbig Cases: Desperately Seeking Ambiguity in Clear Statutory Text

Jonathan H. Adler

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Abstract Does the Patient Protection and Affordable Act of 2010 authorize tax credits within the 36 states that failed to establish health-insurance Exchanges? That is the question presented in *Pruitt v. Burwell*, *Halbig v. Burwell*, *King v. Burwell*, and *Indiana v. IRS*. The plaintiffs argue the statute is clear, and forecloses any possibility of tax credits in federal Exchanges. The government argues the statute plainly authorizes tax credits in federal Exchanges, or is at least ambiguous on the question. Mere disagreement is not evidence of ambiguity. Reaching the truth requires wading deep into each side's arguments. Whether the relevant text is viewed on isolation or in its full statutory context, the PPACA only authorizes tax credits in Exchanges established by the states.

Keywords Affordable Care Act; ACA; PPACA; *Halbig v. Burwell*; *Pruitt v. Burwell*; *King v. Burwell*; federalism; health insurance Exchanges; premium assistance tax credits; employer mandate; individual mandate; statutory interpretation; Chevron deference; community rating; adverse selection

Introduction

Section 1311 of the Patient Protection and Affordable Care Act directs states to establish health-insurance Exchanges, and Section 1321 directs the federal government to establish Exchanges within states that fail to do so. Confounding expectations, 36 states failed to establish Exchanges.

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Section 1401 offers “premium-assistance tax credits” to individuals who meet certain requirements, including a requirement that they enroll in health insurance – quoting the statute – “through an Exchange established by the State under section 1311.” But does the Act authorize tax credits within the 36 states that *failed* to establish Exchanges? That is the question presented in *Pruitt v. Burwell*, *Halbig v. Burwell*, *King v. Burwell*, and *Indiana v. IRS*.

The Internal Revenue Service initially recognized the requirement that tax-credit recipients must enroll through an Exchange “established by the State” (Committee on Oversight and Government Reform 2014). Nevertheless, in January 2014, it began issuing tax credits through both state-established and federal Exchanges.

These “tax credits” take the form of payments from the IRS to insurance companies, and also trigger penalties under the Act’s individual and employer mandates. In the 36 federal-Exchange states, therefore, the IRS’s reinterpretation has resulted in the Treasury sending billions of dollars to insurers on behalf of 5 million federal-Exchange enrollees (Burke, Misra and Sheingold 2014) and subjecting more than 57 million individuals and employers to those penalties (Cannon, 2014), neither of which would have occurred under the statute’s plain text.

The plaintiffs in *Pruitt*, *Halbig*, *King*, and *Indiana* have challenged the final IRS regulation purporting to authorize tax credits in states with federal Exchanges. They argue that rule is contrary to the clear language of the PPACA, and subjects them to penalties without statutory authorization.

Once dismissed as “screwy...nutty...[and] stupid” (Eichelberger, 2013), the plaintiffs’ arguments have been validated in and out of court.¹ At the district-court level, the plaintiffs won in *Pruitt* and lost in *Halbig* and *King*.² At the appellate level, they have won in *Halbig* and lost in *King*. At press time, two of three standing opinions found for the plaintiffs.³

The stakes in this litigation are whether the Act’s Exchange provisions, like its Medicaid provisions, are workable without state buy-in. Were the stakes not so high, the plaintiffs’ claims would be uncontroversial. The text of the PPACA is clear. And while existing legal doctrines permit agencies to depart from clear statutory language in rare cases, none of those doctrines can rescue the IRS’s statutory misconstruction.

This article proceeds as follows. Section II demonstrates the statutory requirement that tax-credit recipients enroll “through an Exchange established by the State” is clear. Section III examines whether the IRS rule can be upheld under either the “absurd results” or “scrivener’s error” doctrines. Section IV examines the government’s claim that the Act plainly deems federal Exchanges

¹ PPACA architect Jonathan Gruber once described the plaintiffs’ claims as “screwy...nutty...[and] stupid.” Shortly after the D.C. Circuit ruled for the *Halbig* plaintiffs, multiple recordings from 2012 surfaced of Gruber telling audiences: “If you’re a state and you don’t set up an Exchange, that means your citizens don’t get their tax credits” (Gruber 2012).

² At press time, there had been no rulings in *Indiana v. IRS*. The district court has heard oral arguments; a ruling is due at any time.

³ The full D.C. Circuit agreed to reconsider the *Halbig* ruling *en banc* (oral arguments to be held December 17), a move that technically vacates the original panel’s judgment, though not its opinion (D.C. Cir. R. 35(d)). The *King* plaintiffs have filed a petition for certiorari with the Supreme Court, while the government has appealed *Pruitt* to the Tenth Circuit.

to be “established by the State.” Section V examines whether the IRS rule is eligible for “Chevron” deference. Section VI concludes.

The Text Is Plain

Sections 1401 and 1321 demonstrate the requirement that tax-credit recipients enroll “through an Exchange established by the State” is clear, and part of a larger scheme designed to induce states to implement multiple provisions of the Act.

The Tax-Credit Eligibility Rules

Section 1401 specifies “premium assistance tax credits” are available through only one type of Exchange: “an Exchange established by the State.”

This requirement is not “a few isolated words” (*Halbig v. Sebelius*, No. 13-623 (D.D.C. Jan. 15, 2014)). The PPACA’s authors imposed it twice explicitly and reinforced it seven times by cross-reference. When the Act describes the people who qualify for credits, the health plans to which credits may be applied, and the premiums used to calculate the credit amount; when it requires recipients to pay their portion of the premium; and when it describes the rating areas in which to find those people, plans and premiums, it specifies all these things are found or occur exclusively in “an Exchange established by the State.”

The tax-credit eligibility rules never mention federal Exchanges, nor ever use broad language that would encompass federal Exchanges (e.g. “an Exchange”), as appears elsewhere in the Act.

A Coherent Scheme to Induce State Cooperation

Section 1321 further conditions those tax credits on states implementing other parts of the Act. That section lists various “requirements,” including “the establishment and operation of Exchanges” and the Act’s community-rating rules. It then provides that states may “elect[]” to adopt those requirements into state law.

Section 1321(c) explains the consequence of “Failure To Establish Exchange Or Implement Requirements” is that “the Secretary shall...establish and operate such Exchange within the State and the Secretary shall take such actions as are necessary to implement such other requirements.” Failure to comply with *any* of these requirements therefore results in an Exchange established by the federal government rather than “an Exchange established by the State,” which precludes the issuance of tax credits.

If Section 1321’s purpose were simply to direct the federal government to perform tasks states failed to perform, it would direct the Secretary to establish Exchanges only when states failed to establish them. Instead, Congress imposed a federal Exchange in the manner of a penalty for any failure to comply with the requirements listed in Section 1321.

Additional Evidence

Adler, Jonathan H., and Michael F. Cannon. 2015. “The *Halbig* Cases: Desperately Seeking Ambiguity in Clear Statutory Text.” *Journal of Health Politics, Policy and Law* 40, no. 3. doi: 10.1215/03616878-2867869.

Further evidence, including legislative history, supports the plain meaning of the PPACA's tax credit eligibility provisions. The Act's authors added language limiting tax credits to "an Exchange established by the State," and language clarifying that requirement, multiple times and at multiple stages of the legislative process, including under the supervision of Senate leaders and White House officials. This eligibility requirement survived multiple rounds of revisions, including revisions to the cross-references attached to it. The reconciliation bill made several amendments to Section 1401, yet left this requirement undisturbed (Adler and Cannon 2014).

In January 2010, all eleven House Democrats in the Texas delegation interpreted the PPACA's Exchange provisions as categorically denying "any benefit" to residents of states that failed to establish Exchanges. (Rep. Lloyd Doggett, et al., Letter to President Obama, January 11, 2010.) They voted for it anyway.

Neither a Drafting Error, Nor Absurd

Many defenders of the IRS claim this requirement was a drafting error that would produce absurd results if followed literally. The Supreme Court has held that agencies may ignore "scrivener's errors," but only in "unusual" cases where there is "overwhelming evidence" showing Congress could not have intended what the statute says (*U.S. National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439, 462 (1993)). Similarly, the Court has held agencies may ignore plain meaning where it would produce an absurd result (*United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)). But again, this requires a "most extraordinary showing" that the statute cannot mean what it says (*Garcia v. United States*, 469 U.S. 70, 75 (1984)) [MC1].

The disputed text may or may not be good policy. But the PPACA's congressional supporters offered far too many similar proposals to claim Congress could not possibly have meant to enact it.

The PPACA works largely by creating financial incentives to induce states to implement its provisions. Section 1311 gave the Secretary unlimited authority to issue start-up grants to states establishing Exchanges. The Act requires states to maintain their Medicaid eligibility levels, a costly requirement, until they establish Exchanges (PPACA § 2001(B)(2)). Until the Supreme Court set it aside, one infamous provision of the Act conditioned all federal Medicaid grants on states implementing the Act's Medicaid expansion. In 2009, even Senate Republicans proposed offering subsidies only in states that established Exchanges (Patients' Choice Act of 2009).

Some argue it is implausible that Congress would impose the Act's community-rating price controls without guaranteeing subsidies and mandates to mitigate the resulting adverse selection. Yet many of the Act's authors concede that in 2009, they advanced another bill that imposed even stricter community rating but still withheld Exchange subsidies in uncooperative states ([Brief of Amicus Curiae Members of Congress & State Legislatures](#) 2014, [Affordable Health Choices Act of 2009](#)). *Amici* for the government concede the PPACA imposes community rating with weak subsidies and no mandate in U.S. territories (Brief of Amicus Curiae Economic Scholars 2014). Finally, the Act also imposed community rating with neither subsidies nor a mandate in both the CLASS Act and the market for child-only coverage.

Adler, Jonathan H., and Michael F. Cannon. 2015. "The *Halbig* Cases: Desperately Seeking Ambiguity in Clear Statutory Text." *Journal of Health Politics, Policy and Law* 40, no. 3. doi: 10.1215/03616878-2867869.

The Government's First Argument: the Text Plainly *Does* Authorize Credits in Federal Exchanges

Interestingly, the government has never invoked the scrivener's-error or absurd-results doctrines in defense of the IRS rule. Instead, as clever lawyers can always do with a complex, intricate statute, the government mines the PPACA's 2,000 pages for provisions to which it can ascribe odd interpretations, and emerges arguing that when read in context, the Act plainly *does* authorize credits in federal Exchanges. Yet no amount of clever lawyering can reconcile this theory with the statute.

"Such Exchange"

The government argues that when Section 1321 says, "the Secretary shall...establish and operate such Exchange within the State," the phrase "such Exchange" indicates that a federal Exchange is the same Exchange that the State would have created – i.e., an Exchange "established by the State." In doing so, the government ignores this passage's subject and verb, which tell us it is *the Secretary*, not the state, who establishes federal Exchanges. Moreover, Section 1323 provides that when a U.S. territory creates "such an Exchange," the territory "shall be treated as a State." The fact that Congress considered it necessary to insert that explicit equivalence language shows Congress did not consider the word "such" to have the meaning the government claims. The phrase "such Exchange" may indicate federal Exchanges have the same *intrinsic* characteristics as a state-established Exchange, but tax-credit eligibility hinges on the *extrinsic* characteristic of who established the Exchange.

The government further argues the federal government "stands in the shoes of" or acts "on behalf of the state" when establishing an Exchange. These claims have no basis in the statute. Section 1321 is clear: the Secretary establishes an Exchange "within" the state – not on its behalf, or in its name, or in its shoes.

"A System of Nested Provisions"

Alternatively, the government argues, the PPACA contains "a system of nested provisions that, when you walk through them, lead to the conclusion that" the statute considers a federal Exchange to have been "established by the State" in which it operates (Oral Arguments Transcript, *Halbig v. Sebelius* (D.C. Cir. Mar. 25, 2014)). First, the government claims various ancillary provisions circuitously define federal Exchanges – which are actually established under Section 1321 – as having been established under Section 1311. Next, it claims that when Section 1311(d)(1) says, "An Exchange shall be a governmental agency or nonprofit entity that is established by a State," that provision defines any Exchange established under Section 1311 as having been "established by a State."

The plain text of the Act squarely forecloses this theory. Section 1311(d)(1) is not a definition. The Act twice describes that provision as a "requirement." Its purpose is clear on its face, and becomes even clearer when we read it in context: "Each State shall . . . establish an American Health

Benefit Exchange . . . that . . . meets the requirement[] [that] [a]n Exchange shall be a governmental agency or nonprofit entity that is established by a State” (PPACA § 1311(b)(1), (d)(1)). This provision does not define anything as having been established anyone. It prevents for-profit Exchanges by requiring state-established Exchanges to be either government agencies or non-profits.

Interpreting Section 1311(d)(1) as a definition turns the provision on its head. If this passage defines federal Exchanges as having been established by a State, then it must also define for-profit Exchanges as governmental agencies or nonprofit entities. The government’s interpretation would thus allow exactly what Congress designed this provision to prevent.

The Government’s Main Argument: the Text Is Ambiguous

The government is likely just pushing those arguments to create the appearance of ambiguity, in the hope that courts will grant “Chevron” deference to the IRS rule. To determine whether an agency’s interpretation of a statute is reasonable under *Chevron* and thus entitled to deference, courts must first determine whether the statute as a whole speaks clearly to the precise question at issue. If the statute is clear, the agency must implement the statute according to its plain meaning. If the statute is ambiguous on that precise question, the court must ask whether Congress delegated authority to resolve such ambiguities to the agency, and whether the agency’s interpretation is arbitrary, capricious, or contrary to law. The IRS rule fails every step of the *Chevron* test.

***Chevron* Step One**

Chevron Step One is not an invitation for agencies to create ambiguity in an otherwise clear statute. As noted above, the tax-credit eligibility rules are clear, and the rest of the PPACA is fully consistent with their plain meaning.

Section 1401’s Information-Reporting Requirements

The government argues a reporting requirement in Section 1401 indicates Congress intended to offer credits in federal Exchanges, and therefore creates ambiguity about Congress’ intent.

Section 1401 requires Exchanges to report information related to enrollees’ tax-credit eligibility to the Treasury Secretary. It imposes this requirement on state-established and federal Exchanges, mentioning each separately (Section 1401, IRC § 36B(f)(3)). There would be no reason to impose this requirement on federal Exchanges, the government argues, unless Congress intended to offer credits there.

On the contrary, the D.C. Circuit found, “Even if credits are unavailable on federal Exchanges, reporting by those Exchanges still serves the purpose of enforcing the individual mandate—a point the IRS, in fact, acknowledged” (*Halbig v. Burwell*, No. 14-5018 (D.C. Cir. Jul. 22, 2014)). Thus there is no tension between those provisions. Moreover, referring to federal Exchanges separately supports the plain meaning of “established by the State” because it shows Congress recognized federal Exchanges as distinct.

