

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, ET AL.,

Plaintiffs,

vs.

CA No. 13-623
Washington, DC
October 22, 2013
10:05 a.m.

KATHLEEN SEBELIUS, ET AL.,

Defendants.

TRANSCRIPT OF ORAL RULING
BEFORE THE HONORABLE PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

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

2 THE COURT: Good morning, everybody.

3 COURTROOM DEPUTY: Civil Action 13-623, Jacqueline
4 Halbig, et al. versus Kathleen Sebelius, et al. I'm going to
5 ask counsel to please come forward and identify yourselves for
6 the record.7 MR. CARVIN: Michael Carvin for the plaintiffs.
8 Yaakov Roth and Jon Berry.9 MR. McELVAIN: Good morning, Your Honor. Joel
10 McElvain for the defendants, with me today is Sheila Lieber.11 THE COURT: Good morning. All right. Yesterday I
12 heard argument on the motion to dismiss filed by the
13 Government and on the motion for preliminary injunction filed
14 by the plaintiffs in this case. There's been a lot of press
15 inquiry, as you might imagine.16 Just so everybody knows, there is a press room
17 downstairs and this is all being piped in to them, so -- I
18 don't know that that matters to anybody. But I didn't want
19 you to think that people were listening in on our
20 conversations without us knowing about it, and I'm sure that's
21 not happening.22 So, I said that I would give you an oral opinion
23 today, and the reason for that, obviously, is this is of some
24 urgency to both sides and timing is important. And to the
25 extent that anything I do -- well, obviously, the grant or

1 denial of a preliminary injunction is immediately appealable,
2 and the grant of a motion to dismiss is appealable, but the
3 denial is not.

4 So, this will be an oral opinion -- or two
5 opinions, if you like. You can get a transcript, if you want
6 one. And there will be a very short order or two orders that
7 follow, which will say simply, For the reasons stated in open
8 court -- whatever. And that will be done today. So, if
9 anybody wants to appeal, you can appeal.

10 As I always say when I'm about to give an oral
11 opinion, I assume it would be much more coherent if I spent
12 the time to write it and edit it and rewrite it. So, if I am
13 a little redundant or not as organized, that's the way it is.
14 I thought you'd rather have an opinion dealing with the issues
15 as quickly as possible.

16 All right. By way of background, as everybody at
17 counsel table knows and lots of the people in the room know,
18 this case involves the Patient Protection and Affordable Care
19 Act. And under that Act most individuals must either obtain
20 minimum health coverage or pay a penalty imposed by the
21 Internal Revenue Service.

22 The law provides for the establishment of Exchanges
23 through which individuals can purchase health insurance. And
24 it also provides for the availability of a premium tax credit
25 or subsidy for many low- and middle-income individuals who

1 purchase insurance on at least some of the Exchanges. And
2 larger employees are expected to share the costs of health
3 insurance coverage for their full time employees, and
4 employers who do not provide affordable health care may be
5 subject to an "assessable payment" or tax.

6 As I said, the Exchanges, I think they are called
7 American Health Benefit Exchanges under the statute, are for
8 the purpose of facilitating the purchase of insurance by
9 private individuals and small businesses. In addition to
10 serving as the forum for health insurance shopping, an
11 Exchange is also used to determine the eligibility of
12 individuals to enroll through an Exchange in a health
13 insurance plan, their eligibility to obtain advance payment of
14 the premium tax credit and other cost reductions, and their
15 eligibility to be deemed exempt from the individual mandate.

16 We spent a lot of time talking about this
17 yesterday. The language of the statute was up here on big
18 poster boards. The Act provides that each state shall, not
19 later than January 1, 2014, establish an Exchange. It also
20 provides that if a state decides not to establish its own
21 Exchange, or fails to establish an Exchange, then under the
22 statute the Secretary of Health and Human Services is directed
23 to establish an Exchange in that state.

24 Thirty-four states have declined to establish their
25 own Exchanges. Seven have elected to assist the federal

1 government with its operation of federally-run Exchanges.
2 Twenty-six have opted out entirely. And, thus, 34 states have
3 federal Exchanges, and 16, plus the District of Columbia, have
4 state-established Exchanges.

5 The Act authorizes premium tax credits for many
6 low- and medium-income individuals who purchase health
7 insurance through the Exchanges. 26 U.S.C. Section 36B or
8 Section 1401 of the Act calculates this credit based in part
9 on the premium expenses for the health plan. I'm not going to
10 go into all the details about how that works.

11 Under the Act most individuals must obtain health
12 insurance or be subject to a penalty. Individuals who cannot
13 afford coverage will not face a penalty if they do not obtain
14 health insurance. The unaffordability exemption applies
15 generally to any individual whose annual health insurance
16 costs exceed eight percent of his or her annual household
17 income. An individual's costs are determined with reference
18 to the cost of the relevant health insurance premium minus the
19 credit allowable under this section.

20 Then there's 26 U.S.C. 4980H, which talks about the
21 "assessable payment" or the tax. And it may matter whether
22 you -- it does matter whether you view it as a tax or not for
23 certain purposes. Imposition of this payment is triggered
24 and, thus, an employer is required to pay it when any of its
25 full-time employees purchases coverage on an Exchange.

1 And as Mr. Carvin pointed out yesterday, it means
2 that if a single employee chooses to purchase coverage on the
3 Exchange, that that triggers the obligation of the employer
4 under 4980H. If an individual is eligible for a premium tax
5 credit or a subsidy, the Exchange notifies the employer that
6 it will be assessed a payment or required to pay a tax under
7 4980H.

8 What this case is about is the regulations that
9 were promulgated by the Internal Revenue Service,
10 26 C.F.R. 1.36B. And the regulations make tax credit -- the
11 premium tax credit available to qualifying individuals who
12 purchase health insurance in either a state-established
13 Exchange or a federally-established or facilitated Exchange.

14 And that regulation defines Exchange by reference
15 to an earlier regulation, 45 C.F.R. 155.20, which says that
16 the Exchange referred to in these regulations is an Exchange
17 regardless of whether Exchange was established and operated by
18 a State, including a regional Exchange or subsidiary Exchange,
19 or by HHS.

20 So, the plaintiffs in this case are a group of
21 individuals and a group of employers that reside in states
22 that have declined to establish Exchanges. And those
23 plaintiffs contend that this regulation, 26 C.F.R. 1.36B and
24 related regulations, are inconsistent with and violate the
25 plain language of the Affordable Care Act. And, therefore,

1 that those regulations exceed the scope of the agency's
2 statutory authority and, thus, are arbitrary, capricious, an
3 abuse of discretion, or otherwise not in accordance with law.
4 They say they're inconsistent with the language of the law.
5 And they bring this action under the Administrative Procedure
6 Act.

7 So, the defendants have moved to dismiss.
8 Plaintiffs have moved for a preliminary injunction. As I
9 said, there are two groups of plaintiffs. There are four
10 individuals, all from states that have declined to establish
11 Exchanges. Ms. Halbig from Virginia. Mr. Klemencic -- and if
12 I'm not pronouncing his name, you can apologize to him,
13 because his name will come up frequently. It's
14 K-L-E-M-E-N-C-I-C in West Virginia. Ms. Lowery in Tennessee
15 and Ms. Rumpf, R-U-M-P-F, in Texas.

16 And then there are three employers, although one of
17 them is a group of restaurants, but they're commonly owned.
18 Innovare Health Advocates in Missouri, which I believe has
19 something like 55 full-time employees. And GC Restaurants and
20 affiliated companies in Texas with about 350 full-time
21 employees. And Community National Bank in Kansas, which I
22 think has 80 full-time employees.

23 Now, all of these businesses have said, I think in
24 the complaint, that they will comply, if they have to comply,
25 under protest, in order to avoid sanctions. But the choices

1 faced by them as well as by the individuals have been
2 described as a Hobson's choice, either complying with a
3 statute that they -- complying with a regulation that they --
4 I guess complying with a statute because of a regulation which
5 they say is an arbitrary, capricious, an unlawful regulation
6 because it's inconsistent with the statute, and either
7 complying or facing a penalty.

8 I suppose it's easier for an individual to make
9 that choice of saying, well, I'll take the penalty, although
10 some of them have said they will comply, than it is for an
11 established business that doesn't want to be viewed as a law
12 violator.

