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REWRITING THE LAW: EXAMINING THE PROCESS THAT LED TO
THE OBAMACARE SUBSIDY RULE

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THURSDAY, JUNE 4, 2015

United States Senate,
Committee on the Judiciary,
Subcommittee on Oversight, Agency Action,
Federal Rights and Federal Courts,
Washington, DC

The Committee met, pursuant to notice, at 2:37 p.m.,
Room 226, Dirksen Senate Office Building, Hon. Ted Cruz,
Chairman of the Subcommittee, presiding.

Present: Senators Hatch, Sessions, Whitehouse,
Klobuchar, Coons, and Blumenthal.

1 OPENING STATEMENT OF HON. TED CRUZ, A U.S. SENATOR FROM
2 TEXAS, CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT, AGENCY
3 ACTION, FEDERAL RIGHTS AND FEDERAL COURTS, COMMITTEE ON
4 THE JUDICIARY

5

6 Chairman Cruz. Welcome, everybody. Welcome, to the
7 members of this committee.

8 Before we get to the substance of the hearing, I want
9 to take just a few minutes to discuss the empty table
10 before us. It is a symbol for how little regard the
11 Obama Administration seems to have for the American
12 people.

13 Two weeks ago, this committee sent a letter to three
14 current employees of the U.S. Treasury Department
15 requesting their attendance here at this hearing to talk
16 about Treasury's role in developing the ObamaCare
17 exchanges subsidy rule, which is hurting millions of
18 people across this country and which is directly contrary
19 to the statutory text of the underlying bill.

20 Specifically, this committee sent letters to Mark
21 Mazur, who is Assistant Secretary for Tax Policy at
22 Treasury; to Emily McMahon, who is the Deputy Assistant
23 Secretary for Tax Policy at Treasury and who was serving
24 as the acting Assistant Secretary Policy when the rule
25 was written and finalized; and, to Cameron Arterton, who

1 is the Deputy Tax Legislative Counsel for Tax Policy at
2 Treasury.

3 Shortly after these invitation letters were sent, the
4 Treasury Department reached out to my staff and brazenly
5 indicated they did not intend to send any witnesses.

6 I would note our former Attorney General, Eric
7 Holder, the first Attorney General in the history of this
8 country to be held in contempt of Congress, these three
9 empty seats demonstrate the ongoing contempt for Congress
10 and for the American people that is manifested by the
11 Obama Administration.

12 For the Treasury Department to tell the United States
13 Senate they have no time, they will not even answer
14 questions about how they promulgated rulemaking in direct
15 conflict with statutory text, is the height of arrogance.

16 The beginning of this hearing was to give them an
17 opportunity to come and answer questions, to recognize
18 the oversight responsibility given to the Senate, given
19 to Congress by the United States Constitution.

20 By their absence, I take it the Administration is
21 saying they are not subject to oversight. And yet, at
22 the end of the day, the American people provide the
23 ultimate oversight.

24 Given that the Administration refused to cooperate in
25 this hearing, it is my hope that the full Committee will

1 take it to the next level of invoking compulsory process
2 so that members of the Executive Branch will be made to
3 answer whether they tried to follow the law or whether
4 they were instructed by political operatives to disregard
5 the law in the interest of a political outcome.

6 That is a question the Executive needs to answer and
7 the purpose of this hearing is to begin getting to the
8 bottom of it. Now, I can understand why the
9 Administration is reluctant to engage in this discussion.
10 I can understand why, both in substance, after over 5
11 years of ObamaCare, we have seen that millions of people
12 are hurting under it.

13 The American people were promised by the President,
14 if you like your health insurance plan, you can keep your
15 health insurance plan. Well, millions of people
16 discovered that promise was false, that it was knowingly,
17 deliberately false, as millions of Americans had their
18 health insurance plans canceled.

19 The President promised the American people, if you
20 like your doctor, you can keep your doctor. That, too,
21 we now know was a statement that was knowingly,
22 deliberately false.

23 Today, as a consequence of ObamaCare, millions of
24 Americans have lost their jobs and been forced into part-
25 time work, have lost their health insurance, have lost

1 their doctors, and are facing skyrocketing insurance
2 premiums.

3 So I can understand why the Administration would be
4 reluctant to defend that record on the merits.

5 I can also understand why the Administration does not
6 want to answer questions about the underlying legal
7 question. The statutory text is straightforward and at
8 the end of the day, it is not a complicated question.
9 What the Administration did is took statutory language of
10 an exchange established by a State and, through trans-
11 mortification that would make Harry Houdini shake his
12 head in wonderment, defined the Federal Government's
13 exchange as an exchange established by a State.

14 The question this hearing and the next panel
15 hopefully will get to is: was that an attempt by an
16 executive agency to follow the law, to carry out the
17 President's constitutional obligation to take care that
18 the laws be faithfully executed, or was it instead a
19 deliberate effort to ignore the law driven by political
20 and partisan objectives from political appointees at the
21 Treasury Department and the White House?

22 This is a question of exceptional importance because
23 if the Executive refuses to implement the laws that are
24 passed by Congress, then the basic protections of our
25 Constitution become ephemeral.

1 That is the purpose of this hearing. I am
2 disappointed that the Administration has chosen not even
3 to engage in this conversation.

4 With that, I will recognize the Ranking Member,
5 Senator Coons.

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1 OPENING STATEMENT OF HON. CHRISTOPHER COONS, A U.S.
2 SENATOR FROM DELAWARE

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4 Senator Coons. Thank you, Senator Cruz.

5 I thought I would open by commenting that in this
6 very same room earlier today, we had a lengthy 3-hour
7 markup of the Senate Judiciary Committee on a distinct,
8 but important issue, patent litigation reform, and at the
9 conclusion of his remarks, I was compelled to whisper to
10 my staff counsel that I thought Senator Cruz, on that
11 topic, got it exactly right.

12 I will not be saying the same thing --

13 Chairman Cruz. I hope that comment is not used
14 against you in your next campaign.

15 Senator Coons. Hopefully, it will not.

16 [Laughter.]

