No. 14-114

IN THE

Supreme Court of the United States

DAVID KING, ET AL.,

Petitioners,

v.

SYLVIA MATTHEWS BURWELL, U.S. SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

BRIEF OF CONSUMERS' RESEARCH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Consumers' Research, founded in 1929, is an independent organization dedicated to educating the

[1] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

public about issues affecting consumers, including issues respecting health care insurance, government policy regarding taxes and regulation, organization of government services, and allocation of authority among government entities making decisions on relevant questions of law and policy. Amicus identifies long-term consumer interests with limited, law-bound governmental authority, and especially with properly constrained administrative discretion. Several of amicus's interests are implicated in the present case.

SUMMARY OF ARGUMENT

Claims that health insurance markets would be disrupted and that essential goals of the legislation to be construed here, the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119, would be frustrated unless an ACA reference to exchanges "established by the State under Section 1311" is deemed to include exchanges established and operated by the federal government (federal exchanges) under a different Section of the ACA (Section 1321) have been advanced in the opinion of the court of appeals, in arguments of defendants and amici below, and in the Respondents' filing in this Court in opposition to the petition for certiorari. See, e.g., *King v. Burwell*, 759 F.3d 358, 374 (4th Cir. 2014) (*King*); Brief of Respondents in Opp. to Cert., at 12-13, 25-27. These claims are inappropriate as a basis for judicial construction of statutory text; they call for decisions within the province of the political branches, not the courts; and, as so often is the case with such claims, the assertions of dire consequences fail to account for a variety of potential adjustments that could well eliminate or vastly reduce any of the predicted effects.

First, the duty of courts, including this Court, is to say what the law is, not to determine what it should be to promote good consequences or to avoid ill consequences. See, e.g., *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010) (*Lewis*). Unlike the courts' role when construing the import of decisions that comprise common law, the judicial power in applying governing legal texts such as statutes is restricted to understanding the terms of the law and applying them to the case at bar. Courts should not refuse to give effect to the plain meaning of legal texts because they predict unfortunate practical consequences would result. See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Lewis*, *supra*, 560 U.S. at 217. Advertence to consequences may be appropriate to some determinations clearly within judicial purview, such as identifying the relation among statutory provisions for purposes of severability. See, e.g., *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607-08 (2012) (*NFIB*) (Roberts, C.J., Breyer, and Kagan, JJ.); *id*., at 2674 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). However, reliance on judges' own assessments of practical consequences as a guide to deciphering what a legal text means risks letting the interpretive task morph into law creation.

Second, assessment of practical consequences from judicial construction of a particular legal command is different in kind from evaluation of a legal term by reference to the context in which it is used. Evaluation of a term's meaning in light of the nature and context of the legal instruction in which it is used calls on tools of construction within the core competence of lawyers and judges. See, e.g., Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 Harv. J. L. & Pub. Pol'y 87 (1984) (starting with the predicate that "Judges interpret words," and arguing

that so far as ordinary sources of linguistic meaning fail, judges must be more modest about their task). In contrast, construction of meaning in light of predicted practical consequences requires judgments that draw on resources that often lie well beyond the lawyer's or judge's natural ken. See, e.g., *id*., at 97-98; Frederick Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning 29-35 (2009) (explaining the nature, role and importance of formalism—as contrasted with consequentialism—in judicial decision-making). Commonly, there are many different potential adjustments in behavior and in law that can be made to any judicial interpretation of the law, and judges simply are not well-positioned to evaluate the relative likelihood, the ultimate impact, or the relative social merit of any of these responses. Judges' assessments of practical consequences, thus, should not guide determinations respecting judicial construction of statutory provisions or judicial acceptance of administrative determinations under the Court's jurisprudence related to *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 847 (1984) (*Chevron*).

Finally, the practical consequences that Respondents and some amici in filings below (repeated by Respondents before this Court) predicted would follow from a straightforward reading of the statutory provisions at issue do not take account of a number of potential adjustments that could eliminate or substantially ameliorate the predicted effects. Although the dire predictions were credited by the court of appeals below as a reason for accepting the interpretation of the Internal Revenue Service (IRS), *King*, *supra*, 759 F.3d at 374-75, they ignore evidence of related experience and do not account for potential actions by the states that have not set up exchanges, by the Department of Health and Human Services (HHS), or by Congress.

Further, the predictions do not address the operation of various legal rules that would cushion the effect of any decision recognizing the unavailability of subsidies for purchases through the federal exchanges. The number, variety, and difficulty of predicting these potential adjustments—and the failure to take such adjustments seriously in the assertions by Respondents, the court below, and others making predictions of calamitous consequences from deciding that the ACA (Section 36B, 26 U.S.C. § 36B) limits subsidies to purchases through state exchanges established under ACA Section 1311, 42 U.S.C. § 18031, not federal exchanges established under ACA Section 1321, 42 U.S.C. § 18041—underscore why courts are not well-positioned to assess practical consequences.

