

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JACQUELINE HALBIG, et al. : Docket Number CA 13-623

vs. : Washington, D.C.

KATHLEEN SEBELIUS, et al., : Tuesday, December 3, 2013

Defendant. : 2:00 P.M.

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TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

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

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2 THE DEPUTY CLERK: Matter before the Court, Civil
3 Action Number 13-623, Jacqueline Halbig, et al. versus
4 Kathleen Sebelius, et. al.

5 Counsel, please come forward and identify yourselves
6 for the record.

7 MR. CARVIN: Good afternoon, Your Honor. Michael
8 Carvin for the plaintiffs. And with me today is John Berry.

9 THE COURT: Good afternoon.

10 MR. McELVAIN: Good afternoon, Your Honor. Joel
11 McElvain for the defendants. With me today is Sheila Lieber.

12 THE COURT: Ms. Lieber.

13 Good afternoon, everybody.

14 Okay, we're here on the parties' cross-motions for
15 summary judgment. I've read all the papers. And, of course,
16 I'm familiar with the matter from the last time we were here.
17 So, and I sent out an order that said 45 minutes a side.

18 I'll try to keep you to that. You'll try to keep yourselves
19 to that. It depends on how active I am in asking questions,
20 I suppose. And I guess both sides get a rebuttal since
21 they're cross-motions.

22 So is it the plan that you are going start,
23 Mr. Carvin?

24 MR. CARVIN: Yes, Your Honor.

25 Good afternoon, Your Honor. I know you're familiar

1 with this, and I'll try not to endlessly repeat it.

2 But the language of the statute is still as plain as
3 it was, and the policy it pursues is just as compelling as
4 when we first met. Obviously, the relevant statutory
5 language is found in 36(b), the subsidy provision, which says
6 subsidies are available if you bought the insurance through
7 a, quote, exchange established by the state under Section
8 1311.

9 The Government wants you to rewrite that to say,
10 under an exchange established by the state under 1311 or by
11 the Federal Government.

12 We think that plainly violates every principle of
13 interpretation and constitutes a judicial revision of the
14 statute.

15 I don't think there's actually much disagreement
16 about 36(b) itself. The Government's argument directs you to
17 another provision of the Act administered by HHS, Section
18 1321. And that's the provision, as you undoubtedly know,
19 that authorizes the Secretary to establish such exchange
20 within the state in the event that the state has not
21 established an exchange under Section 1311.

22 Our first basic point is the fact that this is an
23 exchange established by the Secretary under 1321 precludes
24 interpreting it as an exchange established by the state under
25 1311. They make the point that such exchange means such,

1 means this exchange, an exchange under the definitional
2 exception, it means exchange under 1311.

3 That's quite true. It means when the Secretary
4 establishes the substitute exchange, it needs to be the same
5 exchange as the state would have established. But it doesn't
6 change the fact that it's established by the Secretary as a
7 substitute for the state's failure to create the exchange.
8 And a substitute exchange by the Secretary can't be an
9 exchange established by the state under 1311.

10 More particularly, there's three reasons why their
11 interpretation of 1321 cannot survive even minimal scrutiny.
12 First of all, the premise of 1321, as I said, is that the
13 state has failed to establish an exchange under 1311. It
14 doesn't exist. It's not triggered unless the state has
15 failed to establish an exchange. So it can't be that what
16 the Secretary is establishing, because the state has failed
17 to establish an exchange under 1311, is itself a state
18 established exchange under 1311. Again, it can only be a
19 substitute.

20 The ambiguity that they focus on that's created by
21 the fact that exchange means exchange established under 1311
22 is of no import here. It doesn't do what they need to do,
23 which is to say this is an exchange established by the state
24 under 1311.

25 So regardless of how you answer the metaphysical

1 question of whether the thing established by the Secretary is
2 a 1311 exchange or a 1321 exchange is beside the point,
3 because in either event, it's not an exchange established by
4 the state. The most that their argument would prove is
5 there's two kinds of 1311 exchanges. Those established by
6 the state in the first place and those established by the
7 Secretary when the state doesn't do it.

8 But again, the operative language is established by
9 the state under 1311 for the subsidy provision to apply and
10 therefore whatever ambiguity is created by this definitional
11 exchange doesn't get them close to where they need to be.

12 Even if there weren't those two fatal flaws in their
13 argument, the language itself that they're focusing on, they
14 claim that this creates some legal fiction where an exchange
15 established by the Secretary is deemed to be an exchange
16 established by the state.

17 But there's no language that even remotely conveys
18 that, even if you just view that sentence in isolation. It
19 doesn't say this is an exchange established on behalf of the
20 state or as if it were by a state. It simply says an
21 exchange within the state. So it doesn't have the language
22 that is necessary to create the legal fiction that they argue
23 for. They cannot point to a single statute in the U.S. Code
24 where one entity is deemed to be another entity without
25 language expressly doing that.

1 And that absence is particularly notable here
2 because we have language in the act itself, the territorial
3 provision. It says territories aren't states, but we want
4 them to be treated like state exchanges. And then they
5 therefore add very explicit language saying this will be
6 deemed under 1804(3). This will be deemed a state exchange.
7 There is no parallel language here.

8 The House bill had language like that. The House
9 bill was sort of the opposite. It made the federal exchange
10 the regular order, but states could step up and step to the
11 plate and say we'll take it over. And the House bill, which
12 you can find at the U.S. Government's Summary Judgment
13 Exhibits 15 at page 182 through 183 says, if that happens,
14 then the state exchange shall be deemed to be the relevant
15 exchange. So even in the House bill, they had this relevant.

16 Every other federal code provision has similar
17 language, the Amicus Families U.S.A. helpfully points out
18 that there's a lot of these kind of provisions and each and
19 every one of them has the words "deemed to be or be treated
20 as." No such language here, and again, they can't point to
21 any statute anywhere which has ever been interpreted to deem
22 one entity to be another absent such deeming language.

23 Two other points that I think are relevant here.
24 One is, even the Government admits that the things created by
25 the Secretary are not exchanges created by the state under

1 1311. The HHS reg defining what a federally facilitated
2 exchange is, defines it as one established by the Secretary
3 under 1321 so even their own regs were at war with the
4 argument they're making here. And, of course, there's a
5 provision in the subsidy provision which says here's some
6 money we're going to appropriate for states when they run the
7 exchange.

8 Well, if they believe their deeming argument, then
9 HHS should have been able to draw on that fund. But they
10 haven't been able to because they have not had the audacity
11 to argue to Congress that the money that Congress gave to the
12 states through this imaginative legal fiction should be
13 soaked up by HHS so they won't follow their logic to where it
14 leads.

15 And finally, an overarching point is that it is
16 undisputed that tax credits or tax exemptions or tax
17 deductions are, in their words, they quote *Mayo* in their
18 reply brief, must be narrowly construed. That's a recent
19 Supreme Court decision. There's a presumption, an obvious
20 presumption. Congress is the custodian of the federal purse.
21 Congress guards those prerogatives, and we're not going to
22 allow money to flow out of the Federal Treasury unless in the
23 words of the Supreme Court and Wells Fargo, it is
24 unambiguously proved that this tax credit was to be made
25 available.

1 And whatever you can say about the Government's
2 argument, the notion that it unambiguously proves that
3 subsidies are available, tax credits are available on federal
4 exchanges is plainly not true.

5 So, what kind of policy was Congress trying to
6 implement when it limited subsidies to state exchanges?
7 Again, we've briefed this up and it seems self-evident.
8 Congress had a real problem. It wanted states to run the
9 exchanges because, among other things, Senator Nelson
10 insisted on it. It knew that it was asking the states to
11 undertake a thankless, very controversial task, as recent
12 events have certainly proved true, so they needed to provide
13 them with a big incentive to do it. They couldn't offer them
14 nothing to take on this arduous task.

15 THE COURT: Is there anything in the statute or in
16 the legislative history that says that or are you just saying
17 that makes logical sense as a matter of policy. That the
18 reason we're doing subsidies for the states and only for the
19 states is to give them an incentive to establish exchanges?

20 MR. CARVIN: I think that's an important point, Your
21 Honor, and I'd like to focus on that. The only way that a
22 federal court can depart from the plain language of the
23 statute is to conclude that it leads to an absurd result or a
24 policy that doesn't make any sense. It's certainly
25 inarguable and I don't even think arguable that the policy

1 here makes perfect sense. The Government switches then to
2 say, okay, well, the policy may make perfect sense, but
3 there's no legislative history reiterating this condition.
4 And therefore, you shouldn't infer it.

5 Two points, two fundamental points. One, if they
6 can't find a lick of legislative history which in any way
7 supports their interpretation of the statute which in any way
8 hints that subsidies are available on the Federal Exchange.
9 If they could, it still wouldn't matter because the statute
10 is unambiguous, but they can't even find that.

11 So their entire argument is, well, this Court is to
12 assume that if they were going to make this deal what we
13 would have had is a bunch of senators writing letters to
14 governors and senators going on the floor and talking about
15 this deal. And the absence of that creates this inextricable
16 inference, which is going to now authorize you to rewrite the
17 actual language of the statute.

18 Well, the short answer to that is Medicaid. Surely
19 it was revolutionary to think that Congress was going to
20 actually cut off Medicaid funds to the states. That was a
21 far greater revolution in America than anything about these
22 exchanges which nobody knew about.

23 But they haven't cited you one snippet of
24 legislative history where a senator went out on the floor and
25 said, governors, be aware, if you don't cut our deal, this is

1 going to happen. They didn't have one senator go on the
2 floor and say, gee, what if the state rejects the deal, what
3 happens then? And so there was the same negative -- the same
4 deafening silence that they talk about with respect to
5 Medicaid. And the deal was in the statute was done exactly
6 the same way as it was done for the exchanges as it was done
7 for Medicaid. There wasn't some blinking yellow light saying
8 states, hereby be warned, you're going to lose your Medicaid
9 funds if you don't accept this deal.

10 All the Act did was raise the eligibility provisions
11 of Medicaid to what Congress now wanted it. It upped the
12 number of people that were now eligible to be covered by
13 this. That was it. It just changed 1396(a) to up the
14 eligibility provision, it didn't have any warning on top of
15 that.

16 The Government points to 1396(c), but that wasn't
17 part of the Affordable Care Act, that preexisted the Act.
18 They didn't say here's an additional warning for the new
19 deal. And all 1396 says is what -- confirms what is obvious.
20 Look, if you're not eligible under the criteria we just set
21 forth, then we're not giving you the money. That's what
22 ineligibility criteria is. So all of these negative
23 inference arguments that they trumpet about the exchanges
24 were equally true about Medicaid.

25 But if somebody came into this court and argued if a

1 state had rejected the Medicaid deal that Congress had
2 proposed and said, no, we're not going to up our eligibility
3 standards, could somebody seriously argue the Treasury is
4 nonetheless authorized to give them the old Medicaid money
5 even though they've rejected the deal, even though the
6 statute makes the medicaid money conditional on them
7 accepting these new things. No, and the same analysis should
8 apply here.

9 So if you think about it this way, why was there so
10 little discussion of this deal. First of all, there was some
11 discussion. Jost, who was one of the leading implementors of
12 this, expressly suggested it as a way of inducing states to
13 do it. The Health Act, we keep talking about the Finance
14 Committee's version of the bill under Senator Baucus's
15 control, but the Health Committee had also done a bill, and
16 that had the same provision, the same condition in it. So it
17 was accepted wisdom.

18 But why wasn't there more talk about this? Well,
19 first is the point I think I just made, which is we like to
20 talk about deals between states and the Federal Government,
21 but nobody really thinks that legislators are getting on
22 phones and talking to states and saying -- negotiating some
23 kind of contract. The way you communicate the deal, whether
24 it's the Medicaid deal or any other condition like the
25 insurance provision that they also had is to put it in the

1 statute, the regs will make it clear, and the states will
2 either accept it or not. The regs in the statute make it
3 clear what the deal is. Not in a particular sense.

