

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAVID KING, ET AL., :

4 Petitioners : No. 14-114.

5 v. :

6 SYLVIA BURWELL, :

7 SECRETARY OF HEALTH AND :

8 HUMAN SERVICES, ET AL. :

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10 Washington, D.C.

11 Wednesday, March 4, 2015

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:09 a.m.

16 APPEARANCES:

17 MICHAEL A. CARVIN, ESQ., Washington, D.C.; on behalf of
18 Petitioners.

19 DONALD B. VERRILLI, ESQ., Solicitor General, Department
20 of Justice, Washington, D.C.; on behalf of
21 Respondents.

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1 P R O C E E D I N G S

2 (10:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 14-114, King v. Burwell.

5 Mr. Carvin.

6 ORAL ARGUMENT OF MICHAEL A. CARVIN

7 ON BEHALF OF PETITIONERS

8 MR. CARVIN: Mr. Chief Justice, and may it
9 please the Court:

10 This is a straightforward case of statutory
11 construction where the plain language of the statute
12 dictates the result.

13 JUSTICE GINSBURG: Mr. Carvin, will you
14 please back up, because before we get to a question of
15 statutory construction, as you know, each plaintiff, or
16 at least one plaintiff, has to have a concrete stake in
17 these questions. They can't put them as ideological
18 questions.

19 And we have as -- four plaintiffs. As to
20 two of them, there is a declaration stating "I am not
21 eligible for health insurance from the government," but
22 there's a question of whether they are veterans eligible
23 for coverage as veterans.

24 MR. CARVIN: Yes. One of those is Mr. Hurst
25 who would have to, if -- I would refer you to Joint

1 Appendix at PAGE 42, where this is the government's
2 recitation of facts where they make it clear that
3 Mr. Hurst would have to spend \$750 of his own money as
4 a -- because of the IRS rule.

5 Mr. Hurst was a veteran for 10 months in
6 1970. He is not eligible for any veterans service
7 because if you've served such a short -- health
8 services. If you serve such a short --

9 JUSTICE GINSBURG: I -- I'll ask the
10 government if they agree that --

11 MR. CARVIN: And I should point out that the
12 government has never disputed this, and I'd also like --

13 JUSTICE GINSBURG: But the Court has an
14 obligation to look into it on its own.

15 MR. CARVIN: That's true, but of course
16 there has been fact-finding by lower courts in an
17 adversarial system. I don't believe the Court does its
18 own --

19 JUSTICE GINSBURG: I don't think it was ever
20 brought up in the lower court that these -- these two
21 people were veterans.

22 MR. CARVIN: If I could just make one
23 further point on this, Justice Ginsburg. Even if he
24 were technically eligible, which he is not, there is an
25 IRS Rule 26 C.F.R. 1.36B-2(c)(ii), which says --

1 JUSTICE SCALIA: Ah, yes.

2 MR. CARVIN: With the usual clarity of the
3 IRS code, making clear that you are only disabled from
4 receiving subsidies if you have actually enrolled in a
5 veteran's health services and it's undisputed that --

6 JUSTICE GINSBURG: That's the government
7 that's --

8 MR. CARVIN: -- Mr. Hurst did not.

9 JUSTICE GINSBURG: -- that's deposition to.
10 And then there were the two women, I think one of them
11 was going to turn 65 in June, which would make her
12 Medicaid-eligible.

13 MR. CARVIN: She will turn 65 in late June.
14 She's obviously subject to the individual mandate well
15 in advance of that. By virtue of the IRS rule, she
16 would have to spend \$1800 per year for health insurance
17 by virtue of the IRS --

18 JUSTICE GINSBURG: Per year?

19 MR. CARVIN: Excuse me?

20 JUSTICE GINSBURG: But you said she will
21 turn 65 in June.

22 MR. CARVIN: Late June, yes.

23 JUSTICE GINSBURG: So that takes care of
24 2015.

25 MR. CARVIN: No. Right now she is obliged

1 under the individual mandate to have insurance. You --
2 you have to have insurance for 9 months of the year and
3 so as of April 1st --

4 JUSTICE GINSBURG: Then --

5 MR. CARVIN: -- she will be subject to the
6 penalty which will be alleviated only by --

7 JUSTICE GINSBURG: Again, I'll ask the
8 government if they agree with you on that.

9 And then I think for the fourth plaintiff,
10 there's a question whether she would qualify for a
11 hardship -- hardship exemption from the individual
12 mandate even if she received the tax credit, in which
13 case the tax credits would be irrelevant.

14 MR. CARVIN: That's true. Again, I'll refer
15 you to the Joint Appendix at 41. That was the
16 government's argument below. We didn't want to get into
17 a factual dispute about it because we had such clear
18 standing with respect --

19 JUSTICE GINSBURG: Yeah, but you have to --

20 MR. CARVIN: -- to --

21 JUSTICE GINSBURG: But you would have to
22 establish the standing, prove the standing.

23 MR. CARVIN: Well, as --

24 JUSTICE GINSBURG: If this gets beyond the
25 opening door.

1 MR. CARVIN: Fair enough, Your Honor, but --
2 but it's black-letter law that only one plaintiff needs
3 standing, and for the reasons I've already articulated,
4 both Plaintiff Hurst and Plaintiff Levy have.

5 JUSTICE GINSBURG: Okay. I don't want to
6 detain you on this any more but I will ask the
7 government what their position is on standing.

8 MR. CARVIN: Thank you.

9 Returning to the merits, the only provision
10 in the Act which either authorizes or limits subsidies
11 says, in plain English, that the subsidies are only
12 available through an exchange established by the State
13 under Section 1311.

14 JUSTICE BREYER: If you're going to
15 elaborate on that, I would appreciate your -- in your
16 elaboration, I've read that, and this statute is like
17 the tax code more than it's like the Constitution.
18 There are defined terms, and the words you just used
19 concern a defined term.

20 As I read the definition, there's a section,
21 Definitions, and it says, quote, The term "Exchange"
22 means, quote, an exchange established under 1311. And
23 1311 says, An Exchange shall be a government agency,
24 et cetera, that is established by a State. Those are
25 the definitions.

1 So then you look to 1321. And 1321 says, if
2 a State does not set up that Exchange, then the Federal,
3 quote, secretary shall establish and operate such
4 Exchange.

5 So it says, "The Secretary is to establish
6 and operate such Exchange," the only kind of Exchange to
7 which the Act refers, which is an -- quote, "an Exchange
8 established by a State under 1311." That's the
9 definition.

10 So the statute tells the Secretary, set up
11 such Exchange, namely, a 1311 State Exchange.

12 MR. CARVIN: Correct.

13 JUSTICE BREYER: And there's nothing else in
14 this statute.

15 MR. CARVIN: Correct.

16 JUSTICE BREYER: So that's throughout what
17 they're talking about. So what's the problem?

18 MR. CARVIN: As Your Honor just said, it
19 tells the Secretary to establish such Exchange.

20 JUSTICE BREYER: Yes.

21 MR. CARVIN: And what 36B turns on is
22 whether the State or the Secretary has established the
23 Exchange.

24 JUSTICE BREYER: No, it uses the same
25 terminology that it's used in -- 15 times in this

1 statute, namely, the terminology in the definition is
2 "an Exchange established by a State."

3 MR. CARVIN: Under --

4 JUSTICE BREYER: That's the phrase.

5 MR. CARVIN: Well, under 1311, that is the
6 phrase. And if 1311 created some -- the definitional
7 section created some ambiguity as to whether HHS was
8 establishing a 1311 or 1321 Exchange, that is immaterial
9 because 36B does not say all 1311 Exchanges get
10 subsidies, it says Exchanges established by the State
11 under Section 1311 --

12 JUSTICE KAGAN: Mr. Carvin.

13 MR. CARVIN: -- not established by HHS under
14 Section 1311 --

15 JUSTICE KAGAN: Mr. Carvin.

16 MR. CARVIN: -- so it eliminates any
17 potential ambiguity created by the definitional section.

18 JUSTICE KAGAN: Can -- can I offer you a
19 sort of simple daily life kind of example which I think
20 is linguistically equivalent to what the sections here
21 say that Justice Breyer was talking about?

22 So I have three clerks, Mr. Carvin. Their
23 names are Will and Elizabeth and Amanda. Okay? So my
24 first clerk, I say, Will, I'd like you to write me a
25 memo. And I say, Elizabeth, I want you to edit Will's

1 memo once he's done. And then I say, Amanda, listen, if
2 Will is too busy to write the memo, I want you to write
3 such memo.

4 Now, my question is: If Will is too busy to
5 write the memo and Amanda has to write such memo, should
6 Elizabeth edit the memo?

7 (Laughter.)

8 MR. CARVIN: If you're going to create
9 moneys to Will for writing the memo and Amanda writes
10 the memo and you say, the money will go if Will writes
11 the memo, then under plain English and common sense, no,
12 when Amanda writes the memo --

13 JUSTICE KAGAN: Gosh --

14 MR. CARVIN: -- but now --

15 JUSTICE KAGAN: -- you -- you run a
16 different shop than I do if that's the way --

17 (Laughter.)

18 JUSTICE KAGAN: Because in my chambers, if
19 Elizabeth did not edit the memo, Elizabeth would not be
20 performing her function. In other words, there's a --
21 a substitute, and I've set up a substitute. And then
22 I've given -- I've given instructions: Elizabeth, you
23 write -- you edit Will's memo, but of course if Amanda
24 writes the memo, the instructions carry over. Elizabeth
25 knows what she's supposed to do. She's supposed to edit

1 Amanda's memo, too.

2 MR. CARVIN: And -- and in your chambers,
3 you're agnostic as to whether Will, Elizabeth or Amanda
4 writes it. But the key point is here under Section
5 1311, Congress was not agnostic as to whether States or
6 HHS established the Exchange. It's --

7 JUSTICE ALITO: Well, Mr. Carvin, if I had
8 those clerks, I had the same clerks --

9 (Laughter.)

10 JUSTICE ALITO: -- and Amanda wrote the
11 memo, and I received it and I said, This is a great
12 memo, who wrote it? Would the answer be it was written
13 by Will, because Amanda stepped into Will's shoes?

14 MR. CARVIN: That was my first answer.

15 (Laughter.)

16 JUSTICE KAGAN: He's good, Justice Alito.

17 MR. CARVIN: Justice Kagan didn't accept it,
18 so I'm going to the second answer, which is you are
19 agnostic as between Will and Amanda, but this --

20 JUSTICE KAGAN: Ah, but that's --

21 MR. CARVIN: But Congress was not agnostic
22 as between State and Federal Exchanges.

23 JUSTICE KAGAN: Yes. That's a very
24 important point, I think, because what you're saying is
25 that the answer to the question really does depend on

1 context, and it depends on an understanding of the law
2 as a whole and whether they were agnostic. I agree with
3 that.

4 So it's not the simple four or five words
5 because the four or five words in my example, it's
6 obvious that Elizabeth should edit the memo. It's the
7 whole structure and context of the provision that
8 suggests whether those instructions carry over to the
9 substitute, isn't it?