ARGUMENT

I. COURTS SHOULD NOT SPECULATE ABOUT PRACTICAL CONSEQUENCES IN INTERPRETING GOVERNING LEGAL TEXT.

Amicus does not believe the question presented in this case is one on which deference to an administrative agency's determination is appropriate. Rather than address the broader set of considerations relevant to that issue, however, this brief deals solely with the appropriate treatment of practical considerations—concerning consequences of different interpretations of law—that have been advanced as reasons for choosing one reading of the law, even if the Court is of the view that this is not the better reading based on the law's text.

A. Courts' Constitutional Role Limits Focus to Sources of Law, Not Consequences.

Respondents and amici supporting them urged the court below to take account of practical difficulties

that they asserted would flow from the reading of the ACA urged by petitioners. See, e.g., *King*, *supra*, 759 F.3d at 374 (citing Br. of Appellees, at 35; Amicus Br. of America's Health Insurance Plans, at 3-6; Amicus Br. for Economic Scholars, at 3-6). In their view, a ruling denying "premium tax subsidies" to insureds purchasing coverage through federal exchanges would produce "an adverse selection 'death spiral' in the individual insurance markets in States with federally-run Exchanges." *King*, *supra*, 759 F. 3d at 374. That concern is noted in the court of appeals' opinion as a reason for concluding that the IRS's implicit construction of the law is a permissible one, consistent with the "intent of Congress," and one that therefore merits *Chevron* deference. *King*, *supra*, 759 F. 3d, at 374-75.

Respondents' brief in opposition to certiorari also stresses disruption to the markets created under the ACA that Respondents predict will follow from reversal of the decision below, relying in part on that as a reason to let the court of appeals' decision stand. Brief of Respondents in Opp. to Cert., at 13, 25, 27. They speculate that acceptance of Petitioners' reading of the ACA would lead almost immediately to "disastrous consequences" for health insurance markets. See *id*., at 27. That speculation is central to arguments being made respecting the proper resolution of the dispute in this case, but it is misdirected as a consideration that should control interpretation of the law and misleading as a matter of practicality.

Virtually everyone who has written about the ACA, including commentators with very different views about its virtues and vices, appreciates that some of the ACA's goals would be most easily achieved with

widespread (even universal) health insurance, including insurance for many individuals whose health, wealth, and personal expectations do not make insurance an attractive option. See, e.g., Andy Grewal, *How* King v. Burwell *Creates Problems for 2014-2015 Health Care Enrollees*, 32 Yale J. Reg. Online (2014) (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2525951; Sara Rosenbaum, *The Patient Protection and Affordable Care Act: Implications for Public Health Policy and Practice*, 126 Pub. Health Rep. 130 (Jan.-Feb. 2011), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3001814/.

For individuals who are reluctant to purchase health insurance, government subsidies may be a significant inducement to join the insurance market, and the current structure of the ACA in effect allows government subsidies in the form of tax credits to relatively impecunious, healthy, new insurance clients to flow through insurance markets as subsidies to less healthy (although possibly more wealthy) insureds. A change in the availability of subsidies, thus, may well make a difference in the degree to which some goals of the ACA (and especially of some ACA supporters) are achieved. This issue is addressed in Part III of this Brief in the context of assessing how much can be predicted about the consequences of concluding that tax subsidies are not available to certain purchases of individual insurance contracts.

The question of the law's consequences, however, is not relevant to the Court's consideration of the meaning of the law's directives at issue here.

Chief Justice John Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*

v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). The role of the court in resolving disputes under written law is to determine the meaning of the law as written, not to determine what would have made the most sense and not to determine whether one or another reading of the law would produce better consequences. If a provision's meaning, fairly construed as it is written, seems to produce untoward results—even serious disruption of aspects of life, business, or government—that consideration is not within the Court's purview. See, e.g., *Lewis*, *supra*, 560 U.S. at 217.

Allowing considerations of the expected practical impact of a decision—its disruption of activities, the administrative expense of adjusting to the decision, or other consequential concerns—to be the basis for avoiding otherwise legally mandated outcomes would reduce predictability of the law and leave individual rights and structural assignments of power perpetually at risk. Trying to fit the contours of a written legal command to judicial assessment of its effects almost certainly will divert courts from faithful construction of the law; as the Court has said in another context:

> [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . .

INS v. Chadha, 462 U.S. 919, 944 (1983).