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"Qualified Individuals"

The government argues the phrase "established by the State" cannot be interpreted literally because Section 1312 says "qualified individuals" must "reside[] in the State that established the Exchange." "If an HHS-created Exchange does not count as established by the State it is in, there would be no individuals 'qualified' to purchase coverage in the 34 states with HHS-created Exchanges." (*Halbig v. Burwell*, No. 14-5018 (D.C. Cir. Jul. 22, 2014) (J. Edwards, dissenting)). This absurd result, the government claims, creates ambiguity about the meaning of that phrase.

When read in context rather than isolation, though, this requirement supports the plain meaning of "established by the State." Section 1312 defines "qualified individuals" in terms of "the State that established the Exchange" because in Sections 1311, 1312, and 1313, Congress is speaking to the states, directing them to establish Exchanges, detailing related requirements, and *presuming states will cooperate*. In the very next section, Section 1321, Congress drops that presumption and explains what happens when states fail to establish an Exchange. Up to that point, this requirement imposed on "qualified individuals" makes perfect literal sense. After that point, the requirement still has meaning because Section 1321 directs the Secretary to implement "such" a requirement for federal Exchanges — i.e., that "qualified individuals" must reside in the state "within" which "the Secretary . . . establish[es]" an Exchange (PPACA § 1321(a), (c)).

"MOE"

The government argues it would be "disharmonious" to interpret "established by the State" literally, because Section 2001 requires states to maintain their prior Medicaid eligibility levels until "an Exchange established by the State . . . is fully operational," and a literal interpretation would impose this costly requirement indefinitely. Such a provision is not disharmonious in a statute that pushed the practice of offering such financial inducements to states "pas[t] the point at which pressure turns into compulsion" (*NFIB*, 132 S. Ct. at 2604 (internal quotation omitted)).

Chevron Step Two

Even if the statute were ambiguous, there is no evidence Congress sought to delegate to the IRS authority to determine where tax credits will be issued.⁴

The Supreme Court has repeatedly held warned executive agencies, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes" (*Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). Put differently, Congress does not override plain text and delegate discretionary authority to tax, borrow, and spend hundreds of billions of dollars per year via "a system of nested provisions" hidden within a statute. Moreover, in claiming the relevant provisions are ambiguous, the government effectively concedes Congress was comfortable with denying tax credits in non-

⁴ For reasons we explain elsewhere, the IRS rule is also arbitrary, capricious, and contrary to law (Adler and Cannon 2013).

establishing states, for if the statute is ambiguous the IRS (and a future administration) retains the authority to make that choice.

Conclusion

The PPACA is not a model of legislative drafting. Nonetheless, the Act's tax credit eligibility provisions are crystal clear. Section 1401 only authorizes tax credits for insurance purchased through an Exchange "established by the state." If the Administration or other health care reform advocates are uncomfortable with this result, it must be fixed by Congress, rather than by administrative fiat.

Jonathan H. Adler is the inaugural Johan Verheij Memorial Professor of Law and Director of the Center for Business Law & Regulation at the Case Western Reserve University School of Law, where he teaches courses in environmental, administrative and constitutional law. Professor Adler is the author or editor of five books and his articles have appeared in publications ranging from the *Harvard Environmental Law Review* and *Supreme Court Economic Review* to *The Wall Street Journal* and *USA Today*. His recent work includes "Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA," *Health Matrix: Journal of Law-Medicine* (2013, with Michael Cannon), "The Conflict of Visions in NFIB v. Sebelius," *Drake Law Review* (2014), and "'Judicial Minimalism, the Mandate, and Mr. Roberts,'" in *The Health Care Cases: The Supreme Court's Decision and Its Implications* (N. Persily, G. Metzger, & T. Morrison, eds., Oxford Univ. Press, 2013).

Michael F. Cannon, JM, MA, has been described by the *Washington Post* as "an influential health-care wonk at the libertarian Cato Institute," where he is the Director of Health Policy Studies. His work focuses on making medical care better and more affordable, and making access to medicine more secure. His scholarship has appeared in the *New York Times*, the *Wall Street Journal*, *Forum for Health Economics & Policy*, *Harvard Health Policy Review*, and the *Yale Journal of Health Policy, Law, and Ethics*. He is the coeditor of *Replacing Obamacare: The Cato Institute on Health Care Reform* (2012). His recent work includes "Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA," *Health Matrix: Journal of Law-Medicine* (2013, with Jonathan H. Adler).

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Congress of the United States
Washington, DC 20515

November 4, 2011

Hon. Douglas Shulman
 Commissioner of Internal Revenue
 Department of the Treasury
 1111 Constitution Avenue, NW, Room 3241
 Washington, DC 20224

Dear Commissioner Shulman:

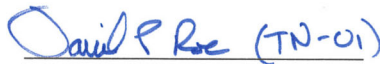
Recent reports indicate that proposed rule REG-13149-10 (rule) released on August 17, 2011 relating to the federal health insurance premium assistance tax credits (tax credits) included in the Patient Protection and Affordable Care Act (PPACA, P.L. 111-148) contradicts the explicit statutory language describing individuals' eligibility for receipt of these tax credits.

Section 1401(b)(2)(A) of Subtitle E of Title I of PPACA states that the tax credit amount determined under this section shall be provided to eligible individuals in a qualified health plan who are "...enrolled in through an Exchange established by the State under [Section] 1311 of the Patient Protection and Affordable Care Act..." However, the rule expands individuals' eligibility for tax credits beyond PPACA's explicit text to individuals enrolled in qualified health plans who reside in states which the federal government has established an Exchange pursuant to PPACA's authority under Section 1321. Specifically, the rule states "The proposed regulations provide that a taxpayer is eligible for the credit for a taxable year if the taxpayer...is enrolled in one or more qualified health plans through an Exchange established under section 1311 or **1321** [emphasis added] of the Affordable Care Act [PPACA]..."¹

Section 1 of Article I of the U.S. Constitution vested the Congress of the United States with the power to enact legislation. Federal administrative agencies like the Internal Revenue Service do not have the authority under our Constitution to propose regulations which contravene the explicit statutory text of dually-enacted public laws. Therefore, the proposed rule—allowing individuals enrolled in qualified health plans through a federally-operated exchange to receive a tax credit—is in violation of Section 1401(b)(2)(A) of PPACA.

We request that you amend the proposed rule's language to be consistent with PPACA's statutory text. Should your agency fail to make such a change, we will be left to consider a legislative solution that enforces Congressional intent.

Sincerely,

 (TN-01)

 (TN-04)

¹ Page 50934 of the Federal Register/Vol. 76, No. 159/Wednesday, August 17, 2011/Proposed Rules

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Mazha Blackburn TN-07

W. Cadd Abin MO-02

Larry Brushon IN-06

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Gynthia (P. Lemmis)

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, Chief Counsel and Staff Director
KRISTINE J. LUCIUS, Democratic Chief Counsel and Staff Director

May 27, 2015

The Honorable Jacob Lew
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC, 20220

Dear Secretary Lew:

I am writing today regarding the Treasury Department's refusal to supply key witnesses for an upcoming Senate Judiciary Committee oversight hearing about the Patient Protection and Affordable Care Act's (PPACA) exchange subsidy rulemaking process. This refusal is unacceptable and interferes with Congress's and this Committee's obligation to ensure proper functioning of federal agencies and the federal rulemaking process.

Last Thursday, May 21, 2015, my staff contacted your Department and requested the appearance of Assistant Secretary for Tax Policy Mark Mazur, Deputy Assistant Secretary for Tax Policy Emily McMahon, and Deputy Tax Legislative Counsel for Tax Policy Cameron Arterton at a planned oversight subcommittee hearing, currently scheduled for Thursday, June 4. Our understanding, based on prior congressional oversight efforts,¹ is that these three current federal employees played instrumental roles in the drafting and implementation of PPACA's exchange subsidy rule.² Given the significant questions that remain unanswered about the mechanics of the rulemaking process that led to this rule, their input, and therefore presence and testimony at the hearing, is considered essential.

Yesterday, Tuesday, May 26, my staff had a conversation with Sandra Salstrom, Deputy Assistant Secretary for Legislative Affairs on tax and budget issues, who informed my staff that your Department would not be permitting Mr. Mazur, Ms. McMahon, or Ms. Arterton to testify at that hearing. The excuse provided by Ms. Salstrom was that your Department would not make these (or presumably other relevant) witnesses available for testimony because of pending litigation on the subject. For two main reasons, this excuse is entirely invalid.

¹ See generally H. Comm. on Oversight and Government Reform and H. Comm. on Ways and Means, Joint Staff Report, *Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies* (Feb. 5, 2014).

² See generally Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012).

United States Senate

WASHINGTON, DC 20510

First, Congress retains its right to conduct oversight of the executive branch at all times, regardless of any perceptions of poor timing by, or inconvenience to, the executive branch. The Senate Judiciary Committee has obligations to ensure the proper functioning of the federal government at all times, and not just during windows of convenience for political officials. Second, your Department's pending litigation justification is without basis, particularly given how you have provided at least one Department witness for the exact same topic during the pendency of other litigation over the last few years.³

I am reiterating my request for your Department to voluntarily make Mr. Mazur, Ms. McMahon, and Ms. Arterton available for congressional testimony at our planned oversight hearing on June 4. If you do not opt to assist Congress and make all three individuals available voluntarily, I may have no choice but to pursue other options, including compulsory process, to make them available for testimony. Please note, in the event we are compelled to use compulsory process to ensure the attendance of these witnesses, the two-week courtesy notice prior to testimony is no longer applicable, and these individuals can be summoned for testimony at any time deemed convenient for the Committee.

Please contact my office to confirm attendance of the above witnesses for June 4 or if you have any additional questions.

Sincerely,



Ted Cruz
Chairman
Subcommittee on Oversight, Agency
Action, Federal Rights and Federal Courts

cc: The Honorable Charles E. Grassley
Chairman
Senate Committee on the Judiciary

³ While it is true that the United States Supreme Court is expected to render its decision in the *King v. Burwell* case before the end of the Court's present term, nothing that is said in the public domain could properly impact the litigation because it would not be part of the record before the Court. In terms of the claim that your Department does not allow witnesses to testify on issues that are the subject of pending litigation, that claim is demonstrably false. Your Department specifically allowed Ms. McMahon to testify before the House Committee on Oversight and Government Reform on July 31, 2013, during the pendency of *Halbig v. Sebelius*, on virtually identical subject matter. See Complaint, *Halbig v. Sebelius*, 1:13-cv-00623-RWR (D.D.C. May 2, 2013); H. Comm. on Oversight and Government Reform, Subcomm. on Energy Policy, Health Care, and Entitlements, *Oversight of IRS' Legal Basis for Expanding ObamaCare's Taxes and Subsidies* (Jul. 31, 2013). Ms. McMahon provided detailed discussion of the relevant subject matter in her written hearing testimony. See generally Written Testimony of Emily S. McMahon, Deputy Assistant Secretary for Tax Policy, U.S. Department of the Treasury, before the House Oversight and Government Reform Subcommittee on Energy, Health Policy [sic] and Entitlements (Jul. 31, 2013).



The Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary

The Honorable Christopher Coons
Ranking Member
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

***King v. Burwell* and the Rule of Law**

Senator Orrin G. Hatch



ABSTRACT

On March 4, 2015, the U.S. Supreme Court heard oral argument in *King v. Burwell*, a tremendously important case involving the administration of the Patient Protection and Affordable Care Act, also known as Obamacare. At issue in *King* is whether the president can lawfully provide subsidies for health insurance plans purchased through federally established exchanges when the text of Obamacare authorizes subsidies only for plans purchased through state-established exchanges. In this Essay, I explain why the president's actions in *King* were unlawful and why a ruling striking down the president's actions is crucial to ensure the continued vitality of the rule of law.

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INTRODUCTION

On March 4, 2015, the U.S. Supreme Court heard oral argument in *King v. Burwell*,¹ a tremendously important case involving the administration of the Patient Protection and Affordable Care Act, also known as Obamacare. *King* is important for a number of reasons. It's important because a lot of money is at stake.² It's important because it may require fundamental changes to be made to Obamacare.³ And it's important—indeed, perhaps it's most important—because of its significant implications for the rule of law. In this Essay, I explain why the president's actions in *King* were unlawful and why a ruling striking down the president's actions is crucial to ensure the continued vitality of the rule of law.

From the early days of the Republic, a core component of our constitutional character has been the idea that our government is a government of laws and not of men.⁴ This means that our leaders—elected and appointed—are constrained by the words in our statute books and in our Constitution.⁵

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1. Transcript of Oral Argument, *King v. Burwell*, No. 14-114 (U.S. Mar. 4, 2015), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-114_lkhn.pdf.
 2. *See* Abbe R. Gluck, *King v. Burwell Isn't About Obamacare*, POLITICO (Feb. 27, 2015), <http://www.politico.com/magazine/story/2015/02/king-v-burwell-states-rights-115550.html> (stating that \$25 billion in subsidies are at stake in the case); *see also* Linda J. Blumberg et al., Robert Wood Johnson Found., *The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums*, URBAN INST. (Jan. 2015), <http://www.urban.org/UploadedPDF/2000062-The-Implications-King-vs-Burwell.pdf> (“[V]ictory for the plaintiff would . . . eliminate \$28.8 billion in tax credits and cost-sharing reductions in 2016 . . .”).
 3. *See* Margot Sanger-Katz, *How an Adverse Supreme Court Ruling Would Send Obamacare Into a Tailspin*, N.Y. TIMES (Feb. 27, 2015), <http://www.nytimes.com/2015/03/02/upshot/how-an-adverse-supreme-court-ruling-would-send-obamacare-into-a-tailspin.html>; Rachana Pradhan & Brett Norman, *No Easy Fix if Supreme Court Halts Obamacare Cash*, POLITICO (Mar. 2, 2015, 5:36 AM), <http://www.politico.com/story/2015/03/supreme-court-obamacare-white-house-115631.html>.
 4. MASS. CONST. pt I, art. 30; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men.”).
 5. *See* *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) (“To be governed by legislated text rather than legislators' intentions is what it means to be 'a Government of laws, not of men.'” (quoting MASS. CONST. pt I, art. 30)). *See also* U.S. CONST. art. VI, § 3 (“The Senators and Representatives before mentioned, and the Members of

Government officials must follow the law, even when their personal predilections would lead them in a different direction. This prevents arbitrary decision making and keeps executive discretion within proper bounds.

The current administration, however, has engaged in a sustained assault on the rule of law.⁶ President Barack Obama's offenses range from releasing Guantanamo detainees without first notifying Congress, as the law requires;⁷ to claiming that congressional inaction somehow clothes him with authority to suspend immigration laws;⁸ to arrogating to himself the power to determine when Congress is in session.⁹

The president's actions in *King* are yet another example of executive overreach. At issue in the case is the president's decision to grant Obamacare subsidies to individuals who are statutorily ineligible for such subsidies in order to further what he claims are Obamacare's overall purposes.

