

1 TESTIMONY OF ROBERT N. WEINER, PARTNER, ARNOLD & PORTER,
2 LLP, WASHINGTON, DC

3
4 Mr. Weiner. Thank you, Mr. Chairman, Ranking Member
5 Coons, for inviting me to testify today.

6 Let me say first that I think it is wrong or at least
7 premature to be talking about a violation of the rule of
8 law by the Treasury Department when the Supreme Court may
9 yet tell us, and I think will tell us, shortly that they
10 were right. ✓

11 Second, I would like to say that the Affordable Care
12 Act, in fact, is working; 14.1 million ^{more} Americans ~~more~~ ✓
13 have insurance than ~~they~~ did before. The rate of
14 uninsured Americans has dropped from 20 percent to 13
15 percent. Health care price inflation is at its lowest
16 level in 50 years and the rate of increase in insurance
17 premiums has declined.

18 Third, the opponents of the ACA in the King case
19 would roll back this ^{program} project and they contend that the ✓
20 Treasury Department, charged with implementing Congress'
21 intent, should have found that what Congress intended to
22 do was to enact a self-destructive statute, one that
23 coerced States to set up their own exchanges by
24 threatening if they did not, to impose a Federal backup
25 system that did not work.

1 Now, why would Congress have done that when the whole
2 point -- why would they have had a nonfunctional backup
3 as a threat when the whole point of the backup was to
4 ensure that the statute did work in those jurisdictions
5 and why would Congress plant a time bomb in the statute
6 anyway?

7 Well, the argument is that ~~the IRS and the Treasury~~
8 ~~Department,~~ those questions ^{are} ~~were~~ off limits because the
9 language was so clear that there was only one permissible
10 interpretation.

11 But let me ~~answer~~ ^{state} one more question and that is why
12 would the States have an incentive without the coercion
13 to establish exchanges, and the States themselves
14 answered that question in the very case that Mr. Carvin
15 handled. When the amended the complaint in the NFIB
16 case, the State governments alleged that the exchanges
17 were coercive. Why were they coercive? Not because they
18 threatened subsidies of the citizens of those States if
19 they did not set up an exchange. They were coercive, the
20 lawsuit said, because the States would cede regulatory
21 authority if the Federal Government established
22 exchanges.

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

1 Now, the opponents really have to take the position
 2 that the statute has one and only one permissible reading
 3 because there is a strong presumption that you read
 4 statutes to be effective -- that you read statutes in
 5 furtherance of their evident purpose. Justice Scalia
 6 says that in his book on statutory interpretation.

7 The argument here is that this self-^{immolating}~~emulating~~
 8 interpretation that the Treasury Department was so
 9 derelict in rejecting can prevail only if it is
 10 impossible to construe the statute any other way.

11 It is crystal clear, they say, but no one at the time
 12 the statute was enacted was aware of it. In fact, it was
 13 so obscure that it was not discovered, and that is the
 14 word that has been used, "discovered," until months after
 15 the statute was enacted by a lawyer whose announced
 16 mission was to find a statutory glitch that would take
 17 down ObamaCare. Nor is this ~~the~~ one and only
 18 interpretation accepted now by authoritative
 19 interpreters, probably ~~for~~ at least four members of the
 20 Supreme Court, ↗

21 ↘ The Solicitor General, Senate and House leaders and
 22 staffers who were involved in the drafting of the bill,
 23 health insurers, the American Hospital Association, the
 24 American Cancer Society, 22 States, the former director
 25 of the CBO, ↗ all of these people interpret the statute the

1 said there is no real operational difference between a
2 Federal exchange and a State exchange.

3 Officials assessing exchanges in Georgia, South
4 Carolina, West Virginia, all these States, ~~advanced a~~ ^{evidenced}
5 knowledge that subsidies were available.

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

11 Senator Coons. Thank you, Mr. Weiner.

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

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

21 How does the context of these four words -- how does
22 the text of the entire statute support the reading that
23 exchanges established by the State includes exchanges
24 established for the State by the Secretary of HHS? You
25 touched on this in your previous testimony. I would