17 Chairman Cruz. I hope it is not used against you in
18 your campaign.

19 [Laughter.]

20 Senator Coons. I just mention that at the outset by
21 way of saying that while we may have found agreement on
22 some important issues of the protection of a
23 constitutionally protected property right this morning,
24 we will approach, I think, today's discussion and this
25 hearing with a somewhat different perspective.

1 I find it unremarkable that the witnesses requested
2 for today did not appear. The Administration has ongoing
3 litigation, litigation before the Supreme Court, which is
4 expected to be resolved very soon and it is my
5 understanding that they were not comfortable sending a
6 witness to this hearing under those circumstances and I
7 find that unremarkable.

8 Congress has a way of compelling cooperation with
9 oversight, which it has not done. So the simple fact is
10 we are left with a so-called hearing today about the
11 rulemaking process in a Senate Judiciary Subcommittee
12 with witnesses who are not in any way involved in the
13 rulemaking process.

14 It is my hope that we will move past this political
15 theater and back to the substance of the Judiciary
16 Committee.

17 Thank you.

18 Chairman Cruz. We will go ahead and give each
19 Senator who is here a chance to make a brief opening
20 statement before we move on to the next panel.

21 The Senator on this side of the aisle who was here
22 next was Senator Sessions.

23 Senator Sessions. Thank you, Mr. Chairman.

24 As a long-time practitioner in Federal court, 15
25 years really practicing before Federal judges, I

1 developed such a great respect for those men and women
2 who lead those courts, the judicial process that we go
3 through, the legal process that we go through, and in
4 Alabama and in States all over the Nation, we presume
5 laws are passed, juries are told that the Executive
6 enforces the laws, and the people expect that.

7 That is the whole essence of the American legal
8 system. And the President of the United States is, in
9 fact, the chief law enforcement officer in America. He
10 has an absolute duty to see that laws are faithfully
11 executed. And I have seen in my time here Presidents of
12 both parties acquiescing in the policies they do not like
13 because the law was to the contrary.

14 I do not believe we have ever seen a President of the
15 United States who is so willing to just ignore plain law
16 to advance a political agenda. This threatens law in
17 America.

18 The American people acquiesce in court decisions
19 every day, many of which they strongly disagree with, but
20 they acquiesce because that is our system. But part of
21 their acquiescence is a grudging belief that somewhere
22 somebody is following through on legal procedures and
23 what has happened to them in the courtroom is a result of
24 some sort of fair and decent process.

25 I do believe, Senator Cruz, that we are not in a

1 healthy relationship right now and if we get to the point
2 where the American people believe that the Supreme Court,
3 5 members out of 9 of the Supreme Court are just
4 advocating and imposing their views instead of faithfully
5 following classical interpretative policies of law, then
6 I think we have threatened the foundation of this
7 republic.

8 My full and firm belief is that the strength of this
9 republic is founded on the Anglo-American rule which we
10 basically inherited. We just celebrated the 800th
11 anniversary of Magna Carta and that is different for a
12 lot of people.

13 So, Mr. Chairman, thank you for having this hearing
14 and I do not believe the President is entitled to do what
15 he wants to no matter what the law says.

16 Chairman Cruz. Thank you, Senator Sessions.

17 Senator Blumenthal?

18 Senator Blumenthal. Thank you, Mr. Chairman. I
19 want to join with my colleague, Senator Coons, in
20 expressing my appreciation for your very eloquent remarks
21 this morning, even though we voted on opposite sides of
22 the issue, and for your having this hearing, because I
23 think it is a topic that well merits attention and
24 scrutiny.

25 If I had been asked for my advice by these witnesses,

1 and I was not, I would have probably given them counsel
2 that appearing here to talk about these issues literally
3 on the eve or perhaps a few days before the United States
4 Supreme Court rules on almost directly related questions
5 of law and possibly fact would have been imprudent and
6 even foolhardy and might have been perceived as improper.

7 The timing of this hearing in relation to the United
8 States Supreme Court decision predetermined the outcome
9 of their appearing here and I would respectfully suggest,
10 Mr. Chairman, that these same witnesses be invited at
11 some later point.

12 Certainly, consideration by the full Judiciary
13 Committee of any compulsory process should await another
14 invitation at a different time. And I do not mean to
15 suggest that the empty table was used as a prop or an
16 argument that may be misperceived, but I would strongly
17 urge that this committee revisit the potential testimony
18 from these witnesses on another occasion.

19 On the issue at hand, contrary to the arguments of
20 many partisan opponents, I firmly believe that the right
21 decision will be to uphold this law, both the act itself
22 and plainly overwhelming evidence from its consideration
23 and passage demonstrate its nationwide scope. Everybody
24 involved understood when it was being debated and when it
25 was being passed that tax credit would be available

1 regardless of which government entity set up an exchange.

2 The act simply would not have worked any other way.

3 The financial support for universal coverage would not
4 have been there without this understanding.

5 So I welcome the scrutiny and oversight and hope that
6 we will find a path where we can really, on a very
7 bipartisan basis, work together.

8 Thank you, Mr. Chairman.

9 Chairman Cruz. Thank you, Senator Blumenthal.

10 Senator Hatch?

11 Senator Hatch. Thank you, Mr. Chairman. Let me
12 begin by thanking the Chairman for convening what I
13 consider to be an important hearing.

14 I would also like to say I am very disappointed by
15 the first panel's decision not to appear here today and
16 testify. Here we are investigating a hugely important
17 issue, whether ObamaCare authorizes subsidies for health
18 care plans, purchaser of the Federal exchanges, and the
19 Administration's representatives will not even talk to
20 us.

21 You would think the Administration would jump at this
22 opportunity to tell the public how it determined that the
23 text of ObamaCare means the exact opposite of what it
24 says; how it determined that established by State means
25 established by the Federal Government.

1 I can only conclude that the Administration's refusal
2 to participate today means it has no really good
3 explanation. It decided early on that subsidies needed
4 to be available on Federal exchanges if the law was to
5 work the way the President envisioned and did not
6 particularly care what the statute actually said.