13 In any event, there are several challenges that the
14 Government raises in its motion to dismiss, and I think they
15 do not all have to be decided today. The first one is whether
16 the individual plaintiffs have -- basically there are several
17 standing arguments. Do you have standing to bring a lawsuit?
18 So, there was a question of whether the individuals whose
19 names I mentioned have standing under Article III of the
20 Constitution. Whether the businesses have standing under
21 Article III of the Constitution. And whether those groups of
22 plaintiffs have what's known as prudential standing.

23 So, the first thing I'm going to talk about is the
24 standing requirements and how I view the arguments of counsel
25 on this. As we all know, federal courts are courts of limited

1 jurisdiction, and if we don't have jurisdiction, we can't hear
2 a case. The Court does not have subject matter jurisdiction
3 over a case where the plaintiff or plaintiffs does not have
4 standing or -- and I'll get to this as well -- the case or
5 controversy is not ripe.

6 The case is not justiciable if the matter is not
7 ripe for decision. So, when there's a motion to dismiss by
8 the defendant, in this case the Government, for lack of
9 subject matter jurisdiction, the plaintiff bears the burden of
10 establishing that the Court does have jurisdiction.

11 But at the pleading stage, which is where we are
12 now, the burden of production to establish standing is more
13 relaxed than it would be later at summary judgment. Still, a
14 plaintiff must allege general factual allegations of injury
15 resulting from the defendant's conduct.

16 There are three requirements for Article III
17 standing under the Constitution that must be established at --
18 what the courts have called an "irreducible constitutional
19 minimum." First, that the plaintiff has suffered an injury in
20 fact -- the invasion of a legally protected interest. Second,
21 that the injury is fairly traceable to the defendants'
22 conduct, that is, that there is an injury that was caused by
23 the conduct of the defendant. And, thirdly, that a favorable
24 decision on the merits likely will redress the injury.

25 There are loads of cases, I'm not going to cite

1 them, but Lujan, L-U-J-A-N, in the Supreme Court; Sprint
2 Communications in the Supreme Court. Lots of cases in the
3 D.C. Circuit. The alleged injury must be concrete and
4 particularized and actual or imminent, not conjectural,
5 hypothetical or speculative.

6 In the Clapper decision the Supreme Court recently
7 said: The threatened injury must be certainly impending to
8 constitute injury in fact, and that allegations of possible
9 future harm are not sufficient. And they also said, in
10 Clapper, that a federal court's standing inquiry is
11 "especially rigorous" if reaching the merits of the dispute
12 would force the Court to decide whether an action taken by one
13 of the other two branches of Government was unconstitutional.

14 So, let me talk first about the four individuals.
15 I'm going to focus on Mr. Klemencic because we have
16 declarations from Mr. Klemencic and I think both sides have
17 focused mostly on him. The plaintiffs maintain that these tax
18 credits financially injure and restrict the economic choices
19 of these individuals in the states that have declined to
20 established Exchanges.

21 The Subsidy Expansion Rule, in effect, makes
22 insurance less "unaffordable." So, they have to purchase
23 costly comprehensive health insurance that they would
24 otherwise forgo. In other words, if it weren't for the
25 subsidy, they would be under the level where an individual is

1 required to buy insurance. Because Mr. Klemencic, for
2 example, there's declarations that show he is self-employed,
3 he earns about \$20,000 a year, and to buy insurance would be
4 more than eight percent of his income. He wouldn't have to do
5 it. If he gets a subsidy, he no longer falls under that level
6 and so he would have to do it. He doesn't want to buy
7 insurance. That's what he's told us in his declarations.

8 So, because of this regulation, which the
9 plaintiffs say is inconsistent with and not authorized by the
10 language of the statute, he's going to be forced to buy
11 insurance. True, it will be subsidized, but he'll be forced
12 to do something he otherwise would not do.

13 And absent the regulations, he would undoubtedly be
14 entitled to the certificates of exemption exempting him from
15 the individual mandate penalty and from the need to buy
16 insurance, and that would be the end of the matter. The
17 defendants argued, at least at the initial briefing, that all
18 of this was much too speculative. There were several levels
19 of speculation.

20 I'm going to get to that in a minute because we've
21 got several declarations from Mr. Klemencic and other people
22 as well as much more information about how much the insurance
23 that he would be required to buy, if he were required to buy
24 insurance, would actually cost. Now, back to the law for just
25 a minute.

1 In order to defeat the Government's motion to
2 dismiss on standing grounds, the plaintiffs need only
3 establish the standing of any one plaintiff at the motion to
4 dismiss stage. They might be able to establish the standing
5 of more than one, but all that's required is that they
6 establish the standing of one.

7 So, the Supreme Court said that in Watt versus
8 Energy Action Educational Foundation, 454 U.S. 151, a 1981
9 case. And that was a case, actually, where there were three
10 separate groups of plaintiffs, the State of California, the
11 City of Long Beach, and consumers of oil and gas products.
12 And the Court found that California had standing, so they
13 didn't even discuss the standing of the other plaintiffs.

14 In the D.C. Circuit in Mountain States Legal
15 Foundation versus Dan Glickman, 92 F.3d Page 1228, in 1996,
16 said -- reiterated that principle citing Watt, and
17 specifically said, if there was any question, that for each
18 claim, if constitutional and prudential standing can be shown
19 for at least one plaintiff, we need not consider the standing
20 of the other plaintiffs to raise that claim.

21 So, A, this principle of Watt applies both to
22 constitutional and prudential standing; and, B, it's claim by
23 claim, but in this case there is only one claim in the
24 complaint. So, if Mr. Klemencic shows standing, nobody else
25 has to -- or I don't have to reach the standing of the others.

1 So, let's talk about Mr. Klemencic first.
2 Plaintiffs have provided a lot of information about
3 Mr. Klemencic's financial situation and his insurance
4 prospects, along with several declarations, and they've been
5 updated as we've gone along. They said he earns about -- he
6 anticipates earning about \$20,000 a year. He's self-employed.
7 As we discussed yesterday, he'd like to earn more, but \$20,000
8 is what he anticipates. And there's some figures in the
9 record about what the implications would be if he earned
10 \$21,000 or \$25,000, I don't think it really matters.

11 There's a discussion about whether he would have to
12 buy the bronze plan or the second lowest silver plan. And the
13 data we talked about yesterday -- have I got it right?
14 Silver? The data we talked about yesterday was the data
15 relating -- the numbers relating to the cost of the second
16 lowest silver plan. But in some of the earlier briefs there
17 was talk about the bronze plan.

18 So, I'm focusing, I guess, on the second lowest
19 silver qualified plan, which I'm told is the minimum coverage
20 that he's permitted to purchase under the Affordable Care Act.
21 In the data that has been presented by the parties is that it
22 might cost \$438 a month or \$450 a month or \$463 a month. But
23 in any event, that far exceeds whatever the number is -- his
24 eight percent -- eight percent of his monthly income.

25 So, I don't think the parties are in disagreement,

1 that if not for the existence of the premium tax credit or
2 subsidy, Mr. Klemencic would be exempted from purchasing
3 health insurance under the unaffordability provision,
4 regardless of which number we're dealing with. That's what he
5 wants to do. He told us he doesn't want to buy insurance.

6 The defendants -- the Government says -- first they
7 argued that his income, his age, his family status, all these
8 other estimates show that he would pay nothing for the
9 relevant insurance. And, therefore, he's got no injury. And
10 they said that the injury must be concrete and particularized,
11 actual or imminent at the time he files suit. It wasn't. And
12 there's a lot of speculation involved.

13 But if we look at the most recent declarations for
14 Mr. Klemencic, he's averring that he anticipates adjusted
15 gross income for 2014 for \$20,000. I've just mentioned that
16 from his affidavits and other affidavits and other documents
17 provided by the Government and by the plaintiffs, we know that
18 the range of cost of the insurance he'd have to buy would be
19 between \$438 and \$463 a month. And he wants a certificate of
20 exemption.

21 But he says in his declaration: If I'm eligible
22 for a subsidy that would reduce my required contribution, I
23 would be disqualified from the unaffordability exemption and
24 unable to obtain a certificate of exemption, and would be
25 forced to either buy insurance or pay a tax penalty. He says:

1 I do not want to purchase comprehensive health coverage, even
2 if the Government subsidizes it.

3 The later declarations suggest that -- and other
4 information in the record -- suggests that if he's making
5 \$20,000 a year -- the Government submitted a declaration on
6 the 18th of this month that shows it would cost him zero. The
7 plaintiff says it would cost him \$18. If it goes -- if his
8 income goes up to \$21,000, it would cost him \$3.90, according
9 to the Government. If his income goes up to \$25,000, it would
10 cost him \$51.64, according to the Government.