This Essay proceeds in four parts. Part I provides an overview of Obamacare's subsidy regime. Part II demonstrates that the text of Obamacare clearly and unambiguously limits subsidies to individuals who purchase health insurance through state-run exchanges. Part III explains why Congress would have wanted to limit subsidies in this way, and rebuts the president's claim that denying subsidies for individuals who purchase insurance through federal exchanges would undermine Congress's intent. Part IV reiterates a point I first made five years ago—a point that became a focus of commentary following questions by Justice Kennedy during oral argument—namely, that Obamacare's subsidy regime unconstitutionally commandeers states into creating healthcare exchanges. A brief conclusion follows.

the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .").

6. I've spoken many times on the Senate floor about the president's disturbing disregard for the separation of powers and other limits on his authority. *See, e.g.*, 160 CONG. REC. S4391 (daily ed. July 10, 2014) (statement of Sen. Hatch); 160 CONG. REC. S3171 (daily ed. May 20, 2014) (statement of Sen. Hatch); 160 CONG. REC. S2857 (daily ed. May 8, 2014) (statement of Sen. Hatch).
7. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1035, 127 Stat. 672, 853 (2013); *see also* U.S. CONST., art. 1, § 8; H.R. Res. 644, 113th Cong. (2014).
8. *See* DHS's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C. 1, 30 (2014), *available at* <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf>; *see also* Julie Hirschfeld Davis, *Obama's Immigration Action Has Precedents, but May Set a New One*, N.Y. TIMES (Nov. 20, 2014), <http://www.nytimes.com/2014/11/21/us/politics/obamas-immigration-decision-has-precedents-but-may-set-a-new-one.html>.
9. NLRB v. Canning, 134 S. Ct. 2550, 2557 (2014).

I. OBAMACARE BACKGROUND

Obamacare requires every person in America to buy health insurance or else pay a penalty.¹⁰ This is the individual mandate that the Supreme Court controversially upheld three years ago.¹¹ Most Americans receive health insurance through their employer, which pays a large part of the premium.¹² But not all do. Many must purchase insurance on their own.¹³ To ensure that such individuals are able to comply with the individual mandate, Obamacare directs states to create healthcare exchanges—government-operated websites where consumers can go to compare and choose insurance plans.¹⁴

Obamacare also provides subsidies for individuals who purchase insurance through these state-run exchanges.¹⁵ Because individuals who purchase insurance on their own through exchanges don't receive an employer subsidy, they must contribute more toward their premium themselves. Obamacare provides subsidies to these individuals to help offset the cost of their higher premium payments.

At issue in *King* is whether Obamacare also authorizes the IRS to provide subsidies to individuals who purchase insurance through federally established exchanges. Under the well-known *Chevron* test, which the Court uses to examine the validity of an agency's interpretation of federal law, the inquiry begins with the text of the statute.¹⁶ If the statute unambiguously answers the question, the inquiry ends and the agency must follow the clear text of the statute.¹⁷ If, however, the statutory text leaves room for doubt, the Court looks to other indicia of Congress's intent in determining whether the agency's interpretation of the statute is "reasonable."¹⁸

Here, the text of Obamacare clearly limits subsidies to individuals who purchase insurance through state-run exchanges. That ends the matter. But even if the text is ambiguous, interpreting the statute to permit subsidies on federally established exchanges is not reasonable because it contravenes Congress's

10. 26 U.S.C. § 5000A (2012).

11. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2572 (2012).

12. See Michael Kitchell, *Obama's 30-Hour Full-Time Work Week*, AMES TRIB. (Jan. 31, 2015, 11:26 PM), <http://amestrib.com/opinion/dr-michael-kitchell-obamacare-s-30-hour-full-time-work-week>.

13. See, e.g., *Choosing Health Insurance*, CONSUMER REP. (Sept. 2012), <http://www.consumerreports.org/cro/2012/09/choosing-health-insurance/index.htm>.

14. See 42 U.S.C. § 18031(b) (2012).

15. See 26 U.S.C. § 36B (2012).

16. See *Chevron, Inc. v. NRDC*, 467 U.S. 837 (1984).

17. See *id.* at 843.

18. *Id.*

intent in conditioning subsidies on creation of state-run exchanges. Under both steps of *Chevron*, this interpretation fails.

II. THE UNAMBIGUOUS TEXT

Start with the text of the statute. As I have described, Obamacare directs states to establish healthcare exchanges. To be precise, the law says, “Each State shall, not later than January 1, 2014, establish an [exchange]” that meets various conditions set forth in the law.¹⁹

Obamacare additionally authorizes subsidies for individuals who purchase insurance through healthcare exchanges.²⁰ But a key provision of Obamacare—the one at the heart of *King*—conditions receipt of these subsidies on an individual’s enrollment in a *state-run* exchange. According to this provision, a subscriber is eligible for a subsidy only for each month that she is covered by a plan that she “enrolled in through an Exchange established by the State.”²¹ The text of this provision could not be more clear.²² If an individual enrolls in a plan through an exchange established by the state, she gets a subsidy. If she enrolls in a plan through any other exchange, she doesn’t get a subsidy.

Congress recognized, however, that some states might not create exchanges. Thus, it provided a backstop. In a separate provision of Obamacare, Congress directed that if a state did not set up an exchange by the January 2014 deadline, the Department of Health and Human Services (HHS) should “establish and operate such Exchange within the State.”²³ Crucially, however, Congress did not provide that subsidies would be available to subscribers who enrolled in plans through federally established exchanges.

Fast forward to May 2012. Notwithstanding the unmistakably clear text of the statute, which limits subsidies to plans purchased through state-established exchanges, the president decided that he would *also* offer subsidies for plans purchased through federally established exchanges.²⁴

19. 42 U.S.C. § 18031(b)(1) (2012).

20. 26 U.S.C. § 36B.

21. *Id.* § 36B(c)(2)(A)(i) (2012).

22. See Transcript of Oral Argument, *supra* note 1, at 7 (“[T]he only provision in the Act which either authorizes or limits subsidies says, in plain English, that the subsidies are only available through an exchange established by the State under Section 1311.”) (statement of Michael A. Carvin, counsel for Petitioners).

23. 42 U.S.C. § 18041(c)(1) (2012).

24. See 77 Fed. Reg. 30,377, 30,378, 30,387 (May 23, 2012).

The president grasps at exceedingly thin textual straws to justify his overreach. Because the backstop provision described above instructs that if a state does not establish an exchange, HHS should step in and establish “such Exchange” itself,²⁵ the president says this means that federal exchanges are state exchanges.²⁶ Right is left and up is down.

Before you try to wrap your head around the president’s *X*-equals-not-*X* argument, let me return to the real provision in dispute in *King*, the one that defines eligibility for subsidies. Recall that this provision says an individual is eligible for each month that she is covered by a plan that she “enrolled in through an Exchange established by the State.”²⁷ An exchange established by the federal government is by definition *not* an exchange established by the state, regardless of whether the federal exchange is a backstop or not.²⁸

And it gets even worse for the president, because the provision additionally specifies that the state exchange must have been established “under section 1311 of the [statute].”²⁹ That section sets forth the requirements for creating state-run exchanges.³⁰ Nowhere does it mention federal exchanges. Rather, the conditions for creation of federal exchanges appear in a different section—section 1321.³¹ Under no plausible reading of the text does a state exchange established under section 1311 mean a federal exchange established under section 1321.

There is, in short, no ambiguity in the statute. Subsidies are available for plans purchased through state exchanges. Subsidies are not available for plans purchased through federally established exchanges. The president’s decision to grant subsidies for both types of plans contravenes clear statutory text.

III. CONGRESS’S INTENT

Lacking support in the text of the statute, the president focuses instead on arguments about Congress’s intent in passing Obamacare. He claims that subsidies for federally enrolled plans are necessary to accomplish Obamacare’s

25. 42 U.S.C. § 18041(c)(1) (2012).

26. Brief for Respondents at 33–35, *King v. Burwell*, 135 S. Ct. 475 (2015) (No. 14–114), *available at* <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/01/14-114-Respondents-Brief.pdf>.

27. 26 U.S.C. § 36B(c)(2)(A)(i) (2012).

28. Transcript of Oral Argument, *supra* note 1, at 26 (“[T]he Solicitor General is coming here to tell you that a rational, English-speaking person intending to [make] subsidies available on HHS Exchanges use[d] the phrase ‘Exchanges established by the State.’ He cannot provide to you any rational reason why somebody trying to convey the former would use the latter formulation.”) (statement of Michael A. Carvin, counsel for Petitioners).

29. 26 U.S.C. § 36B(c)(2)(A)(i) (2012).

30. *See* 42 U.S.C. § 18031 (2012).

31. *See id.* § 18041(c)(1).

overall purpose of reducing costs and improving healthcare access.³² The solicitor general summed up the president's argument well when he told the justices at oral argument that denying subsidies to individuals enrolled through federal exchanges would "precipitate[] . . . insurance market death spirals" and "revoke[] the promise of affordable care for millions of Americans."³³ According to the solicitor general, "That cannot be the statute that Congress intended."³⁴

But there is good reason to believe Congress *did* intend to deny subsidies for federally enrolled plans, and not just because that's what the statute says. The reason is that Congress needed a way to incentivize the states to create their own exchanges.

Recall that Obamacare directs states to establish exchanges "not later than January 1, 2014."³⁵ But there's a wrinkle: The Constitution does not permit the federal government to order states to do things. The federal government and the states are coequal sovereigns.³⁶ Just as one state cannot command another state to do something, so too the federal government cannot command the states to do something. This is called the anticommandeering principle and is well established in Supreme Court case law.³⁷

What the federal government *can* do, however, is incentivize states to act.³⁸ And that's precisely what Congress attempted to do with Obamacare. By tying availability of subsidies to enrollment through state exchanges, Congress ensured that states would feel tremendous pressure to create their own exchanges. If a state fails to establish an exchange, its citizens lose out on millions—perhaps even billions—of dollars in subsidies.³⁹ Obamacare's proponents quite reasonably thought this would lead states to set up exchanges and would thus accomplish the same result that Congress could not achieve through direct command.

32. Brief for Respondents, *supra* note 26, at 38–42; *see also* Transcript of Oral Argument, *supra* note 1, at 44 ("[O]ur reading is compelled by the Act's structure and design.") (statement of Donald B. Verrilli, Solicitor Gen.).

33. Transcript of Oral Argument, *supra* note 1, at 44–45 (statement of Donald B. Verrilli, Solicitor Gen.).

34. *Id.* at 45.

35. 42 U.S.C. § 18031(b)(1) (2012).

36. *See* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." (quoting Tafflin v. Levitt, 493 U.S. 455, 458 (1990))).

37. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012); Printz v. United States, 521 U.S. 898, 925 (1997); New York v. United States, 505 U.S. 144, 161 (1992).

38. *See* Sebelius, 132 S. Ct. at 2602; South Dakota v. Dole, 483 U.S. 203, 206–07 (1987).

39. *See* Tony Pugh, *Money and Quality of Life at Stake as Health Law Returns to Supreme Court*, STATE (Feb. 27, 2015), <http://www.thestate.com/2015/02/27/4015230/money-and-quality-of-life-at-stake.html>.

Congress's reasoning in refusing to provide subsidies on federally established exchanges is therefore obvious. If subsidies were available under both state *and* federal exchanges, states would have no incentive to create their own exchanges—to expend time and resources setting up an online insurance marketplace—because subsidies would come either way.⁴⁰ And if fewer states created exchanges, the federal government would have to step in and create more exchanges of its own.

The restriction of subsidies to state-established exchanges was thus a key element of Obamacare's entire cooperative federalism scheme.⁴¹ Without this restriction, the end result would have been a federally run healthcare market, a result unacceptable to several key Obamacare supporters whose votes were essential to pass the law.⁴²

The president's parade of horrors also proves too much. Without subsidies to individuals in the thirty-four states that lack state-run exchanges, he says, residents of those states will be hit with higher costs and unaffordable health care.⁴³ But the president's argument is completely circuitous. The reason thirty-four states could afford *not* to establish exchanges is because the president said he would provide subsidies regardless of whether a state established an exchange. The president's actions destroyed the incentive structure Congress created. Why would a state go to the trouble and expense of creating an exchange if the end result is the same? Indeed, in these difficult times of tight state budgets,⁴⁴ not creating an exchange might be the fiscally responsible decision.

40. See Transcript of Oral Argument, *supra* note 1, at 26 (“If you give unconditional subsidies, then . . . there is absolutely no incentive for States to do it, and you have fundamentally undermined that distinct statutory purpose.”) (statement of Michael A. Carvin, counsel for Petitioners).

41. James F. Blumstein, *NFIB v. Sebelius and Enforceable Limits on Federal Leveraging: The Contract Paradigm, the Clear Notice Rule, and the Coercion Principle*, 6 J. HEALTH & LIFE SCI. L. 123, 143 (2013) (“Cooperative federalism programs . . . are characterized by the federal government providing money to state (and local) governments to achieve federal programmatic objectives.”); see Ilya Somin, *Why the DC Circuit's Interpretation of the ACA in Halbig v. Burwell Is Far From 'Absurd,'* VOLOKH CONSPIRACY (July 24, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/24/why-the-dc-circuits-interpretation-of-the-aca-in-halbig-v-burwell-is-far-from-absurd>.

42. See Carrie Budoff Brown, *Nelson: National Exchange a Dealbreaker*, POLITICO (Jan. 25, 2010, 7:59 PM), http://www.politico.com/livepulse/0110/Nelson_National_exchange_a_dealbreaker.html; Patrick O'Connor & Carrie Budoff Brown, *Nancy Pelosi's Uphill Health Bill Battle*, POLITICO (Jan. 9, 2010, 9:58 AM), <http://www.politico.com/news/stories/0110/31294.html>.

43. See Brief for Respondents, *supra* note 26, at 12; see also Transcript of Oral Argument, *supra* note 1, at 45 (statement of Donald B. Verrilli, Solicitor Gen.).

44. See, e.g., Reid Wilson, *Even Amid Recovery, State Budgets Bleed Red Ink*, N.Y. TIMES (Dec. 12, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/12/12/even-amid-recovery-state-budgets-bleed-red-ink>; *State Budget Shortfalls, SFY2013*, HENRY J. KAISER FAM. FOUND., <http://kff.org/other/state-indicator/state-budget-shortfalls-sfy13> (last updated June 27, 2012).

Lacking support either in the text of the statute or in other markers of Congress's intent, the president has taken instead to twisting my words—and the words of other Obamacare opponents—to claim that we used to agree with his position.⁴⁵ The president's thinking appears to be that if we used to agree with him, then the Supreme Court should, too.

For example, in its brief in the Supreme Court, the administration dredged up a five-year-old op-ed I wrote for the *Wall Street Journal* that the administration claims supports the president's position.⁴⁶ Of course the op-ed does no such thing. The op-ed makes a number of arguments why Obamacare is unconstitutional.⁴⁷ It says nothing at all about whether subsidies are available for federally enrolled plans.