Courts have the same limited role in statutory cases, perhaps even more so than in cases raising Constitution-based claims. This Court, hence, has forcefully rejected calls to adopt constructions of

statutory language that avoid perceived practical problems. So, for example, despite predictions of serious adverse effects, the Court unanimously declared that provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2k authorized disparate-impact claims to be asserted respecting application of practices notwithstanding claimants' failure timely to assert those claims respecting the initial adoption of the challenged practices:

> The City and its amici warn that our reading will result in a host of practical problems for employers and employees alike. . . .
>
> [I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted.

Lewis, *supra*, 560 U.S. at 217.

B. Consideration of Adverse Effects Does Not Provide a Basis for Judicial Interpretation of Constitutional or Statutory Provisions.

Recognizing its constitutionally delimited role, this Court repeatedly has declared the meaning of law according to its best reading of legal instructions even when it has strong reason to expect that will seriously disrupt some aspect of life. So, for example, in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (*Northern Pipeline*), this Court declared that the organization of bankruptcy adjudication, extending to cases of private right between contesting private parties to be decided by judges without life tenure as required under Article III, violated the Constitution's commitment of the judicial power to Article III courts. The members of

this Court clearly understood that this would cause serious disruption of an important federal function affecting a wide array of individuals and enterprises. See *id*., at 87-88 (plurality op.); *id*., at 91-92 (Rehnquist and O'Connor, JJ., concurring). So, too, in *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (*Stern*), this Court again found aspects of the bankruptcy law (revised following *Northern Pipeline*) to be unconstitutional, despite asserted concerns about the impact on bankruptcy proceedings.

Perhaps most obviously, this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown*), reversed a nearly 60-year-old precedent that was not in keeping with the Constitution's commands notwithstanding the clear understanding that this decision would be both disruptive and controversial (recognized in the extraordinary provision for a further argument on implementation, see *id*., at 495-96; *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955)). A different result no doubt would have been far less disruptive, saving a decade or more of conflict and controversy over implementation of the *Brown* decree. But it would have been wrong. The justices who decided *Brown*, clearly understood that decision based on law, not on predicted practical consequences, is the duty of courts implementing authoritative, legal command.

To be sure, courts adjudicating matters of common law consider the application of precedent in light of naturally expected consequences. Making decisions at common law, or in analogous settings as under the broadly worded commands of basic antitrust laws, requires understanding of the practical implications of a decision as part and parcel of effectuating the legal command. See generally Keith N. Hylton, Antitrust

Law: Economic Theory and Common Law Evolution (2003) (explaining the relation between broadly worded provisions in the antitrust laws, their common law antecedents, and the understanding of their fit with particular economic concepts as developed by judges over time). Courts are not, however, charged generally with looking to predictions of practical consequences as a guide to interpreting specific legislated directives. As this Court's decisions in cases stretching from *Marbury* through *Brown*, *Northern Pipeline*, *Chadha*, *Lewis*, and *Stern* show, understanding the terms of legal authority rather than predicting their effects provides the Court's lodestar.

II. CONSIDERATION OF PRACTICAL CONSEQUENCES OF STATUTORY COMMANDS IS THE PROVINCE OF THE POLITICAL BRANCHES, NOT THE COURTS.

The constitutional division of authority between the branches of government leaves each branch responsible for determinations best suited to it. Courts, far more insulated from popular pressures and accountability than the other branches, are responsible for faithfully interpreting the laws, a task that calls for skills of linguistic and contextual understanding and for willingness to vouchsafe the established rules irrespective of their current popularity. See, e.g., Federalist No. 78 (Hamilton). In contrast, responsibility for the design of statutory commands rests with elected officials who are directly accountable to the citizenry. See, e.g., Federalist Nos. 47, 48 (Madison).

The law-creating task comprehends two different sorts of judgment: (1) on analytical issues—respecting the manner in which individuals and entities will

react to particular situations, the interaction among different responses, the way changes in specific factors alter those responses—and (2) on valuation issues (respecting the worth of particular outcomes). Both sorts of judgments are decidedly the province of the political branches, not the courts.

The resources available to the political branches are better suited to these analytical judgments, as opposed to linguistic and contextual assessments that judges can make without large staffs, experts on economics, industry or other matters, or extensive hearings to establish the predicates for assessment. See, e.g., Einer Elhauge, *A* Chevron *for the House and Senate: Deferring to Post-Enactment Congressional Resolutions that Interpret Ambiguous Statutes*, 124 Harv. L. Rev. 1507, 1508-11 (2011); Norman J. Ornstein, et al., Vital Statistics on Congress, Table 5.1 (updated Jul. 11, 2013), http://www.brookings.edu/~/media/Research/Files/Reports/2013/07/vital%20statistics%20congress%20mann%20ornstein/Vital%20Statistics%20Chapter%205%20%20Congressional%20Staff%20and%20Operating%20Expenses_UPDATE.pdf (showing a total of roughly 20,000 research and other support staff for Congress).