11 It seems to me, and I think that for purposes of
12 argument yesterday, the Government said that their argument
13 was still their argument and they think still persuasive, even
14 if we talk about \$18 a month. So, I think the information
15 that we have in the record is -- we'll assume \$18 a month is
16 what it's going to cost him if he buys the insurance. And we
17 assume \$100 to \$150 a month is what the penalty would be,
18 which is \$12 a month, if he decided to pay the penalty.

19 So, is there enough in this record to demonstrate
20 standing by Mr. Klemencic? And imminent injury, not -- and
21 concrete, particularized and actual imminent -- actual or
22 imminent injury sufficient to give him standing. As I said a
23 few minutes ago, at the pleading stage, general factual
24 allegations of injury resulting from the defendants' conduct
25 are sufficient, according to National Association of Home

1 Builders in this circuit.

2 Or as the Fourth Circuit said, general factual
3 allegations of injury resulting from the defendants' conduct
4 may suffice because on a motion to dismiss we presume that
5 general allegations embrace the specific facts that are
6 necessary to support the claim. And that's in the recent
7 Liberty University decision. I'm told that I said that the
8 penalty would be \$100 to \$150 a month. I meant to say the
9 penalty would be the \$100 to 150 a year, which translates to
10 about \$12 a month maximum.

11 So, based on the declarations of Mr. Klemencic and
12 an expert declaration, based on the numbers submitted even by
13 the Government as well as by the plaintiffs, I find it highly
14 plausible -- I think he has shown injury and I find it highly
15 plausible that because of this challenged regulations he will
16 cease to be eligible for the unaffordability exemption, and
17 instead, will be required to pay for health insurance of
18 somewhere around probably \$18, but even if it's a little less
19 than \$18, or an individual tax penalty of \$12 or somewhat less
20 than \$12.

21 So, I think that Mr. Klemencic has done enough to
22 show that he has been injured as a result of the defendant's
23 conduct. And a favorable decision on the merits can redress
24 his injury. And the merits, which I'm not going to discuss,
25 but this is a claim brought under the Administrative Procedure

1 Act, and we had a lot of discussion yesterday about whether it
2 can be brought under the Administrative Procedure Act, and
3 about whether, at least in the context when we're talking
4 about the employer plaintiffs, do they really get their
5 grievances redressed if the Government could still -- if one
6 of their employees still sought a subsidy, sought insurance.
7 But that doesn't apply to Mr. Klemencic.

8 His grievance would be redressed if this regulation
9 were vacated, it seems to me. And the same is true of the
10 other individual plaintiffs, even though I do not have the
11 kind of detailed information about them that allows me to make
12 the same sort of analysis. So, Mr. Klemencic has Article III
13 standing in my judgment.

14 So, what about the employer plaintiffs? Those
15 three entities, one in Missouri, Innovare, GC Restaurants in
16 Texas and Community National Bank in Kansas. They say that
17 prior to the promulgation of the IRS Rule, they were planning
18 not to offer health insurance plans that complied with the
19 Affordable Care Act to their full time employees.

20 Now they say they must either pay a penalty or
21 alter their behavior to avoid the penalty, i.e., to provide
22 insurance under the Affordable Care Act. And Innovare Health
23 Advocates says that they have something called a
24 "consumer-driven" insurance plan, which they provide. They
25 say it does not comply with the Affordable Care Act, but they

1 would continue to provide it and in fact expand it. But
2 because of the IRS Rule, they would opt to offer insurance
3 that complies with the Affordable Care Act.

4 The restaurants do not offer and do not wish to
5 offer health insurance to many of their full-time employees.
6 But they say, if forced to, they would do so to avoid the
7 penalty. And the same with employer plaintiff Community Bank.
8 They say they would rather not drop its full-time health
9 insurance and provide coverage compliant with the statute, but
10 it plans to provide such insurance rather than risk the
11 penalty.

12 The Government argues that these business
13 employers, these entities, have failed to show that they will
14 or allege facts sufficient to show that they will incur a
15 Section 4980H penalty. So, the Government says -- we're
16 talking about 4980H -- they say that the plaintiffs' complaint
17 does not allege that the employees of these businesses will
18 necessarily obtain coverage on the Exchanges or that they will
19 obtain premium tax credits, and that any such allegations at
20 this stage are purely speculative.

21 They say that the ability of the plaintiffs, these
22 plaintiffs to show standing, depends on third parties who are
23 not before the Court, namely, their employees. Plaintiffs
24 respond that, well, the injury is not the penalty, at least in
25 part, but the cost of complying with the employer mandates,

1 sponsoring coverage, related administrative costs and so
2 forth.

3 The plaintiffs rely on the recent Fourth Circuit
4 opinion in Liberty University versus Lew, that's L-E-W. And
5 they also cite State Farm Insurance. The Fourth Circuit said:
6 Even if the coverage Liberty -- and Liberty was an employer.
7 So, they were talking about the employer situation in 4980H.
8 Even if the coverage Liberty currently provides ultimately
9 proves sufficient, it may well incur additional costs because
10 of the administrative burden of assuring compliance or due to
11 an increase in the cost of care. So, Liberty -- the Fourth
12 Circuit in Liberty said that the employers had standing.

13 The District Court in Oklahoma in Oklahoma ex rel
14 Pruitt versus Sebelius said that the plaintiffs -- employer
15 plaintiffs had standing. As I understood the argument
16 yesterday, the Government isn't trying to distinguish that
17 portion of the Liberty University case, but rather says that
18 the Fourth Circuit is wrong in its view and that I shouldn't
19 follow it.

20 I think there's a lot to what the Government says.
21 And I think the employer plaintiffs have an uphill battle in
22 showing that they have Article III standing. They may
23 possibly be correct, but the Government may also be possibly
24 correct that the injury depends on the actions of third
25 parties.

1 The Government cites a number of cases. National
2 Wrestling Coaches Association versus Department of Education,
3 366 F.3d 930, a D.C. Circuit case, which said: When the
4 plaintiff is not himself the object of the government action
5 or inaction that he challenges, standing is not precluded but
6 it is ordinarily more difficult to establish.

7 And in a case called Grocery Manufacturers
8 Association versus EPA. On the other hand, the plaintiffs
9 argue that the theory of injury that was posited in the
10 Grocery Manufacturer's case was far more attenuated than the
11 theory presented here. It appears highly plausible, they say,
12 that an employer that employees 18 full-time employees at
13 wages between 100 and 400 percent of the federal poverty line,
14 as set out in one of their declarations, or if you're looking
15 at the numbers employed by the restaurants, 350 full-time
16 employees, certainly some substantial number of them would
17 qualify. And that even if one of them goes and buys insurance
18 and seeks a subsidy or gets a subsidy, the employer will be
19 subject to a penalty under the employer mandate.

20 So, we can go back and forth on this. The
21 Government also argues, and this is a strong argument, on the
22 third prong of Article III standing, redressability, that the
23 employer plaintiffs can't have standing even if they show
24 injury or imminent injury because of a failure to establish
25 redressability because no judgment in this action could bind

1 the parties who were not present here, namely, the employees
2 of the employer plaintiffs.

3 And Mr. McElvain yesterday spent a lot of time and
4 came back to this about what happens if I was to vacate or
5 strike down the regulation. That's not going to stop an
6 employee from going forward and seeking -- from seeking
7 insurance and seeking a subsidy. And if they don't get it,
8 bring a lawsuit, for example, regardless of what happens to
9 this regulation.

10 The Government argues that even if I ruled in favor
11 of the employers, these 18 employees of the Golden Chick
12 quick-service restaurant described in Dr. Tharp's declaration
13 would not be bound by the judgment. There's no way that
14 vacating the regulation could prevent the restaurant employees
15 from seeking premium tax credits under 26 U.S.C. 36B.

16 So, I think these are hard questions. They
17 implicate issues of redressability, that is, even if the
18 plaintiffs are injured and even if the injury is fairly
19 traceable to the defendants' conduct, is a favorable decision
20 on the merits likely to redress the injury? I'm happy to
21 revisit that on a motion for summary judgment, and both sides
22 can talk more about redressability.