10 MR. CARVIN: We implore you to examine these
11 words in the context of the Act as a whole because our
12 argument becomes stronger for five reasons.

13 To respond to Justice Breyer's point, he
14 says such Exchange connotes that it's the same person
15 doing it. But look at the provision on territorial
16 Exchanges. It says, territories can establish such
17 Exchanges and then it says, "and shall be treated as a
18 State." So -- so --

19 JUSTICE BREYER: Yes, it does. But you say
20 connote. No, it's not a question of connotation; it is
21 a question of denotation. Now what does that mean? It
22 means that the Federal government, the Secretary, is
23 establishing a thing for the State. And what is the
24 thing? The thing that it is establishing for the State
25 is defined as an Exchange established by the State.

1 MR. CARVIN: To --

2 JUSTICE BREYER: Now, that person from Mars,
3 who's literal, which I usually am not, but a literalist,
4 I think would have to read it that way. But if you --
5 if you're not a literalist, well, at least you could
6 read it that way.

7 Now you want to go into the context -- if
8 you want to go into the context, at that point it seems
9 to me your argument really is weaker.

10 MR. CARVIN: Well, two points.

11 JUSTICE BREYER: The Exchanges fall apart,
12 nobody can buy anything on them. You know the
13 arguments. You've read the briefs. Nobody can -- there
14 are no customers. Employers don't have to pay penalties
15 as long as they use just people from Virginia, but one
16 Maryland person comes -- you know all those arguments.
17 So how does the context support you?

18 MR. CARVIN: Well, again, under the
19 literalist or nonliteralist interpretation, saying that
20 HHS will establish such Exchange doesn't suggest that
21 the State has established such Exchange if there was --

22 JUSTICE SOTOMAYOR: But the State, if made
23 the --

24 MR. CARVIN: -- if there was ambiguity in
25 that regard -- just if I could finish my answer to

1 Justice Breyer -- you look at a parallel provision where
2 they use precisely the same language, and they said,
3 "and shall be treated as a State," that language which
4 is notably omitted from 1321 --

5 JUSTICE BREYER: Correct.

6 MR. CARVIN: -- and it's a basic principle
7 of statutory construction that you interpret the same
8 phrases the same way. And it shows that Congress knew
9 how to create equivalence between non-State Exchanges
10 and Exchanges if and when it wanted to.

11 Sorry, Justice Sotomayor.

12 JUSTICE SOTOMAYOR: Take a breath.

13 (Laughter.)

14 JUSTICE SOTOMAYOR: I'm -- I'm a little
15 concerned with how you envision this provision working.
16 You're saying that the HHS Exchange can't be for the
17 State so that it's established by the choice of the
18 State.

19 The choice the State had was establish your
20 own Exchange or let the Federal government establish it
21 for you. That was the choice. If we read it the way
22 you're saying, then we're going to read a statute as
23 intruding on the Federal-State relationship, because
24 then the States are going to be coerced into
25 establishing their own Exchanges. And you say, oh, no,

1 they can't be coerced, but let's go back to what Justice
2 Breyer was talking about.

3 In those States that don't -- their citizens
4 don't receive subsidies, we're going to have the death
5 spiral that this system was created to avoid. States
6 are obligated, insurers are obligated to make sure that
7 in their States, whether they're part of this program or
8 not, that they have guaranteed coverage, that 26 -- that
9 children are covered till they're 26, and that they base
10 their costs on community ratings. So if they have to do
11 that, then costs are going to rise on every insurance --
12 every insurance plan offered in the country in those 34
13 States, 3 or 6 of -- or 9 of your States will have
14 tightened their Medicaid eligibility requirements in
15 contravention of the Act, so they're taking money by
16 breaking their compacts. They would have to lose all of
17 their Medicaid money.

18 Tell me how that is not coercive in an
19 unconstitutional way? And if it is coercive in an
20 unconstitutional way, in Bond just -- I think it was
21 last term, we said that that is a primary statutory
22 command; that we read a statute in a way where we don't
23 impinge on the basic Federal-State relationship.

24 MR. CARVIN: This Court has never suggested
25 outside the very unusual coercion context of the NFIB

1 Medicaid that a funding condition somehow invades a
2 State police power. Obviously --

3 JUSTICE SOTOMAYOR: Oh, we did it -- we said
4 it last year.

5 MR. CARVIN: In an NF -- no, no. In Bond,
6 there the Federal government was taking away a police
7 power. Here, all the Federal government is doing is
8 saying you want billions of free Federal dollars.
9 That's hardly invading State sovereignty and it's the
10 kind of routine the funding condition that this Court
11 has upheld countless times.

12 JUSTICE KENNEDY: Let me say that from the
13 standpoint of the dynamics of Federalism, it does seem
14 to me that there is something very powerful to the point
15 that if your argument is accepted, the States are being
16 told either create your own Exchange, or we'll send your
17 insurance market into a death spiral. We'll have people
18 pay mandated taxes which will not get any credit
19 on -- on the subsidies. The cost of insurance will be
20 sky-high, but this is not coercion. It seems to me that
21 under your argument, perhaps you will prevail in the
22 plain words of the statute, there's a serious
23 constitutional problem if we adopt your argument.

24 MR. CARVIN: Two points, Justice Kennedy.
25 One is the government's never made that

1 argument. Number two, I'd like to think --

2 JUSTICE KENNEDY: Sometimes we think of
3 things the government doesn't.

4 (Laughter.)

5 MR. CARVIN: Well, I certainly hope you do
6 in this case, but not -- not on this question.
7 What -- what I'm trying to, quite seriously, Justice
8 Kennedy, convey is if this was unconstitutional, then
9 the Medicaid statute that this Court approved in NFIB
10 would be unconstitutional.

11 JUSTICE SCALIA: Mr. Carvin, where the --
12 what would the consequence of unconstitutionality be?
13 Very often you have an ambiguous provision, could be
14 interpreted one way or another way. If interpreting it
15 one way is unconstitutional, you interpret it the other
16 way.

17 MR. CARVIN: Correct.

18 JUSTICE SCALIA: But do we have any case
19 which says that when there is a clear provision, if it
20 is unconstitutional, we can rewrite it?

21 MR. CARVIN: And that -- and that --

22 JUSTICE SCALIA: Is there any case we have
23 that says that?

24 MR. CARVIN: No, Your Honor. And that was
25 really my point, Justice Kennedy. Think about the

1 consequences when -- of the Medicaid deal as being
2 coercive. 22 states have said no to the Medicaid deal.
3 That has created a bizarre anomaly in the law; that if
4 people making less than the poverty line are not
5 available to any Federal funds to help them with health
6 insurance.

7 JUSTICE KENNEDY: I -- I fully understand
8 that, but I think the Court and the counsel for both
9 sides should confront the proposition that your argument
10 raises a serious constitutional question. Now, I'm not
11 sure that the government would agree with that, but it
12 -- it is in the background of how we interpret this --
13 how we interpret this statute.

14 MR. CARVIN: Your Honor --

15 JUSTICE KENNEDY: It may well be that you're
16 correct as to these words, and there's nothing we can
17 do. I understand that.

18 JUSTICE SOTOMAYOR: There are many --

19 MR. CARVIN: A -- A, there's no savings
20 construction to echo Justice Scalia's point; but B, the
21 point I want to make on the straight-up
22 constitutionality is, if this is unconstitutional, then
23 all of the provisions in the U.S. Code that say to
24 States if you do something for No Child Left Behind, we
25 will --

1 JUSTICE GINSBURG: But this is -- this is
2 quite different.

3 JUSTICE KENNEDY: In -- in South Carolina v.
4 Dole where -- where the matter of funding for the
5 highway, suppose Congress said, and if you don't build
6 the highways, you have to go 35 miles an hour all over
7 the State. We wouldn't allow that.

8 MR. CARVIN: No. Well, there, of course,
9 you would be interfering with a basic State prerogative
10 as to establish their limit, and they are -- the
11 condition is not related to that. Here the condition is
12 perfectly related to it.

13 JUSTICE GINSBURG: Mr. Carvin --

14 MR. CARVIN: We want to create something new
15 --

16 JUSTICE GINSBURG: Mr. Carvin, here's a --
17 you refer to the Medicaid example. That's a familiar --
18 a grant-in-aid says to the State, here's the Federal
19 money and here's the conditions, take it or leave it.
20 That's one pattern. But this pattern that we have says
21 flexible State. You can -- you can have your program if
22 you want it, and if you don't, there's a fallback.
23 There's the Federal program. I mean, that's a typical
24 pattern. It's the pattern of the Clean Air Act. You
25 can have a State implementation plan, but State, if you

1 don't get up your plan, there's a Federal implementation
2 plan. I have never seen anything like this where it's
3 if you take what the statute says you can have in 1321,
4 then you get these disastrous consequences.

5 MR. CARVIN: That's why this is much less
6 risky a deal for Congress. And what distinguishes it
7 from Medicaid as the dissenting opinion in NFIB pointed
8 out. In Medicaid, Congress is playing all in, take it
9 or leave it. If they turn down the deal, then Medicaid
10 is completely thwarted. Here, if they turn down the
11 subsidy deal, they still get the valuable benefits of an
12 Exchange and there's not a scintilla of --

13 JUSTICE GINSBURG: What -- what are those
14 benefits? What are the customers that can buy on it?
15 What are the insurers that will sell on it?

16 MR. CARVIN: Well, three points.

17 One is we know textually that they thought
18 Exchanges without subsidies work, because again, they
19 have territorial Exchanges, but the government concedes
20 no subsidies.

21 JUSTICE KAGAN: That's not --

22 MR. CARVIN: We have legislative history
23 which --

24 JUSTICE KAGAN: Mr. Carvin, that's not --
25 that's not what you said previously when you were here

1 last time in this never-ending saga.

2 (Laughter.)

3 JUSTICE KAGAN: You said the -- you said
4 without the subsidies driving demand within the
5 Exchanges, insurance companies would have absolutely no
6 reason to offer their products through Exchanges. And
7 then you said the insurance Exchanges cannot operate as
8 intended by Congress absent the subsidies.

9 MR. CARVIN: That is entirely true. They
10 wouldn't have operated as intended because Congress
11 intended all 50 States to take this deal.

12 So eliminating --

13 JUSTICE SOTOMAYOR: So why create 1326 at
14 all? Obviously, they thought that some States wouldn't.

15 MR. CARVIN: Well, they thought it was
16 possible and --

17 JUSTICE SOTOMAYOR: Very possible.

18 MR. CARVIN: And then --

19 JUSTICE SOTOMAYOR: Because they set up a
20 mechanism for that to happen.

21 MR. CARVIN: And then they -- what happens?
22 You still get the Exchange. It's not like Medicaid
23 where the entire Federal program is thwarted. You get
24 the benefits that were lauded.

25 JUSTICE SOTOMAYOR: But nobody -- no one's

1 going to visit the program if there are no subsidies
2 because not enough people will buy the programs to stay
3 in the Exchanges.