So, too, the value-laden compromises that are inevitable parts of the law-making process are far more suited to the institutional make-up and democratic accountability of the political branches. See, e.g., *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) (noting, as outside the Court's purview, "the policy concerns on one or the other side of the issue" that were "part of the legislative compromise that allowed the law to be enacted."); *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 93-94 (2002) (*Ragsdale*) ("any key term in an important piece of legislation . . . [is] the result of compromise between groups with marked but divergent interests in the contested provision").

Similarly, assessment of the practical effects (not the legality) of a specific interpretation of statutory terms—and appropriate means of accounting for those effects—is within the institutional competence and constitutional responsibility of the political branches, not the courts. Commonly, there are many different potential adjustments in behavior and in law that can be made to any judicial interpretation of the law, and judges simply are not well-positioned to evaluate the relative likelihood or the ultimate impact of any of these responses. Nor are courts appropriate institutions to make the value judgments needed to determine what adjustments in the law (or to the law) are desirable. Appreciation of these points led this Court in *Lewis* to remark about predicted consequences of a law's interpretation that, if those were unexpected (and presumably if they also were thought to be unfortunate), that "is a problem for Congress, not one federal courts can fix." *Lewis*, *supra*, 560 U.S. at 217. See also, e.g., *Reeves v. Ernst & Young*, 494 U.S. 56, 63 n.2 (1990) (*Reeves*) ("If Congress erred, however, it is for that body, and not this Court, to correct its mistake.").

Despite claims that have been advanced by academics ever since the Court's *Chevron* decision, thirty years ago,[2] the institutional advantage for

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[2] See, e.g., Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549 (1985) (agencies are more capable at interpreting legislative intent in statutory provisions respecting complex regulatory programs); Richard J. Pierce, Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vand. L. Rev. 301 (1988) (arguing that agencies are more democratically accountable and therefore more likely of finding the meaning

Congress and the executive branch to make such practical judgments is not a reason for courts to defer to administrative officials on the meaning of statutory law already enacted. See, e.g., Ronald A. Cass, *Vive La Deference? Rethinking the Balance Between Administrative and Judicial Discretion*, 83 Geo. Wash. L. Rev. (forthcoming, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516596.[3] There are substantial reasons to question administrative officials' fidelity to statutory command; indeed, that is the reason that courts have been given authority to review administrative decisions for, among other matters, their fidelity to law. See, e.g., Administrative Procedure Act, 5 U.S.C. § 706. Whatever the appropriate construction of law as providing discretionary policy authority to administrators, respect for administrators' *practical* judgments is no reason to expand the ambit of discretion when addressing matters of *legal* interpretation.

The comparative advantage of political branches over courts respecting judgments on practical—not legal—issues, however, *does* provide a very strong reason for courts not to endeavor to construct

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intended by Congress, either initially or as a result of congressional oversight).

[3] See also, e.g., Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 Admin. L. J. 255 (1988) (*Chevron* deference is incompatible with constitutional delegation of law-interpretation to Article III courts); John Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113 (1998) (*Chevron* deference is incompatible with the Administrative Procedure Act); Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452 (1989) (*Chevron* deference is incompatible with limitations on delegation of law-making function).

statutory meaning based on practical concerns rather than legal texts. The principled predictability required of courts[4] is a poor fit with the sort of multifaceted, fact-based, predictive, pragmatic judgments that have been urged in support of the decision below and that appear to have been accepted by the court of appeals at a minimum in its decision to defer to the IRS's construction of the law. See *King*, *supra*, 759 F. 3d at 372-75.

The court of appeals did not defer to an administrative agency's decision on a matter of practical judgment—for example, on a decision concerning the most efficient means for carrying out a delegated discretionary function, such as division of radio frequency spectrum uses, see Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934), at 47 U.S.C. §§ 301-309 (authorizing division of radio frequency spectrum among different uses, allocation of licenses for stations, and selection of licensees based on the Commission's assessment of "the public convenience, interest, and necessity"); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (affirming Federal Communications Commission (FCC) decision to adopt rules restricting and regulating "chain broadcasting" on basis of FCC's broad discretion over radio broadcasting enabling it to make practical judgments on public interest in broadcasting).

Instead, the court of appeals below deferred to an agency's *legal* interpretation based on that court's

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[4] See, e.g., Ronald A. Cass, The Rule of Law in America 11-15 (2001) (explaining relation of principled predictability to the operation of the rule of law).

assessment of *practical* consequences. This stands the appropriate division of authority on its head.