23 And this relates to another argument that the
24 Government makes that I'll get to in a little bit, is they say
25 that this is not a legitimate Administrative Procedure Act

1 argument -- a legitimate Administrative Procedure Act case.
2 That it should be a tax refund case. That because of the
3 Anti-Injunction Act and because there is a remedy under the
4 tax laws, that's another issue that's implicated by this whole
5 question of the Government's argument that these plaintiffs
6 don't have standing.

7 And I have to say, in terms of the briefs that are
8 coming from both sides, I guess the plaintiffs have to do a
9 better job on redressability. The Government has to do a
10 better job on the APA, because they have yet to persuade me
11 that this is not a legitimate APA case. And why is it any
12 different from any other challenge to a regulation, that if
13 it's arbitrary, capricious, contrary to law, the courts vacate
14 them.

15 The D.C. Circuit has said that when a reviewing
16 court determines that agency regulations are unlawful, the
17 ordinary result is that the rules are vacated, not that their
18 application to individual petitioners is proscribed. National
19 Mining Association versus U.S. Army Corps of Engineers,
20 145 F.3d 1399.

21 In National Mining Association, the Court quoted
22 Justice Blackmun's dissent in Lujan, which the circuit said,
23 quote, apparently expressed the view of all nine Justices on
24 this question. And Justice Blackmun in Lujan said: In some
25 cases the "agency action" will consist of a rule of broad

1 application. And if the plaintiff prevails, the result is
2 that the rule is invalidated, not simply that the Court
3 forbids its application to a particular individual. Under
4 these circumstances a single plaintiff, so long as he is
5 injured by the rule, may obtain "programmatic" relief that
6 affects the rights of parties not before the Court.

7 So, these are arguably two sides of the same coin,
8 or maybe they're separate questions. Redressability for the
9 plaintiffs and APA for the defendants. So, for these reasons
10 and because I've already found that one plaintiff has Article
11 III standing, I'm going to defer a decision on the employer
12 plaintiffs' Article III standing as well as their prudential
13 standing until the summary judgment stage.

14 So, now we get to prudential standing. There is
15 this debate about whether prudential standing is
16 jurisdictional or not. I don't think it matters for today's
17 purposes. Regardless, the courts have said that prudential
18 standing -- that for a plaintiff to show prudential standing
19 is usually not a particularly difficult thing to do.

20 There are arguably two elements to prudential
21 standing, zone of interest and injury. And I say "arguably"
22 for a reason, I'll come back to it. Clearly, one of the
23 requirements for prudential standing is that a plaintiff's
24 injury must be arguably, arguably within the zone of interest.
25 That's important. Not in fact. Not provably. But "arguably"

1 within the zone of interest to be protected or regulated by
2 the statutes that they allege were violated.

3 D.C. Circuit, *International Brotherhood of*
4 *Teamsters*, 724 F.3d 206. This test, said the Court in
5 *International Brotherhood of Teamsters* in 2013, quote: Is not
6 meant to be especially demanding and forecloses suit only when
7 a plaintiff's interests are so marginally related to or
8 inconsistent with the purposes implicit in the statute that it
9 cannot reasonably be assumed that Congress intended to permit
10 the suit.

11 Further, whether a plaintiff's interest is arguably
12 protected by the statute within the meaning of the zone of
13 interest test is to be determined by the particular provision
14 of the law upon which the plaintiff relies. So, I think a
15 pretty interesting discussion is Justice Kagan's decision in
16 this case -- ready for this? *Match-E-Be-Nash-She-Wish Band*
17 *versus Patchak* -- we'll give you the spelling later. There's
18 a lot of hyphens here.

19 *Match-E-Be-Nash-She-Wish Band* -- is it the name of
20 a band? Oh, it's the name of an Indian tribe I think --
21 *versus David Patchak and Ken Salazar*. Yes, it's an Indian
22 tribe. It's actually a statute that arose under the Indian
23 Reorganization Act.

24 Justice Kagan says, for the Court, first, that
25 under prudential standing, the interest must arguably be

1 within the zone of interest to be protected. Secondly, the
2 test is not meant to be especially demanding. Then in
3 something that may be relevant here, she said: When enacting
4 the Administrative Procedure Act to make agency action -- it
5 was intended to make -- Congress intended to make agency
6 action presumptively reviewable.

7 Then she says: We have always conspicuously
8 included the word arguably in the test to indicate that the
9 benefit of any doubt goes to the plaintiff. The test
10 forecloses suit only when a plaintiff's interest are so
11 marginally related to or inconsistent with the purposes
12 implicit in the statute that it cannot reasonably be assumed
13 that Congress intended to permit the suit.

14 I think both sides rely on the D.C. Circuit in *Safe*
15 *Extensions, Inc. versus the Federal Aviation Administration,*
16 *509 F.3d 593.* They talk about the zone of interest question.
17 They talk about the APA's strong presumption of reviewability.
18 They say that the Supreme Court has declared in *Abbott Labs*
19 that judicial review of final agency action by an agreed
20 person will not be cut off unless there is persuasive reason
21 to believe that suit was -- to believe that such was the
22 purpose of Congress, such being the idea of cutting off the
23 rights.

24 There is one other quote I was looking for that I
25 can't seem to find. Defendants on the prudential standing

1 prong argue because Congress's clear intent on passing the
2 Affordable Care Act was to insure that health coverage is
3 affordable, and because plaintiffs here are seeking to insure
4 that health coverage is unaffordable by avoiding the subsidy,
5 they're not within the zone of interest, these plaintiffs.

6 The Government argues because the interest is
7 contrary to the purpose of the statute, the plaintiffs may not
8 bring suit. Well, I'm much more persuaded by the plaintiffs'
9 argument. And I agree with the plaintiffs that disagreement
10 with the Government about a statute's true interest does not
11 render plaintiff outside the zone of interest.

12 The Court cannot resolve the merits question of
13 the statute's true interests, let alone accept the
14 Government's view of the merits as a means of denying the
15 plaintiffs the chance to make their merits arguments.
16 Plaintiffs argue that enacting this and related provisions of
17 the Affordable Care Act, one of Congress's interests was in
18 limiting the expenditure of taxpayers' money and expanding the
19 number of low income people, satisfying the exemption from the
20 individual mandate penalty. And that both groups of
21 plaintiffs in this case are either directly or indirectly
22 regulated by the IRS Rule and, thus, must be considered to be
23 within the zone of interest.

24 So, at least with respect to the individual
25 plaintiffs, I think that the plaintiffs have the much better

1 argument. The circuit has said: In reviewing the standing
2 question, the courts have to be very careful not to decide the
3 questions on the merits for or against the plaintiff, and must
4 assume that on the merits the plaintiffs would be successful
5 in their claims.

6 Furthermore, as the plaintiffs' correctly note,
7 again, citing this Supreme Court case,
8 Match-E-Be-Nash-She-Wish Band, parties challenging agency
9 actions will often assert that an agency has gone too far in
10 promoting certain goals underlying a statute.

11 Plaintiff falls within the zone of interest if
12 the plaintiff's interest is arguably one that is regulated or
13 protected. And, clearly, and it says arguably regulated or
14 protected. Clearly, the individual plaintiffs are directly
15 regulated by the IRS Rule, and this is enough to bring them
16 within the zone of interest, and they have prudential
17 standing.

18 As for the employer plaintiffs, they may be
19 regulated or at least indirectly regulated under the employer
20 mandate provision, and they do rely largely on the -- largely
21 on the Safe Extensions versus FAA decision, which I just
22 mentioned.

23 So, I think that clearly the individual
24 plaintiffs have prudential standing. I'm going to reserve
25 ruling on the employer plaintiffs.

1 In addition to presenting a zone of interest
2 argument, defendants also argue that a third party like the
3 plaintiff employers generally may not challenge the tax
4 liability of another. This argument comes up or some variant
5 of it comes up as part of the prudential standing argument
6 that the Government makes, part of a stand alone tax refund as
7 the better route or the only route argument, and also under
8 the Anti-Injunction Act.

9 So, the Government says that, you know,
10 essentially these employers are challenging the tax liability
11 of another and that, therefore, they don't have prudential
12 standing. And, in fact, if they're successful, they would be
13 increasing the tax liabilities of third parties who are not
14 before the Court. And it is established, they say, that
15 ordinarily one may not litigate the tax liability of another.