4 MR. CARVIN: That is demonstrably untrue and
5 not reflected anywhere in the legislative history. The
6 legislative history quite clearly contradicts that.
7 Many senators got up and said there are very valuable
8 benefits to the Exchange, one-stop shopping, Amazon, as
9 President Obama has said. The government came in the
10 last case and told you these two things operate quite
11 independently. We don't need Exchange without
12 subsidies. In contrast, there's not a scintilla of
13 legislative history suggesting that without subsidies,
14 there will be a death spiral. Not a word.

15 JUSTICE SOTOMAYOR: Wait a minute. That was
16 the whole purpose that drove this bill because States
17 had experimented with this, and those that didn't have
18 subsidies or other -- other provisions of the Act didn't
19 survive.

20 MR. CARVIN: They didn't have --

21 JUSTICE SOTOMAYOR: You said it yourself in
22 the prior case.

23 MR. CARVIN: No. The prior case was about
24 the individual mandate. The government came in and said
25 the individual mandate is necessary to affect death

1 spirals. No one, in the findings in Congress or
2 anywhere else, suggested that subsidies were available.
3 Will subsidies reduce the number of people available on
4 the individual --

5 JUSTICE SOTOMAYOR: My problem -- my problem
6 is that -- the reverse. You're talking about Congress,
7 how -- hiding, borrowing the phrase of one of my
8 colleagues, a -- a -- a huge thing in a mousetrap.
9 Okay? Because do you really believe that States fully
10 understood that they were not going to get -- their
11 citizens were not going to get subsidies if they let the
12 Federal government? What senator said that during the
13 hearings?

14 MR. CARVIN: The same amount of senators who
15 said that subsidies were available on HHS Exchanges,
16 which is none. They didn't deal with it in the
17 legislative history just as they didn't deal with
18 Medicaid because the statute was quite clear.

19 Let's talk about it in context again,
20 Justice Sotomayor. The context is the only provisions
21 in the Act establishing any limit on the subsidies is
22 found in 36B. So it's not a mouse hole. It's the place
23 you'd expect to find it. It's the only place in the Act
24 that limits subsidies to purchases made on Exchange.

25 JUSTICE GINSBURG: But it's a --

1 JUSTICE KAGAN: I don't know think that's
2 quite right, Mr. Carvin.

3 CHIEF JUSTICE ROBERTS: Justice Ginsburg.

4 JUSTICE GINSBURG: It's a tax code provision
5 that's an implementation provision. It tells you how
6 you compute the individual amount.

7 MR. CARVIN: It --

8 JUSTICE GINSBURG: It -- it's not in the
9 body of the legislation where you would expect to find
10 this.

11 MR. CARVIN: No. Your Honor, if that's
12 true --

13 JUSTICE GINSBURG: And if it --

14 MR. CARVIN: Sorry. Please.

15 JUSTICE GINSBURG: What Justice Kagan just
16 read to you, you had the idea that the subsidies were
17 essential --

18 MR. CARVIN: No.

19 JUSTICE GINSBURG: -- to have the thing
20 work. That's what you told us last time.

21 MR. CARVIN: What I told you was it wouldn't
22 work as expected, and that's because they thought this
23 deal would work just like the Medicaid deal where all 50
24 States would say yes, so you would have both of
25 congressional purposes.

1 JUSTICE GINSBURG: Then why in the world
2 would they set up this whole extra thing if they didn't
3 think anybody was going to take it?

4 MR. CARVIN: Well, that -- that was my
5 response to Justice Sotomayor. That -- that is
6 completely unsupported empirical observation made post
7 hoc by amicus. There's no reflection of that in the
8 legislative history. Indeed, the legislative history
9 refutes it.

10 CHIEF JUSTICE ROBERTS: Mr. Carvin, we've
11 heard talk about this other case. Did you win that
12 other case?

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: So maybe it makes
15 sense that you have a different story today?

16 MR. CARVIN: I'm really glad Your Honor said
17 that.

18 (Laughter.)

19 MR. CARVIN: And -- and if I could return to
20 context because I think --

21 JUSTICE KAGAN: I mean -- I'm sorry, Mr.
22 Carvin. Please.

23 MR. CARVIN: Just very briefly, Justice
24 Kagan. Very much appreciate it.

25 To -- to respond, we've already talked about

1 context. Section 1311 is a key part of this context.
2 It says in the strongest possible terms we want States
3 to run these Exchanges. If you give unconditional
4 subsidies, then, of course, there is absolutely no
5 incentive for States to do it, and you have
6 fundamentally undermined that distinct statutory
7 purpose. Whereas if you condition subsidies, Congress
8 accomplishes both of its goals. Widespread subsidies,
9 plus State-run Exchanges.

10 In terms of terms of art, again, there is
11 language in the statute which says
12 "Exchanges," "Exchanges under the Act." Those phrases
13 naturally encompass both HHS Exchanges and
14 State-established Exchanges.

15 And, yet, the Solicitor General is coming
16 here to tell you that a rational, English-speaking
17 person intending to convey subsidies available on HHS
18 Exchanges use the phrase "Exchanges established by the
19 State."

20 He cannot provide to you any rational reason
21 why somebody trying to convey the former would use the
22 latter formulation.

23 CHIEF JUSTICE ROBERTS: Mr. Carvin, why
24 don't you take an extra ten minutes and maybe we'll give
25 you a little bit more of a chance to talk.

1 MR. CARVIN: Okay. Fine.

2 JUSTICE KAGAN: Well, then, I'll ask a
3 question.

4 (Laughter.)

5 MR. CARVIN: Well, if you're going to ruin
6 my ten minutes.

7 JUSTICE KAGAN: No. I mean, let's go back
8 to this question of where -- where Congress put this
9 thing because putting aside constitutional issues, I
10 mean, there's at least a presumption, as we interpret
11 statutes, that Congress does not mean to impose heavy
12 burdens and Draconian choices on States unless it says
13 so awfully clearly.

14 And here -- and this goes back to what
15 Justice Ginsburg was saying -- there's really nothing
16 clear about this. I mean, this took a year and a half
17 for anybody to even notice this language.

18 And as Justice Ginsburg said, it's -- it's
19 put in not in the place that you would expect it to be
20 put in, which is where it says to the -- the States,
21 here is the choice you have. It's not even put in where
22 the statute defines who a qualified individual is or who
23 is entitled to get the subsidies. Rather, it comes in
24 in this technical formula that's directed to the
25 Department of the Treasury saying how much the amount of

1 the subsidy should be.

2 And that seems to be -- it both makes no
3 sense from Congress's point of view, and in terms of our
4 own point of view, in terms of interpreting statutes,
5 that's not the clarity with which we require the
6 government to speak when it's upsetting Federal-State
7 relations like this.

8 MR. CARVIN: I must respectfully disagree
9 for three reasons, Justice Kagan. In the first place,
10 of course, you -- where else would you expect a tax
11 credit except in the tax code? That's where this was.
12 You wouldn't put it in 42 U.S.C., which has nothing to
13 do with taxes. It's the only place where Exchange is
14 limitations placed.

15 You have three audiences here, not just
16 States. You have to tell taxpayers what they're
17 entitled to. You have to tell insurance companies when
18 these subsidies are available. And you have States. So
19 you have to put it in 36B.

20 So the argument, I guess, the government is
21 making is what you should have done is put half of it in
22 36B and half it in 1321 which, of course, would have
23 confused everybody. 36B would say, Exchanges, period.
24 Then you'd go to 1321 and say, when we said Exchanges in
25 36B, we meant established by the State.

1 JUSTICE ALITO: Mr. Carvin, if I were a --
2 if I were a State official and I was trying to decide
3 whether my State should establish an Exchange, and I
4 wanted to know whether individuals who enrolled in a
5 plan on my possible State-established Exchange would get
6 a credit, where would I look?

7 MR. CARVIN: Exactly. The basic thesis here
8 is these Exchanges don't work without subsidies. You've
9 read 1311. You've read 1321. Now you're going to go
10 find out where the subsidies are. That's 36B. They're
11 hypothesizing State --

12 JUSTICE KAGAN: The -- I think not,
13 Mr. Carvin. I mean, I think the place I would look to
14 find out about my choices is in the provision of the
15 statute that talks about my choices.

16 I think the last place I would look is a
17 provision of the statute that talks about -- what is
18 it -- coverage months for purposes of this subsection,
19 which, by the way, isn't even the right subsection, but
20 whatever. That -- that's where I would look, is in --
21 is in where it talks about what a coverage month is?

22 MR. CARVIN: But -- but, Your Honor, I've
23 already described the difficulties of putting it -- part
24 of it in 1321, right? Because then you would create
25 this bizarre tax credit provision which is only half

1 true, and you wouldn't tell taxpayers and insurance
2 companies. So I believe that's the complete answer.

3 But the other practical point I'd like to
4 make is they had three years to implement this. And no
5 one thought the States were going to have to make a
6 decision overnight. If the IRS had done its job, every
7 State would have been fully informed of the consequences
8 because presumably they've read 36B, and then they would
9 make an intelligent decision well in advance of the
10 two -- 2013 deadline.

11 So there's a bizarre notion that States were
12 somehow unable to read a statute or to -- or to read a
13 regulation is simply --

14 JUSTICE BREYER: I really want -- I really
15 want to hear what you're going to say in your 5 to
16 10 minutes. And if you want, only if you want, I would
17 be interested in your responses to the government's
18 brief, that if you read the words "established by the
19 State" without reference to the technical definition as
20 you wish, this isn't just about the taxes; it means
21 employers in Virginia don't have to make policy, don't
22 have to -- don't have to give policies, but if they have
23 one Maryland worker they do; it means that they never
24 can tighten up their Medicaid regulations, never, in 34
25 States -- but, of course, in the others they can; it

1 means that there's no qualified person ever to buy
2 anything on a -- an Exchange established by the
3 Secretary for the State, and they have two or three
4 other anomalies that have nothing to do with taxes, all
5 of which supports their argument that you have to read
6 this phrase technically according to the definition.

7 Now, that's their basic point. I've tried
8 to summarize it. Do it as you wish you. I just want
9 you to have 5 or 10 minutes to answer it.

10 MR. CARVIN: Thank you. And -- and -- and
11 the first point is there are no anomalies.

12 JUSTICE SCALIA: I'm going to clock that,
13 see if -- see if you get 5 minutes.

14 MR. CARVIN: There are no -- the first point
15 I'd like to make is there are no anomalies stemming from
16 our interpretation of 36B. The government agrees with
17 that. Their biggest anomaly is this qualified
18 individuals point about how there would be nobody on HHS
19 Exchanges. The Solicitor General is not going to stand
20 up here and tell you that if we prevail in our
21 interpretation of 36B, they would be obliged by the
22 logic of that opinion to empty out HHS Exchanges. So we
23 all agree that there's no connection between 36B and the
24 qualified individual. That's point one.

25 Point two is, if you want anomalies, their

1 interpretation of the statute requires 34 States today
2 to lose all Medicaid coverage. Why is that? Because of
3 the provisions on 64a through 66a of the government's
4 brief, there are various requirements that the State, on
5 pain of losing all of its Medicaid funds, must
6 coordinate between the State-established Exchange, the
7 State agency for CHIP, and the State agency for Medicaid
8 in terms of secure interface and enrollment.