III. THE GOVERNMENT'S SPECULATION THAT PETITIONER'S INTERPRETATION WOULD PRODUCE "DISASTROUS CONSEQUENCES" FOR HEALTH INSURANCE MARKETS IGNORES POTENTIAL ADJUSTMENTS.

Respondents predict that "disastrous consequences" will ensue if this Court enforces the plain terms of the ACA as Petitioners urge. Brief of Respondents in Opp. to Cert., at 27; see also *id.*, at 25 (arguing that Petitioner's interpretation would "throw a debilitating wrench into the Act's internal economic machinery"); *id.* at 27 (arguing that it would "wreak havoc on the insurance markets in States that opted not to or were unable to" set up a state exchange). Similar assertions were made in the proceedings below by Respondents and their amici and were relied on by the court of appeals as a basis for its decision to accept the IRS's construction of the ACA. See *King*, *supra*, 759 F. 3d, at 374-75.

These dire predictions are speculative hyperbole. Petitioner's reading of the ACA threatens no imminent, unavoidable disaster; none of the effects predicted by Respondents is inevitable or even likely. To be sure, the problem of adverse selection is real, and it may pose a long-term threat to insurance markets in states without their own exchanges, given the changes in insurance made by ACA. See, e.g., *NFIB*, *supra*, 132 S. Ct. at 2614 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2645 (joint dissenting opinion). To the extent that such adverse consequences occur, however, they are likely to do so

gradually, over a period of years, allowing ample time for the political branches to address practical problems with practical—and constitutionally appropriate—solutions. Congress, the executive branch, and the states have numerous options available to ensure that any such problems are addressed before any significant adverse consequences occur.

A. Several Adjustments Are Available to the Political Branches to Address the Availability of Tax Subsidies in Individual Insurance Markets.

Congress, federal agencies, and the states have several options to address any risks to health insurance markets after the invalidation of the IRS Rule in this case. These options are not merely theoretical routes to eliminate perceived problems, but are being actively discussed at present. See, e.g., *A Post Obamacare Strategy*, Wall St. J., Dec. 14, 2014, http://www.wsj.com/articles/a-post-obamacare-strategy-1418601071 (detailing potential legislative strategies for changes that would make subsidies more widely available); Alex Wayne, *State Obamacare Strategies Take Shape as Court Case Looms*, Bloomberg News, Nov. 11, 2014, http://www.bloomberg.com/news/2014-11-11/state-obamacare-strategies-take-shape-as-court-case-looms.html (discussing alternatives being considered to establish new state exchanges or to make state exchanges qualify for subsidies).

1. Congress Can Amend the ACA to Make Tax Subsidies Available on the Federal Exchanges.

First, Congress can avoid any potential adverse consequences from a ruling in Petitioners' favor by

amending 26 U.S.C. § 36B to include taxpayers who enroll through federal exchanges. As Petitioners have argued, the dispositive statutory language in this case is § 36B's limitation of tax credits to taxpayers who enroll in health insurance "through an exchange established by the State under Section 1311." 26 U.S.C. § 36B(2)(A). Rather than having courts torture the current statutory language to reach the result urged by Respondents, Congress could achieve that result by amending that passage to read "through an exchange established by the State under Section 1311 *or by the Secretary under Section 1321.*" This simple, one-line fix would entitle otherwise-qualified taxpayers access to § 36B credits even if they enroll in insurance through a federally facilitated exchange. Although predicting legislative action is not within the Court's purview, it is not far-fetched to expect Congress to revisit this law; in fact, Congress has already amended the ACA to address issues raised by adverse selection, most notably by repealing the portion of the law known as the CLASS Act (ACA title VIII, Community Living Assistance Services and Supports Act), see American Taxpayer Relief Act of 2012, Pub. L. 112-240 126 Stat. 2313, § 642 (2012).

Regardless of whether the current wording of § 36B reflects a drafting error or a strategic judgment, Congress can address this issue easily if the current belief is that the limitation expressed in the law is unwise, and it is Congress's role—not this Court's—to make that judgment. See, e.g., *Lewis*, *supra*, 560 U.S. at 217; *Reeves*, *supra*, 494 U.S. at 63 n.2. Congress, not the courts, is the appropriate forum for addressing policy choices and practical effects. This constitutional assignment also reflects understanding that laws are not logically deduced from obvious predicates but instead, as with the original text of § 36B, are "the

result of compromise between groups with marked but divergent interests in the contested provision." *Ragsdale*, *supra*, 535 U.S. at 93-94.