One line in the op-ed, which the administration's brief pulls out of context, says that establishing an exchange is “not a condition for receiving federal funds.”⁴⁸ As I explain below, this line was a reference to the Supreme Court's holding in *South Dakota v. Dole*⁴⁹ that Congress can use funding conditions to incentivize states to do things that it cannot command them to do directly.⁵⁰ Because Obamacare subsidies go to individuals or to their insurance providers, not to states, *Dole* does not apply. Establishing an exchange is not a condition for a state to receive federal funds.⁵¹

Other Obamacare proponents have dug up old speeches of mine decrying the law's costs and inefficiencies. One writer has even made the perplexing claim that by arguing that Obamacare would lead to higher taxes, I was somehow endorsing the view that subsidies would be available on federal exchanges.⁵² Of course, I never suggested any such thing. I merely made the commonsense point that as Obamacare causes insurance premiums to rise, increasing numbers of employers will drop coverage, forcing more and more Americans onto exchanges.⁵³ And because Obamacare provides subsidies to

45. See Brief for Respondents, *supra* note 26, at 45.

46. See *id.*; Orrin G. Hatch et al., *Why the Health-Care Bills Are Unconstitutional*, WALL ST. J., Jan. 2, 2010, at A11.

47. See Hatch et al., *supra* note 46, at A11–12.

48. *Id.* at A12.

49. 483 U.S. 203 (1987).

50. *Id.* at 212.

51. See *infra* Part IV.

52. Simon Maloy, *Orrin Hatch Is About to Lie: Rebutting His Upcoming SCOTUS Defense, Using His Own Words*, SALON (Feb. 12, 2015, 10:31 AM), http://www.salon.com/2015/02/12/orrin_hatch_is_about_to_lie_rebutting_his_upcoming_scutus_defense_using_his_own_words.

53. See Senator Orrin Hatch, Address at the Heritage Center: Why Obamacare is Harming, Not Helping, Our Health Care System and Our Economy (Oct. 11, 2011), *available at* <http://www.heritage.org/Events/2011/10/Senator-Hatch>.

millions of subscribers who obtain insurance through state-run exchanges, these costs will increasingly be passed on to taxpayers.⁵⁴

To the extent this argument assumes that most subscribers who obtain insurance through exchanges will receive subsidies, this is because—at the time I made the argument—it was widely expected that most states would set up exchanges.⁵⁵ As I have explained, the reason most states ultimately could afford *not* to establish exchanges was because the president decided to also provide subsidies on federal exchanges, thus eliminating the incentive for states to create their own exchanges.⁵⁶

In sum, Congress passed a statute that authorizes subsidies for plans enrolled through state exchanges but not for plans enrolled through federal exchanges. The statute is unambiguous on this point. Moreover, Congress had a clear reason to structure the statute in this way. It needed states to create exchanges in order to avoid a politically untenable, federally run healthcare market, but could not command states to create exchanges directly. So it came up with an incentive. Subscribers enrolled through state exchanges get subsidies; subscribers enrolled through federal exchanges do not. States would accordingly feel pressure to create exchanges to ensure that their citizens do not lose out on millions of dollars in potential subsidies. In granting subsidies for federally enrolled plans as well, the president's act of overreach flies in the face of both clear statutory text and Congress's intent in structuring the subsidy regime that way it did.

IV. THE COERCION QUESTION

At oral argument, Justice Kennedy raised the possibility that if Obamacare subsidies are not available on federal exchanges, then the entire subsidy regime might be unconstitutional because it would place *too much* pressure on states to set up exchanges. Alluding to the president's assertion that denying subsidies for federally enrolled plans would cause insurance markets to collapse in states without state-run exchanges,⁵⁷ Justice Kennedy suggested that the petitioners'

54. *See id.*

55. *See, e.g.,* Sam Baker, *Nine GOP-Led States Get Funds for Health Exchanges*, HILL, Nov. 30, 2011, at 12; Robert Pear, *U.S. Officials Brace for Huge Task of Operating Health Exchanges*, N.Y. TIMES, Aug. 5, 2012, at A17; *see also* Brief for Petitioners at 4, *King v. Burwell*, 135 S. Ct. 475 (2015) (No. 14-114), *available at* <http://www.scotusblog.com/case-files/cases/king-v-burwell> (follow "Brief of petitioners" link).

56. *See* Brief for Petitioners, *supra* note 55, at 14.

57. *See* Brief for Respondents, *supra* note 26, at 15, 37.

reading of the statute would arguably tell states, “either create your own Exchange, or we’ll send your insurance market into a death spiral.”⁵⁸

Supporters of the president immediately latched on to Justice Kennedy’s concern as a reason to interpret the statute to permit subsidies for federally enrolled plans.⁵⁹ The solicitor general, for his part, argued that if the Court thought that limiting subsidies to state-enrolled plans would “rise to the level of something approaching coercion,” then “the doctrine of constitutional avoidance becomes another very powerful reason to read the statutory text our way.”⁶⁰

But the constitutional avoidance doctrine, which says that statutes should be interpreted to avoid “serious constitutional problems,”⁶¹ applies only when a statute is ambiguous.⁶² Here, the statute is crystal clear. Subsidies are available only on state exchanges. End of story.

That does not mean, however, that Justice Kennedy’s concern should be swept aside. The constitutionality of Obamacare’s subsidy regime is highly suspect, and not only under a theory of coercion. As I first wrote five years ago in the *Wall Street Journal* op-ed, the subsidy regime also violates the anticommandeering principle.⁶³ It does so in two ways.

First, it orders states to create exchanges without giving them a benefit in return. As noted above, in *South Dakota v. Dole* the Supreme Court held that Congress can lawfully condition federal funds to states as a means of incentivizing states to act.⁶⁴ This gives Congress a way around the no-commandeering rule—Congress can incentivize states to act but can’t order them—and is precisely what Congress attempted to do with Obamacare. However, as the op-ed explains, there is a crucial difference between the regime the Court blessed in *Dole* and the regime at issue in *King*.

58. Transcript of Oral Argument, *supra* note 1, at 16 (Kennedy, J.).

59. See Brian Beutler, *How Conservative Supreme Court Justices Harmed Their Own Anti-Obamacare Cause*, NEW REPUBLIC (Mar. 6, 2015), <http://www.newrepublic.com/article/121237/king-burwell-conservative-supreme-court-justices-helped-obamacare>; see also Mark Joseph Stern, *King v. Burwell First Reaction: Obamacare Dangles by a Single Vote, Again*, SLATE (Mar. 4, 2015, 12:32 PM), http://www.slate.com/blogs/the_slatest/2015/03/04/king_v_burwell_obamacare_may_survive_but_barely.html.

60. Transcript of Oral Argument, *supra* note 1, at 49–50 (statement of Donald B. Verrilli, Solicitor Gen.).

61. *DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988).

62. See *U.S. v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (U.S. 2001) (“[T]he canon of constitutional avoidance has no application in the absence of statutory ambiguity.”); see also Transcript of Oral Argument, *supra* note 1, at 17 (colloquy between Scalia, J., and Michael A. Carvin, counsel for Petitioners).

63. Hatch et al., *supra* note 46, at A12.

64. 483 U.S. 203, 212 (1987).

Dole involved the payment of federal funds to states. The specific law at issue in the case required states to raise their drinking age or else lose a certain percentage of federal highway funds.⁶⁵ The Court concluded that requiring states to raise their drinking age in this way was constitutional because states received something in return—money.⁶⁶

But Obamacare subsidies don't go to state governments. They go to individuals, or to their insurance providers, in the form of tax credits.⁶⁷ Obamacare thus pressures state governments to act without giving them a monetary benefit in return. The *Dole* escape hatch doesn't apply.

The second way Obamacare's subsidy regime violates the anticommandeering principle is by denying states the ability to reject Congress's directive. Under Obamacare, if a state decides it doesn't want an exchange, the federal government goes ahead and creates one anyway.⁶⁸ This is a bit like telling a child to clean his room and that if he doesn't clean it, you're going to clean it for him. No matter how badly the child wants the room to stay the way it is—maybe he likes the way his toys are arranged, or prefers a little clutter to a bare floor—you're going to make the room look the way you think it should.

That is not the way two equal partners work together. One doesn't tell the other, either you do what I want, or I'll do it myself. If ordering a state to do something violates principles of federalism,⁶⁹ then surely ordering a state to do something and promising to do it anyway if the state refuses also violates federalism. As I wrote in the 2010 op-ed, Obamacare's this-is-going-to-happen-whether-you-like-it-or-not approach “renders states little more than subdivisions of the federal government.”⁷⁰

King may not be the right vehicle to address these constitutional infirmities. Neither side raised the constitutionality of Obamacare's subsidy regime in its briefs, and a decision to strike down a central element of Obamacare should probably be made only with the benefit of full briefing.⁷¹ In an appropriate case, however, the Court should confront these questions head on. Just as the president must follow the law, laws must follow the Constitution.

65. See *id.* at 205.

66. See *id.* at 211.

67. 26 U.S.C. § 36B(f) (2012).

68. 42 U.S.C. § 18041(c)(1) (2012).

69. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012); *Printz v. United States*, 521 U.S. 898, 912 (1997); *New York v. United States*, 505 U.S. 144, 149 (1992).

70. Hatch et al., *supra* note 46, at A12.

71. See SUP. CT. R. 14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”); see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570 (2001) (“We decline to address an issue that was not sufficiently briefed and argued before this Court.”).

CONCLUSION

What's ultimately at stake in *King* is the president's obligation to follow the law. Faced with a statute that doesn't operate quite the way he envisioned, President Obama decided to disregard the parts of the law he doesn't like and instead implement a different statute. But the Constitution doesn't give the president leave to unilaterally rewrite laws. The power to amend laws lies with Congress,⁷² and until Congress amends a statute, the president is bound to the text Congress passed.

Advocates of the president's position would have us believe that statutes are infinitely malleable—up can mean down, right can mean left, established by a state can mean established by the federal government. What matters to them is advancing some alleged statutory purpose—regardless of what the statute actually says—that furthers the president's agenda.⁷³

Those of us on the other side, however, insist that text matters. Words matter. What the statute *says* is what matters because, at the end of the day, the words in our statutes and in our Constitution are what bind our leaders and what prevent them from doing whatever they want.⁷⁴ Fidelity to text is the foundation of the rule of law.⁷⁵

The president's actions in *King* have undermined the rule of law and contravened important constitutional checks on the president's authority. As has increasingly been the case under this administration, it is now up to the Supreme Court to rein in the president's overreach and to reaffirm the fundamental obligation of all government officials to follow the law.

72. See U.S. CONST. art. 1, § 1; *United States v. Gaskin*, 320 U.S. 527, 530 (1944) (Murphy, J., dissenting) ("Congress alone has power to amend or clarify . . . a statute.").

73. See Brief for Respondents, *supra* note 26, at 35.

74. See John L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 NOTRE DAME L. REV. 1237, 1266 (2014) (quoting, while recognizing that the source of the quote is disputed, Patrick Henry as saying that "[t]he Constitution is not an instrument for the government to restrain the people, it is an instrument for the people to restrain the government").

75. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 122 (2007) ("The only sure indication of what Congress intended is what Congress enacted; and even if there is a difference between the two, the rule of law demands that the latter prevail.").

PRESS RELEASE

OVERSIGHT COMMITTEE ASKS IRS TO EXPLAIN RECENT RULE THAT EXPANDS OBAMACARE'S REACH IN A WAY NOT AUTHORIZED IN LAW

<https://twitter.com/intent/tweet?text=https%3A%2F%2Foversight.house.gov%2Frelease%2Foversight-20120817>

PUBLISHED: AUG 22, 2012

URL: <https://oversight.house.gov%2Frelease%2Foversight-20120817>

***CORRECTION--an earlier version of this release included inaccurate letter text; release is unchanged--corrected text follows release...
applies to the error)**

Asks:

WASHINGTON -- Committee on Oversight and Government Reform have asked the head of the Internal Revenue Service to explain an agency rule that dramatically extends Obamacare's employer mandate tax penalty and likely increases federal spending by \$500 billion over the next decade. Independent academics and legal experts do not believe this rule is authorized under the law. The letter to Commissioner Douglas Shulman was signed by Chairman Darrell Issa (R-CA), Rep. Trey Gowdy (R-SC) and Rep. Scott DesJarlais, M.D., (R-TX).

Explain:

President Obama's health care law created "premium assistance tax credits" for individuals who enrolled in health care "exchanges established by [a] State." As part of its implementation of the law, the IRS issued a final rule in May which extends Obamacare's premium assistance tax credits to individuals purchasing insurance in exchanges established by the federal government--not the state exchanges specified in the law.

That:

"The IRS rule is nothing in the legislative history to support IRS's rule and IRS ignored the legislative history that suggests the plain text of the statute represented Congressional intent about limiting the tax credits to state Exchanges, IRS's defense of its rule using "the relevant legislative history" is flawed and misleading," Chairman Issa said.

Since only 14 states have decided to create state insurance exchanges, the IRS's rule that extends the premium assistance tax credits beyond Congressional intent has substantial implications. First, the rule is a massive new tax increase on the American people since the Congressional Budget Office projects 80 percent of the cost of the tax credit represents new government spending. This tax increase is likely to exceed \$500 billion over the next decade.

Second, the rule extends the \$3,000 per worker employer mandate tax to businesses in every state since employers are only penalized if their workers receive Obamacare's premium assistance tax credits.

As part of its oversight of Obamacare's implementation, the Committee has documented how IRS's rule is at odds with the law. On July 23, 2012, the Congressional Research Service (CRS) American Law Division produced a legal analysis of the IRS rule. CRS's analysis raises serious doubt that the IRS "implemented the law that was written" when it issued its rule or that the law contained language that authorized credits to federal exchange enrollees, the letter said.

CRS also pointed out that the law says that the IRS must "determine whether the requirements of the law are met" before it can issue a rule. Reaching in a way not authorized in law via a "GOPOversight&rel" reviewing the legality of the rule might not "limit itself to consideration of only the plain text of the provision," and might also look at "legislative history, legislative purpose, and context," the letter noted. It also said that two noted health care and legal experts argue that "neither the structure, history nor other indicia of congressional intent support the IRS position," and the IRS rule is thus "illegal."

Dr. DesJarlais added, "I appreciate Chairman Issa and Subcommittee Chairman Gowdy for continuing to conduct oversight on this flagrant abuse of power by the IRS. Commissioner Shulman stated in his testimony before the Committee that his 'main job is to implement the law that was written.' I simply fail to see how that statement matches the actions of the agency in circumventing Congress by unilaterally re-writing this important provision of the ACA."

Text of the letter is below:

August 17, 2012

The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
Washington, DC 20515

Dear Commissioner Shulman:

The Patient Protection and Affordable Care Act (PPACA)[1] created premium-assistance tax credits for individuals enrolled in "an Exchange established by [a] State." [2] IRS issued a final rule (rule) on May 16, 2012, which extends PPACA's premium-assistance tax credits to individuals purchasing insurance in Exchanges established by the federal government (federal Exchanges). [3] While PPACA requires the Secretary of Health and Human Services to "establish and operate" an Exchange within any state that fails to create one on its own, [4] PPACA does not contain any language that contradicts or overrides the explicit language limiting premium-assistance tax credits to Exchanges established by states only. [5] Since most states, to date, have opted not to create Exchanges, IRS's extension of the tax credits beyond what the statute authorizes likely increases PPACA's cost in excess of \$500 billion over the next decade. [6] Moreover, since employers are only subject to PPACA's employer mandate tax penalties if their workers receive PPACA's premium-assistance tax credits, [7] IRS's rule subjects employers in every state to the employer mandate tax penalty. The Committee is conducting oversight on this IRS rule, and we are writing to request more information about the rule's rationale, authority, and consequences.

and we are writing to request that information about the rule's structure, meaning, and exceptions.