16 Plaintiffs reject the Government's contention
17 that there is a categorical rule against challenges to laws
18 and rules granting tax credits to others. And they list a lot
19 of cases in which federal courts have reached the merits of
20 third party challenges to tax laws. And there's this dispute
21 about whether those cases all -- the Government says those
22 cases all relate to constitutional challenges to tax laws, and
23 the plaintiffs say, no, they're not, and they're perfectly
24 applicable here.

25 I guess I'm going to invite both parties to

1 further address the issues and, you know, highlight the cases
2 that you think are -- plaintiffs should highlight the cases
3 that they think are most apt in this situation, most
4 analogous.

5 So, bottom line on standing. Since at least one
6 plaintiff has both Article III and prudential standing, the
7 Government's motion to dismiss must be denied on standing
8 grounds.

9 So then we get to ripeness. I have an intern
10 here who is still in law school, so now he can skip his
11 federal jurisdiction course, he knows about standing and
12 ripeness and all of that after today. The ripeness doctrine
13 limits the power of federal courts to decide only judicial
14 matters. It finds its roots both in the 'case or controversy'
15 requirement of Article III of the Constitution, and the same
16 sort of prudential considerations I was previously talking
17 about which favor the orderly conduct of the administrative
18 and judicial processes.

19 Now, in the context of administrative action, the
20 ripeness doctrine prevents courts through premature
21 adjudication from entangling themselves in abstract
22 disagreements over administrative policies, and it protects
23 agencies from judicial interference until the administrative
24 decision has been formalized and its effects are felt in a
25 concrete way.

1 I'm going to get to this, but all you have to do
2 is -- and that's from *Abbott Laboratories*, 387 U.S. 136. I
3 mean, this is a final agency rule. It's out there. It's
4 beginning to affect people now. And I just don't -- I just
5 don't accept the Government's argument that this case is not
6 ripe for review. But now I'll tell you why.

7 The cases say that in considering a ripeness
8 challenge, the Court has to consider the fitness of the issues
9 for judicial decision and the hardship to the parties of
10 withholding judicial review. And a dispute is generally fit
11 for judicial review if it is legal in nature and no other
12 institutional concerns militate in favor -- concerns militate
13 in favor of withholding review. And under the hardship prong,
14 the Court has to consider what the plaintiffs are in securing
15 review now rather than later.

16 The Government argues that the claims are not
17 ripe. They make a number of arguments. But because it's not
18 clear how this regulation will affect the plaintiffs, and they
19 can raise the issues at a later proceeding -- I can't remember
20 whether we're talking about 2015 or 2016 or 2017, but in a
21 later proceeding. And I just don't buy that. The lawfulness
22 of this regulation is a purely legal question. No further
23 factual development will help me in deciding whether or not to
24 vacate this regulation.

25 The case law is pretty clear, what's going on --

1 what I should be looking at. American Petroleum versus EPA,
2 683 F.3d 382, D.C. Circuit, 2012. In the context of agency
3 decision making, letting the administrative process run its
4 course before binding parties to a judicial decision prevents
5 the Court's from entangling themselves in abstract
6 disagreements over administrative policies, and protects the
7 agencies from judicial interference.

8 In this case we've got a final regulation. And
9 when considering the fitness of an issue for review, the Court
10 said, we ask whether it is purely legal. Okay. In this case
11 we have a final regulation, it's purely legal. What does it
12 mean? Is it consistent with the statute or isn't it?

13 On the hardship question, the circuit said in
14 American Petroleum Institute: Considerations of hardship that
15 might result from delaying review will rarely overcome the
16 finality and fitness issues inherent in attempts to review
17 tentative positions. So, what they're saying is if somebody
18 comes in and claims hardship to review an interim rule, you
19 shouldn't do it just because of hardship.

20 But it seems to me that the Congress also makes
21 sense, that if you've got a final rule, how much hardship does
22 the plaintiff need to show? In this case, whether
23 Mr. Klemencic has shown irreparable injury -- justifying
24 preliminary injunction is something I'll talk about later.
25 But we know he's shown that he will be forced to do something

1 he doesn't want to do. And if I can decide the validity of
2 that regulation, he will not have to do that.

3 Again, Electric Power Supply Association versus
4 F.E.R.C., another D.C. Circuit case, 391 F.3d 1255. When
5 you've got a final regulation and no further factual
6 development is necessary to clarify the issues before the
7 Court, then the matter is as fit for judicial review, as it
8 can be -- in that case it says, it can be wholly resolved by
9 an analysis of the Sunshine Act, the Act's legislative
10 history, and its construction by relevant case law.

11 In this case, this can be decided looking at the
12 language of the Affordable Care Act, to the extent it's
13 relevant, the legislative history, and the regulation that
14 issued under it. Quote: The hardship prong under the
15 ripeness doctrine is largely irrelevant in cases, such as this
16 one, in which neither the agency nor the court has a
17 significant interest in postponing review.

18 Now, if one accepts this case as an APA --
19 plaintiffs have no interest in postponing review. They're not
20 claiming -- they are claiming hardship if I do postpone
21 review. From the Government's point of view, if you view it
22 as an APA case, I don't see there's any hardship involved.
23 Only if you view it as the plaintiffs are relegated to a tax
24 refund case later -- if there's some argument that I shouldn't
25 get to the matter now.

1 The Supreme Court's decision in National Park
2 Hospitality Association versus Department of the Interior,
3 123 Supreme Court 2026, and Cohen versus U.S., 650 F.3d 717,
4 the en banc decision of the D.C. Circuit. Again, APA
5 challenges presumption of reviewability. In the context of
6 APA challenges, we have previously said lack of hardship
7 cannot tip the balance against judicial review. So, I think
8 the case is ripe. The issue is ripe for review.

9 Moving right along -- and then, Lisa, we'll take
10 a break before I discuss the preliminary injunction question.
11 The Government next argues that this is not appropriate --
12 this is not an appropriate case under the Administrative
13 Procedure Act. That APA review of this regulation is
14 precluded -- maybe that's too strong a word, maybe it's not --
15 by the existence of another review mechanism.

16 They say that the plaintiffs may not bring this
17 action as an APA action because Congress has specified that
18 the judicial remedy that the plaintiffs must pursue is an
19 action for tax refund. In other words, pay the tax, apply for
20 a refund, if you're right, you'll get your money back and
21 you'll be vindicated on this issue of law.

22 I think I made myself clear yesterday, I am very
23 skeptical of this argument. Maybe I'm too simplistic, but the
24 APA is there for a reason, and there's a challenge to an
25 APA -- there's a challenge under the APA to a regulation that

1 is arbitrary, capricious, contrary to law -- why shouldn't
2 that be resolved, even if it doesn't mean that other people
3 aren't going to -- employees of these employers, for example,
4 aren't going to feel free to seek subsidies and to proceed.
5 We may still have the question -- well, I won't get into that.

6 I'm skeptical that the tax refund action would
7 provide the individual plaintiffs with an adequate remedy, as
8 they are requesting certificates of exemption at the outset
9 and not tax refunds. And the employer plaintiffs say they
10 will choose to comply with the regulations that they think are
11 unlawful rather than violate them. And it just seems to me
12 that this argument undermines the purposes of the APA, which
13 seems imminently appropriate here.

14 There is some support for that view and for the
15 plaintiffs' view on this point in the Cohen versus United
16 States, en banc decision, 650 F.3d 717, where the IRS and the
17 dissenters, because it was an en banc decision, says you
18 should use the tax refund mechanism.

19 And, again, I haven't read the statute at issue
20 there, but the Judge Brown in her opinion said: This suit is
21 an APA action. It questions the administrative procedures by
22 which the IRS allows taxpayers to request refunds for
23 wrongfully collected taxes. The dissent assumes a refund suit
24 provides an adequate remedy at law. But she goes on to say:
25 Congress has not required exhaustion in APA suits challenging

1 the adequacy of IRS procedures, and we're not going to impose
2 it here.

3 I know that that case is not -- the portion of
4 the Internal Revenue Code there is different and nuanced, but
5 I think there is some support for the notion that the APA is
6 an appropriate remedy here. This sort of melds into the
7 Anti-Injunction Act question, although they're presented as
8 and are separate questions.

9 The Anti-Injunction Act argument, as I understand
10 it, is raised by the Government only with respect to the
11 employer plaintiffs, not with respect to the individual
12 plaintiffs. The Anti-Injunction Act provides that no suit for
13 the purpose of restraining the assessment or collection of any
14 tax shall be maintained in any court by any person, whether or
15 not such person is the person against whom such tax was
16 assessed.