2. Even Without Congressional Revision, the ACA Provides Means to Address Any Adverse Consequences.

Even without legislated revision, the ACA provides the executive branch with means to provide subsidies to enrollees in late-established state exchanges. If states, aware of the absence of subsidies for purchases though federal exchanges and the impact that might have on state insurance markets, want to create state exchanges, the executive branch can assist the states through a combination of statutory waivers and transitional tax relief.

The ACA authorizes HHS to waive "all or any requirements" contained in certain enumerated ACA provisions "for plan years beginning on or after January 1, 2017." 42 U.S.C. § 18052(a)(1). This provision permits the Government to waive various statutory requirements that might limit tax subsidy eligibility that is the concern of Respondents. See 42 U.S.C. § 18052(a)(2)(A), (D); see also Brief of Respondents in Opp. to Cert., at 26 n.7 ("Congress provided a specific mechanism to allow a State to obtain a waiver of key provisions of the Act—including the tax credits, the individual-coverage provision, and the employer-responsibility provision."). A state would qualify for the waiver under this provision if it were to establish a state-based exchange that complies with the ACA's substantive requirements, even though the exchange might not otherwise provide qualifying coverage. See *id.*, at § 18052(b)(1). Thus, HHS could rely on this waiver provision to authorize taxpayers enrolled through that exchange to qualify for tax

credits provided for under § 36B. See 26 U.S.C. § 36B(b)(2)(A).

Thus, if states desire the coverage that the Respondents seek to read into the ACA, the present law already authorizes the executive branch to cooperate with the states and assist them in the prompt establishment of state exchanges in the aftermath of this Court's ruling, which then would allow individual insurance purchases through those exchanges to comply with requirements for § 36B tax credits.

3. Even If The States Fail to Establish Exchanges, the Executive Branch Can Alleviate Adverse Consequences Through the Use of Risk Corridors.

Other adjustments are also possible that do not depend on either congressional action or state creation of new exchanges. Even if Congress declines to revise the law and states decide not to establish further exchanges, the ACA provides the Executive with authority to alleviate the impact of adverse selection through the use of "risk corridors."

The ACA authorizes HHS to "establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums." 42 U.S.C. § 18062(a). As HHS has recognized, the express purpose of this risk-corridor program is "to protect against the effects of adverse selection." 78 Fed. Reg. 15,410, 15,411 (March 11, 2013).

Under the risk-corridor program, if the aggregate premiums of a plan exceed allowable costs, the Government reimburses the insurer for a proportion of the losses—including 50 percent of losses between 3 and 8 percent of the total premiums, and 80 percent of losses beyond 8 percent of the total premiums. 42 U.S.C. § 18062(b)(1)(A), (B). In other words, through the risk-corridor provision, the ACA authorizes HHS to subsidize insurers who face losses due to adverse selection in state markets for individual health plans. See *Health Policy Briefs: Risk Corridors* 2, Health Affairs (June 26, 2014), http://healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_118.pdf. "Under risk corridors, the government reduces insurers' risk by partially offsetting high losses and sharing in large profits." *Id.* "Insurers whose ratio of allowable costs relative to the target amount is too high, meaning their premiums did not cover all their claims, will receive partial reimbursement for those losses." *Id*.

The ACA does not impose detailed restrictions on HHS's implementation of the risk-corridor program. Rather, "[m]uch of the detail of the risk corridor program was left to regulation." *Id.,* at 3. Moreover, "[w]hile the risk corridors are symmetric, the ACA does not require the program to be budget neutral. As a whole, if the market suffers from adverse selection and premiums are inadequate, more payments will go out than are collected." *Id.*

Thus, the risk-corridor program allows HHS to alleviate problems associated with adverse selection in state insurance markets by subsidizing insurers, rather than subsidizing individual purchasers. This provides yet another adjustment that can avoid the "disastrous consequences" that Respondents predict.

B. Adjustments Also Are Available to Manage Transitional Issues in Insurance Markets.

Apart from the adjustments noted above, there are other reasons to believe that the claims of "disastrous consequences" are almost certainly wrong**.**

1. Adverse Selection Problems Did Not Cause Immediate Difficulties in States That Implemented Non-Discrimination Policies During the 1990s.