At the Committee's hearing on August 2, 2012, you testified that your "main job is to implement the law that was written."^[8] You also testified that you thought "Section 36B [the Section of the Internal Revenue Code added by PPACA] had some contradictory language in it."^[9] On July 23, 2012, the American Law Division, an arm of the Congressional Research Service (CRS) and who the Congress relies upon for guidance, produced a legal analysis of the IRS rule.^[10] CRS's analysis raises serious doubt that IRS "implement[ed] the law that was written" when it issued its rule or that Section 36B contained "contradictory language" with respect to whether PPACA authorizes tax credits in federal Exchanges. According to CRS:

The plain language of Section 36B suggests that premium tax credits are available only where a taxpayer is enrolled in an "Exchange established by the State." As noted previously, a strictly textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS's authority to issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a state-established exchange. Therefore, an IRS interpretation that extended tax credits to those enrolled in federally facilitated exchanges would be contrary to clear congressional intent, receive no *Chewon* deference, and likely be deemed invalid.^[11]

According to CRS, a court reviewing the legality of the rule might not "limit itself to a consideration of only the plain text of the provision"^[12] and might also look at "legislative history, legislative purpose, and context."^[13] Jonathan Adler, a law professor at the Case Western Reserve University School of Law, and Michael Cannon, director of health policy studies at the CATO Institute, argue that "[n]either the structure, history, nor other indicia of congressional intent support the IRS position."^[14] According to Adler and Cannon, Congress purposefully limited the law's premium tax credits to Exchanges "established by the State"^[15] and the IRS rule that extends the tax credits to federal Exchanges is thus illegal.^[16]

PPACA's authors strongly preferred state-run Exchanges over federal Exchanges. The statute repeatedly uses financial incentives to encourage states and others to comply with the Act's regulatory scheme. Both of PPACA's antecedent bills contained the same feature of withholding credits from residents of uncooperative states. During congressional consideration, PPACA's lead author said that a state must establish an Exchange in order for tax credits to become available.^[17]

In issuing the final rule allowing tax credits in federal Exchanges, IRS argued that "the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges."^[18] For IRS to issue a rule that contradicts "a strictly textual analysis of the plain meaning of the provision,"^[19] the legislative history should clearly support the IRS's interpretation of the rule.

However, IRS failed to cite any legislative history that showed Congress intended for individuals in federal Exchanges to receive PPACA's tax credits. According to Michael Cannon's testimony at the Committee's August 2, 2012, hearing, the relevant legislative history is limited, but the limited legislative history suggests that Congress intended for the tax credits to be confined to state Exchanges:

[M]y staff and I did a pretty extensive search of the Congressional Record, including markups and Committee action, on this statute. We found only two mentions in the Congressional Record of what would happen if States did not create a health insurance Exchange on their own. The first was the chairman of the Senate Finance Committee said that tax credits are conditioned upon States establishing their own Exchanges. . . . The only other mention was in the House during House consideration of the Patient Protection and Affordable Care Act by Congressman Michael Burgess. He said, "What happens if the States don't create an Exchange? Well, a federal Exchange will impose a public option." It made no mention of tax credits. Those are the only two [examples] we have found.^[20]

Although the Congressional debate was limited on the question of whether tax credits would apply to federal Exchanges, Senate Finance Chairman Max Baucus's comments offer support to the interpretation that the tax credits are only available in Exchanges established by states.^[21] Moreover, neither of PPACA's antecedent bills, which were reported by the Senate Finance Committee and the Senate Health Education Labor and Pension Committee, supports IRS's rule.^[22] According to Adler and Cannon, "Each of those bills withheld credits from taxpayers whose state governments failed to establish an Exchange or otherwise failed to implement the law in accord with federal dictates."^[23] Since there is nothing in the legislative history to support IRS's rule and IRS ignored the legislative history that suggests the plain text of the statute represented Congressional intent about limiting the tax credits to state Exchanges, IRS's defense of its rule using "the relevant legislative history" is flawed and misleading.

In order to assist the Committee in understanding how IRS arrived at the rule to extend PPACA's premium-assistance tax credits to individuals purchasing insurance in federal Exchanges, please provide the following information to the Committee by September 4, 2012.

1. Please provide all legal analysis, internal or external, conducted by the IRS which authorizes IRS to grant premium-assistance tax credits in federal Exchanges.
2. Please provide all documents and communications between IRS employees and employees of the White House Executive Office of the President or any other federal agency or department referring or relating to the proposed IRS rule^[24] or final IRS rule^[25] between March 23, 2010, and August 17, 2012.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers to receive all documents in electronic format.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about the Committee's request.

If you have any questions about this request, please contact Brian Blase with the Committee staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,

Darrell Issa
Chairman

Trey Gowdy
Chairman
Subcommittee on Health Care, District of
Columbia, Census & the National Archives

Scott DesJarlais

cc: The Honorable Elijah Cummings, Ranking Member

The Honorable Danny Davis, Ranking Member, Subcommittee on Health Care, District of Columbia, Census and the National Archives

The Washington Post

Politics

Six words might decide the fate of Obamacare at the Supreme Court

By [Lisa Rein](#) March 1

When the Supreme Court takes up the latest challenge to President Obama's health-care law this week, how the justices interpret a six-word phrase in the bill could determine its fate.

The law, adopted in 2010, says the federal government can pay subsidies to help people afford insurance bought through "an Exchange established by the State."

But two-thirds of the states have opted against setting up their own exchanges, and as a result, more Americans have been buying insurance through the federal insurance marketplace. Now, opponents of the law will make their case to the high court that Americans who are not using the state exchanges are ineligible for subsidies. And if they win, insurance premiums could skyrocket and many people might drop their coverage — possibly undermining the whole health-care program.

And as the justices weigh whether the health-care law in fact has a fatal glitch, one of the key questions is this: Why did the Obama administration rule-writing officials in the Internal Revenue Service and its parent agency, the Treasury Department, ultimately interpret the language the way they did?

It had never occurred to the Treasury Department official responsible for making the changes in the tax code required by the law that there was more than one way to read the phrase — until she happened across an article in a trade journal.

Emily McMahon, deputy assistant treasury secretary for tax policy, read an article in Bloomberg BNA's Daily Tax Report in January 2011 raising questions about whether federal subsidies could be paid for millions of Americans buying insurance under the Affordable Care Act, according to Treasury Department officials. The issue was whether the law allowed these payments if the coverage was bought in states that did not set up their own insurance marketplaces.

So McMahon called a meeting with two of her top lawyers, one of them recalled, and asked whether there was "a glitch in the law we needed to worry about."

In the end, the Treasury and IRS officials who wrote the rules adopted the more expansive reading of the law — allowing subsidies for all marketplaces — because they concluded this was required for the new health-care initiative to succeed, according to current and former agency officials and documents they provided to congressional investigators. And, the officials reasoned, Congress would not have passed a law that it wanted to fail.

“Nobody I talked to in government, including many people involved in the legislative process, thought this was a question,” recalled David Gamage, a tax law professor at the University of California at Berkeley hired to help the Treasury Department’s Office of Tax Policy implement the law. “Nobody thought the argument [limiting the subsidies] was persuasive.”

While it was clear to the rules’ authors at Treasury and the IRS that the issue was a practical matter and not a political one, they met regularly with White House officials, who were closely monitoring the drafting of the regulations, two former officials said.

And while the team of tax attorneys had no doubt that the subsidies should apply to all marketplaces, there was a significant debate inside Treasury and the IRS about how much of their reasoning should be spelled out in public. The agency was sensitive to the legal and political minefield it was navigating.

The passage of the 955-page health-care law required officials to draft some of the biggest changes to the tax code in years. In weekly meetings in a fourth-floor conference room at IRS headquarters on the Mall, government lawyers deliberated over dozens of provisions of what would become Part 36B of the Internal Revenue Code, the rules governing the tax credits.

At first, the team of Treasury and IRS lawyers considered the subsidy question a minor issue, in part because it was widely expected that states would set up their own marketplaces.

“It didn’t occupy a lot of conversation, because it was not at all clear that a lot of states wouldn’t establish their own exchanges,” said Clarissa Potter, a deputy tax director at American International Group who was the IRS’s deputy chief counsel until May 2011.

When she learned that opponents of Obamacare were targeting the federal subsidies, Potter recalled, “I remember thinking: ‘Jeez, really? Is this the best you can do?’”

Among the officials drafting the regulations, the unanimous view was that the opponents didn’t have a case, according to Gamage, Potter and two others who were involved.

Gamage circulated a memo concluding that while the law contained some “awkwardly written” phrases, the best reading of the statutory language was that all Americans who are eligible receive the subsidies. He said the language

deems federal marketplaces as a subset of the exchanges established by a state.

The team published a proposed rule in the Federal Register in August 2011, scheduled a public hearing for November and put the issue on the back burner, focusing on other tax issues in the law.

A day before the public hearing, an op-ed piece titled “[Another ObamaCare Glitch](#)” by Case Western Reserve University law professor Jonathan Adler and Michael F. Cannon, a health policy expert at the libertarian Cato Institute, appeared in the Wall Street Journal. They wrote that the IRS had no legal authority to give tax subsidies to people enrolling in a federal exchange. This argument became the foundation for the legal challenge to the law that is now coming before the Supreme Court.

Liz Fowler, a White House architect of the health-care law, read the opinion piece and forwarded it to nine lawyers at Treasury and the IRS. “You probably saw the WSJ article, but note that the bill is asking about a response,” she wrote. “Do you know if we are working on a response? Also might be aware that it could come up at tomorrow’s hearing — though I suppose you have thought about that possibility already.”

Jason Levitis, a Treasury lawyer, replied that the proposed regulations had “worked this issue.”

“If it comes up in the reg hearing tomorrow,” he wrote, “we will thank people for their comments and say we are taking them all into consideration.”

The Treasury and IRS team writing the regulations recognized that the environment was becoming highly charged.

“There was a sense that certain groups were going to sue,” Gamage said. “As increased pressure came from outside,” he said, the exchanges “moved up the issues list.”

House Republicans were writing to the administration opposing the proposed rules and pressing Treasury to document how it wrote the regulations. Investigators with the House Oversight and Ways and Means committees were increasingly frustrated that some of their requests were turned down and others met with redacted documents.

Treasury lawyers said they scoured the law’s legislative history, poring over committee reports and statements from lawmakers on the House and Senate floor that the tax credit applied to all Americans. “We dug into it,” said a former attorney on the Treasury-IRS team who requested anonymity because of the sensitivity of the case. “Certainly, it caused us to go back and look at our legal analysis.”

Discussions intensified inside Treasury and the IRS over how to show that the government had considered the opponents’ views but not draw media attention to the debate over subsidies, former officials recalled.

“The overriding concern was not generating negative news stories,” one former official said. Tax attorneys decided to be concise in drafting the regulation and issue a rule that was “not so minor that nothing is said, but minor enough that little is said,” the official recalled.

The final regulation contained language saying that Treasury would not adopt suggestions from some commenters that the subsidies should be restricted to state exchanges.

House Republicans were sharply critical, accusing the White House of urging the rule’s authors to ignore the text of the law. In a joint report, the House Oversight and Ways and Means committees charged the administration with failing to conduct a thorough review before writing the regulations.

At a House hearing in 2013, Douglas Shulman, the IRS commissioner at the time, acknowledged that the law contained “some contradictory language” on exchanges. But he said the government “exercised the rule-writing authority that is delegated to the Secretary of the Treasury in every tax bill.”

Alice Crites contributed to this report.

Lisa Rein covers the federal workforce and issues that concern the management of government.

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Health Care

Andy S. Grewal of the University of Iowa College of Law writes that the outcome of *King v. Burwell* isn't the only potential challenge to Treasury's ACA rulemaking under tax code Section 36B, highlighting provisions that extend premium tax credits to individuals with incomes falling below a statutory floor and certain unlawful aliens. "Current regulations reflect a desire to implement the ACA as the Treasury thought it should have been drafted, rather than as it was drafted," Grewal writes.

Lurking Challenges to the ACA Tax Credit Regulations

By ANDY S. GREWAL

By the end of its current term, the Supreme Court will decide *King v. Burwell*¹ and address whether the tax code Section 36B¹ premium tax credit extends to purchases of health care policies made on federally established exchanges.² The stakes of the litigation are high because only 14 states have set up their own health insurance exchanges, for which the availability of credits isn't disputed.³

¹ Except when noted otherwise, Section references are to the Internal Revenue Code of 1986, as amended (26 U.S.C.).

² *King v. Burwell*, 759 F.3d 358 (4th Cir.), cert. granted 135 S. Ct. 475 (2014). Standing alone, Section 36B(b)(2)(A) refers to credits only for persons "enrolled in through an Exchange established by the State," but the government argues that related statutory provisions support its view, reflected in regulations, that credits are available for purchases of policies on federal exchanges. See Treas. Reg. Section 1.36B-2(a)(1) (providing tax credit eligibility to anyone "enrolled in one or more qualified health plans through an Exchange") and Treas. Reg. Section 1.36B-1(k) (defining "Exchange" to include federally established exchanges).

³ Kaiser Family Foundation, State Health Insurance Marketplace Types, 2015, [http://kff.org/health-reform/state-](http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/)

indicator/state-health-insurance-marketplace-types/ (describing marketplace attributes in each state).

⁴ See generally Adler & Cannon, "Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA," 23 Health Matrix 119 (2013).

⁵ Brief for Respondent at 11-13, 23-27, *King v. Burwell*, No. 14-114 (U.S. filed Oct. 2014) (describing in detail the implications of an adverse ruling). But see Joel M. Zinberg, "A *King v. Burwell* ruling for the plaintiffs may not equal death spirals," Inside Sources (March 31, 2015).

⁶ Pub. Law No. 111-148, 124 Stat. 119 (2010).

⁷ See Treas. Reg. Section 1.36B-2(b)(6), discussed infra.

⁸ See Treas. Reg. Section 1.36B-2(b)(5), discussed infra.

Andy S. Grewal is an associate professor at the University of Iowa College of Law. He welcomes comments, corrections, or criticisms at agrewal@iowa.uiowa.edu.

not qualified to pass on.⁹ Nor do I wish to present some philosophical objection to the extension of health care to our country's most impoverished individuals. (Who could be against such a thing?)

Instead, I wish to use Section 36B to highlight the pitfalls associated with the Treasury's failure to recognize limits on its administrative authority.¹⁰

The ACA has become such a hot button issue that some will view any criticism as an inherently political attack. There is nothing that I can do about those with such a jaundiced view. But I hope that others will find that this article furthers their understanding of Section 36B and the administrative challenges related to making health care accessible to low-income individuals.