9 Now that makes perfect sense if "Exchange
10 established by the State" means what it says, but they
11 think it encompasses HHS Exchanges. Well, the State
12 cannot ensure coordination between HHS Exchanges and the
13 State agencies, and none of the 34 are doing it today.
14 So under their atextual reading of the statute, 34
15 States will suffer the penalty that this Court found in
16 NFIB as unconstitutionally coercive.

17 As to this Medicaid maintenance anomaly, the
18 government agrees that the purpose of this provision was
19 to freeze Medicaid payments until you had an Exchange
20 with subsidies, which makes sense, right? You want to
21 coordinate the two.

22 And that's exactly what this provision means
23 under our interpretation. Until you have an Exchange
24 with subsidies, the States will be frozen.

25 The government says, that thing ended on

1 January 1, 2014. That's a figment of their imagination.
2 It's nowhere in the statute; plus which it makes no
3 sense. Before 2014, the States were powerless to have
4 an Exchange with subsidies, right? They couldn't do it.
5 So there was a 3-year freeze on Medicaid that they were
6 powerless to get out of.

7 After 2014, if they don't want to have their
8 Medicaid frozen, all they have to do is establish an
9 Exchange. So it's a less harsh restriction on States,
10 plus which it gives them another incentive in addition
11 to the subsidies to create the State Exchange, which is
12 the purpose enunciated in 1311.

13 I don't know -- oh, as to, yeah, maybe
14 somebody would from another -- if you had an employee
15 that let -- lived in other State, maybe he would be
16 subject to the employer mandate. Why is that an
17 anomaly? Congress likes the employer mandate. Of
18 course they wanted to expand it. They also never
19 thought it would really happen because, again, what they
20 thought was going to happen was there wouldn't be
21 neighboring States without it because nobody was going
22 to turn down this extraordinarily generous deal.

23 I don't know if my 5 minutes are up, but
24 that -- that's -- that's my response to these anomalies.
25 I think that you --

1 JUSTICE KAGAN: As I understand it --

2 MR. CARVIN: I think if I could --

3 JUSTICE KAGAN: Wow. You've been talking a
4 long time.

5 MR. CARVIN: Yes. Yes. Sorry.

6 JUSTICE KAGAN: You have two more sentences.

7 MR. CARVIN: Even if there were anomalies in
8 these other sections, you don't transport them to 36B
9 which is concededly neither absurd and furthers the
10 purposes of the Act, just like in Utility Air, because
11 the word pollutants didn't work with one section, you
12 don't spread it like a virus throughout the rest of the
13 Act. You cure it in that provision --

14 JUSTICE KAGAN: Those were two long
15 sentences --

16 MR. CARVIN: -- if and when there's any
17 litigation.

18 JUSTICE KAGAN: I think -- I think --

19 MR. CARVIN: Oh, it was a long sentence.

20 JUSTICE KAGAN: Yes. I -- I think I'm right
21 that Justice Breyer's question about anomalies, which
22 are replete in the Act, under your interpretation, did
23 not talk about what I think is one of the most glaring
24 ones, which is this qualified individualist thing, that
25 you're essentially setting up a system in which these

1 Federal Exchanges, that there will be no customers and,
2 in fact, there will be no products, because Section 1311
3 says that the Exchange shall make health plans available
4 to qualified individuals, and then the next section says
5 that qualified individual means an individual who
6 resides in the State that established the Exchange.

7 So under your theory, if Federal Exchanges
8 don't qualify as Exchanges established by the State,
9 that means Federal Exchanges have no customers.

10 MR. CARVIN: Which, of course, is not the
11 reading that the government's giving to it because
12 they're not going to tell you --

13 JUSTICE KAGAN: Well, that's -- that's
14 because they don't share your theory.

15 MR. CARVIN: No, no.

16 JUSTICE KAGAN: Under your theory --

17 MR. CARVIN: No.

18 JUSTICE KAGAN: -- that's the result.

19 MR. CARVIN: Well, no. Let me be as clear
20 as I can. If we prevail in this case, they are not
21 going to empty out the HHS Exchanges because they
22 understand that there are numerous defenses even if you
23 interpret "established by the State" literally in the
24 qualified individuals provision.

25 Number one defense that they will use is, it

1 says you have to be a qualified individual with respect
2 to an Exchange. As Justice Breyer pointed out, the
3 statutory definition of Exchange is a 1311 Exchange. So
4 they're only talking about State Exchanges, not these
5 HHS Exchanges, and it is in Section 1312, which
6 immediately follows 1311, before 1321.

7 Number two, "qualified individual" doesn't
8 mean that -- that means you're guaranteed access. It
9 doesn't mean if you're not qualified, you're absolutely
10 denied access. We know that from the illegal alien
11 provision, which says illegal aliens are neither
12 qualified individuals nor eligible for subsidies.

13 JUSTICE KAGAN: Ah, but look at the -- look
14 at the prisoner provision, which says prisoners
15 shouldn't be treated as qualified individuals. So under
16 your theory, this statute effectively said that
17 prisoners should be able to enroll on Federal Exchanges?
18 That makes no sense.

19 MR. CARVIN: It makes perfect sense to say
20 the States get a choice. Think about somebody who's in
21 prison in February, they're getting out in April,
22 they've got to buy insurance under the individual
23 mandate. So if you said nobody who's incarcerated can
24 buy insurance, that means they wouldn't be able to buy
25 insurance during the relevant enrollment period. It

1 makes perfect sense to give States the flexibility to
2 say, as to those incarcerated principles, you can make
3 them available for Exchanges, but under illegal aliens
4 we don't want to, which is why we are saying they are
5 neither qualified nor eligible.

6 Even if Justice -- even if you don't find
7 that the most pristine logic to be applied to a statute,
8 remember, we are interpreting these statutes to avoid an
9 absurd result. And it's a basic principle of statutory
10 construction that you will give a plausible, if not the
11 most persuasive, reading to a statute to avoid the
12 result.

13 JUSTICE KAGAN: But we are interpreting a
14 statute generally to make it make sense as a whole,
15 right? We look at the whole text. We don't look at
16 four words. We look at the whole text, the particular
17 context, the more general context, try to make
18 everything harmonious with everything else. I think you
19 said, even at the very beginning of this argument as we
20 were going back and forth about my hypothetical, that,
21 of course, context matters and context might make all
22 the difference with respect to what those five words
23 mean.

24 And I think what we're suggesting is that,
25 if you look at the entire text, it's pretty clear that

1 you oughtn't to treat those five words in the way you
2 are.

3 MR. CARVIN: I've given you the contextual
4 points before. I think the key one that I'd like to
5 convey to you, Justice Kagan, is Section 1311. You say
6 the -- the statute must work harmoniously. If you
7 provide a -- subsidies to HHS Exchanges, you have
8 essentially gutted Section 1311's strong preference for
9 State Exchanges.

10 What will happen is precisely what did
11 happen under the IRS rule, two-thirds of the States are
12 saying no, we're not going to undertake this thankless
13 task of running these Exchanges with no incentives to do
14 so. So yes, it -- what I have here in terms of what the
15 statute means is 36B quite clearly saying Exchanges are
16 available only on States. I have 1311 explaining why
17 they limited subsidies to that. And there is no
18 contrary legislative history at all.

19 What do they have, an atextual reading of
20 36B, which they can't explain why anybody would have
21 used those words if they wanted to convey Exchanges, a
22 rule that completely undermines the purposes of -- of
23 1311 and no supporting legislative history. So under
24 all the legal materials that this Court normally used to
25 discern what statute means, we clearly prevail.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 General Verrilli, you'll have extra ten
3 minutes as well.

4 ORAL ARGUMENT OF GENERAL DONALD B. VERRILLI, JR.
5 ON BEHALF OF THE RESPONDENTS

6 GENERAL VERRILLI: Thank you, Mr. Chief
7 Justice, and may it please the Court:

8 Standing has been raised, so let me start by
9 telling you where we stand on standing and then I'd
10 appreciate the opportunity after that to summarize what
11 I think are the two key points in this case.

12 Now, with respect to standing, the question
13 -- the case or controversy question turns on whether any
14 of the four Petitioners is liable for the tax penalty
15 for 2014.

16 Now, this case was litigated in -- in the
17 district court in 2013 based on projections on the part
18 of each of the four Petitioners that they would earn a
19 certain income in 2014. They filed declarations saying
20 that. With respect to 2 of the 4, the projections were
21 -- of their income were such that they would qualify for
22 the unaffordability exception and they wouldn't have
23 standing. With respect to the other 2, their
24 projections were such that they wouldn't qualify for the
25 unaffordability exception and they would have standing.

1 But those were projections in 2013 about their income in
2 2014. 2014 has now come and gone, and we know -- we
3 don't know, but Petitioners know whether any of the 4
4 have, in fact -- are, in fact, liable for the tax
5 penalty and that will depend on whether their -- their
6 actual income in 2014 matched their projections.

7 Now, Mr. Carvin said there was factfinding
8 about this. I'm afraid that's not correct. The -- the
9 Petitioners -- the Petitioners did file a motion for
10 summary judgment, but the case was decided on the basis
11 of the government's motion to dismiss before discovery
12 and without any factfinding.

13 I'm assuming because Mr. Carvin has not said
14 anything about the absence of a tax penalty, that, at
15 least, 1 of the 4 has and is, in fact, liable for a tax
16 penalty, but that's the key standing question.

17 Now, with respect to the veterans point,
18 Your Honor, if it is the case, as Mr. Carvin tells us,
19 that Mr. Hurst was a veteran for only 10 months, then I
20 think he's correct, he would not qualify for VA health
21 care because you generally have to serve two years. So
22 that's where we are on standing.

23 Now, if I could turn to the merits.

24 JUSTICE GINSBURG: So are you saying one
25 person does have standing?

1 GENERAL VERRILLI: No, no. It will depend
2 on whether as a factual matter 1 of the 4 has and is, in
3 fact, liable for the tax penalty for 2014. And that's
4 information that is not in the government's possession;
5 it is in the possession of Petitioners' counsel. And I
6 should make one more point, with respect to 2015, there
7 were no projections, there's nothing in the record about
8 the possible income of any of the Petitioners for 2015,
9 so there's really nothing that would establish a case of
10 controversy for 2014.

11 CHIEF JUSTICE ROBERTS: Well, you're surely
12 not raising a standing question with us here for the
13 first time at oral argument, are you?