As this Court has noted, "[i]n the 1990's, several states—including New York, New Jersey, Washington, Kentucky, Maine, New Hampshire, and Vermont—enacted guaranteed-issue and community-rating laws without requiring universal acquisition of insurance coverage." *NFIB*, *supra*, 132 S. Ct. at 2614 (Ginsburg, J., concurring and dissenting). These experiments were largely unsuccessful, but none of these states suffered an immediate disaster in its insurance markets. Rather, in each case, adverse selection gradually produced the kinds problems anticipated here, typically occurring over a period of several years.[5] See generally Leigh Wachenheim & Hans

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[5] Some commentators dispute whether the difficulties experienced in these health-insurance markets were caused by the non-discrimination policies or similar reform provisions. *See, e.g.*, Beth C. Fuchs, Expanding the Individual Health Insurance Market: Lessons from the State Reforms of the 1990s (2004), at 10, https://folio.iupui.edu/bitstream/handle/10244/506/no4synthesisreport.pdf (concluding that "[i]nsurance carrier departures could have been due to other factors" than the insurance reforms); Alan C. Monheit et al., *Community Rating and Sustainable Individual Health Insurance Markets in New Jersey*, 23 Health Affairs 167, 173-74 (2004) ("Critics will be quick to attribute

Leida, The Impact of Guaranteed Issue and Community Rating Reforms on Individual Insurance Markets (March 2012), http://www.ahipcoverage.com/wp-content/upload s/2012/03/Updated-Milliman-Report .pdf.

For example, one study of the healthcare reforms enacted in New York indicated that, after three years, shifts in the insurance market "were not statistically different from similar shifts in two neighboring states" that had *not* enacted similar reforms and that "the main impact of the reforms in New York was a shift from traditional indemnity plans towards managed care plans." Wachenheim & Leida, *supra*, at 37 (citing Thomas C. Buchmuller & John E. DiNardo, Implications for California of New York's Recent Health Insurance Reforms (2000)); see also Wachenheim & Leida, *supra*, at 37-38 (suggesting that Buchmuller and DiNardo study's three-year data sample was too brief to detect adverse insurance-market effects because "[e]ffects of selection spirals occur over time"). Later, New York did experience the predicted adverse effects, at which time the state's legislature enacted two statutes aimed at addressing these issues. See *id.* at 38.

In Washington, the state legislature implemented health-care reform in 1993 without imposing an individual mandate. *Id.* at 49. Significant adverse effects in the state's health insurance market, however, did not appear until "the late 1990s." *Id.* at 49; see also Amicus Brief of the Governor of Washington Christine Gregoire, at 11, *U.S. Dep't of*

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problems in the IHCP to community rating and open enrollment. However, other factors we have identified may have played a key role in the decline in covered lives and rise in premiums.").

Health and Human Services, et al. v. *Florida*, 132 S. Ct. 2566 (2012) (No. 11-398), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-398_petitioneramcugovgregoire.Authcheckdam.pdf (explaining that "insurance carriers began reporting significant market losses and premiums began to rise" only after "a few years"). At that point, more than five years after enactment of its reform law, Washington State then modified its guaranteed-issue policy and substantially improved the functioning of its health insurance market. See, e.g., Carol M. Ostrom, *Why Washington State's Health Reform Faltered after Loss of Mandates*, Seattle Times, (March 28, 2012), http://seattletimes.com/html/localnews/2017852301_insurancemandate28m.html.

Similarly, in New Jersey, an analysis of the early effects of the state's 1992 health-reform law (which did not include an individual mandate of the sort contained in the ACA) reported that its early effects were far from disastrous and in some respects could be seen as positive. The report noted that during the first three years following reform passage, due to features of the State's risk-pooling mechanism among carriers, the number of carriers in the individual insurance market "increased dramatically" (going from 5 to 29). See Wachenheim & Leida, *supra,* at 30. New Jersey's legislature has had plenty of time to revisit and adjust New Jersey's program as problems arose, and the State's guaranteed-issue and community rating provisions have survived multiple rounds of legislative reform in their twenty-two years. See *id*., at 30-32.

These experiences belie assertions that any reduction in incentives to purchase insurance accompanying the individual mandate will cause imminent collapse

of state health-insurance markets (the dreaded "death spiral"). Despite quite foreseeable problems from efforts to restructure health care markets, the evidence does not support speculation of calamitous results from reducing subsidies.

Even those states that ultimately abandoned their health-reform regimes did not experience sudden, catastrophic results from the absence of subsidy-driven incentives. For example, in New Hampshire, three years after the implementation of guaranteed issue and community rating, the number of insurers participating in the individual market decreased, but only declined from twelve to five. See Conrad F. Meier, Council for Affordable Health Insurance, Destroying Insurance Markets: How Guaranteed Issue and Community Rating Destroyed the Individual Health Insurance Market in Eight States 65 (2005), http://www.cahi.org/cahi_contents/resources/pdf/destroyinginsmrkts05.pdf. The remaining insurers provided sufficient coverage that, coupled with the gradual nature of these effects, New Hampshire waited seven years to repeal its health-care reforms. See Wachenheim & Leida, *supra* at 25.