'Applicable Taxpayers' And Low-Income Individuals

Under Section 36B(a), an "applicable taxpayer" receives a tax credit determined by his or her premium assistance amount for a taxable year. The premium assistance amount generally depends on the premiums paid by the taxpayer for the taxpayer's or dependents' health insurance coverage.¹¹ As household income rises, the taxpayer's credit generally shrinks.¹²

Section 36B(c)(1)(A) specifically defines "applicable taxpayer" and therefore the type of person eligible for the credit. The statute limits the term to "a taxpayer whose household income for the taxable year equals or exceeds 100 percent but does not exceed 400 percent of an amount equal to the poverty line for a family of the size involved." In other words, a taxpayer can enjoy a premium tax credit only if his or her household income hits a floor (100 percent of the relevant poverty line amount) but doesn't cross a ceiling (400 percent of that amount).¹³

Although it might seem odd to deny credits to taxpayers with the lowest levels of income, Congress contem-

plated that Medicaid would cover them. The ACA essentially commanded states to provide Medicaid coverage to individuals with income up to 133 percent of the relevant poverty line amount.¹⁴ This reflected a significant expansion of prior law, under which some states offered Medicaid only to individuals whose income fell significantly below even the 100 percent amount.¹⁵

However, in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, the Supreme Court found that the severe consequences associated with a state's failure to expand Medicaid (loss of significant federal funding) reflected unconstitutional congressional coercion.¹⁶ Consequently, states can reject Medicaid expansion without losing federal funding. Several million individuals now earn too much income to qualify under their state's non-expanded Medicaid program but earn too little to enjoy premium tax credits under Section 36B. These individuals fall within the so-called Medicaid coverage gap.¹⁷

Regulatory Expansion of Section 36B(c)(1)(A)

Under Treasury Regulations Section 1.36B-2(b)(6), an individual qualifies as an "applicable taxpayer" and can enjoy the premium tax credit even if his or her household income falls below the 100 percent statutory floor. This rule applies when the taxpayer or a family member enrolls in a plan on an exchange, the exchange estimates his or her household income falls with the 100 percent to 400 percent statutory range, advance credits are authorized and paid, and the taxpayer would qualify under the statute if the 100 percent to 400 percent limitation didn't apply.¹⁸ These taxpayers generally receive larger credits than do those who actually meet the statutory criteria.¹⁹

¹⁴ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601 (2012) (discussing Medicare expansion).

¹⁵ See id. ("On average States cover only those unemployed parents who make less than 37 percent of the federal poverty level, and only those employed parents who make less than 63 percent of the poverty line.")

¹⁶ Id. at 2604 (2012) ("[T]he financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head. § 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that 'further payments will not be made to the State.'")

¹⁷ See Kaiser Family Foundation, "The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid (2015)" (noting that 22 states chose not to expand Medicaid and about 4 million poor uninsured adults fall into the Medicaid gap).

¹⁸ See Treas. Reg. Section 1.36B-2(b)(6)(i)-(iv).

¹⁹ See Treas. Reg. Section 1.36B-2(b)(7), under which the credit for beneficiaries of the special rule is computed by reference to taxpayer's actual household income rather than the 100 percent statutory floor, and Section 36B(b)(2), under which lower levels of income generally increase the premium assistance credit amount, such that a person with (for example) household income at the 57 percent amount will receive a greater credit than someone at the 100 percent amount. Aside from household income, other factors influence the size of the credit, including the cost of the plan in a particular locality and the scope of desired coverage (e.g., coverage for spouse or dependents). However, in absolute dollar terms, and holding all else equal, Treas. Reg. Section 1.36B-2(b)(7) effectively provides the largest tax credits to persons who don't satisfy the statutory criteria.

⁹ Compare, e.g., Timothy Jost, "If The ACA Were Repealed, Just What Would Replace It?" Health Affairs Blog (April 14, 2015) (listing some achievements of the ACA and arguing that it "has been largely successful" in accomplishing stated goals), with Michael Cannon, "50 Vetoes: How States Can Stop the Obama Health Care Law," Cato Institute White Paper (March 21, 2013) ("President Obama's health care law remains harmful, unstable, and unpopular.")

¹⁰ See also, e.g., Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,381 (May 23, 2012) (acknowledging that Section 36B(c)(2)(C)(iii) flatly denies premium tax credit for any month in which employee pays for and obtains minimum essential coverage under employer plan, even if such coverage is unaffordable or doesn't provide minimum value, but breaking from statute and proposed regulations to "clarify," in Treas. Reg. Section 1.36B-2(c)(3)(vii)(B), that Section 36B(c)(2)(C)(iii) doesn't apply in some circumstances where employee obtains coverage via automatic enrollment).

¹¹ See Section 36B(b)(2).

¹² If Section 36B(b)(2)(A)'s limitation doesn't apply, the premium tax credit will generally be determined by the cost of a silver plan over the applicable percentage of the taxpayer's household income, and the applicable percentage increases as household income rises. See Sections 36B(b)(2)(B) & (b)(3). A taxpayer's household income generally includes his or her modified adjusted gross income along with the aggregate modified adjusted gross incomes of the persons for whom he or she is allowed a deduction under Section 151. For further relevant definitions, see Section 36B(d).

¹³ The poverty line amounts are determined by reference to Social Security law. See Section 36B(d)(3)(A).

The regulation addresses an imperfection in the tax credit regime.²⁰ Under Section 36B, an applicable taxpayer's premium tax credit depends on his or her household income for a taxable year.²¹ However, taxpayers generally purchase health insurance during open enrollment seasons, well in advance of the close of their taxable years. Consequently, taxpayers may enroll in health plans and receive advance payments of their premium tax credits without knowing whether they are in fact eligible for those credits.²²

Under Section 36B(f), taxpayers generally must repay any excess credits that they received. But Treas. Reg. Section 1.36B-2(b)(6) contradicts that rule. The regulation allows a taxpayer to fully keep his or her tax credits even if, at the close of the taxable year, the taxpayer's household income didn't meet the statutory floor and the taxpayer wasn't entitled to any credits.²³

**Because Treas. Reg. Section 1.36B-2(b)(6)
contradicts the congressionally prescribed criteria,
it reflects an impermissible interpretation of the
statute.**

As a matter of abstract policy, the Treasury regulation seems reasonable. But under the familiar *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* framework, reasonableness depends on the agency's construction of the governing statute. And here, the statute leaves no room for interpretation: An applicable taxpayer includes only individuals whose income meets the 100 percent floor but doesn't cross the 400 percent ceiling. Wisely or not, "Congress has directly spoken to the precise question at issue," and a "court, as well as the agency, must give effect to th[at] unambiguously expressed intent."²⁴

Because Treas. Reg. Section 1.36B-2(b)(6) contradicts the congressionally prescribed criteria, it reflects an impermissible interpretation of the statute.

The Treasury indirectly acknowledged this when it responded to public comments on the premium tax credit regulations. In its Notice of Proposed Rulemaking, the Treasury stated that Treas. Reg. Section 1.36B-2(b)(6) would merely "clarify" that individuals outside

of the statutory range could enjoy premium tax credits.²⁵

In response, commenters urged the Treasury to expand the regulation such that individuals whose actual household incomes exceeded the statutory range would also get to keep their credits, if those individuals received advance payments in circumstances similar to those described for low-income individuals.²⁶ However, the Treasury rejected those comments, concluding that they ran "contrary to the language of section 36B."²⁷

It is hard to reconcile Treas. Reg. Section 1.36B-2(b)(6) with the Treasury's response to the commenters. The Treasury wouldn't provide tax benefits to individuals whose incomes exceed the 400 percent ceiling because doing so runs contrary to the statute. Yet the Treasury maintains that individuals with household incomes below the 100 percent floor may qualify as applicable taxpayers. In other words, the Treasury thinks that it is ambiguous whether a taxpayer at the 99 percent level comes within the 100 percent to 400 percent statutory range but that a taxpayer at the 401 percent level unambiguously exceeds it.

A court probably won't have trouble seeing the similarity between the situations. Taxpayers outside of the statutory range, whether at the high end or the low end, don't qualify as applicable taxpayers and aren't entitled to premium tax credits. Nothing in Section 36B allows the Treasury to rewrite the criteria for qualifying as an applicable taxpayer.

In arguing that the Treasury should indirectly expand the availability of premium tax credits, one group relied on Section 36B(g)(1).²⁸ That statute authorizes regulations providing for "the coordination of the credit allowed under this section with the program for advance payment of the credit under section 1412" of the ACA. But the group misunderstood the direction of the statutory scheme.

Section 36B(g)(1) doesn't contemplate that premium tax credits are available whenever a taxpayer gets an advance payment. Instead, it contemplates that advance payments will be made for credits that are "allowed under this section [36B]." The statute's plain language reiterates that Section 36B governs credit determinations. If the fact of an advance payment fixed a taxpayer's right to a tax credit, much of Section 36B would be pointless.²⁹ Section 36B(g)(1) doesn't authorize regulations allowing individuals to keep whatever advance

²⁵ Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,934 (Aug. 17, 2011) ("The proposed regulations clarify the treatment of a taxpayer who receives advance credit payments but has household income below 100 percent of the FPL for the taxable year.").

²⁶ See Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) ("Commentators requested that the final regulations treat a taxpayer whose household income exceeds 400 percent of the FPL for the taxpayer's family size as an applicable taxpayer if, at enrollment, the Exchange estimates that the taxpayer's household income will be between 100 and 400 percent of the [poverty line] for the taxpayer's family size and approves advance credit payments.").

²⁷ See *id.* at 30,378.

²⁸ See AFL-CIO Criticizes Proposed Health Insurance Premium Tax Credit Regs, 2011 TNT 220-24 (arguing that Section 36B(g)(1) allows for the Treasury to limit repayment obligations under Section 36B(f) when a taxpayer's circumstances change during the taxable year).

²⁹ See, e.g., Section 36B(f)(1) (reducing allowable credit on account of advance payments); Section 36B(f)(2)(A) (requiring

²⁰ See generally Lawrence Zelenak, "Choosing Between Tax and Nontax Delivery Mechanisms for Health Insurance Subsidies," 65 Tax L. Rev. 723, 733-37 (2012) (questioning whether current year income reflects the proper standard for determining premium tax credit allowances).

²¹ See Section 36B(b).

²² Taxpayers need not apply the full amount of their estimated credits to their monthly premiums.

²³ Taxpayers described in Treas. Reg. Section 1.36B-2(b)(6) could even receive tax refunds if their premium assistance amounts exceeded their advance payments, which seems quite possible given the special rule in Treas. Reg. Section 1.36B-2(b)(7).

²⁴ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

payments they receive, and the Treasury properly rejected the group's comments.

Although this result may seem harsh, Section 36B(f) provides significant relief for poor individuals. If a taxpayer whose household income falls below the 200 percent poverty line amount receives advance payments that exceed the credit properly allowed, his or her repayment obligation will be limited to \$600.³⁰ One need not qualify as an applicable taxpayer to enjoy the benefits of this limitation, and a low-income individual won't face thousands of dollars of tax credit repayments.

Of course, repaying even \$600 may impose severe hardships on taxpayers with few dollars to spare. However, the Treasury regulation encourages behavior that may lead to bigger problems. Under the regulation, a taxpayer who believes that he or she will fall short of the floor may be encouraged by an unscrupulous tax adviser or enrollment counselor to engage in unethical behavior and inflate income, especially if he or she is caught by the Medicaid coverage gap.³¹

The ACA, however, contains extraordinary penalties for those who negligently or intentionally supply incorrect information to an exchange. Under Section 1411(h)(1) of the ACA, an individual who negligently provides incorrect information when enrolling on an exchange faces a \$25,000 penalty, and someone who intentionally provides incorrect information faces a \$250,000 penalty.³² To the extent that the Internal Revenue Service actually enforces these crippling provisions, taxpayers encouraged by Treas. Reg. Section 1.36B-2(b)(6) to inflate income may face problems much more severe than those associated with being caught in the Medicaid gap.

Also, unlike other regulations that provide benefits to taxpayers, Treas. Reg. Section 1.36B-2(b)(6) could face judicial challenge. Tax code Sections 4980H(a) and (b) impose penalties on large employers who fail to offer health coverage or who fail to offer affordable minimum essential coverage.³³ Those penalties are triggered or increased when a full-time employee receives a Section 36B tax credit for his or her purchase of a health policy on an exchange.³⁴ Because the regulation expands the scope of applicable taxpayers and there-

fore the persons eligible for the credit,³⁵ it increases the number of individuals who might trigger the Section 4980H(a) penalty or increase the Section 4980H(b) penalty.³⁶ In appealing the assessment of any penalty,³⁷ an employer can argue that the regulation invalidly extended a credit to a full-time employee.

Regulatory Expansion of Section 36B(c)(1)(B)

Although Section 36B(c) generally denies applicable taxpayer status to individuals with incomes below the 100 percent poverty line, the statute contains a special rule for some individuals lawfully present in the U.S. Under Section 36B(c)(1)(B), a lawfully present alien with household income below the 100 percent amount who is ineligible for Medicaid by reason of his or her alien status will be treated as if his or her household income were equal to the 100 percent amount.³⁸ Unlike very low-income citizens, who Congress thought would obtain Medicaid coverage, some low-income lawful aliens may enjoy premium tax credits under Section 36B.

Treasury regulations, however, expand the statute and provide tax credits to individuals not lawfully present. Under Treas. Reg. Section 1.36B-2(b)(5), the special rule applies when "the taxpayer or a member of the taxpayer's family is lawfully present in the United States," and "the lawfully present taxpayer or family member is not eligible for the Medicaid program." The references to family members, not found in the governing statute, allow the lawful status of a family member to qualify an unlawful alien as an applicable taxpayer.

The regulation's preamble offers no explanation and cites no authority for going beyond the statutory language, but policy objections to Section 36B(c)(1)(D) might have prompted the Treasury to act. Under that

³⁰ The annual household income of most full-time employees probably exceeds the 100 percent poverty line amount, such that the regulation won't apply to them. However, a full-time employee's annual household income may fall below the poverty line amount if, for example, he or she has a large family or is employed for only a few months during the year.

³¹ For employers who don't offer health coverage, the allowance or payment of a credit for a single full-time employee triggers a penalty based on the number of the employer's full-time employees. See Section 4980H(a). For an employer who offers some type of health coverage, the penalty depends on the number of full-time employees who are actually allowed or paid credits. See Section 4980H(b). If, for a given month, an individual can obtain affordable minimum essential coverage through his or her employer, he or she won't be eligible for a Section 36B credit for that month. See Sections 36B(c)(2)(A)-(C).