4 Here you had three years between writing the statute
5 and when the states were going to have to make a decision.
6 So you had ample time to communicate this. It was never
7 communicated this time because the IRS decided to communicate
8 a completely different message than you can find in the plain
9 language of the statute.

10 The other reason there wasn't a lot of discussion of
11 it was the same reason there was very little discussion of
12 Medicaid. Everyone assumed that the states would take the
13 deal. Who wouldn't take this deal? As the Government points
14 out, this deal is free federal money. It doesn't cost the
15 states a dime. Who turns down a gift horse like that in the
16 mouth? Particularly since, as the Government also helpfully
17 points out, you're not just hurting the low income people
18 getting the subsidies, you're hurting everybody in the state.
19 Because by denying the subsidies, the wealthier people have
20 to make up the difference in the premiums and the insurance
21 companies get hurt. So you'll have the business community,
22 wealthy people, low income people objecting to this change.
23 Congress had every reason to believe and certainly assume,
24 just like they did with Medicaid, that the states were going
25 to take this deal.

1 The CBO didn't score the money that it would take to
2 run the federal exchanges because they didn't think there was
3 going to be any money for federal exchanges. There was no
4 appropriation in the Act to run the federal exchanges because
5 Congress didn't really think there were going to be these
6 things.

7 The White House admitted afterwards, they never
8 thought that they would be running any exchanges much less 36
9 of them. And the reason they're running 36 of them is
10 because the IRS adopted this irrational policy of saying
11 here, take on this task, what will we get in return? Zero,
12 nothing, bupkis. And, of course, 36 states said, no, thank
13 you.

14 THE COURT: Say that again? Your explanation as to
15 why 36 states, you just said this is a deal that no one could
16 refuse. And then you gave me a one sentence explanation as
17 to why 36 states refused it. And I didn't understand the
18 sentence.

19 MR. CARVIN: I apologize. If you say to the states,
20 here's the deal. We are going to cut off your subsidies if
21 you don't run the exchange. The IRS comes in and says, no,
22 no, here's the deal, we'll give you the money even if you
23 don't run the exchanges, you get the sweet without the
24 bitter. You get the quid without the quo.

25 Well, if they don't have to do anything to get the

1 exchanges, if they are treated exactly the same way, whether
2 they undertake the very difficult task of running the
3 exchanges or they sit and watch the Federal Government run
4 the exchanges, then what incentive do they have to run the
5 exchanges? If somebody says --

6 THE COURT: What's the evidence, what's the evidence
7 that 50 states were going all opt in until the IRS issued
8 this regulation?

9 MR. CARVIN: What I'm saying is, what we -- we were
10 talking about Congressional expectations, and Congressional
11 expectations are vividly revealed by the fact that the CBO
12 didn't even account for how much money the feds would be
13 using to run the exchanges because they assumed the states
14 would do it. Congress didn't appropriate any money for the
15 feds to run the exchanges because they assumed the states
16 were going to do it. And do I know or do you know what would
17 have happened? No, but we're talking about reasonable
18 expectations. And I'm saying the proof is in the pudding.

19 If you undo the deal, let me put it this way. They
20 were greatly worried the states wouldn't do it but for the
21 subsidies. Right? And if you undo the deal, if you say
22 we're going to give you the subsidies regardless of whether
23 you run the exchange, we've seen what happened in the real
24 world, 36 states said no.

25 Now, can you or I psychoanalyze what would have

1 happened if they were put to the Hobson's choice of denying
2 all these billions of dollars flowing into their states? No.
3 But common sense tells us that the deal would have been a
4 heck of a lot more attractive, and they would have had to
5 engage an entirely different decisional calculus if they are
6 confronted with this choice.

7 I assume if we strike, as we request, the IRS will
8 be struck down, I think there's going to be a lot of
9 discussion in the states. Are we really going to deny
10 thousands, hundreds of thousands of our citizens these
11 subsidies simply because we don't want to run the exchanges?

12 But all I'm talking about now is we're in the fourth
13 level of trying to psychoanalyze Congress. And they're
14 trying to --

15 THE COURT: That's always a difficult job.

16 MR. CARVIN: Always a difficult job, which is why we
17 like to stick to what Congress enacted, not what individual
18 legislators were thinking. But even in that scenario, wasn't
19 it very reasonable for them to assume, just like they did
20 with Medicaid, that nobody would turn down this deal because
21 it would have paid at least a severe political cost. And we
22 don't know what would have happened because the IRS never put
23 them to that painful choice since it gave them all the
24 goodies without asking for any of the sacrifice.

25 Finally, we didn't have any real discussion of this

1 because the real discussion of this was going to happen in
2 conference if they had followed the normal provision. The
3 House is going one way with the federal exchanges, the
4 Senate's going the other way with the state exchanges. This
5 was all going to get worked out of conference because with
6 Scott Brown's election, they had to go under budget
7 reconciliation. All you could do was budget items that
8 didn't increase the deficit.

9 Then you've got the declaration from
10 Mr. Holtz-Eakin, which is attached to the Adler/Cannon
11 amicus, he's the ex-director of CBO, who makes it clear that
12 if CBO had been asked the question, what if we're going to
13 have to provide subsidies on the federal exchanges, obviously
14 in addition to the state exchanges, obviously that would
15 increase the deficit. Or at least there would have been a
16 very strong argument that that would have increased the
17 deficit. And if you increase the deficit, you can't operate
18 under the reconciliation provisions because of the brouhaha.
19 So it really wasn't a viable candidate to be put into the
20 reconciliation process. Therefore, the entire colloquy
21 between the House and the Senate were shortchanged when
22 people were really trying to figure it out.

23 So I think, even if we're dealing with these levels
24 of abstraction, the policy was clear. The results were
25 clear. And none of the psychoanalysis that the United States

1 wants you to engage in in any way refutes that. So finally
2 they come up with just the purely naked policy argument would
3 be, it would be really bad not to have subsidies in every
4 state because we want every state to be treated the same.

5 But Congress didn't want every state to be treated
6 the same. They wanted to treat the states that establishes
7 the exchanges better than the exchange that didn't. They
8 needed to provide that incentive. And the one thing that the
9 Government can't come up here and tell you is why anybody in
10 Congress would have thought that all 50 states would have
11 signed on the dotted line if they hadn't given them any money
12 or money to their citizens to induce them to do it. That
13 would have been the irrational policy to think that these
14 people who sit on the sidelines, these states who sit and
15 watch the Federal Government run their exchanges would have
16 adopted the more difficult thing when they're not getting
17 anything in return.

18 In other words, sure, Congress obviously wanted
19 subsidies in every state, but it wanted something else. It
20 wanted the states to run it. And they thought they were
21 getting both because they thought it was a deal that nobody
22 could refuse. And they didn't want the perfect to be the
23 enemy of the good. They thought they could get the best of
24 both worlds. They could get the states to run it and have
25 the subsidies. When the IRS undid that deal, then all the

1 logic of the Congressional Act was undone.

2 But in all events, appeals to policy can't just
3 focus on that Congress wanted subsidies to the states, which
4 is stipulated. It also has to account for the fact that
5 Congress wanted states to run the exchange. And the
6 Government can't give you any reason to think that that
7 second objective would have been accomplished when the IRS
8 gave subsidies regardless of whether you ran the exchange.

9 So as I say, I think that that's the end of this
10 case. Then the Government takes you on this cook's tour of
11 the other provisions of the Act.

12 THE COURT: Well, is the reason for the cook's tour
13 because of *Chevron*? In other words, your argument is, your
14 argument is the statute is clear and it's unambiguous. But
15 if there's an argument that it's ambiguous, then there's the
16 question as to what I'm supposed to look at and what I'm not
17 supposed to look at to determine whether it's ambiguous.

18 MR. CARVIN: So, I think we may be conflating two
19 points.

20 THE COURT: All right.

21 MR. CARVIN: There needs to be ambiguity in the
22 language to get to *Chevron* step two.

23 THE COURT: Correct.

24 MR. CARVIN: In all circumstances.

25 THE COURT: But I mean, but the question, and maybe

1 you don't want to get there yet, but the question is, in
2 deciding, I mean, you say it's unambiguous, that's your
3 Motion for Summary Judgment. They say it's unambiguous, but
4 if it's ambiguous, here is why you should defer to the IRS.

5 So, question one under *Chevron* step one is what am I
6 permitted to look at to determine if it's ambiguous beyond
7 the, if anything, beyond the specific words of the text?

8 MR. CARVIN: Your Honor, that's fine. I'm going to
9 have to break my answer into two parts. One is we don't
10 think *Chevron* step two applies here for reasons that I'll
11 return to in a moment. But to answer your question more
12 directly: If a provision says the sun comes up in the East.
13 And another provision says we assume that the sun will be
14 coming up in the West, I'm not in any way suggesting you
15 can't look at that separate provision if you've got some kind
16 of conflict between the two.

17 If, for example, 1321 said states will be deemed,
18 federal exchanges will be deemed to be state established
19 exchanges under 1311, you could look at that provision and
20 read it into the subsidy provision. That's fine. But what
21 I'd like to walk you through is, have they come up with
22 anything like that, some absurdity, some conflict between our
23 interpretation of the subsidy provision and these other
24 provisions of the Act? And the answer is no, which is why I
25 somewhat derisively referred to it as a cook's tour. What

1 they try and do is walk you through the rest of the Act and
2 say, see, the plaintiff's interpretation must be wrong
3 because, like in your hypothetical, it bumps up against
4 another provision.

5 Well, let's look at these other provisions, see if
6 our interpretation creates some unworkability, some absurdity
7 that leads you to question the plain language. The one they
8 lead with is 1803(2), which says individuals are qualified
9 under the federal exchange and the second box they need to
10 check is they reside in the state that created the exchange.
11 And therefore, they say, see, the state didn't create the
12 exchange. They can't check that second box, and they can't
13 become eligible for the federal exchange.

14 Okay. But first of all, that's blatantly untrue
15 under 1803(2) itself because it says you need to check that
16 box for eligibility only with respect to an exchange. And an
17 exchange, as they emphasize quite vigorously when they're
18 making their legal fiction argument, exchange is defined as
19 an exchange under 1311. So in other words, the check the box
20 provision only applies to exchanges established under 1311,
21 i.e., state exchanges. It wouldn't have applied if the state
22 doesn't create it.

23 THE COURT: Well, is there such a thing as a
24 qualified individual under an exchange established by the
25 Secretary?

1 MR. CARVIN: Yes. But he doesn't have to -- he
2 doesn't have to check that box. In other words, anybody who
3 lives in the state has to do it. You only have to check the
4 box that says I'm a resident of the state that created the
5 exchange with respect to an exchange under 1311, i.e., with
6 respect to a state exchange.

7 THE COURT: In other words, you don't have to tell
8 the Secretary of HHS or the IRS where you live if it's a
9 federal exchange?

10 MR. CARVIN: You can tell them where you live, but
11 it doesn't have to be in a state that was created by the
12 exchange. Nobody argues that there's ambiguity about the
13 word "state."

14 THE COURT: No, but the question is qualified
15 individual. I mean, how do you -- what provision of the law
16 defines a qualified individual for a federally created
17 exchange?

18 MR. CARVIN: Well, all of the reporting provisions,
19 all the premium provisions only go to state residents, if
20 that's what I'm understanding you to mean. So, in other
21 words --

22 THE COURT: I know, but don't you have to be a
23 qualified individual to get health insurance through a
24 federal exchange as well as through a state exchange?

25 MR. CARVIN: Well, it says with respect to an

1 exchange. And again, an exchange is an exchange under 1311,
2 it doesn't say an exchange under 1321, it says an exchange
3 under 1311. Do you have to be a qualified individual? Yes.
4 But your qualifications are not that you would live in a
5 state that's -- where -- you reside in the state which
6 created the exchange. You just reside in a state that has
7 the exchange.