14 GENERAL VERRILLI: Well, Mr. Chief Justice,
15 as I said, that based on the projections, it is our --
16 it was our understanding that at least 1 of the 4 would
17 be liable for a tax penalty. The question of standing
18 has been raised and I've tried to identify for the Court
19 what I think is the relevant question, which is whether
20 any one of the 4 has, in fact -- is, in fact, liable for
21 a tax penalty because --

22 CHIEF JUSTICE ROBERTS: This is -- this is
23 on a motion to dismiss, right?

24 GENERAL VERRILLI: Well, that's correct,
25 Your Honor, but it does also go to this Court's

1 jurisdiction. Because if there's no -- if none of the 4
2 is liable for a tax penalty for 2014, there just isn't
3 the case or controversy. None of them is liable,
4 there's no -- there's no injury. And so I do think
5 that's ultimately the relevant question here and -- with
6 respect to standing. I don't think there's a question
7 about veteran status, but I do think that's the relevant
8 question.

9 JUSTICE ALITO: Isn't the question before us
10 as to standing whether the district court correctly held
11 in the motion to dismiss context that there was
12 standing? That may not be the end of the matter, but
13 don't we have to -- isn't that what's before us?

14 GENERAL VERRILLI: Well, that -- that may be
15 -- yes. But then you -- and you might alternatively
16 think about this as a question of mootness, I guess, in
17 that, you know, based on the projection, there was a
18 case or controversy, but if the projection didn't come
19 to pass and none of the plaintiffs is liable for a tax
20 penalty, then the case or controversy no longer exists.

21 JUSTICE ALITO: Well, what are you
22 suggesting? Should we have a -- should we have a trial
23 here?

24 GENERAL VERRILLI: No, I'm not suggesting
25 anything of the kinds.

1 JUSTICE ALITO: -- on this issue and find
2 what the facts are?

3 GENERAL VERRILLI: Justice Alito, I did not
4 raise standing affirmatively, the Court raised it. And
5 I'm just doing my best to let the Court know what our
6 position is on standing.

7 JUSTICE GINSBURG: Well, you -- would you
8 send it back then to -- to the district court?

9 GENERAL VERRILLI: Well, I guess no. I
10 guess what I've said is that -- that Mr. Carvin hasn't
11 suggested that there's no plaintiff liable for a tax
12 penalty. Based on that, I'm inferring that at least one
13 of the Petitioners --

14 JUSTICE SOTOMAYOR: Would you -- would you
15 --

16 GENERAL VERRILLI: -- has standing.

17 JUSTICE SOTOMAYOR: Why wouldn't we accept a
18 representation by him?

19 GENERAL VERRILLI: There's no reason not to
20 and I'm not --

21 JUSTICE SOTOMAYOR: If he -- if he makes a
22 representation that at least 1 of the 4 is -- has -- was
23 liable in 2014 and is liable in 2000 -- or will be
24 liable in 2015 --

25 GENERAL VERRILLI: So I guess what I'm

1 saying --

2 JUSTICE SOTOMAYOR: I mean, we know at least
3 one of them won't because that's --

4 GENERAL VERRILLI: What I'm saying about
5 that is I'm actually going to step further than that,
6 Justice Sotomayor, given that there hasn't been -- I'm
7 willing to accept the absence of a representation as an
8 indication that there is a case or controversy here,
9 and -- and so that's why, Mr. Chief Justice, we haven't
10 raised standing and that's what it -- but I do think
11 that the key question is whether one of the four is
12 liable for a tax penalty. You have to have that to have
13 a case or controversy in the case.

14 If I could now, let me please turn to the
15 merits that summarize what I think are the two key
16 points. First, our reading follows directly from the
17 text of the Act's applicable provisions and it's really
18 the only way to make sense of Section 36B and the rest
19 of the Act. Textually, their reading produces an
20 incoherent statute that doesn't work; and second, our
21 reading is compelled by the Act's structure and design.
22 Their reading forces HHS to establish rump Exchanges
23 that are doomed to fail. It makes a mockery of the
24 statute's express -- status express textual promise of
25 State flexibility. It precipitates the insurance market

1 death spirals that the statutory findings specifically
2 say the statute was designed to avoid, and of course it
3 revokes the promise of affordable care for millions of
4 Americans. That cannot be the statute that Congress
5 intended.

6 JUSTICE SCALIA: Of course it could be. I
7 mean it may not be the statute they intended. The
8 question is whether it's the statute that they wrote. I
9 mean, you know, there -- there -- there are no
10 provisions in the statute that turn out to be ill --
11 ill-considered and ill -- ill-conceived.

12 GENERAL VERRILLI: So it's not the statute
13 that they wrote, and the reason it's not the statute
14 that they wrote, I think -- I want to actually start, if
15 I could, picking up I think on a variation of the
16 hypothetical that Justice Kagan ask -- asked. In
17 Petitioners' brief they throw down the gauntlet with
18 respect to a hypothetical about airports, and that -- a
19 statute requires a State to construct an airport, it
20 says the Federal government shall construct such airport
21 if the State doesn't, and no one would think that the
22 Federal government's airport was an airport constructed
23 by the State.

24 Well, what I would say to that is that if
25 those statutory provisions were conjoined with a

1 provision that said airplanes may only land at airports
2 constructed by the State, then you would conclude
3 immediately that what -- that -- that that Federally
4 constructed airport qualifies as an airport constructed
5 by the State, and the -- because otherwise the statute
6 would make no sense. And the same exact thing is true
7 here.

8 JUSTICE SCALIA: There are no statutes that
9 make no sense.

10 GENERAL VERRILLI: This one makes sense.

11 JUSTICE SCALIA: If that is the case, every
12 statute must make sense and we will -- we will twist the
13 words as necessary to make it make -- that can't be the
14 rule.

15 GENERAL VERRILLI: That isn't the rule. But
16 the rule --

17 JUSTICE SCALIA: Of course not.

18 GENERAL VERRILLI: -- is that you read --
19 that you don't read statutory provisions in isolation;
20 you read them in context. The rule is that you read
21 them in order to ensure that the statute operates as a
22 harmonious whole. You read them so that you don't
23 render the statutory provisions ineffective. You read
24 them to promote --

25 JUSTICE SCALIA: Where is that possible.

1 GENERAL VERRILLI: -- you read --

2 JUSTICE SCALIA: I mean, you acknowledge
3 that all of what you're saying only applies where there
4 are alternative readings that are reasonable. You pick
5 the one that will do all the things that you say.

6 GENERAL VERRILLI: And there is -- there
7 is --

8 JUSTICE SCALIA: But, but -- if -- if it can
9 only reasonably mean one thing, it will continue to mean
10 that one thing even if it has untoward consequences for
11 the rest of the statute. No?

12 GENERAL VERRILLI: With respect to this
13 statute, first, let me -- I want to make two points.
14 First --

15 JUSTICE SCALIA: Answer me in principle. I
16 mean, is it not the case that if the only reasonable
17 interpretation of a particular provision produces
18 disastrous consequences in the rest of the statute, it
19 nonetheless means what it says. Is that true or not?

20 GENERAL VERRILLI: I think there are --
21 there are a couple of limitations on that principle.
22 The first is if what you have is a situation in which
23 the -- that creates conflict within a statutory scheme,
24 then the Court's got to do its best to try to harmonize
25 and reconcile the provisions. And secondly --

1 JUSTICE SCALIA: Well, I disagree with that.
2 You have a single case in which we have said the
3 provision is not ambiguous, it means this thing, but,
4 Lord, that would make a terrible statute, so we will
5 interpret it to mean something else. Do you have one
6 case where we've ever said that?

7 GENERAL VERRILLI: I think -- I think Brown
8 & Williamson is a good example of that. In Brown &
9 Williamson, the Court said, look, the definition of drug
10 and drug delivery device would actually seem
11 unambiguously to cover tobacco, but when you read that
12 provision in context, and considering the full scope of
13 the regulatory regime, it can't possibly mean that.

14 But let me -- let me actually work through
15 the text here, because I do think I can show you that
16 there's a quite reasonable reading of this statutory
17 text that allows you to affirm and requires you to
18 affirm the government's position.

19 JUSTICE ALITO: But, General Verrilli,
20 before we get too immersed in a number of provisions of
21 this, could you respond to a question that was asked
22 during Mr. Carvin's argument. If we adopt Petitioners'
23 interpretation of this Act, is it unconstitutionally
24 coercive?

25 GENERAL VERRILLI: So the -- here's what I

1 would say about that, Justice Alito. I think that it
2 would be -- certainly be a novel constitutional
3 question, and I think that I'm not prepared to say to
4 the Court today that it is unconstitutional. It would
5 be my duty to defend the statute and on the authority of
6 *New York v. United States*, I think we would do so. But
7 I don't think there's any doubt that it's a novel
8 question, and if the Court believes it's a serious
9 question --

10 JUSTICE KENNEDY: Is it a -- I was going to
11 say does novel mean difficult?

12 (Laughter.)

13 JUSTICE KENNEDY: Because it -- it -- it
14 does seem to me that if Petitioners' argument is
15 correct, this is just not a rational choice for the
16 States to make and that they're being coerced.

17 GENERAL VERRILLI: So what I --

18 JUSTICE KENNEDY: And that you then have to
19 invoke the standard of constitutional avoidance.

20 GENERAL VERRILLI: Well, what I was going to
21 say, Justice Kennedy, is to the extent the Court
22 believes that this is a serious constitutional question
23 and this does rise to the level of something approaching
24 coercion, then I do think the doctrine of constitutional
25 avoidance becomes another very powerful reason to read

1 the statutory text our way. Because I do think -- and I
2 do think with respect to the point that Your Honor's
3 making, remember, it's not just -- it's not just a
4 situation in which there is onerous conditions, onerous
5 consequences for State residents. It's also a profound
6 problem of notice here, that, you know, if you read
7 Petitioners' -- if you take Petitioners' reading of the
8 statute, then the idea that States were given added --
9 you can't possibly justify this as adequate notice to
10 the States.

11 JUSTICE ALITO: Well, Mr. -- General
12 Verrilli, let me ask you this about notice. We get lots
13 and lots of amicus briefs from States. And we got two
14 amicus briefs from States here; 34 states I think is --
15 that's the number of States that declined to or failed
16 to establish a State Exchange?

17 GENERAL VERRILLI: Correct.

18 JUSTICE ALITO: Now, if they were all caught
19 off guard and they were upset about this, you would
20 expect them to file an amicus brief telling us that.
21 But actually, of the 34, only 6 of them signed the brief
22 that was submitted by a number of States making that
23 argument. 23 States, 23 jurisdictions submitted that
24 brief; 17 of them are States that established State
25 exchanges. Only 6 of the States that didn't establish

1 State exchanges signed that brief, how do you account
2 for that?

3 GENERAL VERRILLI: So, I -- I guess I'd make
4 two points about that, Justice Alito. First, you've got
5 22 States there, States in both camps, all of whom told
6 you that they didn't understand the statute that way.

7 Now, with respect to the other 8 States that
8 filed the amicus brief on the other side, I actually
9 think there's quite an important point that goes to
10 their understanding of what this Act did. Remember,
11 this is an IRS rule that we're talking about here, and
12 the IRS put out a notice of proposed rulemaking saying
13 this is what we intend to do, and several of these
14 States -- Oklahoma, Indiana, Nebraska -- they filed
15 rulemaking comments in that -- in that proceeding. And
16 if you look at those rulemaking comments you will see
17 that they address a number of issues, and they say
18 nothing, nothing about the -- the issue that's before
19 the Court now.