³² See Section 1411(f)(2)(A) of the ACA (directing the Department of Health and Human Services to establish a "separate appeals process for employers who are notified . . . that the employer may be liable for a tax imposed by section 4980H of the Internal Revenue Code of 1986 with respect to an employee"). HHS procedures are in addition to the appeal rights generally found in the tax code. See *id.*

³³ Under many Medicaid programs, aliens become eligible for benefits only after the expiration of a five-year waiting period. See generally Karla Guerrero, "Waiting Five Years for Healthcare: How Restricting Immigrants' Access to Medicaid Harms All," 21 *Annals Health Law Advance Directive* 109 (2011); Vinita Andrapalliyal, "'Healthcare for All?' The Gap Between Rhetoric and Reality in the Affordable Care Act," 61 *UCLA L. Rev. Discourse* 58 (2013).

repayment if "the advance payments to a taxpayer under section 1412 of the Patient Protection and Affordable Care Act for a taxable year exceed the credit allowed by this section"). The various provisions related to current year tax attributes would also be pointless, because exchange estimates depend on prior year attributes.

³⁰ See Section 36B(f)(2)(B)(i) (prescribing a maximum \$600 tax liability increase for persons whose household income is less than 200 percent of the relevant poverty line).

³¹ See also Jack L. Millman, *Gambling for Healthcare*, 76 *Ohio St. L.J.* (2015) (suggesting an "absurd tax planning" technique under which poor persons may use wagering activities to inflate household income and arguing that this "illustrate[s] the perversity of the current situation and the need for Congress or states to act").

³² The reasonable cause defense applies to the negligence penalties. See ACA Section 1411(h)(1)(A)(ii).

³³ See Section 5000A(f) (defining minimum essential coverage).

³⁴ See Sections 4980H(a)(2) and (b)(1)(B). The receipt of a cost-sharing reduction under Section 1402 of the ACA of the ACA may also trigger a penalty.

statute, an individual for whom a Section 151 deduction is allowable to another person can't take the premium tax credit. Consequently, if a lawfully present alien obtains health coverage but is the dependent of an unlawful alien, the statute denies the availability of the credit. The regulation overrides the statutory limitation and effectively permits a credit in these circumstances.

Once again, the Treasury regulation seems reasonable as a matter of abstract policy. But Section 36B(c)(1)(B) doesn't present any interpretive gap for the Treasury to fill. In precise terms, Congress crafted a special rule that treats an alien whose household income falls outside of the statutory range as an applicable taxpayer only if the alien himself or herself enjoys lawful status, and it specifically denied credits to dependents.

Nonetheless, it seems doubtful that a judicial challenge to Treas. Reg. Section 1.36B-2(b)(5) will arise. The Section 4980H penalty is triggered or increased when an employee obtains a tax credit for his or her own coverage on an exchange.³⁹ The regulation, however, extends credits to dependents of employees, not employees themselves. Consequently, it seems unlikely, though not impossible, that Treas. Reg. 1.36B-2(b)(5) will lead to further employer penalties.⁴⁰

Any blowback to the Treasury for contradicting the statute will likely be political. Literally speaking, the regulation allows unlawful aliens to obtain tax credits, and issues related to unlawful aliens reflected a controversial issue during debates over the ACA. The statute itself allows unlawful aliens to take credits on behalf of lawful family members when household income falls within the 100 percent to 400 percent statutory range.⁴¹

³⁹ See Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8,544, 8,544 (Feb. 12, 2014) ("[C]overage for a dependent only will not result in liability for the employer under section 4980H.")

⁴⁰ The regulation might lead to an employer penalty in some highly convoluted circumstances, such as where the unlawful alien and the dependent lawful alien are both full-time employees of the same employer and other requirements are met.

⁴¹ Section 36B(a) doesn't carve unlawful aliens from its general rule. However, such persons can't legally obtain coverage for themselves on an exchange. See Treas. Reg. Section 1.36B-2(b)(4).

but a further extension of credits without statutory authority could raise the ire of some lawmakers.

Conclusion

As the Treasury and other agencies issue guidance under the ACA, more and more problems in the statute come to light. Current regulations reflect a desire to implement the ACA as the Treasury thought it should have been drafted, rather than as it was drafted. In the long run, it is doubtful that a complex statute can offer stability if agency guidance contradicts fundamental provisions, especially given the shifting priorities and viewpoints of different administrations.

Administrative regulations that lack statutory foundation also jeopardize those who rely on them. Ordinarily, no one enjoys standing to challenge beneficial tax regulations.⁴² But the ACA's structure pits taxpayers against each other, where a credit to one class of persons triggers or increases penalties on another class.

Going forward, the Treasury should reconsider its unilateral approach to the ACA. The current legislative majority might not seem amenable to the amendments that the Treasury has effected by regulation, but no canon of statutory construction expands an agency's authority upon a showing that it is acting against the will of Congress. To amend Section 36B and provide health care to our society's most vulnerable individuals, the Treasury should do everything possible to reach a compromise with our elected representatives.⁴³

⁴² Somewhat perversely, invalid regulations that provide benefits to low-income persons may give rise to challenges, but taxpayers will lack standing to challenge invalid regulations that provide benefits to large employers. See, e.g., Treas. Reg. Section 54.4980H-5(e)(2) (although Section 4980H(b) imposes a penalty for failure to offer affordable minimum essential coverage, and receipt of premium tax credit by an employee increases the penalty, an employer that provides unaffordable coverage will be exempt from penalty under various nonstatutory safe harbors).

⁴³ See Jonathan Adler, "How the IRS repeatedly rewrites Obamacare tax credit provisions," Wash. Post Volokh Conspiracy Blog (April 14, 2015) ("Congress has already made over one dozen changes to the PPACA that have been signed into law, and there is no reason it could not make others."); Zelenak, *supra* note 20 at 727 (noting that Congress has twice amended I.R.C. Section 36B(f) advance payment reconciliation rules).

TaKing Stock: The Potential Impact of King v. Burwell

By Brittany La Couture, Douglas Holtz-Eakin
May 13, 2015

Executive Summary

The Supreme Court's pending decision in *King v. Burwell* could upend the way premium subsidies are distributed through the federal health insurance exchanges in as many as 37 states. The impacted states are those that declined or failed to establish their own exchanges under the Affordable Care Act (ACA). Examining the insurance market effects we find that:

Individual Market Impacts of a Ruling for the Plaintiffs

6.6 million	Individuals To Lose Health Insurance Subsidy
\$3,156	Average Annual Subsidy Impacted Individuals will Lose
11.1 million	Individuals Freed from Individual Mandate
\$1,200	Average Annual Penalty Impacted Individuals will be Freed From



In addition, such a decision would tend to reverse the damaging labor market impacts of the ACA. Our analysis indicates that these impacts would be:

Employer Market Impacts of a Ruling for the Plaintiffs

262,000	Business Establishments Freed from Employer Mandate
237,000	New Jobs
1,270,000	Workers Added to the Labor Force
\$830 to \$940	Increase in Pay Per Worker
\$13.6 Billion	Increase in Total Pay
3,300,000	Part-Time Workers Who May Gain Hours



Introduction

King v. Burwell, which was argued before the Supreme Court in March 2015 and will likely be decided in June 2015, poses a question of statutory interpretation. The plaintiffs argue that the text of the ACA should be read literally: it only authorizes premium subsidies for people in "exchanges established by the State under §1311." A separate section, §1321, describes the establishment of a federal exchange by the Secretary of Health and Human Services (HHS) if the state does not create its own exchange. A rule issued in 2012

by the Internal Revenue Service (IRS) allowed premium subsidies to be paid through exchanges established by the Secretary, but plaintiffs argue these subsidies are illegal since there is no congressional authorization for that spending.

If the plaintiffs are successful, the immediate effect will be to stop the flow of premium subsidies to states that have not established their own exchange. A secondary effect will be that many individuals in those states will be exempt from the individual mandate penalty because without the subsidies, they will qualify for an affordability exemption. Likewise, all employers in states without state-established exchanges will be exempt from the employer mandate penalties, which are only triggered if an employee receives a federal tax subsidy for health insurance through an exchange. This will cause a fundamental shift in the economies of the “*King* states” by altering the way insurance is bought and sold, and by redefining the relationships between employers and employees.

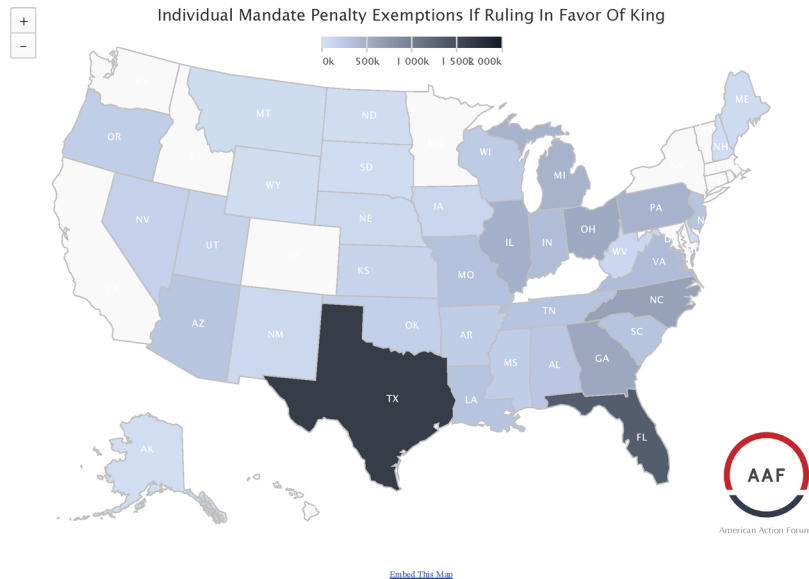
Methodology

In determining how to address the questions presented by a possible ruling in favor of the plaintiffs in *King*, we had to make some simplifying assumptions. First, we assumed that no federal congressional action would be taken between the announcement of a ruling in *King* and the beginning of the 2016 open enrollment season; in reality there is every indication Congress would take *some* action, but it is impossible at this stage to predict what it would be. Second, when considering the effects on employers and employees, we assumed that all employees are residents of the state in which they are employed. We rely loosely on the assumption that the Supreme Court would stay a ruling for 3-6 months to give states and the administration time to react to the consequences of its ruling. Finally, we assumed that the language limiting the permissible establishment of §1311 exchanges to dates before January 1, 2014 would not be enforced and that the states would be afforded an opportunity to establish exchanges in the future, particularly if the ruling in *King* is favorable to the plaintiffs; the legality of this non-enforcement may ultimately be settled by subsequent litigation.

Individual Market Effects

A ruling for *King* would bring about changes in the individual market with myriad impacts on various stakeholders, including newly-insured individuals, previously-insured individuals, and individuals facing tax penalties as a result of the ACA.

Should the plaintiffs in *King* win, around 6.6 million people would lose their health insurance subsidies.^{[1][1]} This is about 87 percent of the total enrolled population of the federal exchanges as of February 22, 2015. Of the states with federal exchanges, however, there will be significant geographical differences in the impact on individuals. For instance, about 92 percent of enrollees in North Carolina’s exchange are subsidized while 71 percent of New Hampshire’s exchange enrollees are subsidized.



There are also significant differences in the value of the subsidies in different states. In the 2015 enrollment year, the average annual tax subsidy received in the federal exchanges will be approximately \$3,156, or \$263 per month, yet there is significant geographical variation among states.[2] For example, in Arizona, the average annual subsidy is only \$1,860 while it is \$6,408 in Alaska. Alaska, however, is an outlier with unique geographical and demographic characteristics that drive up costs in that state; the next highest average subsidy is \$5,040 followed by \$4,236 in Wyoming and Mississippi, respectively.

Many individuals that lose access to a premium subsidy will likely continue to purchase insurance, either by paying a higher price for their current plan or by switching to cheaper insurance. In 2014, the McKinsey Institute estimated that about 74 percent of exchange enrollees were insured before passage of the ACA, which indicates that these individuals would be able to purchase insurance post-*King* as well, if they were so inclined.[3] It is important to keep in mind, however, that the Essential Health Benefits and mandatory community rating attendant on the ACA's Qualified Health Plan requirements have made previously-available insurance plans unavailable or unaffordable to many, which may reduce re-uptake.

Despite obstacles to gaining insurance imposed by the ACA, most subsidized individuals would still be able to access insurance post-*King*. Immunity from the individual mandate will allow individuals over 30 years old to enroll in catastrophic plans, which is currently penalized by the mandate under the ACA. These plans have lower actuarial value than the "metal-tiered" plans of the ACA, but actuarial value does not measure quality of coverage, rather the expected ratio of dollars paid out-of-pocket to dollars paid by the insurer to cover the cost of care.

Many individuals living in states that will be impacted by the *King* decision will be exempted from the individual mandate and its tax penalty. Under the ACA, a household is not required to pay the penalty if the lowest cost health insurance plan available is more than 8 percent of household income. Without subsidies, many households will newly fall into this exemption category. These households will be freed from the burden or threat of the tax, which will average about \$1,200 for this population in 2015.[4] In total, 11.1 million individuals will no longer face the threat of a tax penalty. Absent the subsidies, most exchange enrollees would be exempted from the

threat of this penalty, and those not exempted would have incomes approaching 400 percent of the Federal Poverty Level.

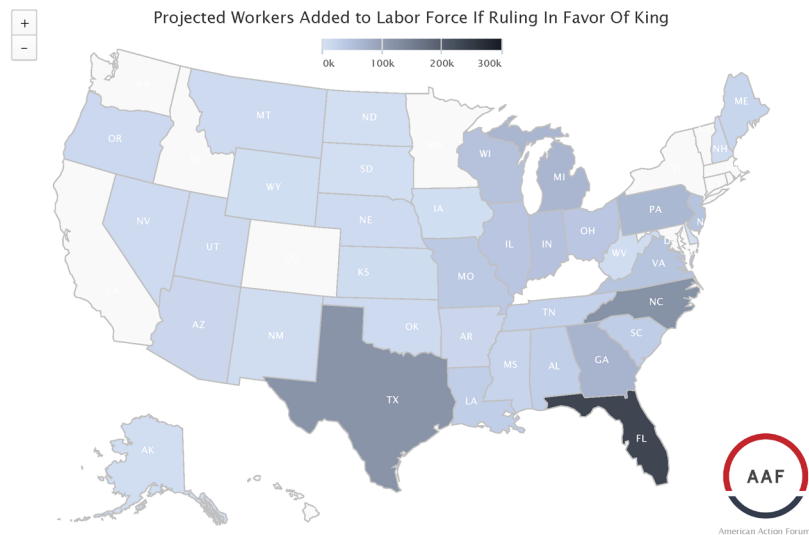
The individual mandate penalty is not the only tax headache that could be avoided however. It is estimated that in 2014, about 50 percent of individuals who purchased insurance through the exchanges and received subsidies will have to repay some portion of those subsidies through their taxes. These 3.85 million or so individuals, on average, will owe the IRS around \$794.[5] Should King win, however, these people will not face this problematic tax-season surprise.