8 In other words, there's no obligation for the
9 Federal Government to provide people from West Virginia in
10 exchange for Virginia. The entire logic of the Act, all of
11 the Act is built around each state will have an individual
12 exchange.

13 THE COURT: But we now know that 36 states don't
14 have state established exchanges.

15 MR. CARVIN: Right.

16 THE COURT: And so I live in one of those states.

17 MR. CARVIN: Uh-huh.

18 THE COURT: Do I have -- is there a provision, is
19 there a section of the Affordable Care Act that requires me
20 to prove to somebody that I'm a qualified individual or is
21 anybody and everybody qualified in the federal exchange
22 situation, or is nobody a qualified individual in a federal
23 exchange situation?

24 MR. CARVIN: Right. And I take your point, but you
25 wouldn't look at 1803(2) to determine qualifications. You

1 would you look at the reporting provisions and the exchange
2 functions which are built for people in that provision.

3 In other words, the Government has to read this
4 language right now; right? It has to say, do you reside
5 within a state that created the exchange. And they have not
6 had any problems saying only people from Virginia can get on
7 the Virginia exchange.

8 THE COURT: Right.

9 MR. CARVIN: So it may not come from 1803(2). They
10 are using this definitional section which flows throughout
11 the Act, the first check box. They keep coming back to
12 qualified individual and say, aha, it says the state created
13 the exchange. But what happens if the state didn't create
14 the exchange? Okay. And I'm saying one answer is, the
15 provision only applies if the states create the exchange
16 because the definition of exchange is state created exchanges
17 under 1311.

18 But even if I'm wrong on that, the Government
19 still's got to answer the question. Remember, the only
20 reason we're looking at this provision is whether our
21 interpretation of the subsidy provision creates some
22 craziness that is avoided by not reading it -- by not
23 interpreting it to mean what it says.

24 And nobody says, the Government doesn't say that
25 Virginia is a state that created an exchange. Their argument

1 is through the legal fiction, the alchemy of 1321, the state
2 didn't create the exchange, but you can treat the Federal
3 Government exchange like it was the state exchange for those
4 purposes. But they still have to deal with the question,
5 well, you don't reside in a state that created an exchange,
6 you reside in a state that didn't create the exchange, but
7 HHS created them for it. Either way, you've got to read that
8 language with some common sense background.

9 And so, it's not our discussion, the subsidy
10 provision that creates the problem. The problem is created
11 if the state doesn't create the exchange under anybody's
12 circumstance. The problem is not created by whether or not
13 subsidies are available if the states doesn't create the
14 exchange, the problem is created if the state doesn't create
15 the exchange at all.

16 And your question would be equally valid there.
17 Well, how do we figure out what a qualified individual is?
18 The common sense answer, and the one we advanced in our brief
19 and they didn't respond to, is these can't be viewed as
20 qualifications, these can just be viewed as information that
21 the Federal Exchange wants. And the fact that they assumed a
22 condition that doesn't exist, i.e., that the state created
23 the exchange, shouldn't be used to penalize people from that
24 state from getting on, because otherwise the Federal
25 Government would have created a condition that is impossible

1 for anybody to meet. And we don't interpret statutes to
2 create catch-22s. So that's another way, without worrying
3 about it.

4 But again, my basic point is none of those
5 difficulties are created by our interpretation of the subsidy
6 provisions. All of those difficulties are created when the
7 state doesn't create the exchange under anybody's
8 interpretation. We've given two very common sense ways out
9 of that dilemma, which doesn't seem to have puzzled anybody
10 thus far in actual implementation, and the Government
11 resisted.

12 Now, the reason the Government resists our exchange
13 under 1311 argument is they say, no, exchange means 1311 and
14 1321. Well, two points: I think that contradicts the
15 argument they were originally making, but regardless, that's
16 their interpretation, not ours. So they can't ascribe any
17 difficulty to us because they disagree with us.

18 Again, the purpose of this exercise is to see if you
19 interpret the subsidy provision, does it create this
20 roadblock that you indicated earlier, this ambiguity.

21 The next effort at this is to say that look, there's
22 reporting requirements and functions that are listed for both
23 state and federal exchanges, and they reference subsidies.
24 So they say, therefore, you must infer that Congress thought
25 federal exchanges would have subsidies.

1 Well, that doesn't follow at all. If Congress
2 thought some states were going to have subsidies and some
3 states were not going to have subsidies, it would have
4 written what the exchanges are required to report and their
5 functions in precisely the same way. They would have put one
6 list together for both states and say some states say it
7 doesn't apply to don't need to fill out the list.

8 What would have been the alternative? They would
9 have had two lists. They would have had to have the list for
10 the state exchanges with the subsidy provisions included,
11 then they would have had to have the exact same list minus
12 two or three items that referenced subsidies for the feds.
13 That's just redundancies, it's just duplication. Again, it
14 doesn't prove any kind of inconsistency.

15 The others, some I can't even understand in all
16 candor. The next argument is look, there's this provision in
17 the act that says in 2017, the Secretary can give innovation
18 waivers to the states. It can say, look, this is the
19 structure we've established in the Affordable Care Act, but
20 if you come up with a better way of skinning the cat, I'm
21 going to waive you out of it. Okay. And they say that is
22 somehow made redundant by our view of subsidies. Because
23 they say, look, if the states can opt out of running
24 exchanges, then that makes the innovation waiver process
25 superfluous.

1 Well, what they're arguing renders the innovation
2 waiver provision superfluous is the fact that the states can
3 opt out. They agree the states can opt out. So no, it has
4 nothing to with our interpretation of the subsidy provision,
5 it has to do with whether or not states can opt out at all,
6 which everyone agrees they can do.

7 I will point out that there's absolutely no
8 inconsistency. The innovation waiver goes to a lot more than
9 just running the exchanges. It goes to the individual
10 mandate, the employer mandate, all of these other things.
11 And in all events, it makes perfect sense. What the Act said
12 was, look, if you're running an exchange, and you want to get
13 out, we'll let you get out if you've got a better way of
14 doing it. But we're not going to let you get out if you've
15 never run an exchange.

16 In other words, there's two paths here. You get
17 into the exchange business, and in 2017 we'll look and see if
18 you've got a better way of doing it. You stay out of the
19 exchange business, and, of course, then you don't need the
20 waiver because you've never been in it in the first place.
21 So that one makes no sense.

22 The abortion provision. The abortion provision
23 states, says states can prohibit abortions offered through an
24 exchange. The only word there is "exchange." I didn't think
25 we disagreed about the word "exchange." It certainly has

1 nothing to do with our debate about the subsidy provisions,
2 the word "exchange." So again, this is just a complete
3 nonissue.

4 But in all events, I will point out, if exchange
5 means state established exchanges, then the provision makes
6 perfect sense; right? Because then it means states can stop
7 abortions if states run the exchange, but not if the feds run
8 the exchange. Well, that's a very sensible policy. Why
9 should the states be able to dictate to the Federal
10 Government what policies they offer on their exchanges.
11 States usually don't have some power to tell the Secretary of
12 HHS how to run her exchanges, number one.

13 Number two, if you adopt, which I guess is their
14 interpretation for this provision, which exchange means state
15 and federal, then that simply means that the states can do it
16 for both. But however you resolve that dispute has nothing
17 to do again with the subsidy provision. It's just a problem
18 they've created out of the word "exchange," which is not
19 something we're debating about.

20 Finally, I think finally, they say, look, there's a
21 lot of provisions in there that tell the Act, the Act says
22 the states have to do this on their exchange, they have to do
23 this on their exchange, and there's no parallel provision
24 telling the Secretary that she's got to do X, Y and Z; right?

25 Well, okay, that's because the Secretary is not

1 given specific direction, she's given general directions in
2 1321. It says take any actions necessary to establish such
3 exchange. You've got to replicate these state exchanges so
4 go ahead and do it. You've got general authority to do it.
5 That's not a problem.

6 In their reply brief they make a new argument for
7 the first time which says, okay, that may generally be true,
8 the Secretary may generally be able to use her own general
9 discretion to do all this stuff, but not with respect to this
10 one provision, it's a very complicated argument.

11 Apparently there's a provision in the Act that
12 there's a chip program out there that gives money to
13 relatively poor kids. And so there's a provision in the Act
14 that says, look, if the chip fund runs out of money for some
15 reason, what you should do is in exchanges establish by the
16 states, you should put those kids on the exchanges and see if
17 you can take care of them that way. And they say, see,
18 exchange established by the state. So the Secretary couldn't
19 do it. Well, I think they're right. And I think that helps
20 us.

21 In other words, the only reason you're switching
22 these kids from chip to the exchange is because they can get
23 subsidies on the exchange. And if we're right that subsidies
24 are only available on the state exchanges, you'd only want to
25 switch them to the exchanges so they could get the subsidies.

1 If you switch them to the federal exchanges where there's no
2 subsidies available, then you can't make up the chip
3 shortfall. So that's another example out of many where the
4 supposed inconsistencies with our interpretation actually
5 reinforce our interpretation of the Act.

6 I'd like to switch, I told you a minute ago I was
7 going to get to why *Chevron* doesn't apply. If this is -- I
8 can now answer the second part of your question.

9 THE COURT: All right. Then maybe you should wrap
10 up soon because we're getting close to --

11 MR. CARVIN: Yeah. But I do think it's important on
12 *Chevron* to understand that we're not talking about *Chevron*
13 step two here; right? Yes, we think that it's unambiguous so
14 you don't get there.

15 But in addition to that, it is binding D.C. Circuit
16 case law that you need to -- you can only defer to an agency
17 if they've been given the authority to administer the Act.

18 THE COURT: Well, doesn't Section 36 specifically
19 give the Secretary of the Treasury the authority to issue
20 regulation under 36?

21 MR. CARVIN: Absolutely, and they've got plenty of
22 authority to resolve, therefore, any ambiguities in 36(b).
23 They don't claim there's any ambiguities in 36(b), we've all
24 agreed on that. They claim the ambiguity comes from 1321.
25 And that's administered by HHS, so HHS can resolve the

1 ambiguities in 1321. But it can't resolve the ambiguities in
2 36(b) because it doesn't administer it. You can't defer to
3 the IRS because there's no ambiguity in the provision they do
4 administer, and you can't defer to HHS because they have no
5 ability to administer 36(b).

6 This is just like the *Shinseki* case that the D.C.
7 Circuit decided this year. There, you had a specific
8 provision in the Veterans Administration under collective
9 bargaining; right? So what Judge Silberman said was, look, I
10 can't defer to them under *Chevron* with respect to this
11 provision, even though the head of the Veterans
12 Administration we normally defer to because the word
13 "collective bargaining" is administered by, generally by the
14 FLRA.

15 THE COURT: Well, Judge Silberman doesn't have to
16 defer to anybody to figure out what collective bargaining
17 means. I mean, he knows that better than anybody in the D.C.
18 Circuit.

19 MR. CARVIN: That's true. But even a more modest
20 judge, a less --

21 THE COURT: Yes. And I might say that we know many
22 more modest judges. And I say that, I say that, you know,
23 just so the record is clear, Judge Silberman and I are
24 neighbors and friends, so I'm kidding.

25 MR. CARVIN: And if I could add the same

1 clarification --

2 THE COURT: Go ahead.

3 MR. CARVIN: -- although we're not neighbors. But
4 look, this is the dilemma; right? The provision you're
5 fighting about, in this case 1321, is not administered by the
6 agency that's claiming *Chevron* deference. The FLRA was
7 administering collective bargaining so you don't defer to the
8 VA, and so if what you're fighting about is a different
9 provision than the one they've been granted a delegation for,
10 what are you going to defer to?

11 Look, the IRS recognizes this; right? They didn't
12 come up with their definition of exchange. They incorporated
13 HHS's definition of the exchange. HHS wakes up tomorrow,
14 changes their minds, the IRS has nothing to say about where
15 these subsidy provisions go. That's about as clear an
16 illustration as I can make is the IRS is not in control of
17 these subsidy provisions, HHS is.