7 So many things about this whole process are
8 disturbing. You have the Congress that passes a hugely
9 consequential bill through a backwards legislative
10 process after the people of Massachusetts have linked a
11 Republican Senator to stop the bill from moving forward.
12 You have a President that then decides to rewrite the law
13 through administrative fiat so that it says what he
14 wishes it said rather than what Congress actually wrote.
15 And now you have senior Administration officials refusing
16 to even show up to explain how they arrived at their
17 anti-textual reading of the statute.

18 Now, these are not the actions of an Executive Branch
19 accountable to the rule of law. These are the actions of
20 an Executive Branch willing to bend the law to suit
21 political purposes.

22 I have spoken many times about President Obama's
23 disturbing disregard for the rule of law, of which the
24 ObamaCare subsidy rule is just one example. Last month I
25 published an article with the UCLA Law Review explaining

1 how the President's rewriting of ObamaCare contravenes
2 important constitutional checks on his authority. The
3 article is entitled *King v. Burwell and the Rule of Law*,
4 after the court case challenging the President's action.

5 I would like to just quote from that article. Quote,
6 "What is ultimately at stake here is the President's
7 obligation to follow the law. Faced with a statute that
8 doesn't operate quite the way he envisioned, President
9 Obama decided to disregard the parts of the law he
10 doesn't like and instead implement a different statute.
11 But the Constitution doesn't give the President leave to
12 unilaterally rewrite laws. The power to amend laws lies
13 with Congress and until Congress amends a statute, the
14 President is bound to the text Congress passed," unquote.

15 Now, I ask unanimous consent that the article be
16 entered into the record.

17 Chairman Cruz. Without objection.

18 [The article referred to follows:]

19 *****COMMITTEE INSERT*****

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1 Senator Hatch. I am glad we have a second panel
2 with us today who can talk about the Administration's
3 path to determining that subsidies can be offered on
4 Federally-established exchanges, even though ObamaCare
5 provides no such authority.

6 Now, I wish the Administration would take this as
7 seriously as we do. And let me just say that I lived
8 through that whole ObamaCare matter and heard all sides
9 and really got tremendously involved in it, naturally,
10 because I have done an awful lot of health care
11 legislation over my 39 years in the Congress, and I have
12 to say that one of the principal arguments was by some
13 that the exchanges would have to be set up by the State.

14 The argument behind it was that is the only way you
15 are going to get people to really sign up for it because
16 that is where the money goes, and that argument was used
17 on more than one occasion and all I can say is I am very
18 concerned about this whole issue.

19 The statute is unambiguous. It is amazing to me that
20 we have come this far without somebody admitting that,
21 hey, they made a mistake and that we would have to
22 rewrite the law so that you can do what they have just
23 unilaterally decided to do without any real legal
24 authority to do it.

25 Thank you, Mr. Chairman.

1 Chairman Cruz. Thank you, Senator Hatch.

2 Senator Whitehouse?

3 Senator Whitehouse. Thank you, Chairman. I want to
4 echo the comments of my colleagues about the empty chairs
5 here.

6 Senator Blumenthal and I have both been the attorneys
7 general of our States and we have had the obligation to
8 provide advice to government officials on how to respond
9 when their agency is the subject of ongoing litigation
10 and I concur fully with the remarks of Senator Blumenthal
11 and I concur fully with his recommendation that once that
12 impediment is lifted, the Chairman should consider having
13 the witnesses return. I think it could be a constructive
14 hearing if it were not for that impediment, which I think
15 is a real and genuine one.

16 In Rhode Island, we are not very affected by King v.
17 Burwell because we did set up a State exchange and our
18 State exchange has been quite a success. We have just
19 hit 500 businesses having achieved health care through
20 our exchange, which has a business plan, as well as the
21 individuals plan. Thousands of families have achieved
22 coverage.

23 Our major primary care practice groups are adapting
24 the way in which they practice to take advantage of some
25 of the innovation programs in the Affordable Care Act.

1 They are seeing better care for their patients. Their
2 patients are seeing longer hours, simpler processes, more
3 support for prevention and other types of less costly
4 ways of dealing with people's health.

5 So we are seeing really better delivered in a less
6 costly way that is simpler and clearer, less bedeviled by
7 the confusion and duplication that had been the hallmark
8 of our health care system. We are seeing that at the
9 national level through the savings.

10 The Pioneer ACOs have just been put through the
11 Innovation Center as an approved nationwide process
12 because they were able to demonstrate to the actuary
13 hundreds of millions of dollars in savings, all
14 accompanied by better, simpler care for the individuals
15 whom they serve.

16 So I think we have a continuing process that we are
17 obliged to pursue to make sure that the American health
18 care system, which remains, by 30 percent to 50 percent,
19 more expensive per capita than all of the countries that
20 we compete with, the other industrialized countries, and
21 I think that gives us an obligation to really try to keep
22 our eye on the ball and to make sure that we are reducing
23 the cost of care while maintaining or actually, likely,
24 even improving the quality of care that our people
25 receive.

1 There is absolutely no reason that we should continue
2 to be the country that has the higher per capita costs in
3 the developed world and yet has health care outcomes as
4 measured by things like length of life that equate to
5 countries like Greece and Croatia.

6 We can do a lot better. The Affordable Care Act is a
7 tool that has already been proven to do a lot better and,
8 in my view, the exchanges are a tool for continuing to
9 drive the health care system in that direction, away from
10 duplication, away from fee-for-service, away from
11 confusion.

12 Unfortunately, behind the political language and the
13 political fights that have accompanied the Affordable
14 Care Act, there are just an awful lot of Americans,
15 particularly those who have had a loved one or who
16 themselves had a very serious illness and who have had to
17 deal with the American health care system and they have
18 seen firsthand what a complex, burdensome, inefficient,
19 bedeviling system it was.