Individuals will also have new incentives in *King* States. Because premium subsidies available through the ACA increase the value of not working, the Congressional Budget Office (CBO) estimates that over 2 million workers will be drawn out of the national labor force. If the Court rules in favor of *King*, the American Action Forum (AAF) estimates that 1.27 million workers will be added to the labor force by 2017.[6]

Employer Market Effects

A ruling in favor of the plaintiffs in *King* would have implications for the employer market as well. Since the employer mandate will be unenforceable, some employers may drop insurance coverage for their employees.

In the 37 states that are likely to be impacted by *King*, about 95 million people are covered by employer-sponsored insurance. However, 96.1 percent of large employers and 60 percent of all employers offered insurance before the employer mandate went into effect. [7] These employers are unlikely to drop coverage for their employees regardless of the outcome in *King*. Some reports suggest that the average number of firms offering employer sponsored insurance is statistically unchanged even after the mandate went into effect.



[Embed This Map](#)

Because they will not be subject to the mandate, small to medium size employers may expand employment to more people, or allow

their employees to work more than 30 hours per week. AAF estimates that there are currently about 3.3 million part-time workers in the states affected by the ruling who are seeking but are unable to find full-time employment.[8] Others have estimated that at least 20 percent of businesses cut hours for workers in 2013, in part to remain below the 50 employee threshold that triggers the employer mandate.[9]

Currently there are about 261,844 employers in the 37 *King* states that are subject to the mandate penalty, 146,407 of which are medium-sized employers, who were the most impacted by the employer mandate. Absent the administrative and financial burdens imposed by the ACA mandates, the recent trend away from full-time hiring that has cost Americans more than 350,000 jobs—237,000 of which are in *King* states—may be reversed and these and countless other small employers may begin hiring more full-time workers.

How States May React

It is not completely clear which states the ruling in *King* would apply to. It is possible that it will be enforced in all states with any measure of reliance on the federal exchange platform (currently 37 states). The ruling may only be applied to states that have never had their own platform, exempting states that established exchanges and then switched, such as New Mexico and Nevada, from the effects of the ruling. It is also possible that *King* will only apply in states that have not passed legislation or executive orders attempting to create exchanges, which means that the 8 hybrid exchanges will be exempted. The Secretary of HHS has the authority to deem which states have exchanges “established by the State under §1311,” and her decision will likely reflect what the states want. The inevitable objections to her determinations will eventually have to be settled in the courts if no legislative fix is offered.

Assuming that all 37 possible states are subject to the ruling, there will likely be four main categories of responses to the ruling.

Some states that were politically, financially, or technologically unable to establish their own exchanges in 2013 may attempt to do so before the next open enrollment period. For instance, in Delaware, Democrats have unified control of both the Governorship and the legislature, and could therefore be among the first to attempt and subsequently establish its own exchange. Iowa, Maine, Montana, New Hampshire, New Jersey, Pennsylvania, and West Virginia all have Democrats in control of either the Governor’s mansion or the legislature, either of which could initiate the establishment of exchanges in those states if that appeared to be the course of action that enables the continued flow of subsidies. Despite cautionary tales from states with failed or unstable state based exchanges, this endeavor could be facilitated by innovative private companies that are already offering to sell or rent states the technology needed to quickly take over control of their own “pre-fab” state exchanges.

On the other hand, some states have passed legislation which precludes the establishment of an exchange. Of course, subsequent legislation can always repeal previous laws, but laws preventing the establishment of exchanges, known as Health Care Freedom Acts, have the power to prevent governors from establishing an exchange by executive order. Governors in Georgia, Louisiana, Missouri, Utah, and Virginia will all need legislation to be passed by their legislatures before an exchange may be established.

Taking this concept a step further, Alabama, Arizona, Ohio, Oklahoma, and Wyoming have passed Health Care Freedom Amendments to their state constitutions. This means that in order for these states to establish exchanges, they must meet the enhanced constitutional threshold for an amendment, rather than just reach a simple majority required to pass a typical bill. Because of this rather large obstacle, it is less likely that these states will succeed in any attempts to establish exchanges, especially not before the 2016 open enrollment period.

Obstacles to establishment aside, some states are unlikely to even try to establish exchanges, instead taking advantage of the tax exemptions the *King* ruling would apply to the states’ citizens and businesses. For example, during the debate of whether to establish an exchange back in 2012, Indiana Governor-elect (now Governor) Mike Pence cited the employer mandate exemption and its benefits to Indiana’s labor market as a specific reason for why the state should not establish an exchange. Other governors and state legislatures will again face the decision of whether to establish an exchange, and this time, they will have the guarantee of knowing that by not establishing, they can help create job growth in their states.

Long-Term Effects

Many of the effects of the decision in *King* will not be immediately apparent. That said, there will be longer term changes in the individual insurance market, labor market, as well as the way insurance plans are designed.

In a post-*King* world, individuals will be better situated to make the most economically appropriate decisions regarding purchasing health care. Without the mandate penalty, many individuals may decide to purchase less generous insurance (regardless of actuarial value) if it is better suited to their needs and lifestyle. This change will allow individuals to purchase less-expensive insurance and to have more personal control over their resources.

We might expect to see higher wages in the states impacted by *King*, even among employers that do offer insurance to their employees, because they will be able to make employment decisions and run their businesses more efficiently. AAF estimates that the ACA's regulations have reduced annual wages for employees of small and medium sized businesses by \$830 to \$940 each, totaling \$13.6 Billion in the *King* states. There will be fewer administrative burdens when employers offer full-time employment to qualified employees who will have the opportunity to become specialized and therefore more efficient in their work. We might also expect to see more job growth in these states as employers expand their businesses and offer more hours without the cost of complying with the ACA.

Insurers may also begin adapting their plan designs to better meet the physical and financial needs of citizens of these states. These plans will still be subject to the many restrictions on plan design imposed by the ACA, but the restrictions on what types of plans individuals may purchase will be lifted. For example, an individual over the age of 30 would be able to purchase catastrophic health insurance without being subject to the individual mandate penalty if standard policies are not affordable to them. Community rating and other Essential Health Benefit requirements would, however, remain in effect absent further legislative action.

Conclusion

While a ruling in favor of the plaintiff in the *King v. Burwell* case would prohibit subsidies flowing to states without their own exchanges, there are also economic benefits related to the elimination of the individual mandate for some and the employer mandate for all affected citizens. Almost 11.1 million individuals will become eligible for an exemption from the individual mandate penalty, and 1.27 million will be incentivized to re-enter the labor market. Millions of employers will also be released from the employer mandate penalty, which could lead to wage increases of up to \$940 per employee, and would eliminate employment restrictions that have left 3.3 million part-time workers unable to work more hours.

[1] 6.6 million individuals were enrolled in the 37 *King* state exchanges as of March 31, 2015 (an earlier version of this paper estimated 7.7 million based on reports from February, 2015). This is not a static number as some individuals may not have paid their first premiums, or have left the exchange due to a new job or otherwise attaining access to employer sponsored coverage. Likewise, more individuals may enroll in the exchanges through the administration's enrollment period extension, or as a result of a qualifying life event, such as a move or change in family size.

[1] http://aspe.hhs.gov/health/reports/2015/MarketPlaceEnrollment/Mar2015/tb_2015mar_enrollment.pdf, February 15, 2015; <http://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-06-02.html>.

[2] *Id.*

[3] http://www.forbes.com/fdc/welcome_mjx.shtml

[4] AAF estimates of the number of people that are subject to the individual mandate and the average applicable penalty rely on demographic information from the 2011-2013 American Community Survey and health insurance premium data published on data.healthcare.gov.

[5] <http://kff.org/health-reform/press-release/new-analysis-half-of-u-s-households-eligible-for-a-tax-subsidy-under-the-health-law-would-owe-a-repayment-while-45-percent-would-receive-a-refund/>

[6] Using CBO's figures and estimated total premium subsidies spent in each state, we project the increase in workers relative to the CBO baseline that would occur in the 37 states that *King* would impact. In total, we estimate that *King* would add 1.2 million workers to the labor force by 2017 and 1.6 million by 2024.

[7] <http://kff.org/report-section/ehbs-2014-summary-of-findings/>; <http://www.rwjf.org/content/dam/farm/reports/reports/2013/rwjf405434>

[8] AAF estimates of part-time workers seeking more hours use the February 2015 Current Population Survey, and reflect the number of employed workers that work for fewer than 30 hours a week but would prefer a full-time job.

[9] <http://www.rwjf.org/content/dam/farm/reports/reports/2013/rwjf405434>

Disclaimer



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Brittany has a J.D. from Georgetown University where she focused her studies on health care policy, and is licensed in New Jersey.



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Related Research

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The Volokh Conspiracy

The IRS Wants to Give Tax Credits for Health Insurance Purchases Beyond Those Provided for in the ACA

by [Jonathan H. Adler](#) on September 9, 2011 11:43 am in [Administrative Law](#), [Federalism](#), [Health Care](#), [Insurance Exchanges](#), [Regulation](#)

The Internal Revenue Service is beginning to promulgate regulations to implement the tax-related provisions of the Affordable Care Act (aka "ObamaCare"). A [proposed rule](#) issued last month provides that eligible taxpayers may receive tax credits for the purchase of qualifying health insurance plans established by states under Section 1311 or by the federal government under Section 1321. The only problem is that this is not consistent with the actual text of the statute passed by Congress.

ACA Section 1401 provides that eligible taxpayers may receive income tax credits for purchase of insurance "through an Exchange established by the State under Section 1311." Section 1311 calls upon states to establish health insurance exchanges. It does not provide for the federal government to create health care exchanges. Rather, a separate provision of the act, Section 1321, provides that if a state does not "elect" to create an exchange that meets federal requirements, the federal government shall then "establish and operate" an exchange. Thus, under a plain reading of the text, the ACA only provides for tax credits for state-run exchanges, and if states fail to create exchanges, there are no tax credits for insurance bought on a federally run exchange.

This is potentially significant for several reasons. The individual mandate requires all Americans to purchase health insurance. Even if the mandate is successful at reducing adverse selection, health insurance premiums are still expected to rise due to other provisions in the law. Higher premiums could make it difficult for many Americans to comply with the mandate. For this reason, Congress not only called upon states to create exchanges, it also authorized tax credits to offset the cost of health insurance premiums for those with incomes between 100 and 400 percent of the poverty level. But if these tax credits are only available for insurance purchased through state-based exchanges, many will be left high-and-dry in states that don't create their own exchanges — and this could be a big problem. According to [one recent report](#), only ten states had passed legislation to create qualifying exchanges through August 2011. (See also [here](#).)

As David Hogberg [reports](#) in *IBD*, this has led some to believe the limitation of tax credits to state-based exchanges is a mistake. Under this theory, Congress meant to provide tax credits for any exchange-purchased insurance, because Congress wanted lower-income individuals to be able to purchase health insurance (and comply with the mandate). This may be true. As Vanderbilt's James

Blumstein tells *IBD* (and I discussed in [this paper](#)), the exchange-related provisions of the law were not written all-that-carefully. Nonetheless, federal agencies lack the authority to unilaterally revise statutory mistakes. (A point Cato's Michael Cannon also makes [here](#).) Congress may have wanted to make tax credits more widely available — just as it may have wanted those making less than poverty-level income to be eligible for exchanges as well — but that is not what Congress did.

The IRS may be inclined to argue that the failure to include a reference to federally run exchanges or Section 1321 in Section 1401 was a "scrivener's error" that should be disregarded. But this is a difficult argument to make in this case for several reasons. First, a "scrivener's error" is supposed to be that — a purely clerical error that could be attributed to a failed transcription or something of that sort. An example would be mistaking the relevant subsection in a statutory cross-reference — say mistaking "(i)" for "(ii)" or "Section 36B(B)(l)(b)" for "Section 36(B)(l)(b)," or screwing up punctuation. The alleged error here is more significant, however. Not only did Congress forget to include any reference to Section 1321, it also expressly stated that the tax credits were for insurance purchased through "an Exchange established by the State." So a legislator reviewing the relevant language could not claim that they did not realize the statutory cross-reference excluded federal exchanges because the clear text of the statute does as well. In other words, any legislator who actually bothered to [read the bill before voting](#) would have seen the limitation.

Another problem for the "scrivener's error" argument is that it is usually dependent on showing that it is implausible, and not merely unlikely, that the statutory provisions were a mistake. As the Supreme Court explained in *U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439 (1993), this will be shown in the "unusual" case in which there is "overwhelming evidence from the structure, language, and subject matter of the law" that Congress could not have consciously adopted the language in the statute. Similarly, in *Appalachian Power Co. v. EPA*, 249 F.3d 1032 (D.C. Cir. 2001), the D.C. Circuit explained that:

“ We will not . . . invoke this rule to ratify an interpretation that abrogates the enacted statutory text absent an extraordinarily convincing justification because . . . the court's role is not to correct the text so that it better serves the statute's purposes, for it is the function of the political branches not only to define the goals but also to choose the means for reaching them. . . . Therefore, for the [agency] to avoid a literal interpretation . . . , it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it. [internal quotations and citations omitted]

Given what's in the ACA, this is a showing that the IRS and HHS would have a hard time making. While it is certainly plausible — perhaps even likely — that many in Congress wanted tax credits for the purchase of health insurance to be broadly available, there is also ample evidence that the ACA was designed to induce states to create exchanges of their own. For example, Section 1311 directs states to create exchanges. Further, as [Blumstein notes](#), under the ACA the federal government could sue to

force a state to create an exchange. As in other policy areas, the federal government can't force states to comply, so it uses a combination of positive and negative incentives – in this case, subsidies for creating exchanges and the threat of a federally run exchange if a state does not create one on its own. In this context, limiting the availability of tax credits to insurance purchased in state-run exchanges can be seen as just an added inducement. Much like the Clean Air Act threatens states with the loss of highway funds if they fail to adopt sufficiently stringent pollution control programs, the ACA as written threatens states with the loss of tax credits for state residents if they do not create an exchange. Such a policy may not be wise or fair – and may undermine the goal of getting more people insured – but it takes far more than that to justify ignoring a statute's plain text.

Neither the IRS nor HHS has addressed these concerns as far as I'm aware, nor has anyone else. I'll certainly do a follow-up post if such arguments are out there. I noted that the ACA's text limits subsidies to state exchanges at a [conference on health care reform and the states](#) last fall, and no one suggested I was in error, but that does not mean I am right. It's also possible there's some other overlooked provision of the ACA that could be used to solve this problem. If so, I couldn't find it, but I'll also post an update if such a provision is found. In the meantime, the limitation of tax credits to those who purchase their insurance in state-run exchanges could be unwelcome news to those in the majority of states yet to create exchanges of their own.

I should also note that I have not addressed what would happen if the IRS were to just go ahead and finalize regulations providing for tax credits beyond those authorized by the ACA's text. Under such a scenario, standing to challenge the IRS' action in court would certainly be a big issue. As a general matter, there is no standing for a taxpayer to challenge a tax benefit conferred upon someone else. But the IRS, like all federal agencies, has an independent obligation to comply with the law, and I do not know of anyone who has argued that the IRS may create tax credits at will just because it thinks that's what Congress meant to do and such actions are not easily challengeable in court. Just imagine the sorts of mischief such a doctrine could unleash.