17 The courts have said, it's intended to protect
18 the Government's ability to collect a consistent stream of
19 revenue by barring litigation to enjoin or otherwise obstruct
20 the collection of taxes. Normally, because of the
21 Anti-Injunction Act, taxes can only be challenged after they
22 are paid by suing for a refund. That's why I say it melds
23 into this other APA argument.

24 So, I guess from the Government's point of view,
25 the Supreme Court sort of threw a monkey wrench into this AIA

1 discussion by its decision in National Federation of
2 Independent Business versus Sebelius. Nevertheless, I think
3 that HHS and the Government and the President are happy to
4 have to deal with that monkey wrench rather than to deal with
5 what the alternative was going to be -- because we can all
6 count to five.

7 So, the Supreme Court in National Federation of
8 Independent Businesses versus Sebelius held that the label
9 that Congress gives to a payment matters for purposes of the
10 Anti-Injunction Act. They said -- the Anti-Injunction Act --
11 the Chief Justice said: Both the Anti-Injunction Act and the
12 Affordable Care Act are creatures of Congress's own creation.
13 How they relate to each other is up to Congress, and the best
14 evidence of Congress's intent is the statutory text.

15 Congress cannot change whether an exaction is a
16 tax or a penalty for constitutional purposes, they say, but
17 for purposes of whether the Anti-Injunction Act applies. It's
18 what they call things that matters. The Supreme Court then
19 noted that the penalty imposed on individuals who failed to
20 obtain essential minimum coverage under the Affordable Care
21 Act, the individual mandate, cannot be considered a tax for
22 purposes of the Anti-Injunction Act since Congress
23 consistently used the term penalty when discussing the
24 individual mandate and not the term tax.

25 In other aspects of the Affordable Care Act they

1 use the term tax or taxes, said the Supreme Court. In fact, I
2 believe the Chief Justice in his opinion said the word tax or
3 taxes are used several hundred times, maybe over 600 times, in
4 other parts of the statute.

5 The Court found that the distinction between the
6 terms tax and penalty is important for purposes of the
7 Anti-Injunction Act. So, the Government asserts that in
8 contrast to the individual mandate at issue in the National
9 Federation of Independent Businesses case, the exaction under
10 Section 4980H, the so-called employer mandate, is a tax. And
11 it's true that sometimes the word tax is used here, but the
12 term assessable payment is also used.

13 This question came before the Fourth Circuit in
14 Liberty University versus Lew. Liberty University was an
15 employer plaintiff. The Fourth Circuit concluded that the,
16 quote: Assessable payment reference in 4980H did not in fact
17 constitute a tax under the Anti-Injunction Act.

18 In an opinion -- we don't know who wrote it, it's
19 signed by all three judges and I'm not sure why. They didn't
20 say per curiam and they didn't say who, but Judge Motz, Judge
21 Davis and Judge Wynn issued an opinion jointly. And they said
22 that in this part of the Act, the employer mandate part, the
23 use of the word tax is used infrequently, and assessable
24 payments is used more frequently.

25 And while they couldn't explain why it's mostly

1 called one thing and occasionally called something else, they
2 did say that they saw no distinction between what the Supreme
3 Court did in National Federation of Independent Businesses and
4 what was before them in Liberty University. No distinction
5 between the employer mandate and the individual mandate in
6 terms of what is and is not a tax for purposes of the
7 Anti-Injunction Act.

8 And they specifically said, under the Secretary's
9 theory: An employer subject to the employer mandate can bring
10 only a post-enforcement suit challenging the employer mandate.
11 The Fourth Circuit said: It seems highly unlikely that
12 Congress meant to signal with two isolated references to the
13 term tax -- that the mandate should be treated differently.
14 And, therefore, they ruled against the Secretary on this.

15 The Government's argument on this question is
16 that the Fourth Circuit is wrong and that I should reject the
17 Fourth Circuit reading. They say that the employer plaintiff
18 suit is barred by the Injunction Act -- barred by the
19 Anti-Injunction Act because, they say, 4980H imposes a tax.
20 And what the employer plaintiffs are seeking is to be relieved
21 from a tax under that section applied to them.

22 The Fourth Circuit has analyzed this. The Tenth
23 Circuit in the Hobby Lobby case has analyzed this and has
24 followed the Fourth Circuit. And the question is: Are the
25 employer mandate, the language of the relevant provision of

1 the statute and the structure and affects sufficiently similar
2 to the individual mandate penalty to call it a tax -- I mean,
3 to call it a penalty, or is this different and is it a tax?

4 So, you know, the Government's got an uphill
5 battle on this. But since I found that one individual
6 plaintiff has both Article III and prudential standing, and I
7 found that the case is ripe for decision, I don't have to
8 decide this now since this AIA argument applies only to the
9 employer plaintiffs.

10 The Government can brief it further. The
11 Government can see if they can try to persuade me, in the
12 summary judgment papers, not to follow the Fourth Circuit, not
13 to follow the Tenth Circuit, to see if there's a distinction
14 between this and what the Supreme Court previously did. And
15 it seems to me, finally, that until I decide the standing of
16 the employer plaintiffs in this issue, I really don't need to
17 decide the Rule 19 question of indispensable parties.

18 And, again, the Government can give me more on
19 Rule 19 if they think it's worth a candle, but I'm not going
20 to decide that one today either. So, bottom line, it took a
21 long time to get there. Anything I missed? Bottom line is
22 that the motion to dismiss is denied and the case goes forward
23 with summary judgment briefing.

24 And we will talk about a schedule for summary
25 judgment briefing at the end of this hearing. So, should we

1 take a 10-minute break and then I'll come back and tell you
2 what I think about the preliminary injunction motion?

3 BRIEF RECESS

4 AFTER RECESS

5 THE COURT: The second motion that I heard argument
6 on yesterday is the plaintiffs' motion for a preliminary
7 injunction. And, again, we focus on Mr. Klemencic, and
8 because -- one of the things that one has to show for
9 preliminary injunction is irreparable harm, and so the effort
10 was made with respect to him to show irreparable harm.

11 Essentially what the plaintiffs are asking is that
12 the regulation be enjoined, or its effectiveness or its
13 application be enjoined, pending a final determination on the
14 merits of this case. And now that I've denied the motion to
15 dismiss we know that there will be a final determination on
16 the merits in this case. If I had granted the motion to
17 dismiss, then the motion for preliminary junction would have
18 been moot, as the case would have been gone.

19 So, as all the lawyers in the room know, a
20 preliminary injunction is considered an extraordinary remedy
21 that may only be awarded on a clear showing that the plaintiff
22 is entitled to such relief. A plaintiff seeking a preliminary
23 injunction has the burden by a preponderance of establishing
24 that, one, he's likely to succeed on the merits; two, he's
25 likely to suffer irreparable harm in the absence of the

1 preliminary relief that he's requested; and that the
2 balance -- third, that the balance of equities tips in his
3 favor; and fourth, that an injunction is in the public
4 interest.

5 Traditionally, in this circuit, these factors were
6 viewed as a continuum, and if there were more than one factor
7 that could compensate for less than another. So, for example,
8 if you had a really, really strong likelihood of succeeding on
9 the merits then you had to show less injury. And if you had
10 really significant injury, then maybe not so much on the
11 merits.

12 Under this sliding scale test, if the argument for
13 one factor was particularly strong, an injunction may issue
14 even if the arguments in other areas are weak. The Supreme
15 Court decided a case called Winter versus Natural Resources
16 Defense Council, 129 Supreme Court 365.

17 And in Sherley versus Sebelius, 644 F.3d 388, the
18 D.C. Circuit suggested, but did not decide, that the
19 likelihood of success and irreparable harm factors each are
20 independent requirements, and that you couldn't get a
21 preliminary injunction unless you showed both -- likelihood of
22 success and likelihood of irreparable harm.

23 So, regardless of whether I adopt a more or less
24 flexible approach to this, the D.C. Circuit has said in
25 Chaplaincy of Full Gospel Churches versus England, among other

1 cases, and a case which I lost called Sea Containers versus
2 Stena, 890 F.2d -- that's when I was practicing law -- F.2d
3 1205. I shouldn't cite that, I guess. I won part of the
4 case, but I lost the preliminary injunction part of the case.

5 The circuit has said, regardless, it has said that
6 a movant has to demonstrate at least some injury for a
7 preliminary injunction to issue. And if the moving party
8 fails to show any irreparable harm, that's grounds for denying
9 the motion.