20 I think that particularly in this area of lowering
21 costs by improving the quality of care, the Affordable
22 Care Act has really made some important breakthroughs.
23 We want to encourage those breakthroughs to make us more
24 internationally competitive and to provide a better
25 humane result, frankly, for the people of the country.

1 At least in Rhode Island, I think the State exchange
2 is helping our State manage that problem and steer itself
3 in that direction.

4 So thank you very much for the time and with my time
5 expiring, I will yield back.

6 Chairman Cruz. Thank you, Senator Whitehouse.

7 I will make a couple of observations and then we will
8 welcome the second panel.

9 One, when it comes to discussions of costs and
10 limiting health care and health insurance costs, I think
11 on the merits, ObamaCare has been an abject failure.

12 President Obama promised the American people if this
13 law passed, that the average family would see a \$2,500
14 decrease in health insurance premiums. I think you will
15 be hard-pressed to find many families for whom that is
16 the case. Indeed, the average family in America under
17 ObamaCare has not seen any health insurance premium
18 decrease. Rather, the average health insurance premium
19 increase has been over \$3,000. That is \$5,500 difference
20 out of hardworking Americans who are struggling to pay
21 the bills and they are discovering that under ObamaCare
22 they are getting less coverage for that.

23 They have higher deductibles, they have higher
24 copays, they have less coverage, and they are paying
25 more.

1 I would also note that the Administration's
2 justification for not being here is the pendency of King
3 v. Burwell, and, yet, Ms. McMahon, one of the three
4 witnesses who was called here today, testified before the
5 House Oversight Committee on July 31, 2013, while the
6 Halbig case, with the same underlying issue was pending.
7 The record was open in that case and yet the
8 Administration sent a witness, and, yet, here they are
9 unwilling to answer those same questions about whether
10 the Administration is willing to comply with the law.

11 The letter this committee sent to Treasury Secretary
12 Jack Lew on May 22, without objection, I am going to
13 enter that letter into the record and I will hold the
14 record open for a week for any additional material
15 Senators would wish to enter.

16 [The letter referred to follows:]

17 *****COMMITTEE INSERT*****

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1 Chairman Cruz. With that, I would like to welcome
2 the second panel to the table and we will start
3 immediately as soon as you can be seated.

4 [Pause.]

5 Chairman Cruz. I would like to introduce briefly
6 the members of the panel. We have Mr. Michael Carvin.
7 He is a partner at Jones Day. He is the lead lawyer in
8 King v. Burwell and he has the ignominious distinction of
9 being my very first boss in private practice, which I am
10 sure many will hold him to account for all of the
11 mistakes I have made since then.

12 We have got Mr. Michael Cannon, who is the Director
13 of Health Policy Studies at the Cato Institute. He is a
14 learned and well respected scholar on questions of
15 economics and health care.

16 We have Professor Andy Grewal, who is an Associate
17 Professor of Law at the University of Iowa College of Law
18 in Iowa City.

19 We have Ms. Elizabeth B. Wydra, who is the Chief
20 Counsel of the Constitutional Accountability Center here
21 in Washington, DC.

22 And we have Mr. Robert Weiner, who is a partner at
23 Arnold & Porter.

24 I would like to ask each of the witnesses to stand
25 and be sworn in, please.

1 [Witnesses sworn.]

2 Chairman Cruz. Thank you very much. Mr. Carvin, we
3 will start with you. Please turn your microphone on.

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1 TESTIMONY OF MICHAEL A. CARVIN, PARTNER, JONES DAY,
2 WASHINGTON, DC

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4 Mr. Carvin. Is it on now? Thank you. I was just
5 talking about the importance of this hearing. As a
6 number of Senators have already indicated, while the
7 policy issues are obviously very important, I think the
8 real issue for this hearing is the rule of law.

9 Is this going to be a Nation governed by laws enacted
10 by this body pursuant to constitutional prerogatives or
11 is it going to be governed by the policy preferences of
12 unelected bureaucrats?

13 And I think that that is exactly what happened in
14 this case. I think this is an extraordinary simple case
15 and I think the IRS has not interpreted the law, but very
16 dramatically revised the law, and that is because the law
17 simply says that you receive subsidies on exchanges
18 established by the State under Section 1311 and the IRS
19 has transformed that into something that where you
20 receive subsidies on exchanges established by HHS under
21 1321. And anyone who speaks English knows that that is
22 not a reasonable interpretation of that language.

23 The proponents of the IRS rule have argued -- they
24 cannot dispute that the plain language commands the
25 opposite of what the rule says, so they try and change

1 the subject. They say, "Well, you have ripped that
2 language out of context and that language is contrary to
3 the underlying purpose of the statute." But in reality,
4 neither of those is true.

5 In fact, the context in which those words reside
6 confirms in every way that the plain language means
7 exactly what it says and following that plain language is
8 really the only way to implement the broader purposes of
9 the Affordable Care Act.

10 For example, in terms of context, it is argued that
11 this is an unusual place to put a restriction on
12 subsidies, but the reality is that Section 36(b) is the
13 only provision in the act that deals with the
14 availability of subsidies and the reality is that it is
15 the only restriction, for example, that make sit clear
16 that you need to make a purchase off an exchange in order
17 to receive the subsidies. So far from being an unusual
18 place to put the restriction in the statute, it is the
19 only logical place and the context makes that clear.

20 In terms of the statute's broader purposes, the plain
21 text of Section 1311 of the act makes it clear that a
22 principal purpose of the act is to ensure that States run
23 these exchanges and not the Federal Government. Indeed,
24 it is stated in the mandatory. The States shall
25 establish and operate these exchanges.

1 And one of the principal problems with the IRS rule
2 is it dramatically undermines that statutorily stated
3 purpose. Since the IRS rule makes the subsidies
4 available regardless of whether States have established
5 an exchange, it provides the States no incentives to
6 undertake this difficult and arduous task.

7 So the IRS rule dramatically undermines one of the
8 stated purposes of the ACA, which is to have States
9 establish the exchanges.