18 So then the Government comes back and says, well,
19 look, when agencies jointly administer a statute, if they
20 agree on it, then you do give them *Chevron* deference. A,
21 that's irrelevant, and B, it's clearly wrong under the law.

22 It's irrelevant because, as we just discussed, HHS
23 and IRS don't share 36(b). This is a rule that was developed
24 like for OCC, the Fed, OTS, they're all administering the
25 same statutes that govern the various depository institutions

1 banks. And so they say, look, we're not going to give
2 deference to any of the agencies because they're all
3 administering the same statute.

4 But that doesn't even apply here because they're not
5 administering the same statute. If it did apply here, they
6 would still be wrong under *DeNaples*, which again is D.C.
7 Circuit decision of this year. There, the OCC and the Fed
8 administering the same statute absolutely agreed on the cease
9 and desist order at issue there. And *DeNaples* was clear as
10 it could be, we don't give *Chevron* deference because it's
11 shared.

12 They drop a footnote and says, look, there's been
13 some inconsistencies in footnote four in our prior decisions
14 on this, but this is the rule. And so they can tell you
15 whatever they want about whatever prior D.C. Circuit opinions
16 said or didn't; they're all wrong. But the relevant point is
17 the D.C. Circuit's done your work for you and they've told
18 you what the rule is here.

19 And then finally, I've already emphasized that
20 there's a provision that says there's a presumption against
21 interpreting tax credits unless it's unambiguous. And
22 therefore, *Chevron* doesn't apply for that reason as well,
23 because under *St. Cyr* and these other cases, they say, look,
24 the normal rule is there's ambiguity, you follow the agency.
25 But if there's a presumption that ambiguity is resolved

1 against, in this case the person seeking the tax credit, then
2 that -- that's how you resolve ambiguities, pursuant to the
3 presumptions, not pursuant to the agency.

4 I would like to briefly comment on the relief that
5 they're seeking because, A, I'm puzzled, and B, they seem to
6 be asking you not to invalidate the regulation, to the extent
7 I can understand it, with any American -- with respect to any
8 American citizen except Mr. Klemencic and maybe some of the
9 other plaintiffs. That has never happened in American
10 history, and that's lawless for three reasons.

11 It's lawless because it's contrary to the clear
12 holding of the D.C. Circuit in *National Mining Association*
13 which says, no, you set aside direct. It's contrary to the
14 plain language of the EPA, which does not say you may set it
15 aside if it's contrary to law, as the Government claims, it
16 says you shall set it aside if it's contrary to law.

17 So, courts every day in this circuit and everywhere
18 else see a reg, it's lawless, then obviously they invalidate
19 the reg.

20 The reason I'm worried about this is the Government
21 seems to be saying that even if you strike down this reg as
22 lawless and completely contrary to the statute, they plan on
23 continuing to administer it even though the reg is vacated.
24 The reason I'm saying that is they complain about this
25 nationwide injunction, which seems -- the only difference

1 between a nationwide injunction and validating the reg is
2 that they are going to defy this Court's order and continue
3 to administer the reg even if you order otherwise. That's
4 just the kind of chaos that the D.C. Circuit in *National*
5 *Mining Association* was designed to prevent, and I think what
6 the Government's up to is if they lose in this case, they
7 won't even take an appeal to the D.C. Circuit, they'll just
8 allow this to pucker along for Mr. Klemencic only, and then
9 continue the lawless regime.

10 If that's not their plan, they need to explain to
11 this Court why they're resisting the nationwide injunction,
12 what they think the consequences of vacating the regulation
13 are in terms of how they administer this reg, and if they
14 tell you that they're going to defy it and not -- and
15 continue to apply the reg, I think that's reason alone to
16 make sure that the reg is vacated and they are enjoined from
17 applying --

18 THE COURT: I think the APA says that if you find
19 that there's a regulation that's capricious or contrary to
20 law, that the Court is supposed to vacate it. And there are
21 some cases, and there's a debate actually, I think between
22 Judge Silberman and Judge Randolph for a number of years
23 about circumstances where you might remands to the agency to
24 fix it up without -- without vacating it. But I don't quite
25 see how that works in this situation.

1 MR. CARVIN: Right. We were saying this regulation
2 is invalid under any rationale and in all circumstances. I
3 think the debates between Judge Randolph and Judge Silberman,
4 both fine judges, is that in the *McHenry* example where maybe
5 they used the wrong, they used the wrong reasoning, but the
6 result might not be wrong, then we'll let them fix it. But
7 here, this is a straight statute versus regulation. It has
8 nothing to do with the reasoning underlying the IRS rule.

9 THE COURT: All right.

10 MR. CARVIN: Thank you.

11 THE COURT: Okay.

12 MR. CARVIN: Did you have further questions?

13 THE COURT: Not at the moment.

14 MR. CARVIN: Thank you.

15 THE COURT: Mr. McElvain.

16 MR. McELVAIN: Good afternoon, Your Honor, and may
17 it please the Court.

18 When Congress enacted the Affordable Care Act, it
19 set out to create a system with nationwide application to
20 provide for affordable health coverage for all Americans.
21 The plaintiffs propose a reading of the Act that would
22 provide for that coverage in some states, but not others.
23 Their reading is directly contrary to the text of the Act,
24 Congress's obvious purpose in enacting the Act, and it defies
25 common sense as well.

1 Their reading of the Act should be rejected, and
2 Treasury's contrary reading should be adopted because it
3 comports with the language of the Act, and at the absolute
4 minimum is a reasonable reading of the Act under *Chevron*.

5 Now, beginning with the text of the statute, the
6 plaintiffs refer you to Section 36(b), which includes the
7 phrase in it an exchange established by the state under
8 Section 1311 of the Act, 42 USC 18431. And they ask you
9 essentially just to look at that phrase alone, but it's quite
10 clear under *Chevron* and every principle and statutory
11 interpretation that you cannot look at that phrase alone, you
12 need to look to the larger structure of the Act. The Supreme
13 Court has said that over and over and over again, most
14 recently in *National Association of Home Builders*, and in the
15 *Zuni* case, *FDA versus Brown and Williamson* gave us --

16 THE COURT: Slow down a little bit.

17 MR. McELVAIN: Oh, I apologize.

18 *FDA versus Brown and Williamson, Davis versus*
19 *Michigan Department of Treasury*, and many other cases. You
20 have to look to the overall structure of the Act to be sure
21 that you're adopting a reading that comports with Congress's
22 overall intent and in adopting the statute.

23 If there were any doubt in that score, the phrase
24 that plaintiffs rely on itself would resolve that because it
25 doesn't just say exchange established by the state, it says

1 exchange established by the state under 42 USC 18031. So
2 even by its own terms that phrase is telling you, you need to
3 go to other provisions of the Act to figure out what Congress
4 had in mind. And 1803(1) is quite instructive on this score
5 because it tells you in 1803(1) Sub B, each --

6 THE COURT: Sub E or B?

7 MR. McELVAIN: Sub B, B as in boy. Each state shall
8 establish an American health benefit exchange referred to in
9 this title as an exchange for the state. It repeats that
10 directive again in 1803(1)(d), "An exchange shall be a
11 governmental agency or a nonprofit entity that is established
12 by a state." So that is what Congress had in mind when it
13 was using the term "exchange."

14 Now, we're all agreed, both plaintiffs and defense
15 agree does not mean literally every state is going to set up
16 their mechanisms and operations of running the exchange. If
17 a state declines to do so or tries to do so, but fails to do
18 so adequately under federal standards, the Act directs the
19 Secretary to step in and to create the required exchange
20 which is to find as such exchange, that is, the same
21 exchange.

22 So, when you combine these provisions together, it's
23 quite clear that Congress intended both the state run
24 exchange and the federally run exchange to be equivalents,
25 not -- they're not two different classes of exchanges. The

1 federally run exchange steps in and performs all the same
2 functions as the state run exchange.

3 And again, if there are any doubt on this score,
4 there are further definitional provisions in the Act that
5 says an exchange is an exchange established by a state. Each
6 time the word "exchange" appears in the Act, that's what that
7 means. And so when you plug that into 42 USC 1804(a)(c),
8 which is the language referring to the Secretary running the
9 exchange, the Secretary is running the exchange that is
10 established under 1803(1). It is the same exchange. That is
11 the one type of exchange that Congress had in mind each time
12 it refers to that concept throughout the Act.

13 So, it's quite clear that Congress did not intend
14 there to be two types of exchanges, a greater kind of
15 exchange and a lesser kind of exchange that could perform
16 some functions, but not others.

17 This is further confirmed, as we've referenced
18 before and in our briefs, by Section 36(b) itself because as
19 we've discussed, 36(B)(f)(3) has the reporting provisions in
20 it which explicitly refer both to exchanges run by the state
21 and run by the Federal Government. And there's absolutely no
22 reason that Congress would have enacted this reporting
23 provision and specifically directed that it apply to the
24 federally run exchanges unless it understood as a background
25 that the federally run exchange would be -- that federally

1 offered premium tax credits would be available on the
2 federally run exchange.

3 There are six provisions, there are six items in
4 (f)(3) that are listed as required to be reported by the
5 Federal Exchange to the Department of the Treasury. There's
6 absolutely no reason at all that Congress would have thought
7 that the Treasury Department would have wanted to receive
8 this information other than to administer the premium tax
9 credits. I can go through each of them.

10 First, (f)(3) Sub A asks you to, for each plan
11 purchased on the federally run exchange, asks the federally
12 run exchange to report the level of coverage described.
13 There is no reason in the world that the Treasury Department
14 would care what level of coverage, bronze, silver or gold or
15 platinum, a particular person buys other than the fact that
16 it is only on silver plans that cost sharing subsidies are
17 available which are administered along with tax credits.

18 THE COURT: And just so we're clear, in this
19 provision, 36(b)(f)(3), Secretary means the Secretary of the
20 Treasury.

21 MR. McELVAIN: Absolutely, because it is a provision
22 of the Internal Revenue Code, and the Internal Revenue Code
23 defines "Secretary" as Secretary of the Treasury, yes, that's
24 correct.

25 B is the total premium for the coverage provided,

1 and that, of course, is needed by Treasury to calculate -- to
2 calculate the subsidies. C is the aggregate amount of any
3 advance payment. And that's obvious, you don't get the
4 advance payment of the credit unless you're eligible for the
5 credit, which, under our reading of the Act, of course, under
6 the federally run exchange, somebody is eligible, but under
7 the plaintiff's reading, nobody is.

8 D is the name, address and tax identification number
9 of the primary insured and the other individuals obtaining
10 coverage.

11 Now, the only reason that Treasury would care about
12 getting that information in the aggregate for everybody under
13 the policy is so that they can reconcile that with the tax
14 credit claimed, both by the person buying coverage and
15 anybody else in his family who he's claiming the tax credit
16 for.

17 And then the last two are self-evident. Any
18 information provided to the exchange to determine eligibility
19 for the credit, information necessary to determine whether
20 the taxpayer has received excess advance payments, those are
21 obviously linked to the tax credit.

22 So there's just absolutely no reason that Congress
23 would have gone to the effort of specifically instructing the
24 Federal Exchange to report this information to the Treasury
25 Department that would have been useless for the Treasury

1 Department apart from the fact that Treasury was
2 administering federal premium tax credits for participants on
3 the federally run exchange.

4 And if there's any doubt on that, the common sense
5 point is that this provision is in Section 36(b) itself.
6 What Congress obviously had in mind was that b's elements of
7 information were necessary for administering 36(b), not some
8 free-floating other issue that Treasury might deal with.

9 So, for three reasons, one is the structure of
10 1803(1) and 1804(1) combined with 36(b)'s reference to
11 1803(1).

12 Second, the definitional provisions of the Act.

13 Third, the reporting provisions of 36(b) itself,
14 it's quite clear what Congress had in mind, that federal
15 premium tax credits would be available on a nationwide basis
16 regardless of the identity of the operator of exchange.