10 So, I'm going to start by talking about
11 plaintiffs' injuries in the irreparable harm prong. So, the
12 minimum coverage provision, under which individuals who do not
13 obtain minimum coverage are assessed a tax penalty, will be
14 effective starting in 2014. Plaintiffs have asserted that
15 unless the challenged regulations are enjoined before the end
16 of this calendar year, David Klemencic will be irreparably
17 deprived of his right to obtain a certified exemption from the
18 Affordable Care Act's individual mandate for calendar
19 year 2014.

20 He's got to obtain that certified exemption, it
21 was said in the briefs, before December 31st. And if he
22 doesn't get relief before December 31st, he would be forced
23 either to buy comprehensive health coverage that he doesn't
24 want or risk incurring a penalty; and he would be foreclosed
25 from getting the catastrophic coverage for 2014.

1 In the briefs it was said that once 2014 begins,
2 he would no longer be able to obtain a certificate of
3 exemption and that his remedy -- his injury could not be
4 remedied after the fact. In short, the rule that's at issue
5 in this lawsuit, the IRS rule that's at issue in this lawsuit,
6 is preventing him from obtaining a certificate of exemption,
7 and the window for him to do so is going to close.

8 Now, I think what I understand from the recently
9 filed declarations by Mr. Klemencic, by the representations
10 made by counsel for both sides yesterday, that the actual
11 deadline for enrolling in an Exchange is March 31, 2014. And
12 under the applicable regulation, an individual who seeks a
13 certificate of exemption under the unaffordability provision
14 may apply for such a certificate any time before the final
15 date on which he or she is eligible to enroll in a qualified
16 plan offered under the Exchange. And that's 45 C.F.R. Section
17 155.605(g)(2).

18 In looking at the penalty provision of the
19 statute, this deadline appears consistent with the exemption
20 for short coverage gaps of less than three months. Thus, it
21 seems, that an individual who waits until March 30, 2014, to
22 obtain health insurance would not be subject to a penalty and
23 that you can get a certificate of exemption anytime before
24 that date.

25 It was said in court yesterday by plaintiffs'

1 counsel, with the necessary lead time, they think the date
2 that it becomes crucial -- they may still be sticking to their
3 December 31st date -- but I understood them to say that with
4 the necessary lead time leading up to March 30, 2014, and
5 getting the exemption and other things, that would be
6 February 15th, 2014.

7 And, so, the question is, if there is no risk of
8 injury until February 15th, 2014, or possibly later, is there
9 irreparable injury in this case for Mr. Klemencic? And I
10 guess I would add, is there irreparable injury if I can decide
11 the merits of the case before February 15th, 2014? And I see
12 no reason why I can't with expedited briefing. And some of
13 the issues -- some of the issues that were briefed on the
14 motion to dismiss have either been resolved or one side or the
15 other is going to abandon them or tell me they are not that
16 important to them.

17 Other issues that have previously been briefed
18 have to be briefed further, if you want to persuade me, and
19 I've said some of that earlier this morning. The main issue
20 that still needs to be briefed, in my judgment, is the Chevron
21 Phase I and the Chevron Phase II, but there are others.

22 So, without a preliminary injunction,
23 Mr. Klemencic and possibly other plaintiffs will have to
24 choose between paying a penalty estimated for Mr. Klemencic
25 at about \$12 a month, or obtaining health insurance that he

1 doesn't want, after being awarded a subsidy that he says would
2 be illegally granted, around \$18 a month. If he chooses the
3 penalty -- if he chooses the penalty or tax, if you want to
4 call it a tax, and ultimately prevails in this lawsuit, he'll
5 be able to recover the money expended through a tax refund.
6 If he chooses to buy the insurance, that money is, I think,
7 not retrievable.

8 So, I would make a couple of points. One, this
9 case can be resolved on the merits before February 15th, 2014,
10 and I think that really undercuts Mr. Klemencic's irreparable
11 injury argument. Two, if he pays the penalty and wins
12 ultimately, if I didn't get to it by that date, which I will,
13 he would get a tax refund. So, I don't see any irreparable
14 injury. And if there's no irreparable injury, then there's no
15 preliminary injunction.

16 But he says he may choose to take the insurance
17 under protest. In fact, I think he says he will choose to
18 take the insurance under protest rather than pay the penalty.
19 And if he does that and later wins the lawsuit, he doesn't get
20 a tax refund. So, I raise the question, without deciding it,
21 although -- and that's this.

22 Preliminary injunction is an equitable remedy.
23 Is it fair to let someone create his own irreparable injury
24 and then get a preliminary injunction because he's created his
25 own irreparable injury? This gets to the Hobson's choice

1 discussion we've had before. But if he pays the penalty, no
2 irreparable injury.

3 If he takes the other option, for whatever
4 reason, can he thereby create irreparable injury? Even if he
5 did -- if he could -- is the amount, \$18 a month, so
6 de minimis that it's not really irreparable injury, because
7 surely, even if I didn't require expedited briefing, which I
8 will, this case can be decided by me quickly. And, so, maybe
9 he pays one month of insurance, maybe he pays two months of
10 insurance, that's not going to happen. What you all do with
11 respect to the Court of Appeals and what kind of stays and
12 injunctions you ask for, depending upon how I rule, is another
13 question.

14 There's a second and independent reason that the
15 Government raises, and that's that traditionally economic harm
16 is not a basis for a preliminary injunction, and certainly
17 de minimis economic harm cannot constitute irreparable harm
18 for preliminary injunction purposes. And, again, we're
19 talking about a penalty of \$150 a year, is the estimate, or
20 \$12 a month, or \$18 a month in insurance.

21 The cases -- there are a lot of cases on this
22 point. Hi-Tech -- but, again, you know, other than a tax
23 refund, you can't sue the Government presumably because of
24 sovereign immunity. But even in cases where the Government is
25 a defendant, the courts have invoked that principle where the

1 economic harm is de minimis.

2 In an opinion by Judge Bates, Hi-Tech Pharmacal
3 Company versus the Food and Drug Administration, 587 F.Supp.2d
4 Page 1. He says: To demonstrate irreparable injury, a
5 plaintiff must show that it will suffer harm that is more than
6 simply irretrievable; it also must be serious in terms of its
7 effect on the plaintiff. To warrant emergency injunctive
8 relief, the injury must be certain, great, actual, and
9 imminent.

10 Harm that is merely economic in character is not
11 sufficiently grave under this standard, citing Wisconsin Gas.
12 To shoehorn potential economic loss into a showing of
13 irreparable injury, plaintiff must establish the economic harm
14 is so severe as to cause extreme hardship to his business or
15 threaten his very existence. That's one example, there may be
16 others.

17 Chaplaincy, which I mentioned, of Full Gospel
18 Churches versus England, 454 F.3d at 290, the D.C. Circuit
19 also discusses that, and says: The key word in this
20 consideration is irreparable. Mere injuries, however
21 substantial, in terms of money, time and energy necessarily
22 expended in the absence of a stay are not enough.

23 The possibility that -- in Gulf Oil Corporation
24 versus Department of Energy, 514 F.Supp. 1019, a 1981 decision
25 by Judge Flannery says: Some concept of magnitude of injury

1 is implicit. The injury must be more than simply
2 irretrievable, it must be serious in terms of its effect on
3 plaintiff.

4 Another case is American Association for Homecare
5 versus Leavitt by Judge Urbina, at 2008 Westlaw 2580217.
6 And -- let's see if I think this is relevant. In a case of
7 mine, Sterling Commercial Credit-Michigan versus Phoenix
8 Industries, 762 F.Supp.2d Page 8. I said that, under some
9 circumstances, courts have held economic harm may qualify
10 where a plaintiff's alleged damages are unrecoverable. But
11 even unrecoverable losses must have a serious effect on a
12 plaintiff in order to be considered irreparable. And I cited
13 a case called Sandoz versus FDA 439 F.Supp.2d 26. A loss of
14 less than 1 percent of total sales is not irreparable harm.
15 So, it's a second reason for why I find that the injury to Mr.
16 Klemencic is not irreparable.

17 So, what about success on the merits? Even if I
18 assume that there -- even if there were some threat of
19 irreparable harm to Mr. Klemencic, what about the merits?
20 If the sliding scale analysis still applies, the plaintiffs
21 would have to show, since I've said I didn't find any
22 irreparable harm, a particularly strong likelihood of success
23 on the merits. And I don't think the plaintiffs have made
24 that showing. And let me be very clear what I'm saying here
25 because this is important to you and to the world at large.