10 None of the proponents to the rule can explain why
11 any reasonable person or reasonable legislature would
12 have thought all the States or most of the States would
13 have done this if they were provided no incentive to do
14 so and they cannot explain any incentive other than
15 conditioning of the subsidies.

16 The notion that there is some purpose out there to
17 have subsidies in all States is simply a fiction invented
18 by the Obama Administration. There is no text, there is
19 no legislative history anywhere suggesting that Congress
20 intended to make subsidies available on exchanges that
21 are established by HHS.

22 Therefore, the purpose argument is not any effort to
23 discern congressional intent through any of the normal
24 means of expressing legislative intent. It is actually a
25 unilateral effort to impose the Executive Branch's own

1 purposes in contradistinction to those of the
2 legislature.

3 We have a specific statutory provision that tells you
4 what the limitation is in 36(b). We have a specific
5 statutory provision, Section 1311, that tells you why
6 they impose that limitation and there is no legislative
7 history which contradicts either of those statutorily
8 enacted texts.

9 So any legislative material that any Justice on the
10 Supreme Court has looked at, there is no purpose that
11 would justify the IRS' revision in the Code.

12 I think my final point I will make is that the
13 proponents of the act cannot even agree on the rationale
14 behind why the IRS' revision was okay. The Solicitor
15 General invented this term of art theory in the Supreme
16 Court. You will not see that term of art theory anywhere
17 in the IRS' discussion of the rule at the time they did
18 it. So this was a post hoc invention by the Solicitor
19 General that is not even consistent with what the IRS
20 came up with.

21 The media explanation for all of this was that it was
22 a giant mistake, that nobody really understood what was
23 going on, but neither the Solicitor General nor the IRS
24 has bought into this notion that this was simply a matter
25 of oversight.

1 So all of the various rationales that have been
2 offered up for this bureaucratic revision of the
3 statute's plain text are not only unpersuasive, they are
4 actually at odds with each other.

5 Thank you.

6 [The prepared testimony of Mr. Carvin appears in the
7 appendix.]

8 Chairman Cruz. Thank you, Mr. Carvin.

9 Mr. Cannon?

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1 TESTIMONY OF MICHAEL F. CANNON, DIRECTOR OF HEALTH POLICY
2 STUDIES, CATO INSTITUTE, WASHINGTON, DC

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4 Mr. Cannon. Thank you, Mr. Chairman, Ranking Member
5 Coons and members of the Committee, for the opportunity
6 to discuss what we do know about how the IRS developed
7 its health insurance premium tax credit rule of May 23,
8 2012. That is the rule that is being challenged in King
9 v. Burwell and it is the rule that implements the premium
10 assistance tax credit provisions of the Patient
11 Protection and Affordable Care Act of 2012.

12 Two Federal courts have found that that that rule
13 expanded the reach of the ACA's employer mandate beyond
14 the clear limits Congress imposed on the IRS' authority.
15 According to those courts, the IRS is unlawfully
16 subjecting more than 250,000 employers and 57 million
17 workers to that tax.

18 One of those workers is Kevin Pace, a jazz musician
19 who lives not far from here in Northern Virginia.
20 According to the *Washington Post*, Pace lost \$8,000 of
21 income in the first year the IRS unlawfully imposed that
22 mandate on his employer as a direct result of the
23 imposition of that mandate.

24 According to one estimate, this illegal tax reduces a
25 typical affected worker's income by nearly \$1,000 and has

1 eliminated nearly a quarter-million jobs.

2 Those Federal courts likewise found the IRS' tax
3 credit rule unlawfully expanded the reach of the ACA's
4 individual mandate. As a result, the IRS is currently
5 subjecting an estimated 11 million taxpayers to an
6 illegal tax averaging \$1,200 each.

7 Whatever good the IRS hopes to accomplish with the
8 funds raised by these taxes is irrelevant. The authority
9 to levy taxes and to spend Federal dollars rests with
10 Congress alone.

11 In King v. Burwell, four Virginia taxpayers alleged
12 that this tax credit rule is subjecting them, Kevin Pace,
13 and 57 million other Americans to illegal taxes. The
14 Supreme Court has heard oral arguments in March and will
15 likely rule later this month. A ruling for the
16 challengers would invalidate that rule. It would create
17 an estimated 237,000 new jobs, free more than 57 million
18 Americans from illegal taxes, and increase affected
19 workers' earnings by nearly \$1,000.

20 Now, my co-author, Jonathan Adler, and I have written
21 at length about how neither the ACA nor the legislative
22 history provide any support for the IRS' interpretation
23 of the statute. Indeed, both the legislative history and
24 the statute squarely foreclose the IRS' interpretation.

25 But today, for the remainder of my testimony, I would

1 like to discuss the troubling picture that emerges from
2 what little we know about how the IRS developed this rule
3 and why we know so little about how the IRS developed
4 this rule.

5 The available evidence suggests that IRS officials
6 recognized that the ACA did not give them the authority
7 to impose these taxes, yet they impose these taxes
8 anyway. Treasury and IRS officials performed little or
9 no analysis of the ACA and its legislative history. They
10 used legislation that was rejected by Congress in order
11 to support their theory of congressional intent and they
12 failed to consider important dimensions of this issue.

13 The IRS' proposal to implement these taxes and
14 subsidies in Federal exchange States met immediate and
15 sustained criticism, including from some members of this
16 committee as far back as 2011.

17 The administrative record offers no support or
18 substantive explanation, no statutory support or
19 substantive explanation of the IRS' decision to ignore
20 the plain meaning of the tax credit eligibility
21 requirement that recipients must enroll in health
22 insurance through an exchange established by the State.

23 The administrative record contradicts arguments the
24 government offered before the Supreme Court and reveals
25 those arguments to be post hoc rationalizations.

1 Mr. Carvin mentioned the term of art argument that
2 the Solicitor General made before the Supreme Court.
3 What little we know about the administrative record shows
4 dispositively that the IRS did not believe that this was
5 a term of art.