17 This conclusion is further reinforced by the
18 presumption that has not been rebutted by the plaintiffs that
19 Congress, when it enacts federal legislation, it enacts
20 federal legislation on a nationwide basis. The Supreme Court
21 said that in *Mississippi Band of Choctaw Indians*, and this
22 presumption applies a special force in federal tax statutes
23 as the Supreme Court said in *United States versus Irvine*, you
24 would need the plain language, a plain indication of
25 Congress's intent that Congress meant the federal tax statute

1 to apply in some states, but not others. And there is no
2 such indication here. So, just from those provisions
3 themselves, I think it's clear what Congress had in mind.

4 But if you go to the larger structure of the Act, it
5 becomes even more clearer and what is -- what is -- what I
6 think is particularly telling is the language in 1803(2), the
7 language referring to qualified individuals, persons who are
8 eligible to buy insurance on the exchange. This is the very
9 next section in the Act after 1803(1), so it's clear that
10 Congress had the same concepts in mind in the first section
11 and then in the section immediately following.

12 Under 1803(2), it defines a qualified individual as
13 somebody who may enroll in a qualified health plan, and it
14 defines a qualified individual as an individual who resides
15 in the state that established the exchange.

16 Now, under the plaintiff's reading of the Act,
17 although it's the logic of plaintiff's reading leads to the
18 conclusion that there are no such individuals. Nobody could
19 buy in the federally run exchange, which means the exchange
20 would just collapse in on itself. That cannot be the law.
21 That cannot be what Congress had in mind.

22 So -- and even the plaintiffs acknowledge that that
23 would be an absurd result. Congress could not have meant to
24 have an exchange that would just be a shell entity. And
25 they've offered a few ways around the absurdity that their

1 reading leads to.

2 One says, well, you know, the language is slightly
3 different, so it's not necessarily the language we're
4 referring to that leads to this conclusion. So there's no
5 reason for you to get involved in whatever the language is in
6 1803(2).

7 But I'm not sure what distinction they're trying to
8 draw. Under 36(b), the reference is to an exchange
9 established by the state. 1803(2) refers to the state that
10 established the exchange. If there is some difference
11 between those two phrases, it's not one that is apparent to
12 me. And I've thought hard about it because I've read the
13 plaintiff's briefs, and I was trying to figure out what they
14 were referring to. And they have not explained what
15 distinction they think exists between those two phrases, and
16 there is none. So they have to come up with some other way
17 around the absurdity that their reading creates.

18 Then they say, well, it's not an issue because that
19 definitional provision only refers to with respect to an
20 exchange, and you can read with respect to an exchange to
21 mean only the state reference exchange, so there would be no
22 definitions at all that apply in the federally run exchange,
23 and we just don't need to worry about the problem.

24 But that's obviously not what Congress had in mind.
25 Congress obviously was intending to establish a definition of

1 who a qualified individual was that would apply on a
2 nationwide basis. And you couldn't just throw that out the
3 window and say it's free form, and anybody could apply for
4 coverage in a state without really running afoul of what
5 Congress had in mind when it set up the system of the
6 Affordable Care Act.

7 Moreover, the plaintiffs elsewhere in the argument
8 have fully conceded and fully agree with us that the term
9 "exchange" when it appears to the Act refers both to the
10 state run exchange and the federally run exchange for the
11 reasons we've already discussed. They're the definitional
12 provisions of exchange, 1804(1)(c) says the Federal
13 Government run such exchange so it gets plugged into that
14 definitional provision, and the term refers to both.

15 Other aspects of their argument, plaintiffs fully
16 agree with that reading of that term "exchange," they only
17 resisted right here in 1803(2). In fact, just earlier,
18 plaintiff's counsel, when referring to the abortion
19 provisions in the Act, said he doesn't -- he sees no problem
20 whatsoever with -- there's no inconsistency in whether or not
21 states could adopt their own abortion policies and states
22 with federally run exchanges because, and I think this is his
23 quote from just a few minutes ago, we don't disagree about
24 the meaning of the word "exchange." That's right, I don't
25 think we disagree except for right here where he's offering

1 you a brand-new and different definition of the term
2 "exchange" that would apply for 1803(2) and 1803(2) alone.
3 That violates fundamental principles of statutory
4 construction as the Supreme Court has said in *empower acts*
5 and other cases, when Congress uses one term, you presume it
6 means to use the same meaning for that term throughout the
7 Act. And they've offered no reason to think that there
8 should be some one-time departure from the meaning of that
9 word from 1803(2) alone.

10 So the plaintiff's next argument to get around the
11 absurdity that their theory creates is, well, maybe this
12 definition just doesn't apply at all because there are two
13 provisions, qualified individuals defined as one person
14 seeking to enroll in a plan, and B, resides in the state that
15 established the exchange. They said, well, maybe you can
16 just read and as or. And that one, too, would just be --
17 clause two would just be read out of the statute, and as long
18 as you satisfy clause one, you're seeking to enroll, you're a
19 qualified individual.

20 Well, that's obviously not right. Congress used
21 that clause for a reason. And it used the word "and" for a
22 reason. They were adopting a definition of qualified
23 individual that included that aspect of the definition. You
24 can't just read that out of the statute.

25 For that reason, by parenthetically I would note

1 because they're proposing to read that clause out of the
2 statute, and they're proposing to ignore 1803(1(d), which
3 again defines an exchange as an exchange established by the
4 state, because they're proposing to read those clauses out of
5 the statute.

6 Their reference to the canon against superfluidity,
7 which is a hard term to say, which is really is the only
8 thing they have going for them when they seek to interpret
9 36(b). Their reference to that canon has no force
10 whatsoever. The Supreme Court has said over and over that if
11 a party is relying on that canon, but their reading creates
12 other superfluidities, then the canon has no force
13 whatsoever. You have to provide a reading that makes sense
14 of every provision of the Act. Our reading does make sense
15 of the whole Act read together, their reading does not.

16 So I think that alone, the reference to the
17 qualified individuals provision, is a very strong textual
18 clue of what have Congress had in mind, that every exchange
19 would be treated as the same, that there were not two classes
20 of exchanges that the Affordable Care Act created.

21 But there are other absurdities as well, other
22 anomalies. There's the issue of the state innovation
23 waivers. And Mr. Carvin addressed those in his argument.

24 Under 42 USC 10852, there's a system set out
25 starting in 2017 where a state can --

1 THE COURT: Let me just ask you a question as you go
2 through this.

3 MR. McELVAIN: Yes, uh-huh.

4 THE COURT: Are we still in *Chevron* step one?

5 MR. McELVAIN: Both.

6 THE COURT: Well, that's what -- I mean, I think
7 both of you are pretty slippery on this question. I mean, my
8 question is, as I understand *Chevron*, if a statute is
9 unambiguous and is clear, that's the end of the matter.

10 Now, what am I allowed to look at to decide whether
11 a statute is unambiguous and clear? Your first argument is,
12 well, you have to look beyond the words of 36(b) because
13 36 -- the portion of 36(b) that's at issue itself references
14 1803(1) and through that 1804(1). And you say you have to
15 look at 18, you have to look at 26 USC 36(b) in all of its
16 parts to put it in context. And you're still in *Chevron* step
17 one.

18 And then you say, well, okay, let's also go to
19 1803(1) because it's the very next section. Well, now you're
20 many sections later. So, in deciding what a particular
21 phrase in a provision in 36(b) means, how much of the
22 Affordable Care Act do we have to look at on the question of
23 whether this portion of the statute is clear and unambiguous
24 and, therefore, that's the end of the analysis? Because
25 eventually the context and the statutory purpose, you can

1 expand those notions. I mean, if you want to look at the
2 statutory purpose and goal, which is to provide affordable
3 health care to all, you say, then we'll -- they'll never get
4 to *Chevron* step two in the statute. Or in the Clear Air Act
5 you can say the goal is to provide clean air, or in the
6 Endangered Species Act. So nothing can ever be ambiguous if
7 you take this too far beyond the text.

8 MR. McELVAIN: Well, and I'm not proposing that we
9 go far beyond the text. What I am proposing is that we take
10 a look at what Congress meant by the words that are used, and
11 it meant that the Federal Exchange is plugged into the
12 definition of the state exchange.

13 So on the question of what you can look at at
14 *Chevron* step one, again, the Supreme Court has said over and
15 over and over, the meaning or ambiguity of certain words or
16 phrases may only become evident when placed in context. So
17 you do need to look to the larger context. You do need to
18 look, not just to the reference sections, but to the larger
19 operation of the Act.

20 Now, I think when you put that all together, and
21 when you also look at the purpose of legislative history, as
22 the Supreme Court said in *Zuni*, you should do it, step one.

23 THE COURT: Do you look at legislative history in
24 step one?

25 MR. McELVAIN: Under *Zuni*, you do, yes. But in any

1 event, if you look at all these things together, I think, I
2 think we do --

3 THE COURT: I think Judge Scalia says you never look
4 at legislative history.

5 MR. McELVAIN: Well, it may be an eight to one vote
6 on this one. But there are holdings from the Supreme Court
7 that say you do look to the --

8 THE COURT: I do think I -- I think there are lots
9 of judges who don't think you should look at legislative
10 history that will concede that the Supreme Court says you
11 look at legislative history if you get to *Chevron* step two.
12 But do you look at it in *Chevron* step one?

13 MR. McELVAIN: Under *Zuni* and other cases, you do.
14 But the overall point I want to make is I think when you look
15 at all these things together, I think we do win under *Chevron*
16 step one. I think we're the only ones of the two parties
17 here who have offered a reading that reconciles the whole
18 Act, the text of the Act, reinforced by the purpose and
19 history of the Act. I think -- so I think we win under step
20 one.

21 But at minimum we win under step two, and I'm, you
22 know, I'm not going to stand on principle and insist on step
23 one, step one, step one. I'm perfectly happy to accept a
24 victory under step two.

25 THE COURT: Sometimes we can really hurt ourselves

1 by standing on principle.

2 MR. McELVAIN: You know, and I think at a minimum
3 we've offered a reasonable reading given, given what Congress
4 had in mind, given the text of the statute, given Congress's
5 purpose.

6 THE COURT: If you're going to get to -- are you
7 ready to talk about step two?

8 MR. McELVAIN: Sure.

9 THE COURT: What about Mr. Carvin's argument about
10 the fact that the IRS has issued a regulation. And it's that
11 regulation that's at issue. But he says that since it is
12 really an interpretation of 1803(1), I guess, they've
13 overstepped their bounds because it's not the Secretary of
14 the Treasury at all, it's the Secretary of HHS that has
15 authority under that statute.

16 MR. McELVAIN: Two points in response to that, and
17 there are really three points. The first point is they
18 waived it because they said over and over, and theirs are
19 fully briefed, and then up comes this new argument on the
20 reply filed about a week ago. But that aside, there are two
21 responses on the substance of the argument.

22 The first is, there is no conflict here between
23 Treasury and HHS. They've worked in close coordination as
24 they specifically recited in the "Federal Register" to enact
25 the -- I'm sorry, to promulgate the exchange related

1 regulations, and they've worked in lockstep. And their
2 interpretations are the same. Treasury in its interpretation
3 of 36(b) provides for federal tax cuts nationwide.

4 HHS for its part provides for advance payments of
5 the tax credits, provides for cost sharing subsidies which
6 are related to the tax credits. Again, on a nationwide basis
7 for every exchange. So, there's no conflict at all. The
8 agencies are fully in agreement. In fact, both agencies are
9 defendants here. I'm counsel for both agencies. And I'm
10 telling you both agencies share the same interpretation in
11 this courtroom today.

12 So, the occasion to apply this exception just simply
13 does not arise. There is no conflict, and the Supreme Court
14 and the D.C. Circuit and courts in the D.C. District Court
15 have said over and over where there is no conflict where the
16 agencies stand together to offer the same interpretation,
17 there is no issue. *National Association of Home Builders*,
18 the Supreme Court said it was deferring to, quote, the
19 agencies, in the plural, agencies charged with implementing
20 the Endangered Species Act.