1 The plaintiffs make a very good argument. We
2 spent a lot of time on this yesterday. That the words in the
3 statute, an Exchange, quote, established by a state, should be
4 construed literally and that federal Exchanges are not
5 established by a state. The defendants have a good argument,
6 too, at least a credible argument, that when you view this in
7 the context of the entire statute and the overall scheme of
8 things, and when you apply Chevron to the regulation, that
9 they're likely to win on the merits.

10 We haven't had a lot of discussion about Chevron.
11 I think both sides suggested that we don't get beyond Chevron
12 Step 1 that the statute is unambiguous. But I think the
13 briefs that I'm going to get from you on summary judgment are
14 going to have to discuss both Chevron Step 1 and Chevron
15 Step 2.

16 So, all I'm saying is that if, on preliminary
17 injunction, in a case where I find no irreparable harm, the
18 plaintiffs have the burden of showing a particularly strong
19 likelihood of success on the merits, I don't think they've
20 done that. They have made an argument that may ultimately be
21 successful. The defendants have made an argument that may
22 ultimately be successful.

23 And as I delve further into the statute, with the
24 assistance of additional briefing by the parties, the strength
25 of each party's position will become clearer. So, that's what

1 I have to say about irreparable harm -- about merits. I guess
2 implicit in my irreparable harm discussion is that because of
3 the February 15th/March 31st as opposed to December 31st
4 discussion, the employer plaintiffs probably couldn't show
5 irreparable harm either, although, as I understand the
6 preliminary injunction motion, it's brought only on behalf of
7 Mr. Klemencic.

8 What about the balance of the equities, the
9 public interest. You know, I've spent a lot of time on this,
10 but it's not worth spending a lot of time on this in light of
11 what I've said so far. The plaintiff said there's a public
12 interest in ensuring that a government agency acts within the
13 limits of authority. No doubt that's true. But until I
14 decide the merits, it's hard to know whether they have not
15 done that.

16 They also argue that lots of people are going to
17 be affected by this if I don't adjudicate this matter
18 promptly, and plaintiffs, the employers, the employees, are
19 making health insurance decisions based on the current
20 regulations, and that's undoubtedly true. So, that's why I
21 want expedited briefing so that I can deal with this.

22 The defendants argue that there is inherent harm
23 to an agency in preventing it to enforce its regulations that
24 Congress found it in the public interest to direct the agency
25 to develop and enforce. Well, yeah, but only if the

1 regulations are lawful. And they also argue that the ability
2 to award relief in this case is limited -- it would not
3 affect -- any relief I granted would not affect many people
4 not before the Court. Well, that goes to arguments on the
5 merits -- on the -- partly on the APA argument and partly on
6 the other prudential issues. And I don't need to talk about
7 that further today.

8 So, I think what we need is further briefing.
9 And I'm assuming that the plaintiffs have filed a motion for
10 summary judgment. So, what we'll get next is an opposition to
11 the motion for summary judgment and a reply. Or are we going
12 to get an opposition to the motion for summary judgment plus a
13 defendant motion for summary judgment? In which case, we
14 get -- the Government files a summary judgment
15 motion/opposition, or in two separate documents on the same
16 day.

17 The plaintiffs then file their reply to the
18 opposition and an opposition to the Government's motion, and
19 then the Government files a reply. But I want to do it
20 quickly. The parties can address the remaining arguments on
21 jurisdiction and on the merits. They could revisit, if they
22 wanted to, any of the things I've already decided. But,
23 certainly, the question of the standing of the employer
24 plaintiffs, the redressability question, the APA versus tax
25 refund question, the APA question more broadly, I said

1 redressability, and Chevron Step 1 and Step 2. I'm sure that
2 when all of the lawyers get back to their office they will
3 think of other things they want to brief, too.

4 So, that's where I am. Who wants to say
5 anything?

6 MR. CARVIN: Just a brief inquiry of the Court,
7 Your Honor. If I remember correctly, the extant order was for
8 them to file an opposition within two weeks of you ruling on
9 the motion to dismiss. Do I remember that correctly? Or are
10 you planning on -- do you want us to suggest a briefing
11 schedule?

12 THE COURT: I think we should revisit the briefing
13 schedule because it seems to me that you want an answer
14 quickly.

15 MR. CARVIN: As fast as possible.

16 THE COURT: And I think you should have an answer
17 quickly. Mr. McElvain can tell me whether they've already
18 decided whether they're going to file their own summary
19 judgment motion, but that --

20 MR. CARVIN: Did you want to --

21 THE COURT: Do you want to do it now or do you all
22 want to get together and talk and try to submit something in
23 the next couple of days?

24 MR. CARVIN: Because time is of the essence, I'd
25 rather do it now, but...

1 MR. McELVAIN: Your Honor, I'll need to return to
2 my office and consult with people in -- Your Honor, I'll need
3 to engage in consultations as to dates. I think there should
4 be no problem arranging a schedule that would build towards
5 reaching a decision by the February 15th date.

6 THE COURT: Or earlier.

7 MR. McELVAIN: Or earlier. We would intend to file
8 a cross motion for summary judgment, so we would work out a
9 schedule for cross briefing. One potential X-factor, which I
10 won't ask the plaintiffs to make a representation one way or
11 the other right now, but there is one potential issue, which
12 is, I don't know if the plaintiffs intend to take an appeal
13 from the denial of the preliminary injunction motion, and that
14 may affect scheduling.

15 THE COURT: Well, I don't know whether it does.
16 I mean, if you take an appeal from -- does it affect my
17 jurisdiction to consider summary judgment?

18 MR. CARVIN: It's a nonfactor, Your Honor, right.
19 And with all respect to Mr. McElvain, if he wants us to get
20 back to the Court, that's fine, but the Justice Department is
21 a big place. I think a deadline for getting back to you with
22 proposed schedules by COB tomorrow will maybe make those
23 wheels spin a little quicker.

24 THE COURT: Today is Tuesday.

25 MR. McELVAIN: Your Honor, I'm going to be out of

1 the office for the afternoon for a previously scheduled
2 medical appointment. So, if I could have until Thursday close
3 of business, that would be --

4 THE COURT: Let's do this. If you can reach an
5 agreement and file something by close of business Thursday --
6 if you can't, I'll make myself available for a conference call
7 on Friday. I'm going to be away the first couple of days of
8 next week, so I would like to get it resolved this week.

9 MR. CARVIN: That's fine with me, Your Honor. We
10 could also submit something in writing Thursday before the
11 conference call --

12 THE COURT: Here's what I'm suggesting. Why don't
13 we do this. Submit something in writing by close of business
14 Thursday. If you're in agreement there's no need for a
15 conference call.

16 MR. CARVIN: Right.

17 THE COURT: But if you're not in agreement -- I
18 don't think I've got anything in court on -- I've got my
19 calendar right here. I don't have anything in court on
20 Friday, I do on Thursday. So, do you want to set a time now
21 for a tentative conference call?

22 MR. CARVIN: 10:00 cloak.

23 MR. McELVAIN: 10:00 o'clock would be fine. I
24 doubt that we'll need it, but that would be fine.

25 THE COURT: So, let's say 10:00 o'clock Friday

1 morning for a tentative conference call. I don't know how you
2 want to do it, with a call-in number or whatever. My law
3 clerk, Julie Dona, will send you both an e-mail so we can get
4 the logistics set up. And then if you don't need it, you can
5 respond to her by e-mail at the same time you file something
6 on Thursday by close of business. I mean, no need to do it if
7 you're in agreement on a schedule.

8 MR. CARVIN: Thank you, Your Honor.

9 THE COURT: And I'll issue an order today saying,
10 motion to dismiss denied for reasons, and preliminary
11 injunction denied for reasons, blah, blah, blah. So, if you
12 do want to appeal the preliminary injunction, you'll have a
13 piece of paper or an electronic thing or both.

14 MR. CARVIN: Thank you, Your Honor.

15 THE COURT: Okay.

16 MR. McELVAIN: Thank you, Your Honor.

17 THE COURT: Okay.

18 END OF PROCEEDINGS

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C E R T I F I C A T E

I, Lisa M. Foradori, RPR, FCRR, certify that
the foregoing is a correct transcript from the record of
proceedings in the above-titled matter.

Date: _____

Lisa M. Foradori, RPR, FCRR