6 The IRS has attempted to hide its actions and its
7 reasoning from congressional scrutiny. According to an
8 article in the *Washington Post* which interviewed several
9 members -- several officials at the Treasury Department
10 and IRS who were involved in the development of this
11 rule, one formal official said, quote, "The overriding
12 concern was not generating negative news stories. The
13 overriding concern of the officials who wrote this rule
14 was not fealty to the law, but avoiding negative news
15 stories."

16 And the IRS continues to try to avoid scrutiny. In
17 December 2011, the then Ranking Member of the Senate
18 Finance Committee, a member of this committee who is here
19 today, Senator Hatch, sent a letter to the Department of
20 the Treasury after the promulgation of this proposed rule
21 and before it was finalized disputing the legality of the
22 rule and asking the Treasury Department to turn over all
23 documents related to the development of this rule and the
24 IRS' reasoning behind this rule.

25 The IRS and the Treasury Department have been

1 ignoring that request for 3-and-a-half years. The IRS is
2 taxing and spending the American people's money without
3 permission from or accountability to Congress. The
4 American people need to know how this happened and that
5 begins with transparency.

6 I thank you very much for your time and I look
7 forward to your questions.

8 [The prepared testimony of Mr. Cannon appears in the
9 appendix.]

10 Chairman Cruz. Thank you, Mr. Cannon.

11 Professor Grewal?

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1 TESTIMONY OF ANDY GREWAL, ASSOCIATE PROFESSOR OF LAW,
2 UNIVERSITY OF IOWA COLLEGE OF LAW, IOWA CITY, IOWA

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4 Mr. Grewal. Thank you very much, Mr. Chairman.

5 I suspect that if the IRS had shown up today, it
6 would tell you that it tried to carefully obey its
7 statutory authority when it issued regulations under
8 Section 36(b).

9 I want to explain why that is nearly impossible to
10 believe. At the outset, I will say I do not take any
11 particular position on the King v. Burwell issue and I do
12 not know whether ObamaCare is a good idea or a bad idea.
13 So that is why I am sitting here in the middle.

14 But I do want to discuss three circumstances where
15 other regulations under 36(b) clearly contradict the
16 legislative language. And if you think established by
17 the State is clear, you will think these ones are very
18 clear. I have even offered a case up here on Twitter to
19 anybody who could just come up with some colorful
20 counterargument.

21 In the first circumstance, a statute plainly grants
22 credits only to citizens when their income falls within a
23 particular range, 100 percent to 400 percent of the
24 relevant poverty line amount. The IRS does not like that
25 result and it has potentially expanded credits to several

1 million persons below the 100 percent amount. Again, if
2 you think established by the State is clear, a statute
3 that refers to 100 percent or 400 percent is far clearer.

4 In the second circumstances, the ACA has two related
5 provisions. One provision says that if you are a large
6 employer and you offer health insurance to your
7 employees, we want you to automatically enroll all those
8 employees in coverage, and the Department of Regulations
9 will issue regulations saying as much. If you are going
10 to have a plan, get everybody in there.

11 As a sweetener to this, the persons who are enrolled
12 will not get credits under 36(b) because they are going
13 to be getting coverage under the employer plan. With no
14 credits, that means there are no penalties on employers
15 when they automatically enroll employees in their
16 existing plan.

17 The IRS does not like that result and it has issued a
18 regulation saying that in some circumstances, you will
19 actually get a credit under Section 36(b) even though you
20 are getting coverage by your employer and the employer
21 will relatedly get hit with a penalty.

22 The third category I want to discuss relates to
23 unlawful aliens. Congress recognized that some very low
24 income persons who are here lawfully cannot get Medicaid.
25 Some States say, "Well, all right, you are not a citizen,

1 but we will help you, but please wait 5 years before you
2 apply for Medicaid."

3 The statute, Section 36(b), says that, "Okay. We
4 will help you out with credits on the Federal" -- or
5 sorry -- "on the State exchanges," and, arguably, the
6 Federal exchanges, "if you are here lawfully, you
7 yourself can get a credit for policies purchased on an
8 exchange."

9 The Treasury has issued a regulation saying that even
10 if you are here unlawfully and you meet the income
11 requirements, you are eligible for a credit. I think the
12 statute is very clear that says that you must be here
13 lawfully to get this benefit of this special rule.

14 All of these there provisions may be good ideas in
15 the abstract. I do not know. They seem reasonable on
16 one level. But they clearly violate the relevant
17 statutory language.

18 In closing, I just want to emphasize that as we talk
19 about the Treasury expanding Section 36(b), we do not
20 give enough attention to the fact that an expansion of
21 36(b) means more penalties from employers. Unlawful
22 credits lead to unlawful penalty collections.

23 The fact that the IRS, in expanding Section 36(b), is
24 illegally collecting penalties from private businesses
25 should receive more attention.

1 Thank you, Mr. Chairman.

2 [The prepared testimony of Mr. Grewal appears in the
3 appendix.]

4 Chairman Cruz. Thank you, Professor.

5 Ms. Wydra?

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1 TESTIMONY OF ELIZABETH B. WYDRA, CHIEF COUNSEL,
2 CONSTITUTIONAL ACCOUNTABILITY CENTER, WASHINGTON, DC

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4 Ms. Wydra. Thank you, Chairman Cruz, Ranking Member
5 Coons and the members of the Subcommittee, for inviting
6 me here to testify before you today.

7 I must take issue, I am afraid, however, with the
8 substantive premise of today's hearing, at least as
9 reflected in its title, which suggests that the Treasury
10 Department rewrote the Affordable Care Act when it
11 ensured that tax credits would be available nationwide to
12 all Americans who need them.

13 Far from rewriting the statute, I would assert that
14 the Treasury Department applied the ACA according to its
15 text, statute design and purpose when it interpreted the
16 act and made this rule.

17 Similarly, I must take issue, I am afraid, with my
18 esteemed colleague, Mr. Carvin. What you just heard him
19 describe a few moments ago is not how statutory
20 interpretation works. How you heard him describe the
21 Affordable Care Act is also not how anyone who was
22 involved with enacting the statute understood that law to
23 work.