20 So if they really understood the statute as
21 denying subsidies in States that did not set up their
22 own exchanges, that would have front and center in their
23 rulemaking comments, but they said nothing about it and
24 I think that tells you a good deal about where --
25 what -- what everybody understood that this statute

1 was --

2 JUSTICE ALITO: Well, there's another point
3 on notice on this Pennhurst argument that seems curious
4 to me. Usually when this argument comes up, a State has
5 signed up for a Federal program and then they say, oh,
6 my gosh, we didn't realize what we had gotten ourselves
7 into. But here, it's not too late for a State to
8 establish an exchange if we were to adopt Petitioners'
9 interpretation of the statute. So going forward, there
10 would be no harm.

11 GENERAL VERRILLI: Well, let -- let me
12 address that directly, and then I'd like to make a
13 broader point about statutory context in response. Now
14 directly, of course, I don't -- I don't think it's
15 possible to say there would be no harm. The tax credits
16 will be cut off immediately and you will have very
17 significant, very adverse effects immediately for
18 millions of people in many States in their insurance
19 markets --

20 JUSTICE ALITO: Well, I said -- I've said
21 going forward.

22 GENERAL VERRILLI: And then --

23 JUSTICE ALITO: After -- after the current
24 tax year.

25 GENERAL VERRILLI: And then going --

1 JUSTICE ALITO: Would it not be possible if
2 we were to adopt Petitioners' interpretation of the
3 statute to stay the mandate until the end of this tax
4 year as we have done in other cases where we have
5 adopted an interpretation of the constitutional -- or a
6 statute that would have very disruptive consequences
7 such as the Northern Pipeline case.

8 GENERAL VERRILLI: Sure. Northern Pipeline
9 is an example of doing that, and it will be up to the
10 Court to decide whether it has the authority to do that.
11 I will say, this does seem different than Northern
12 Pipeline to me, because this is about money going out of
13 the Federal treasury, which is a different scenario.
14 But if the Court -- obviously, if that's where the Court
15 is going and that's what the Court thinks the proper
16 disposition is, that would reduce the disruption.

17 But what I think is another important point
18 to make here just as a practical matter, the idea that a
19 number of States, all of these States or a significant
20 number are going to be able to in the 6 months between
21 when a decision in the this case would come out and when
22 the new -- the new year for insurance purposes will
23 begin we'll be able to set up Exchanges, get them up, up
24 and running and get all the approvals done I think is
25 completely unrealistic.

1 JUSTICE GINSBURG: How long has it taken --

2 GENERAL VERRILLI: Well, for -- just to give
3 you an example of the current time line, Justice
4 Ginsburg, the -- in order to be -- in order to have an
5 exchange approved and insurance policies on the exchange
6 ready for the 2016 year, those approvals have to occur
7 by May of 2015. Okay. So that gives you a sense of
8 the -- of the time line that HHS is operating under.

9 JUSTICE SCALIA: What about -- what about
10 Congress? You really think Congress is just going to
11 sit there while -- while all of these disastrous
12 consequences ensue.

13 I mean, how often have we come out with a
14 decision such as the -- you know, the bankruptcy court
15 decision? Congress adjusts, enacts a statute that --
16 that takes care of the problem. It happens all the
17 time. Why is that not going to happen here?

18 GENERAL VERRILLI: Well, this Congress, Your
19 Honor, I -- I --

20 (Laughter.)

21 GENERAL VERRILLI: You know, I mean, of
22 course, theoretically -- of course, theoretically they
23 could.

24 JUSTICE SCALIA: I -- I don't care what
25 Congress you're talking about. If the consequences are

1 as disastrous as you say, so many million people
2 without -- without insurance and whatnot, yes, I think
3 this Congress would act.

4 GENERAL VERRILLI: And -- but the relevant
5 question -- and then I'm going to try to get back to
6 the point I was trying to make in response to Justice
7 Alito's question.

8 The relevant question here is: What did the
9 Congress that enacted this statute in 2010 do? Did they
10 really set up a system in which the States are subject
11 to the kind of onerous situation that the Petitioner
12 claims? And I think there are three textual
13 indications -- objective, textual indications that that
14 cannot possibly have been the statutory scheme that
15 Congress tried to set up.

16 First is the existence of the Federal
17 Exchanges. It would make no sense, no sense for
18 Congress to have provided for Federal Exchanges if,
19 as -- as Mr. Carvin suggests, the statutory design was
20 supposed to result in every State establishing its
21 Exchange.

22 Second --

23 JUSTICE KENNEDY: Well, wouldn't it have
24 been -- again, talking about Federalism -- a mechanism
25 for States to show that they had concerns about the

1 wisdom and the workability of the Act in the form that
2 it was passed?

3 GENERAL VERRILLI: So, Justice Kennedy, I
4 think the Federalism values are promoted by our
5 interpretation, because if -- if that is, indeed, what a
6 State thought, if a State really would have preferred
7 that -- not to have the State government participate in
8 the implementation of this Act, for reasons that Your
9 Honor identified, the structure of the Act that Congress
10 put in place and that we're advocating for today fully
11 vindicates that concern. They can decide not to
12 participate without having any adverse consequences
13 visited upon the citizens of the State.

14 And that's why our reading is the
15 pro-Federalism reading. It's their reading that seems
16 to me that is the anti-Federalism reading, and that's a
17 powerful reason to reject it.

18 And if I could go to the second statutory
19 point, which is related to what we're talking about,
20 Justice Kennedy, which is Section 1321, says that this
21 statute is designed to afford State flexibility. State
22 flexibility. It would be an Orwellian sense of the word
23 "flexibility" to use it in the manner that Petitioners
24 say the statute uses it, because it's the polar opposite
25 of flexibility.

1 And the third point, seems to me, is the
2 notice point, that if, indeed, the plan was, as Mr.
3 Carvin said, that every State was going to establish an
4 Exchange for itself and that that would cure all of the
5 massive statutory anomalies and textual anomalies and
6 absurdities and impossibilities that his reading
7 provides for, if that was really the plan, then the
8 consequence for the States would be in neon lights in
9 this statute. You would want to make absolutely sure
10 that every State got the message.

11 But instead what you have is a subclause in
12 Section 36B, which is a provision that addresses the
13 eligibility of individual taxpayers for taxing purposes.

14 JUSTICE SCALIA: This is not the most
15 elegantly drafted statute. It was -- it was pushed
16 through on expedited procedures and didn't have the kind
17 of consideration by a conference committee, for example,
18 that -- that statutes usually do.

19 What -- what would be so surprising if --
20 if, among its other imperfections, there is the
21 imperfection that what the States have to do is not --
22 is not obvious enough? It doesn't strike me as
23 inconceivable.

24 GENERAL VERRILLI: So, Justice Scalia, I --
25 I'm going to answer that question by talking about the

1 legislative process, because I think it is quite
2 relevant and I think it ought to be quite relevant even
3 to you with respect to the question you just asked.

4 The language here in 36B was not the product
5 of some last-minute deal, it wasn't the product of
6 scrambling at the end. The language that emerged here,
7 the statutory structure with the language of 36B about
8 tax credits, the language that's in 1311, the language
9 that's in 1321 was the product of the Senate Finance
10 Committee markup, which went on for weeks and weeks.

11 It was a public -- it was a public hearing.
12 It -- frankly, it was covered by C-SPAN. You can go
13 watch it on the C-SPAN archives if you want to; and you
14 will see coming out of that that the -- that the
15 understanding, the clear understanding was with this
16 statutory setup would result in subsidies being
17 available in every State.

18 JUSTICE SCALIA: There were senators, were
19 there not, who were opposed to having the Federal
20 government run the whole thing, because they thought
21 that would lead to a single-payer system, which -- which
22 some people wanted. And the explanation for this
23 provision is it prevents -- it prevents the -- the
24 Federalization of -- of the entire thing.

25 GENERAL VERRILLI: No. Justice Scalia, I --

1 JUSTICE SCALIA: That's -- that's certainly
2 a plausible explanation --

3 GENERAL VERRILLI: No.

4 JUSTICE SCALIA: -- as to why the provision
5 is there.

6 GENERAL VERRILLI: Mr. Carvin has floated
7 that as an explanation and he -- and he suggests that it
8 was Senator Ben Nelson who required it. We -- there is
9 absolutely no contemporaneous evidence, none whatsoever,
10 that anybody thought that way, that the -- the solution
11 to the problem that Your Honor's identified is what
12 Congress did by having States have the option to set up
13 their own Exchanges with State-by-State Federal
14 fallbacks rather than a national system.

15 Senator Nelson has made clear, he has stated
16 that he had no intention of the kind. There's no
17 contemporaneous evidence at all that anyone did. And I
18 do -- and what Mr. Carvin has suggested is that this was
19 the product of some deal to try to get votes so the Act
20 could get passed.

21 What I would suggest to Your Honor is that
22 there is objective proof that that is not true. The --
23 the provisions in the Act that were negotiated at the
24 end to secure the necessary votes are in Title X of the
25 Act. And if you look in the -- in the Act, Pages 833 to

1 924 -- that's Title X -- you can see all of the
2 amendments. Not a single one has anything to do with
3 the statutory language before the Court now.

4 JUSTICE ALITO: Well, the puzzle that's
5 created by -- by your interpretation is this: If
6 Congress did not want the phrase "established by the
7 State" to mean what that would normally be taken to
8 mean, why did they use that language? Why didn't they
9 use other formulations that appear elsewhere in the Act?
10 Why didn't they say, "established under the Act"? Why
11 didn't they say, "established within the State"? Why
12 didn't they include a provision saying that an Exchange
13 established by HHS is a State Exchange when they have a
14 provision in there that does exactly that for the
15 District of Columbia and for the territories? It says
16 that they are deemed to be States for purposes of this
17 Act.

18 GENERAL VERRILLI: So --

19 JUSTICE ALITO: So why would they do that?

20 GENERAL VERRILLI: So, of course, the
21 provision says -- doesn't say "established by the State"
22 with a period after State. It says "established by the
23 State under Section 1311." And our position textually
24 is -- and we think this is clearly the better reading of
25 the text -- that by cross-referencing Section 1311,

1 effectively what Congress is doing is saying that
2 Exchanges established through whatever mechanism,
3 Exchanges set up by the States themselves, Exchanges set
4 up by --

5 JUSTICE KENNEDY: So you're saying that
6 by -- by cross-reference to 1311, they really mean 1311
7 and 1321?

8 GENERAL VERRILLI: Yes. Well, let me -- and
9 I do think that, and let me walk through why I think
10 that's true.

11 JUSTICE KENNEDY: All right. That -- that
12 seems to me to go in the wrong direction --

13 GENERAL VERRILLI: No, I think --

14 JUSTICE KENNEDY: -- for your case --

15 GENERAL VERRILLI: I think --

16 JUSTICE KENNEDY: -- not the
17 right direction.

18 GENERAL VERRILLI: No, I think it goes in
19 the right direction, if you'll just ride with me for a
20 little bit, Justice Kennedy, on this.