Similarly, Iowa and South Dakota waited nine and seven years, respectively, to repeal their health-insurance reform programs. *Id.* at 3. Kentucky, which suffered the most significant and most rapid adverse effects from a reform initiative, the legislature acted quickly to repeal the reforms. *Id.* at 8; see also id. at 3 (noting that Kentucky's reforms were particularly unsuccessful because "reforms were applied piecemeal, so that some portions of the individual market operated under pre-reform rating and issue rules for years after reform was originally enacted"); Adele Kirk, *Riding the Bull: Experience with Individual*

Market Reform in Washington, Kentucky and Massachusetts, 25 J. Health Politics, Pol'y & L. 133, 152-53 (2000).

State experience with health insurance reforms indicate that expected adverse effects, when they occur, do so gradually enough to allow ample time for political actors to make adjustments. It is neither necessary nor appropriate for courts to attempt to predict practical consequences in this arena, but efforts to frighten judges into such actions rest on soft ground indeed.

2. Federal and State Laws Restrict Impact of Effects from Reducing Subsidies by Regulating Decisions to Decline or Non-Renew Health-Care Insurance.

Federal and state laws further reduce potential adverse effects of reduced health insurance subsidies by restricting insurers' freedom to cancel or to decline to renew individual health plans. These provisions afford interim protection to purchasers of health insurance plans through federal exchanges while the political branches consider potential adjustments to the absence of subsidies for such policies.

First, the ACA itself limits insurers' ability to cancel plans and abandon state insurance markets, thereby giving the political branches ample time to implement alternatives to the currently enacted program. Most significant, the ACA prohibits insurers from rescinding coverage under an existing policy unless the enrollee has engaged in fraud or misrepresentation. 42 U.S.C. § 300gg-12. In addition, the ACA restricts insurers' ability to deny plan renewal. Insurers that intend to leave a state market altogether

must provide plan participants, beneficiaries, and sponsors at least 180 days' notice prior to coverage cancellation. 42 U.S.C. §§ 300gg-2(c)(2)(A)(i), 300gg-42(c)(2)(A)(i). The ACA further provides that an insurer that leaves a state market cannot reenter that market for five years. *Id*. at §§ 300gg-2(c)(2)(B), 300gg-42(c)(2)(B). Finally, if an insurer discontinues a category of plans (rather than all plans in a state), it still must provide plan participants, beneficiaries, and sponsors 90 days' notice before cancellation. Id. at §§ 300gg-2(c)(1)(A), 300gg-42(c)(1)(A).

Many state laws also contain regulations that delay or mitigate risks to individual insureds. For example, some states already regulate insurers' ability to decline policy renewal. See, e.g., §§ 627.6425(1), (3) (mandating policy renewal except under specified circumstances, requiring 180-day notice if insurer intends to leave market); Mo. Rev. Stat. § 376.454.1, 376.454.4 (same); Neb. Rev. Stat. § 44-787(1) (same); N.H. Rev. Stat. § 420-G:6 (same); S.C. Code § 38-71-675 (A), (C) (same); La. Rev. Stat. § 22:1074 (A), (C)(1)(a) (mandating policy renewal except under specified circumstances, requiring 90-day notice if insurer intends to leave market); Nev. Rev. Stat. § 687B.340 (requiring 30-day notice if insurer intends not to renew policy); S.D. Codified Laws § 58-17-18 (same); N.C. Gen. Stat. § 58-51-20 (requiring notice of non-renewal based on length of insurance coverage). Similarly, many states prohibit rescission or cancellation of existing policies. See, e.g., Nev. Rev. Stat. § 687B.320; S.C. Code § 38-71-335(A). And many states prohibit insurers that leave the state's insurance market from reentering for five years. See, e.g., La. Rev. Stat. § 22:1074(C)(2)(c); Mo. Rev. Stat. § 376.454.4(b)(2); Neb. Rev. Stat. § 44-787(2); S.C. Code § 38-71-675(C)(2)(b); S.D. Codified Laws § 58-17-83.

The combination of state and federal laws already in place does not entirely eliminate any impact of potential adverse selection problems, but existing laws do make any serious problems less likely and also less apt to be experienced in a time frame inconsistent with opportunities for adjustment by the political branches. If the Court were inclined to take such matters into account in construing statutory terms—a course amicus opposes as inappropriate in light of the courts' constitutional role and institutional capacities—it should find that the potential avenues for adjustment are sufficiently numerous and the time frame apposite to potential adverse effects sufficiently remote that these considerations counsel against modifying the interpretation of law this Court would adopt based on statutory text.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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