21 *Coeur Alaska*, again the Supreme Court said it was
22 deferring to the agency's regulations again, in the plural,
23 where there were both statutes worked together to implement
24 the statute in that case, the Clean Water Act. So there's
25 just simply no occasion to apply the exception that

1 plaintiffs are referring to.

2 Second, moreover, this is not a case where we need
3 to hunt for what Congress implicitly intended as to whether
4 *Chevron* should apply or not. Congress specifically said in
5 36(b), I'm sorry, 36(b), Sub G, that the Treasury had
6 rule-making authority under that provision. And generally
7 under the Internal Revenue Code, as well, under 7805. And
8 that's exactly the language that Congress has -- I'm sorry
9 the Supreme Court has referred to, to say that *Chevron*
10 applies where there's been such an express grant of
11 rule-making authority.

12 In fact, the City of Arlington just this past June
13 from the Supreme Court, the majority chided the descent for
14 ignoring the fact that there was an express grant of
15 rule-making authority, and it said where there is such an
16 express grant --

17 THE COURT: He chided the Senate on lots of things.

18 MR. McELVAIN: Indeed. But as relevant here, the
19 point is there was an express grant, and so there was no need
20 to hunt provision by provision as to what was within the
21 express grant or not. So, *Chevron* clearly applies for both
22 of those two independent reasons.

23 They've also offered the argument that *Chevron*
24 wouldn't apply because there's a clear statement principle
25 for tax benefits. In fact, as we've already discussed, in

1 the realm of tax law the clear statement of principle runs in
2 the opposite direction that the presumption is that tax
3 statutes apply with nationwide effect. And that you need a
4 clear statement that Congress intended the tax provision to
5 apply in some states, but not others.

6 But in any event, whatever the principle is, it's
7 not -- is not a rule that trumps *Chevron* deference as the
8 Supreme Court just made clear in *Mayo Foundation* because *Mayo*
9 *Foundation* itself involved a tax exemption, an exemption from
10 calculations of income. And the Supreme Court recited the
11 fact that ordinarily you do construe tax benefits provisions
12 narrowly. But didn't say that to trump the question of
13 *Chevron* deference, it recited that principle as a reason that
14 Treasury had adopted a reasonable regulation applying *Chevron*
15 deference, applying *Chevron* step two.

16 So there's absolutely no reason at all to avoid
17 applying *Chevron* deference here. And when you do apply
18 *Chevron* deference, at the absolute minimum, we have provided
19 you with a reasonable interpretation of the statute that
20 should prevail.

21 Now, I'd be happy to address the purpose and history
22 arguments as well.

23 THE COURT: So my first question about purpose and
24 history is to what extent are they relevant at step one or
25 are they only relevant at step two or are they somewhat

1 relevant at step one and more relevant in step two? What's
2 the Government's real position on that?

3 MR. McELVAIN: They are relevant in both. I mean,
4 you referred to, I think the Clean Air Act earlier where if
5 all that was going on as it was referring to the principle
6 that Congress wanted there to be clean air, that that
7 wouldn't be enough. And I agree with that, that's not the
8 hypothetical we have here. We're not using the purpose that
9 Congress had in mind to trump the language, we're using it to
10 reinforce the statutory language as a principle, a background
11 principle that the Congress -- I'm sorry, that the Court
12 should look at the language that Congress used to figure out
13 what Congress had in mind.

14 And I actually think there's not that much dispute
15 at all as to what the purposes of Congress were, we're all
16 agreed that Congress wanted to provide for affordable health
17 care. We're all agreed that everybody understood at the time
18 that the tax credits were absolutely central, absolutely key
19 to this goal for providing for affordable health care because
20 the exchanges simply couldn't operate as Congress wished them
21 to work if you could not provide for the tax credits on that,
22 on a particular exchange.

23 So --

24 THE COURT: What about this argument that -- that
25 the Congressional Budget Office only calculated the amount

1 that would be necessary or something to that effect, then
2 it's the Holtz-Eakin affidavit and other places that -- that
3 there was no money appropriated for federal exchanges, only
4 for state exchanges?

5 MR. McELVAIN: Well, in fact, and sorry, let me
6 check my notes. 42 USC 18121 establishes a health insurance
7 reform implementation fund that HHS could use to implement
8 the Act. So Congress provided an appropriation to the states
9 because he needed something specific to justify money going
10 out the door to particular states. But also more generally
11 established a fund for HHS to use for various activities
12 including operating the exchange.

13 Now, as to the question of whether anybody
14 anticipated that there would be federally run exchanges or
15 not, I think the words of CBO Director Elmendorf themselves
16 answer the question as to whether this was relevant or not.
17 He said in his letter to Representative Issa as cited in our
18 brief, "The possibility that those subsidies would only be
19 available in states that created their own exchanges did not
20 arise during the discussion CBO staff had with a wide range
21 of Congressional staff when the legislation was being
22 considered."

23 Now, plaintiff's whole theory is that there was this
24 intended enormous incentive that Congress intended to convey
25 to the states, and that this was a central feature of the Act

1 that -- that Congress intended the fundamental operation
2 exchanges to be different whether state run or federally run
3 as an incentive to the states. That would have been quite a
4 central feature of Congress's deliberations at the time,
5 certainly somebody would have been discussed it and, in fact,
6 Director Elmendorf is telling you that the issue simply never
7 arose. Congress just did not have the purpose that the
8 plaintiffs are ascribing to it.

9 And the plaintiffs argue further, well, maybe the
10 issue didn't arise because everybody just assumed it was
11 absolutely impossible. It was unthinkable that even a single
12 state would decline to run a state run exchange. But it was
13 well known at the time that some states would decline to do
14 so. That not every state considered the Affordable Care Act
15 to be a particularly popular piece of legislation coming
16 their way.

17 They're saying about that -- that's in the "New York
18 Times" article that we cited to you where -- which quote
19 state senators as saying we would be essentially telegraphing
20 our intentions if there was an opt in, we're essentially
21 stating now we are not going to opt in.

22 So this is -- it was clear at time that this was
23 controversial, not everybody loved the Affordable Care Act at
24 the time, it broke down on fairly stark partisan divide. The
25 notion that it was just absolutely inconceivable that a

1 single state would decline to run the exchange is just not a
2 tenable -- tenable proposition given what we know about the
3 political climate in 2009, 2010.

4 So given the purpose I've discussed, given the utter
5 implausibility of what plaintiffs contend was the contrary
6 purpose that Congress had, given the relevant legislative
7 history and most importantly the text of the statute, which
8 makes clear that Congress intended to be -- there to be one
9 class of exchange, whether state or federally run, I think
10 it's quite clear that the federal premium tax credits are
11 available in every state even where the Federal Government is
12 running the exchange.

13 I would like to touch on the disability issues as
14 well. I know we discussed them in detail at the last
15 hearing. But most importantly, there are several threshold
16 barriers that still remain for the plaintiffs. But in
17 particular, there's the question of what form of proceeding
18 that Congress specified. And here all of the plaintiff's
19 claims are tax related claims. Congress specified that such
20 actions should be brought in a tax refund action. And when
21 you have this alternative remedy, alternative statute that
22 Congress has set up under 5 USC 703 and 5 USC 704, there's no
23 pre-enforcement APA action available unless that alternative
24 action is inadequate. It's quite clear that a tax refund
25 remedy would be adequate here.

1 Mr. Klemencic, based on his own allegations --

2 THE COURT: But why is it adequate when we know that
3 what's going to happen in the tax refund action, which will
4 take a very long time, so these individual plaintiffs say pay
5 the tax under protest. And -- or I mean take the insurance
6 under protest or pay the tax or penalty, and then they seek a
7 refund, and that takes a long time. And they finally get
8 through the administrative maze, and the Commissioner of IRS
9 or the Secretary of the Treasury says, well, haven't you read
10 this regulation? Under 36(b), you lose; right? And then
11 they come to court.

12 MR. McELVAIN: Right. And then they go to court.
13 And the same argument was raised by the plaintiff in *Bob*
14 *Jones University* under much more compelling facts of the
15 plaintiff there. There was a university who was threatened
16 with shutting down business if they couldn't get immediate
17 relief as opposed to waiting for a tax refund action.

18 Here, Mr. Klemencic would pay \$100 given the
19 allegations in his complaint if he's subject to the 5,000 day
20 tax penalty and then sued to recover that \$100. And even in
21 *Bob Jones University* the Court said, no, Congress set up this
22 remedy, the tax refund remedy is adequate, and we've always
23 held that a tax refund action is an adequate remedy at law.
24 And the same -- same principle holds here.

25 THE COURT: Well, what do you make of the D.C.

1 Circuit's en banc decision in *Cohen*?

2 MR. McELVAIN: *Cohen* supports us. Because *Cohen*, it
3 does. Because in *Cohen*, the issue there was a procedural
4 challenge to the refund procedures themselves. It was not a
5 challenge to the substantive liability for the tax. And the
6 D.C. Circuit took pains to note that they were not saying
7 everything is free form and any tax related challenge can be
8 brought in an APA action. It's specifically where the action
9 itself relates specifically to procedures and not the
10 substantive liability for the tax. And they distinguished
11 other circumstances where somebody is challenging the actual
12 tax liability. Then you still need to go through the tax
13 refund action.

14 THE COURT: Well, there seems to be a pretty sharp
15 conflict on this issue between Judge Brown and Judge
16 Kavanaugh.

17 MR. McELVAIN: I think on this principle, they were
18 united. I mean, Judge Kavanaugh thought that the -- even the
19 case that was before the Court should have gone away. But
20 even under the majority opinion, they took pains to
21 distinguish actual challenges to substantive tax liability,
22 which is what we have here.

23 THE COURT: Now, you mentioned *Bob Jones*, is that --
24 was that a tax refund case or was it an Anti-Injunction Act?

25 MR. McELVAIN: It was an Anti-Injunction Act case,

1 but the question was what remedy was adequate. And so the
2 same principle applies here for 5 USC 703 and 704, what
3 remedy is adequate. So the tax refund actions remedy --
4 excuse me, the tax refund remedy is an adequate remedy for
5 purposes of the Anti-Injunction Act, the same principle
6 applies here. Adequate is adequate.

7 THE COURT: So, I mean, you've said why you think
8 *Cohen* supports you. What about *Bowen verse Massachusetts*?

9 MR. McELVAIN: Again, the question comes down to
10 what is the adequate remedy. If Congress supports, if
11 Congress provides for the alternative remedy, the question is
12 what is adequate. And under case after case after case, and
13 the specific application of tax law, tax refund actions have
14 been held to be adequate.

15 Now, the plaintiff's argument is, well, it wouldn't
16 be adequate because we would have to comply with the
17 individual mandate, and we shouldn't be put to the Hobson's
18 choice of violating the law so we can bring our claim. But
19 that's simply not a plausible reading of Section 5,000(a)
20 anymore after what the Supreme Court said in *NFIB*. *NFIB* said
21 Section 5,000(a) is a tax penalty. There's no independent
22 legal requirement. You're not a law breaker if you go
23 without insurance, you're subject to a tax. And so under
24 that principle, you can challenge the tax that you may be
25 subject under the procedures that the Internal Revenue Code

1 provides.

2 One, if I may, one further note on the remedy,
3 which, of course, is an academic point because I believe we
4 are going to prevail here, but in the event, in the event
5 that we do not, any remedy should be limited to the
6 plaintiffs available here. And that is a principle of equity
7 that the Supreme Court has emphasized over and over that
8 equitable relief should be tailored to the individual
9 plaintiffs before the Court, and equitable relief should not
10 be crafted so as to harm innocent parties who are not before
11 the Court. And here there are millions of persons who have
12 an interest in receiving the tax credit.

13 THE COURT: The general principle, but, you know,
14 the only way I get to the question of remedy is if you lose
15 on the merits.