21 JUSTICE ALITO: Well, before you -- before
22 you get on to that, that -- your answer doesn't explain
23 why -- why "by the State" is in there. Then why didn't
24 they say "established under 1311"?

25 GENERAL VERRILLI: Well, so the second point

1 is that wherever this provision appears in the Act,
2 "established by the State under Section 1311," it's
3 doing work; and the work it's doing is saying, what
4 we're talking about is the specific Exchange established
5 in the specific State as opposed to general rules for
6 Exchanges. If you look at the Medicaid
7 Maintenance-of-Effort provision that -- it works the
8 same way.

9 JUSTICE ALITO: Well, why didn't they say
10 "in the State"? That's the phrase you just used, "in
11 the State." Why didn't they say "in the State"?

12 GENERAL VERRILLI: Because -- I suppose they
13 could have, but it worked perfectly well this way. If
14 you look at the qualified individual provision, it's
15 clearly how they're using it with respect to the
16 qualified individual provision. And with respect to
17 that provision, it says a qualified individual is a
18 person who is located -- who resides in the State that
19 established the Exchange. Clearly, what they're talking
20 about is a geographical reference to the particular
21 State. That's what's going on there and what's going on
22 every time the -- the statute uses that phrase. So it's
23 doing that work, and that's why it's in there.

24 But now if I could go back to your point,
25 Justice Kennedy, it says, "established by the State

1 under Section 1311." Section 1311(b)(1) says, "Each
2 State shall establish an American Health Benefits
3 Exchange for the State." It's not, as Mr. Carvin said,
4 an urging that States do it. It says, "Each State shall
5 establish."

6 Now, we know that when Congress used that
7 language, "each State shall establish," it must have
8 meant something more inclusive than each State
9 government shall itself set up the Exchange.

10 We know that because Congress is legislating
11 against the backdrop of the Tenth Amendment, and so it
12 couldn't impose that requirement. And we know that
13 because of Section 1321, because Section 1321 provides
14 the means by which the 1311(b)(1) requirement is
15 satisfied. It will be satisfied by a State electing to
16 meet the Federal requirements for Exchanges, or it can
17 be satisfied in the event that a State doesn't or tries,
18 but comes up short by HHS stepping in and establishing
19 the Exchange.

20 JUSTICE ALITO: So when the statute says,
21 "each State shall establish," it really means the
22 Federal government shall establish if a State doesn't
23 establish.

24 GENERAL VERRILLI: I think the right way --

25 JUSTICE ALITO: And if that were the correct

1 interpretation, you wouldn't 1321 at all.

2 GENERAL VERRILLI: So -- no. I think the
3 right way to think about this, Justice Alito, is that
4 what's going on here is that -- the right place to
5 focus, let me put it that way. The right place to focus
6 here is not on the who, but on the what; on the thing
7 that gets set up and whether it qualifies as an Exchange
8 established by the State, and these Exchanges do
9 qualify.

10 And the reason they qualify is because they
11 fulfill the requirement in Section 1311(b)(1) that each
12 State shall establish an Exchange. And 1321 tells you
13 that because it says to the HHS that when a -- when a
14 State hasn't elected to meet the Federal requirements,
15 HHS steps in, and what the HHS does is set up the
16 required Exchange. It says such Exchange, which is
17 referring to the -- immediately prior to the required
18 Exchange where the only Exchange required in the Act is
19 an Exchange under Section 1311(b)(1).

20 So it has to be that that's -- that what HHS
21 is doing under the plain text of the statute is
22 fulfilling the requirement of the Section 1311(b)(1)
23 that each State establish an Exchange, and for that
24 reason we say it qualifies as an Exchange established by
25 the State. That's reinforced, as Justice Breyer

1 suggested earlier, by the definition which says that an
2 Exchange is an Exchange established under Section 1311.
3 1311, again, has 1311(b)(1) which says each State shall
4 establish an Exchange.

5 And it has to be that way because
6 Petitioners have conceded, and it's at page 22 of their
7 brief, that an Exchange that HHS sets up is supposed to
8 be the same Exchange that Petitioners say function just
9 like an Exchange that the State sets up for itself.

10 JUSTICE SCALIA: Well, you're -- you're
11 putting a lot of weight on the -- on the -- one word,
12 such, such Exchange. Such -- it seems to me the most
13 unrealistic interpretation of "such" to mean the Federal
14 government shall establish a State Exchange.

15 Rather, it seems to me "such" means an
16 Exchange for the State rather than an Exchange of the
17 State. How can the government -- Federal government
18 establish a State Exchange. That is gobbledygook. You
19 know, "such" must mean something different.

20 GENERAL VERRILLI: It isn't gobbledygook,
21 Justice Scalia. And I think about it and I go back to
22 something that Justice Alito asked earlier. And
23 that -- if the language of 36B were exactly the same as
24 it is now, and the statute said in 1321 that an Exchange
25 set up -- set up by HHS shall qualify as an Exchange

1 established by the State for purposes of Section 1311,
2 you wouldn't change the language of 36B one iota, and
3 that wouldn't be any doubt in anyone's mind that
4 the -- that subsidies were available on Federal
5 Exchanges. And what we're saying is that effectively
6 reading 1311 and 1321 together, that is what the statute
7 does.

8 And that is certainly -- that is a
9 reasonable reading of the statute. It is really the
10 only reading of the statute that allows you to be
11 faithful to the text of 1311(b)(1), the word "shall,"
12 and to the Tenth Amendment. In order for their --

13 JUSTICE SCALIA: The word "such" means
14 not -- not just the Exchange that the State was supposed
15 to set up, but it means the State Exchange.

16 GENERAL VERRILLI: It means an Exchange that
17 qualifies as satisfy -- as an exchange established by
18 the State because it satisfies the requirement of
19 1311(b)(1).

20 JUSTICE SCALIA: No. You -- you have to say
21 it means the State Exchange. You have to -- your case
22 hinges on the fact that a Federal Exchange is a State
23 Exchange for purposes --

24 GENERAL VERRILLI: It hinges on -- it hinges
25 on it qualifying as the State Exchange or being

1 equivalent to the State Exchange for the purpose of the
2 operation of the statute. That is a reasonable reading
3 of the particular textual provisions, and once you've
4 concluded that it's a reasonable reading of the
5 particular textual provisions, then you have to read it
6 the way that we say it needs -- it is to be read because
7 it is the only way to make sense of the statute as a
8 whole. It is the only way to bring it into harmony with
9 the Act's qualified individual and qualified health plan
10 provisions which do lead to what they admit is an
11 absurdity under their reading under the law.

12 JUSTICE ALITO: Would you agree that
13 there -- that there are provisions of the Act where the
14 exact same phrase, "established by the State," has to be
15 read to mean established by the State and not by HHS?

16 GENERAL VERRILLI: I don't --

17 JUSTICE ALITO: There are some provisions
18 like that.

19 GENERAL VERRILLI: They've pointed out some,
20 but I think they're wrong about each one, and I don't
21 know what Your Honor has in mind.

22 JUSTICE ALITO: All right. Well, let's take
23 one -- let's take one. I'd be interested in your answer
24 to it. 42 U.S.C. Section 1396w-3(h)(1)(D) which says
25 that each State shall establish procedures to ensure

1 that an Exchange established by the State utilizes a
2 secure electronic interface. And they say that if that
3 is read to -- if "Exchange established by the State"
4 there is read to mean an HHS Exchange, that means that
5 the State in which that Exchange is established is
6 responsible for making sure that the Federal Exchange
7 has a secure electronic interface.

8 GENERAL VERRILLI: Yes. They're just wrong
9 about that. It's just completely wrong. The statute
10 says that the State shall -- first of all, the statutory
11 obligation is addressed to the State Medicaid and CHIP
12 agencies. What it says is they shall establish
13 procedures to ensure the coordination. HHS has issued
14 regulations setting forth what that statutory provision
15 requires of States in those circumstance. Every State
16 where there is a federally facilitated Exchange has met
17 the requirements and fulfilled them, and it worked
18 perfectly fine. There's no anomaly there at all.

19 JUSTICE ALITO: And the State --

20 JUSTICE SCALIA: It met -- it met the
21 requirements of the regulations you say, but do the
22 regulations track the statute?

23 GENERAL VERRILLI: Yes, they do.

24 JUSTICE SCALIA: Do -- do they give the
25 State authority to -- to say whether or not these --

1 these conditions have been met?

2 GENERAL VERRILLI: They -- the requirements
3 are imposed on the State Medicaid and CHIP end of the
4 relationship. That's what the statute does, and the
5 regulation to implement that statutory requirement, and
6 it's satisfied in every State.

7 And, of course, as Your Honor reading it to
8 me said, it does say -- and I think that proves our
9 point. The statute says each State shall. It doesn't
10 say States that have set up Exchanges for themselves
11 shall. It says each State shall. It presupposes that
12 there is going to be something that qualifies as an
13 Exchange established by the State in every State. So
14 there's no anomaly there, and if Your Honor wants to ask
15 me about any of the other ones, you can, but I -- there
16 are no anomalies frankly.

17 JUSTICE ALITO: As I understand your answer
18 to be that there are Federal regulations telling the
19 States what they have to do here, and they've all done
20 it. But the fact remains that the State has some
21 obligation under the regulations to make sure that there
22 is a proper interface with the Federal Exchange.

23 GENERAL VERRILLI: On the State's side of
24 the interface, yes. But that's the CHIP and Medicaid
25 agencies. Those are State government agencies, and it's

1 their side of the interface that the statute governs.

2 And, you know, as I said, I don't think
3 there are anomalies of our reading, but if they are,
4 they pale in comparison to the anomalies on the other
5 side. I mean, I really do want to focus on this point
6 about the qualified health plan and the qualified
7 individual, because the statute is quite clear in
8 Section 1311 that an Exchange, not an Exchange
9 established by the State, but an Exchange can only sell
10 a qualified health plan. It is forbidden from selling a
11 health plan that is not a qualified health plan. And
12 that's not an Exchange established by the State. It is
13 an Exchange.

14 Now, the statute also says that to certify a
15 health plan as qualified, the Exchange has to decide
16 that it is in the interest of qualified individuals.

17 Now, qualified individuals are persons who
18 reside in the State that established the Exchange. So
19 if you read the statute, the language, the way
20 Mr. Carvin reads it instead of the way we read it, you
21 come to the conclusion and in a State in a federally
22 facilitated Exchange, there are no qualified
23 individuals. Therefore, the Exchange cannot certify a
24 qualified health plan as being in the interest of
25 qualified individuals because there aren't any, so there

1 aren't any qualified health plans that can lawfully be
2 sold on the Exchange.

3 JUSTICE ALITO: What is the provision that
4 says that only a -- only a qualified individual can
5 be -- can enroll in a plan under an Exchange?