24 Republican and Democratic members and staffers alike
25 involved in drafting the law have made clear that no one

1 understood the law to preclude tax credits for residents
2 of States that opted to use the Federal fallback provided
3 to them in the law instead of electing to set up an
4 exchange for themselves.

5 To the contrary, statements by members of Congress at
6 the time and reports drafted by committees and the CBO
7 all assumed that tax credits would be available in every
8 State on any exchange without making a distinction
9 between State-run and Federally-facilitated exchanges.

10 Did any members of Congress stand up at that time and
11 profess the vision of the tax credit provision that we
12 heard Mr. Carvin and other critics of the Treasury rule
13 put forth? As Mr. Carvin had to admit when the Supreme
14 Court asked him this very question, there were none.

15 But I would like to back up for a moment to talk
16 about the language of the statute itself because I think
17 it is important to correct what I see as some
18 mischaracterizations.

19 As Justice Scalia reiterated last year, it is a
20 fundamental canon of statutory construction that the
21 words of a statute must be read in their context and with
22 a view to their place in the overall statutory scheme; in
23 other words, not plucking a foreword phrase out of a
24 statute and using it to defeat the very fundamental
25 purpose of the entire act, which, in this case, was to

1 provide affordable health insurance for all Americans.

2 To help achieve this aim of broadening access to
3 health care and insurance, the statute provides for the
4 establishment of exchanges on which individuals can
5 purchase quality, affordable health insurance.

6 Section 1311 provides that, quote, "Each State shall,
7 not later than January 1, 2014, establish an American
8 health benefit exchange." The act clarifies, however,
9 that there is, quote, "State flexibility" in meeting this
10 requirement. A State may elect to set up the exchange
11 for itself or if a State chooses not to establish an
12 exchange or cannot establish an exchange that meets the
13 act's requirements, then HHS, according to the statute,
14 shall establish and operate such exchange within the
15 State.

16 When the statute uses the term "an exchange
17 established by the State" in the statute, it refers to
18 exchanges established at the State level by the State, as
19 well as exchanges established at the State level by HHS
20 standing in the shoes of the State.

21 Now, with respect to the eligibility for tax credits
22 allowing individuals to afford to purchase insurance on
23 these exchanges, the act expressly presents income level
24 as the method by which an individual is determined to be
25 eligible or not for these tax credits, not the

1 bureaucratic entity which runs the health insurance
2 exchange in that State.

3 But what about the phrase seized upon by critics of
4 the Treasury Department's rule found in the provision for
5 calculating the amount of the tax credit from -- who
6 purchased a policy at an exchange established by the
7 State? Well, you could pluck a foreword phrase out of
8 *Moby Dick* and say that it was a story about a Sunday
9 whale watching cruise, but that is not how you read a
10 book and that is not how the Supreme Court tells us you
11 read a statute either.

12 Reading the law to provide tax credits nationwide on
13 both State-run and Federally-facilitated exchanges allows
14 the provisions of the ACA to work harmoniously, which is
15 something the Supreme Court has told us clearly is
16 something that should be a guidepost when we are reading
17 statutes.

18 In contrast, the reading asserted by the King
19 challengers would deny effect to the regulatory scheme by
20 subverting the act's structure and design and basic
21 purpose and rendering important provisions absurd,
22 something the Supreme Court has told us we should avoid
23 when reading a statute.

24 I believe the interpretation of the law reflected in
25 the Treasury rule making tax credits available nationwide

1 to all Americans who need them regardless of the State in
2 which they live accords with the plain text of the law
3 and allows the law to work in the way that Congress
4 intended.

5 Interpreting Section 36(b) in this way allows the
6 fundamental market reforms at the heart of the law to
7 work in the way that they were intended and is the best
8 interpretation of the law when you read the law according
9 to the way that the Supreme Court tells us we should read
10 statutes.

11 I would be delighted to answer any questions the
12 court has -- I mean, the panel has. I am used to being
13 in front of judges. But thank you for your time and I
14 would be delighted to answer further questions.

15 [The prepared testimony of Ms. Wydra appears in the
16 appendix.]

17 Chairman Cruz. And I can promise you none of us
18 will be wearing robes.

19 [Laughter.]

20 Chairman Cruz. Mr. Weiner?

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

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

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

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

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

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

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

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

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

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

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

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

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

1 same way the IRS does. And to say that their
2 interpretation is impermissible is to question either
3 their literacy or their candor, and neither is really in
4 doubt.

5 Let me just say with regard to the IRS and their
6 process, truth is a defense and the IRS engaged in a
7 process that produced a reasonable result, one that did
8 not gut the statute as the interpretation offered by the
9 ACA opponents would do, one that was consistent with the
10 commonly -- with the commonly understood meaning of the
11 statute by those who enacted it at the time.

12 Thank you.

13 [The prepared testimony of Mr. Weiner appears in the
14 appendix.]

15 Chairman Cruz. Thank you very much. I would like
16 to thank each of the members of this learned panel. I
17 agree very much with the testimony of Mr. Carvin that
18 this is fundamentally about the rule of law. This is
19 fundamentally about the question of whether the Federal
20 Government can impose billions of dollars of taxes upon
21 millions of Americans directly contrary to the text of
22 Federal law. It is likewise about whether the Federal
23 Government can spend billions of dollars explicitly
24 prohibited by Federal law.

25 If the answer to both of those questions is yes, if

1 the Administration's interpretation is acceded to, it
2 makes the entire constitutional law-making function
3 superfluous.

4 If the Executive has the authority to tax and spend
5 directly contrary to statute, the limits on the
6 Executive's authority are all together abdicated.

7 Now, the legal question is not terribly complicated.
8 The statute provides that monthly premiums for qualified
9 health plans enrolled through an exchange established by
10 the State, the entire argument here is whether the
11 Federal exchange established by HHS is an exchange
12 established by the State.