16 MR. McELVAIN: Right.

17 THE COURT: And the way you lose on the merits,
18 presumably, is by my saying they don't have to pursue a tax
19 refund remedy. This can be an APA action. And then I move
20 on to disagree with your reading of the statute. So, if it
21 hypothetically is an APA action, and I say that the rule is
22 contrary to law or arbitrary and capricious because it's
23 inconsistent with the statute, hypothetically, where in the
24 APA does it say that I do anything other than vacate the
25 rule?

1 MR. McELVAIN: What the APA says is you set aside
2 the agency action.

3 THE COURT: Right.

4 MR. McELVAIN: And here the agency action at issue,
5 to be completely technical, the agency action issue is not
6 the regulation because this is not a direct review of the
7 regulation type proceeding as Congress sometimes establishes
8 for some statutes.

9 The potential agency action at issue here is the
10 potential application of the tax penalty to the individual
11 through the application of the tax to the employers. So for
12 the purposes of considering the issue of the plaintiffs
13 before the Court, the Court sets aside the regulation to
14 consider their circumstances. But the Court does not purport
15 to adjudicate the claims -- the claims because there's a
16 conflict here with absent parties.

17 The Court does not purport to subject absent third
18 parties to a detriment, those third parties can bring their
19 own claims in various district courts around the --

20 THE COURT: We'd have a lot of litigation, then it's
21 not going to be in the tax court.

22 Anyway, go ahead.

23 MR. McELVAIN: I fully agree. There would be a lot
24 of litigation. That's a reason that the Fifth Circuit
25 identified in Apache Bend Apartments that courts should not

1 go about presuming to deprive tax benefits on a nationwide
2 basis because under prudential principles that would lead to
3 a flood of litigation in every other court.

4 But fundamentally the issue does not arise because,
5 as you said, the remedy issue only arises if you rule against
6 us. And for the reasons I've already defined, the text of
7 the statute, the larger structure of the statute, Congress's
8 obvious purpose in providing for affordable health care for
9 all Americans on a nationwide basis, the better reading of
10 the statute, and at a least a reasonable reading of the
11 statute, is that tax credits are available in every state.

12 Thank you.

13 THE COURT: Why don't we take a little break, maybe
14 about ten minutes, and then I'll hear from both of you in
15 rebuttal.

16 THE DEPUTY CLERK: All rise. This Honorable Court
17 stands in recess for a period of ten minutes.

18 (Brief recess at 3:33 p.m, resuming at
19 3:45 p.m.)

20 THE COURT: Mr. Carvin.

21 MR. CARVIN: Thank you, Your Honor.

22 I know we're getting pretty granular here, but I
23 think it might help that we're focusing on, I think two
24 provisions now in terms of the extraneous provisions that are
25 somehow supposedly affected by our subsidy provision.

1 Mr. McElvain started with the reporting provision
2 that he says clearly contemplates that there would be
3 subsidies everywhere. Two points on that. First of all,
4 that provision isn't 36(b). And at the top of that provision
5 it makes it clear that it's referring to exchanges under
6 Section 1311(F)(3) or 1321(c). So, it expressly contemplates
7 that it's complying with both.

8 As to Mr. McElvain's point that why would the
9 Treasury Secretary of the IRS care about who's bought
10 insurance on the exchanges. The only possible reason is for
11 subsidies. That's obviously untrue. Most obviously, they
12 enforce the individual mandate. As he points out, that's a
13 tax penalty. So, if you're going to find out who's complying
14 and who's not complying with the individual mandate, you need
15 a data source for people who have gotten insurance. So
16 that's the most obvious thing, reason the Secretary of
17 Treasury would want to know it. And indeed, that's why the
18 IRS was given the enforcement over the individual mandate in
19 the first place. It's the only agency around that gets all
20 this information about what people are buying and not buying.

21 More generally, of course, it's borderline absurd
22 for a representative of the Federal Government to say the
23 Federal Government doesn't care how many people, you know,
24 who's getting what kind of coverage, what sort of premiums
25 are they paying and who they are on that exchange.

1 Obviously, they want to know if these exchanges are, quote,
2 working, and if they're providing affordable care. The very
3 next provision of the ACA has a study on the affordability of
4 coverage. So you need all this data to figure out who's
5 showing up and whether or not it's working for a multitude of
6 reasons, including, presumably, convincing the states that
7 they should get on board.

8 So, it's just completely untrue that the Secretary
9 of the Treasury is somehow unconcerned about whether or not
10 people are buying insurance.

11 Again, on the qualified individual provision that I
12 know we've discussed at length, again, the Government claims
13 not to understand our point about how their provision doesn't
14 solve the problem. Their interpretation doesn't solve the
15 problem. The provision says you have to reside in the state
16 that established the exchange. Under their convoluted
17 reasoning, they're not saying West Virginia established the
18 exchange. They're saying West Virginia is deemed to have
19 established the exchange because the Secretary did it. So
20 you're going to have to confront this issue regardless of
21 which interpretation you undertake.

22 As to their only response again to our, with respect
23 to the exchange being exchange under 1381 is the claim that
24 we somehow agree with them that exchange means state and
25 federal exchange. We've never said that, I don't know what

1 they're talking about.

2 I thought what they thought the -- when they're
3 dealing with 1321, they say, see, the definitional section
4 says exchange under 1311, so it's a state. So I thought they
5 had locked themselves into the notion that exchange meant
6 exchange under 1311. Now they're saying no, they mean both.

7 At the end of the day, I don't care what they say.
8 But the point is that it's not our interpretation that's
9 creating these difficulties, it's theirs.

10 To eliminate any potential ambiguity, when I said I
11 don't disagree with their view of exchange, what I was trying
12 to convey, perhaps ineptly, was that's not the disagreement
13 that brought us here. We're not coming here and saying the
14 word "exchange" means this or the exchange means this. Where
15 the phrase is an exchange established by the state under
16 Section 1311.

17 So, again, they keep saying, interpreting that
18 phrase to mean what it says somehow creates problems
19 throughout the Act. When you get to these other provisions
20 in the Act, they don't focus on the words "exchange"
21 established by the state under Section 1311, they pull out
22 the word "exchange" and say it creates a problem, which I
23 reiterate again is a faux problem.

24 In terms of your *Chevron* questions, and again, well,
25 I don't want to use the word "ambiguity." I want to make my

1 answers as clear as possible.

2 If there is no ambiguity in the statute, you never
3 get to *Chevron* step two, that is black letter law. I was
4 trying to give you the caveat that if the first sentence said
5 west and the second sentence said east, you can look at that
6 provision. I don't want you to pull a sentence, they keep
7 accusing us of saying just look at this one sentence. You
8 can look at the context, the provision, and see if there's
9 something that says march north when the other one says march
10 south, but that's not where we are. We're into all this
11 purpose and underlying stuff.

12 I think the best way to think about it is the exact
13 formulation that Justice Stevens used in *Chevron*. He said
14 did Congress speak to the precise question at issue. And
15 here the precise question at issue is when subsidies were
16 available, if we're clear that they're only available on
17 exchanges, then the rest of this, all the legislation,
18 everything else that they have looked at is irrelevant. You
19 have to find ambiguity there.

20 My second point is, again, even if you get to step
21 two in normal circumstances, you don't get to it here,
22 because of the IRS, the point I was making before about the
23 two agencies being involved.

24 The Government had three responses. They said we
25 waived this argument because we waived it in reply. We put

1 in a opposition to their summary judgment. It wasn't a
2 reply, it was an opposition to their summary judgment. We
3 get to make our arguments in response to theirs.

4 Second, he says there's no conflict because the HHS
5 agrees with the IRS. Well, again, what difference does it
6 make if the HHS agrees with the IRS about the tax code. The
7 HHS's views about the tax code are irrelevant. I don't care
8 if they can bring the Labor Department of the Defense
9 Department to agree as well. Congress has not delegated to
10 HHS or the Labor Department the ability to interpret the
11 statute, the tax code. So that's why this agreement issue is
12 irrelevant.

13 But as I also pointed out, and it --

14 THE COURT: I think you made a mistake. You said
15 Congress is not delegating to HHS. Did you mean HHS or IRS?

16 MR. CARVIN: Okay. Let's be precise. He says HHS
17 agrees with IRS, so everything's hunky-dory.

18 THE COURT: Right.

19 MR. CARVIN: I am saying I think he's
20 misunderstanding. I think he's arguing that if they agree on
21 a jointly administered statute, that somehow leads to *Chevron*
22 deference. My point is it's not a jointly administered
23 statute. HHS doesn't administer 36(b), just the IRS does.
24 So, who cares what HHS says about 36(b) or the Labor
25 Department?

1 THE COURT: Right.

2 MR. CARVIN: Congress has not delegated to the HHS
3 the ability to interpret 36(b). They have certainly
4 delegated to HHS 1321 and the abortion provisions, all of the
5 things that's begin with 42 USC, that's been delegated to
6 HHS. But just as we wouldn't care about what the IRS's
7 interpretation of the abortion provision is, we don't care
8 what the HHS's interpretation is of the provision within the
9 IRS's bailiwick.

10 But in all events, it doesn't --

11 THE COURT: Well, let me ask you this, and I'll ask
12 Mr. McElvain this, too. It seems like a straightforward
13 point. But unlike a lot of other situations where we either
14 have joint administration or not, this is one statute called
15 the Affordable Care Act and because, for a variety of
16 reasons, some portions of it wind up in Title 42 and some
17 portions of it wind up in Title 26.

18 So it would be very different, for example, if you
19 took Title 21, which governs controlled substances and said,
20 well, maybe it isn't so different because you've got Justice,
21 you've got DEA, which I guess is a part of Justice, you've
22 got certain things that were split off as part of Homeland
23 Security, and you've got HHS, and they're all involved in
24 some way in dealing with the drug enforcement in this
25 country, civil and criminal.

1 So, you know, if you have a statute that was passed
2 by Congress on a particular day, and then when it's codified,
3 some pieces of it go to Title 26 and some pieces of it go to
4 Title 42, is that different from the normal principle that
5 you just articulated so clearly?

6 MR. CARVIN: No, for two reasons, Your Honor. One
7 is there are a number of statutes. This is a very long
8 statute. But there's a number of statutes, I think some of
9 these examples you gave are good examples, where the same
10 crime bill is going to solve this problem and HHS would do
11 midnight basketball and Justice will do drug rehab. So it's
12 not at all unusual to have separate delegations into separate
13 agencies' areas of expertise combined in the same thing. I'm
14 sure the Immigration Bill that's pending has all kinds of
15 directions to all kinds of agencies.

16 But I don't think you can make *Chevron* deference
17 turn on whether these bills were passed individually or
18 separately or in combination because the relevant question is
19 did Congress make a judgment that if there's ambiguities in
20 here, we're going to defer to the people with the relevant
21 expertise. The relevant expertise in this case is over the
22 tax code. They have not deferred to HHS's interpretation of
23 the tax code anymore than they interpreted IRS's
24 interpretation of the Medicaid statute.

25 But even if all of that is wrong, what are you left

1 with? You are left with a conscious decision by Congress to
2 say, look, we're going to have a number of agencies in your
3 example and in the cases where the relevant banking agencies
4 are all administering the same statute. And there, D.C.
5 Circuit again couldn't have been clearer in *DeNaples*.

6 They say look, we don't defer there because Congress
7 has not told us that agency X is the one that we're supposed
8 to defer to. It's given us this smorgasbord. And it's not
9 just if they disagree, the test articulated in *DeNaples* and
10 *Rapaport* is we don't defer for two reasons:

11 A, they may think about it differently, which is the
12 Government's argument. Or, one of them may come into court
13 beforehand and they'll be the ones that do it. In other
14 words, we don't want to have *Chevron* deference turn on events
15 outside of Congress's control, i.e., when the relevant
16 regulation winds up in court. So that was the separate
17 rationale, which again, the Government can argue all it wants
18 about *National Home Builders* and *Coeur Alaska* and all that.
19 Those were decided 2007, 2009. We have a 2013 decision by
20 the D.C. Circuit that says we don't care that OCC and the Fed
21 agree because they have delegated it to separate statutes.