6 GENERAL VERRILLI: So let -- the -- the -- I
7 will address that, but I just want to make clear the
8 provision I'm talking about with respect to the -- the
9 prohibition on selling a qualified health plan to
10 anybody on -- on anything other than a qualified health
11 plan on an Exchange is 1311(d) (2) (B), which is at page
12 8a of the appendix to our brief. It's absolutely
13 unambiguous. An Exchange, not an Exchange established
14 by the State, an Exchange may not make available any
15 health plan that is not a qualified health plan. So --

16 JUSTICE ALITO: Qualified health plan. But
17 what's the provision you were referring to when you said
18 that an Exchange may enroll only a qualified individual?

19 GENERAL VERRILLI: Well, I -- what they --
20 what the statute says throughout is that -- that
21 qualified individuals are eligible to purchase on
22 Exchanges, and it's the necessary meaning of that phrase
23 that if you are not a qualified individual, then you are
24 not eligible to purchase health care on an Exchange
25 because otherwise, the word qualified would not have any

1 meaning. The whole -- the meaning of the word qualified
2 is to distinguish between people who are eligible and
3 people who are ineligible. And as a policy matter, it
4 wouldn't make any sense because think of the people who
5 are not qualified individuals. The people who don't
6 live in the State, the people in prison, and they're
7 unlawfully documented.

8 JUSTICE SOTOMAYOR: This is part of Section
9 1312. A person qualified to purchase on an Exchange
10 must, quote, reside in the State that established the
11 Exchange.

12 GENERAL VERRILLI: Right. And there are no
13 such people in 34 States under Mr. Carvin's theory of
14 the statute. So it just doesn't -- it just -- you just
15 run into a textual brick wall.

16 JUSTICE ALITO: I understand your argument
17 is that it's a -- it's a logical inference from a number
18 of provisions that only a qualified individual may
19 purchase the policy, but I gather there is no provision
20 that you can point to that says that directly.

21 GENERAL VERRILLI: It's -- well, that's what
22 qualified means, Justice Alito. It means that, you
23 know, if you're not qualified, you're unqualified. And
24 so, I mean, that's what it means. And so you're just
25 reading the word "qualified" out of the statute if you

1 read it that way.

2 JUSTICE ALITO: "Qualified" is used in
3 the -- in the lay sense of the term, it's not a
4 technical term here.

5 GENERAL VERRILLI: Well, I -- I think --
6 well, given the way it's defined, it's defined as a
7 person who resides in the State. It excludes people out
8 of State. It does that because the statute was quite
9 clear that you weren't going to be allowed to shop for
10 insurance policies across State lines because that would
11 infringe on traditional State prerogatives regulating
12 insurance. And it -- and with respect to prisoners, it
13 doesn't make any sense to say that prisoners should be
14 able to get insurance. Mr. Carvin says, yes, it does
15 because they get out of prison. Well, there's a
16 specific statutory provision that says when you face a
17 changed-life circumstance, such as getting out of
18 prison, you can sign up for insurance at that point. He
19 makes the point about unlawfully present persons being
20 both unqualified and not being able to be covered, but
21 that's not -- that's not surplus, that's there for a
22 very important reason, which is that someone can be in
23 lawful status and, therefore, be eligible for health
24 care, but then lose lawful status and at that point,
25 they can no longer be covered. So, just none of that

1 works for them. None of that works for them.

2 And -- but to -- really, to get to the
3 fundamental point here that both at the level of text,
4 you have clear irresolvable conflicts so that the
5 statute can't work if you read it Mr. Carvin's way. You
6 have, at the level of text --

7 JUSTICE KENNEDY: Is -- is that a synonym
8 for ambiguity?

9 GENERAL VERRILLI: I think so, exactly
10 right, Justice Scalia -- I mean, excuse me, Justice
11 Kennedy -- that -- that you have ambiguity there
12 precisely because you have to -- you know, this is a
13 statute that's going to operate one way or the other.
14 And the question is how it's going to operate. And when
15 you read it their way, you --

16 JUSTICE KENNEDY: Well, if it's -- if it's
17 ambiguous, then we think about Chevron. But it seems to
18 me a drastic step for us to say that the Department of
19 Internal Revenue and its director can make this call one
20 way or the other when there are, what, billions of
21 dollars of subsidies involved here? Hundreds of
22 millions?

23 GENERAL VERRILLI: Yes, there are billions
24 of dollars of subsidies involved here. But two points
25 about that --

1 JUSTICE KENNEDY: And it -- it seems to me
2 our cases say that if the Internal Revenue Service is
3 going to allow deductions using these, that it has to be
4 very, very clear.

5 GENERAL VERRILLI: So --

6 JUSTICE KENNEDY: And it -- it seems to me a
7 little odd that the director of Internal Revenue
8 didn't -- didn't identify this problem if it's ambiguous
9 and advise Congress it was.

10 GENERAL VERRILLI: So a few points about
11 that with respect to Chevron deference. First, we do
12 think Chevron deference clearly supports the government
13 here and I'll explain why. But before you get to that,
14 you can resolve and should resolve this statute and the
15 statute's meaning in our favor even without resort to
16 Chevron deference. That's what the canon of reading a
17 statute as a whole to make it work harmoniously directs
18 you to do. It's what the very important principles of
19 Federalism that we've been describing here direct you to
20 do. If you think there's a constitutional problem with
21 the statute, it's what the doctrine of constitutional
22 avoidance directs you to do.

23 Now, with respect to Chevron, Section 36B(g)
24 of the statute expressly delegates to the IRS the
25 specific authority to make any decisions necessary to

1 implement Section 36B. So you don't have any ambiguity.
2 Congress said the IRS should do this. It is a big
3 question, but as the Court said in City of Arlington two
4 terms ago, Chevron applies to big questions as well as
5 small. Your Honor raised this point about the need for
6 clarity in -- in a tax deduction and IRS in the
7 statutory reading of tax deductions, there is a learned
8 treatise that describes that as a false notion. And it
9 is certainly not consistent with this Court's unanimous
10 decision in Mayo two terms ago that Chevron applies to
11 the tax code like anything else. And so --

12 CHIEF JUSTICE ROBERTS: If you're right --
13 if you're right about Chevron, that would indicate that
14 a subsequent administration could change that
15 interpretation?

16 GENERAL VERRILLI: I think a subsequent
17 administration would need a very strong case under step
18 two of the Chevron analysis that that was a reasonable
19 judgment in view of the disruptive consequences. So as
20 I said, I think you can resolve and should resolve this
21 case because the statute really has to be read when
22 taken as a whole to adopt the government's position.
23 But I do take --

24 JUSTICE SOTOMAYOR: General --

25 JUSTICE ALITO: If there are any -- if there

1 are any tax attorneys in the -- in the courtroom today,
2 I think probably they wrote down what you just said.
3 When we get future tax cases, the United States is going
4 to argue that we should not read them to -- you know,
5 there should be no presumption that a tax credit is
6 provided by that statute.

7 GENERAL VERRILLI: You should -- you should
8 read it according to its terms. And when you read this
9 provision according to its terms and you read it in
10 context and you read it against the background
11 principles of Federalism, you have to affirm the
12 government's interpretation. Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, General.
14 Four minutes, Mr. Carvin.

15 REBUTTAL ARGUMENT OF MICHAEL A. CARVIN

16 ON BEHALF OF THE PETITIONERS

17 MR. CARVIN: Thank you, Mr. Chief Justice.

18 Very quickly on standing. Mr. Hurst would
19 be subject to a penalty absent relief by this Court for
20 2014. As I've discussed, both he and Mrs. Leevy, of
21 course, would face the same principle for 2015. If the
22 government is suggesting that their case has become moot
23 because of changed circumstances, under Cardinal
24 Chemical 508 U.S. 83, it's their burden to raise it, not
25 ours to supplement the record.

1 In terms of the anomaly, in terms of all the
2 States losing -- 34 States losing their Medicaid funds,
3 the Solicitor General greatly distorted the statute.
4 It's printed at 64A of their exhibit. It says, "a State
5 shall establish procedures," so the notion that HHS
6 established them is obviously contrary to that. It
7 says, "the State will identify people to enroll on their
8 Exchanges." Well, they can't enroll anybody on their
9 Exchanges if there are no such Exchanges in the State.

10 Therefore, by the plain language, if you
11 adopt the notion that "Exchange established by the
12 State" means established by HHS, all of them need to
13 lose their Medicaid funding.

14 JUSTICE SOTOMAYOR: Could I follow up on
15 something the General ended with, which -- and Justice
16 Kennedy referred to, which is the need to read subsidies
17 limited. But so is -- in a limited way. But so is the
18 need to ensure that exemptions from tax liability are
19 read in a limited way. And under your reading, we're
20 giving more exemptions to employers not to provide
21 insurance, more exemptions to States and others or to
22 individuals, how -- how does that work? I mean, you've
23 got two competing --

24 MR. CARVIN: No, no. You do get more
25 exemptions for employers under our reading, but -- and

1 the same principle applies. Is it unambiguous? It's
2 undisputed that that one is unambiguous.

3 JUSTICE SOTOMAYOR: Well --

4 MR. CARVIN: The dispute here is whether or
5 not if they win under ambiguity, and they don't because
6 the canon requires unambiguous statutes not to afford
7 the tax credit. In terms of the employer mandate, I
8 think that's very helpful in terms of Justice Kennedy's
9 concern about Federalism. Under their view of the
10 statute, the Federal government gets to unilaterally
11 impose on States -- there's an amicus from Indiana
12 describing this -- a requirement that States insure
13 their own individuals. It implies the employer mandate
14 to States. So their -- under their theory, the States
15 are absolutely helpless to stop this Federal
16 intervention into their most basic personnel practices.
17 Whereas under our theory, they are able to say, no. So
18 actually, the more intrusive view of the statute is
19 theirs.

20 In terms of the funding condition, head on,
21 Your Honor, I think my short answer is as follows:
22 There's no way to view this statute as more coercive or
23 harmful than the Medicaid -- version of Medicaid that
24 was approved by this Court in NFIB and, indeed, the NFIB
25 dissenting opinion pointed to this provision as

1 something that was an acceptable noncoercive
2 alternative. But in all events, even if there's a
3 constitutional doubt under a novel constitutional
4 question, as Justice Scalia pointed out, there's no
5 alternative reading of the statute that -- that avoids
6 that, because either way, you're intruding on State
7 sovereignty.

8 In terms of the anomaly, in terms of
9 qualified individuals, as predicted, Solicitor General
10 did not come up here and tell you, yes, if we prevail
11 here under this theory, they're going to have to empty
12 out the HHS Exchanges. Nor did he even respond to my
13 argument that with respect to an Exchange under the
14 definitional section only applies to State Exchanges.
15 So I think we can view this as -- as a complete
16 tendentious litigation position and not a serious
17 statutory interpretation.

18 In terms of the qualified health plan that
19 he discussed with you, Justice Alito, the complete
20 answer to that is that is in 1311.

21 1311 only is talking about State established
22 Exchanges. It has no application to HHS Exchanges,
23 therefore, it can't possibly create an anomaly with
24 respect to those HHS Exchanges.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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The case is submitted.
(Whereupon, at 11:34 a.m., the case in the
above-entitled was submitted.)

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