1200 18th STREET NW, SUITE 501 • WASHINGTON, DC 20036
PHONE: 202-296-6889 • FAX: 202-296-6895 • www.theusconstitution.org

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://theusconstitution.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://theusconstitution.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://theusconstitution.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://theusconstitution.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://theusconstitution.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://theusconstitution.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* plaintiff's reading of the statue 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 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 decisions[44] 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.