22 I will briefly comment on *National Home Builders*.
23 They never even discussed the issue of whether *Chevron*
24 deference was appropriate because it was delegated to two
25 agencies. So it's a driveby at most. But there, they're

1 just mischaracterizing the thing. EPA was the one who was
2 given the authority to transfer these responsibilities to the
3 state.

4 One of the criteria on whether EPA made that
5 decision was this issue involving the Endangered Species Act.
6 And in that part of the opinion, the Court said, look,
7 there's other agencies that interpret the Endangered Species
8 Act, but there was only one agency involved, *Coeur Alaska*, if
9 you just read the opinion, the first thing they decide is
10 that it's the Corps of Engineers, not the EPA that has
11 responsibility for landfill permits. So no, these were not
12 shared responsibility cases.

13 And in any event, drive-by decisions by the Supreme
14 Court don't trump subsequent explicit decisions by the D.C.
15 Circuit.

16 The other point that I guess we're getting to is the
17 plain statement rule, or the fact that was clearly a
18 presumption against interpreting the tax code provisions to
19 give the taxpayer money unless Congress has, as I said,
20 unambiguously conveyed that message to the IRS.

21 The Government comes up and says, well, look at
22 *Mayo*. Well, *Mayo* is my case. *Mayo* says you narrowly
23 construe tax exemptions. That reinforces the presumption.
24 Government says, well, they agreed with the Government in
25 that case. Well, that's because the Government was seeking

1 to narrowly construe. So, of course, they -- if you have the
2 presumption and the agency, they'll say, you know, this is
3 yet another reason.

4 The question here is whether the agency can overcome
5 the presumption. This is admittedly unusual. The Government
6 wants to give money out of the Treasury that the plaintiffs
7 are saying don't give. So therefore, the question is which
8 wins? The presumption against letting the money go absent
9 plain or ambiguous language or *Chevron*? And we know the
10 presumptions trust *Chevron* under *St. Cyr* and all the other
11 cases we cited in our brief.

12 I'm terms of this psychoanalyzing Congress, I'll
13 just make one last point about how the Government argues,
14 CBO, you know, they had these meetings with these guys, and
15 somebody said nobody even brought this up, as if that's some
16 kind of legislative history anybody can defer to.

17 Well, the relevant point is that CBO didn't score
18 what the federal -- the money needed to do federal exchanges.
19 That was an official decision. They didn't think that they
20 would need the money. He says there's some fund out there
21 that HHS could dip into. Okay. Maybe they could dip into
22 it, but CBO, when they're calculating new legislation, say,
23 well, how much are they going to dip into it? Again, the
24 amount here was zero because nobody contemplated federal
25 exchanges.

1 Then they cite this "New York Times" article which
2 has nothing at all to do with states saying we're going to
3 turn down the deal offered to us in the ACA, it's about
4 proposals in Congress. And yes, some states were saying,
5 we're going to resist any proposals, including opt out or opt
6 in provision.

7 There's a debate, of course, the states were
8 debating. It's hardly any secret that a lot of people didn't
9 like the Affordable Care Act during its passing. But think
10 about it, if that's true, that gave Congress all the more
11 reason to give the states an incentive.

12 Mr. McElvain comes up here and says, look, everybody
13 knew a lot of these red states were going to resist, hammer
14 and tongs, doing anything to make the Affordable Care Act
15 work. Well, if I was somebody who supported the Affordable
16 Care Act, I said, well, I'd better make him an offer they
17 can't refuse. I'm not going to trust on their good will like
18 the IRS rule does. So to the extent he's making that
19 argument again, it supports us.

20 Finally, just -- I think finally. In terms of
21 the -- this notion of the agency action we're complaining
22 about has something to do with Mr. Klemencic being subject to
23 the individual mandate and the employer sanctions. No, no.
24 The agency action we're complaining about as the face of our
25 complaint makes clear is the IRS rule. We say enter a

1 declaratory judgment, the IRS rule violates the APA.

2 Preliminary and permanent injunction -- I apologize.

3 Enter a preliminary and permanent prohibiting the
4 application or enforcement of the IRS rule.

5 He's confusing why we're affected, our Article 3
6 injury with what our cause of action is. And as to your
7 point about a flood of litigation resulting from not
8 enjoining it, that's exactly the point the *National Mining*
9 *Association* used when it said that it's necessary to enter
10 injunctions that apply to litigants that are not before the
11 Court.

12 Unless there are further questions, thank you.

13 THE COURT: Thank you.

14 Mr. McElvain.

15 MR. McELVAIN: Just a few points on reply, Your
16 Honor. First on the question of what the Court can look to
17 at *Chevron* step one. I cited several cases in my initial
18 argument. One additional case that was cited in our briefs,
19 I do want to call to your attention as well, is *Household*
20 *Credit Services versus Pfennig*, P-F-E-N-N-I-G, it's a 2004
21 Supreme Court case. It said, "In ascertaining the plain
22 meaning of the statute, the Court must look to the particular
23 statutory language at issue as well as the language and
24 design of the statute as a whole."

25 And what's interesting about that case was the Court

1 of Appeals actually struck down a regulation under *Chevron*
2 step one looking only to particular provision, and the
3 Supreme Court very carefully recited that's not a proper
4 application of step one, you need to look more broadly to the
5 statute as a whole and the design of the statute.

6 So, all of the arguments we presented before, not
7 just the interplay of 36(b) and 1803(1), but the other
8 provisions of the Act, specifically the very next section,
9 1803(2), the qualified individual's absurdity that
10 plaintiff's argument creates. These are all proper subjects
11 for the Court to take into account at step one.

12 And certainly they're proper again at step two to
13 reach the result that Treasury has provided at minimum a
14 reasonable reading of the statute, which again is all we need
15 to show you.

16 On Mr. Carvin's points regarding 36(b)(f)(3), the
17 reporting provisions relating to premium tax credits. Now,
18 the first thing he said is while Treasury would care because
19 it also administers the minimum coverage provision Section
20 5,000(a). But Treasury already gets reporting for that from
21 insurers relevant to Section 5,000(a) under 26 USC 6055.

22 What Section 36(b) directs is more information
23 beyond what Treasury is already getting for the minimum
24 coverage provision relating to the specific, for example, the
25 specific metal level of the plan that somebody is buying on

1 the exchange, bronze, silver, gold or platinum. There is no
2 reason at all that Treasury would need to know what
3 particular kind of coverage somebody is buying on the
4 exchange, they just need to know somebody has bought a plan
5 on the exchange to establish that they've complied with the
6 minimum coverage provision.

7 It's a particular metal level that Treasury would
8 need to know to know whether or not the cost sharing
9 subsidies are available because those are only available for
10 silver plans for people below a certain income level.

11 And again, those are only available if you are
12 initially eligible for a 36(b) tax credit. So it would make
13 no sense at all for the Federal Exchange to report that
14 information unless Congress was working from the initial
15 presumption that tax credits are, in fact, available on the
16 Federal Exchange, as I think it's clear from the face of
17 36(b)(f) that Congress had in mind.

18 And in particular, again, this is a provision within
19 36(b) itself. So Congress was not contemplating just
20 reporting to the Federal Government for some free floating
21 purpose to see if the Affordable Care Act was working well or
22 not. It was specifically -- they specifically directed
23 reporting to Treasury for the purpose of administering 36(b).
24 So I think the intent of Congress is plain right there.

25 Now, as to the qualified individual provision.

1 Mr. Carvin said, well, yeah, we have the -- I don't mean to
2 put words in his mouth, but I think what he said was, yeah,
3 there's this issue that we need to get around under our
4 reading of the statute, but the same issue arises under the
5 Government's reading.

6 But that's not the case at all. If you follow our
7 reading, Treasury's reasonable construction of the statute,
8 the Federal Government stands in the shoes of the state,
9 that's what Congress had in mind when it used the phrase
10 "state exchange established by the state, or state that
11 established the exchange." Then there's no interpretative
12 problem in 1803(2) at all. If you live in a state with a
13 federally established exchange, you live in the state that
14 established the exchange because the background presumption
15 that Congress was working off of was the Federal Government
16 stands in the shoes of the state to perform that particular
17 function.

18 So for the same reasons that we've reconciled 36(b)
19 and 1803(1), and the issues with 1832 simply go away. The
20 absurdity does not arise in the first place. But under
21 plaintiff's reading it does, and they have to scramble around
22 to find some argument to get out of the absurdity, including
23 the argument that you should just read the qualified
24 individual provision out of the statute altogether, which is
25 not a proper mode of statutory construction.

1 So that is a very powerful textual clue as to what
2 Congress had in mind when it was -- when it was establishing
3 the premium tax credits and defining the state exchange and
4 the Federal Exchange to be equivalent in their functions.

5 On the *Chevron* issue, the question, as I think you
6 put it, is, is there a textual clue that Congress made a
7 judgment that some particular agency was to have interpretive
8 authority. There's no question here. There's no -- there's
9 no need to guess as to what Congress's intent was. Congress
10 specifically said in 36(b) Sub G that the Secretary of the
11 Treasury shall have rule-making authority. That is *Chevron*
12 authority, that's the language that Congress used to confer
13 *Chevron* authority as the Supreme Court has said over and
14 over.

15 So the issue simply doesn't arise because we know
16 what Congress's intent was. Treasury shall have rule-making
17 authority for the statute the same way it does for the
18 Internal Revenue Code generally.

19 Mr. Carvin raised the question of, well, what if
20 there were a conflict between -- between Treasury's reading
21 and HHS's reading, which, in fact, there is not for the
22 reasons we already discussed. But what if there were that
23 conflict, and then there would be some issue as to the
24 meaning of the statute being established for all time simply
25 by which agency got to the Court first. That is no longer

1 good law under the Supreme Court case of *Brand X*, which said
2 that when you defer to an agency's interpretation under
3 *Chevron* step two, you're not setting the meaning of the
4 statute for all time. You're simply deferring to a
5 reasonable construction. And other reasonable constructions
6 could be adopted by the agency at a later point.

7 But this is a largely academic dispute because again
8 there is simply no conflict. Treasury and HHS stand in
9 lockstep, they worked in close coordination, Treasury and its
10 regulations, HHS and its regulations. And they are fully in
11 agreement that tax credits, cost-sharing subsidies, advance
12 payments for the tax credits, all of those things are
13 available, both on the state exchange and federal exchanges.
14 There's simply no conflict at all between the two agencies.

15 Under the DeNaples case, if I'm saying it correctly,
16 the recent D.C. Circuit case, what was noteworthy of that
17 case was that FDIC also had regulatory authority under the
18 relevant statute, and the FDIC was absent, so there was a
19 possibility, at least it was not certain as of the time of
20 the Court's consideration of the case, if FDIC could come
21 forward with an alternative interpretation.

22 Here, the only two relevant agencies are Treasury
23 and HHS, they both stand here together. And as I've said,
24 there's no conflict, both agencies stand together to advance
25 the same interpretation to the Court. So there is no *Chevron*

1 issue.

2 And with that, I think I've addressed the points I
3 wanted to touch on in reply, but I'd be happy to answer any
4 questions.

5 THE COURT: No.

6 MR. McELVAIN: That's an acceptable answer for me,
7 Your Honor. Thank you.

8 THE COURT: I'm not going to raise the
9 Anti-Injunction Act at this late hour. I know your positions
10 from your briefs.

11 Okay. Well, I've got all your arguments. I've got
12 all your briefs. And I will give you a decision as soon as I
13 can.

14 THE DEPUTY CLERK: All rise. This Honorable Court
15 adjourns.

16 (Whereupon, Court adjourned at 4:20 p.m.)

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CERTIFICATE OF REPORTER

I, Lisa Walker Griffith, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Lisa Walker Griffith

Date