13 Now, several witnesses have testified that no one
14 possibly envisioned that an exchange established by the
15 State meant an exchange established by the State. I
16 would note that at least one person understood that very
17 well, someone who has been described as one of the
18 leading architects of ObamaCare, Professor Jonathan
19 Gruber, who indeed achieved worldwide fame when he
20 candidly admitted that passage of ObamaCare depended
21 upon, as he put it, the stupidity of the American people.
22 And Professor Gruber quite candidly said what is
23 important to remember politically about this is if you
24 are a State and you do not set up an exchange, that means
25 your citizens do not get your tax credits.

1 Now, I would note we heard several times no one
2 understood this. Well, apparently Professor Gruber
3 understood it very well, but was relying upon a lack of
4 transparency and, as he put it, the stupidity of the
5 American people to keep it hidden.

6 I want to focus on the decision-making process that
7 occurred at Treasury and the IRS. Mr. Weiner mentioned
8 that no one is questioning the candor or erudition of
9 Treasury or the IRS.

10 Well, it is difficult to make an assessment of that
11 because they are unwilling to show up and defend their
12 decision-making. So what I can tell you is they are not
13 here. They are refusing to recognize the oversight
14 responsibility of the Senate.

15 So I would like to ask you, Mr. Cannon, you have
16 examined this question closely. What do we know about
17 the decision-making process at the IRS and Treasury in
18 establishing the rule here?

19 Mr. Cannon. Well, unfortunately, very little,
20 Senator, because as I mentioned before, a request by
21 Senator Hatch for all the documents related to the
22 development of this rule has been ignored by Treasury and
23 IRS for 3-and-a-half years.

24 In September of 2014, the Chairman of the House
25 Oversight Committee, after being frustrated by Treasury

1 and IRS' unwillingness to release those documents to his
2 committee, issued a subpoena for those documents.
3 Treasury and IRS have been ignoring that subpoena for --
4 how long ago was September of last year -- almost a year.

5 Chairman Cruz. Let me stop you on that point,
6 because it was said a moment ago that no one is doubting
7 the candor of Treasury or the IRS. You are telling me
8 that Treasury and the IRS are denying a congressional
9 subpoena, are refusing to show up to this hearing; is
10 that correct?

11 Mr. Cannon. That is -- well, the congressional
12 subpoena has to do with a subpoena from a House committee
13 for those documents, not a subpoena to show up at this
14 hearing. But, yes, they are ignoring a congressional
15 subpoena to provide those documents, which I think bears
16 on the suggestion made by the Ranking Member that if they
17 do not show up at this hearing, perhaps compulsory
18 process could be pursued.

19 Compulsory process has already been pursued against
20 Treasury and IRS and they are --

21 Chairman Cruz. And the Obama Administration is
22 defying that process. Well, that seems, at a minimum,
23 not an exercise in candor, living with the ordinary
24 bounds of the English language.

25 Mr. Cannon. It is not an idea transparency, no.

1 Chairman Cruz. Now, my understanding is that staff
2 was permitted to review some documents under highly
3 restrictive circumstances. Can you describe those
4 circumstances, as you understand them?

5 Mr. Cannon. Well, after much persistence by the
6 staff of the House Oversight and Government Reform
7 Committee, the Treasury and IRS did release some
8 documents, 386-87 pages, I believe, a fair amount of
9 which was the final rule itself, about half of it -- a
10 lot of it, maybe, I would, a fifth, 20 percent of it was
11 my work that they just released to the committee. Only
12 about 5 percent even commented on was there any
13 substantive discussion by Treasury and IRS officials, and
14 it was never here are the factors we are considering. It
15 was just mentioning these things tangentially.

16 As for -- but those are the documents that they have
17 released, which do not tell us a lot about the
18 deliberative process.

19 Chairman Cruz. The staff, as I understand, was also
20 allowed to review some documents, but not take notes, not
21 make copies of those documents.

22 Mr. Cannon. There are many documents that Treasury
23 and IRS have not released and on two or three occasions,
24 staff were allowed to review those documents. They were
25 allowed to go into a room, sometimes with pen and paper,

1 sometimes without pen and paper. They were not allowed
2 to take any of those documents out of the room. They
3 were not allowed to make copies of those documents. They
4 were allowed to look at them and make notes and on one
5 occasion, they were not even allowed to make notes. They
6 were only allowed to read --

7 Chairman Cruz. So no notes, no copies, no
8 transparency to Congress, no transparency to the American
9 people, defying subpoenas, refusing to show up at this
10 hearing.

11 Now, my understanding is those documents which they
12 are fighting tooth and nail to avoid sunshine coming up
13 on show that initially career staff at Treasury and the
14 IRS analyzed the phrase "an exchange established by the
15 State" and concluded that it means exactly what it says,
16 an exchange established by one of the 50 States; is that
17 correct?

18 Mr. Cannon. Well, I am not sure about that,
19 Senator. What we know is that -- and this was from the
20 in-camera review where they were allowed to go into the
21 room with the document, but could not even take pen and
22 paper with them. They had to scramble out of the room
23 and write down everything they remembered seeing.

24 From that in-camera review -- in that in-camera
25 review, staff were allowed to look at different drafts of

1 the proposed rule before the proposed rule was issued and
2 what we know from their review of those drafts is
3 initially, IRS officials had included that statutory
4 requirement that tax credit recipients be enrolled,
5 quote, "through an exchange established by the State."

6 Around the same time a Treasury official raised this
7 issue with the IRS, that requirement, that statutory
8 language was dropped from the proposed rule.

9 Chairman Cruz. So, Mr. Cannon, I want to make sure
10 this committee understands that. Our understanding,
11 although, to be clear, the Obama Administration is
12 blocking release of the documents, so it is all
13 deliberately hidden in the lack of transparency that
14 Professor Gruber bragged about, but our understanding is
15 the initial version of the rule drafted by career staff
16 at the IRS and Treasury attempting to follow the law
17 followed the plain text and concluded it had to be an
18 exchange established by a State.

19 But then subsequently it appears that political
20 appointees at the Department of Treasury overruled that
21 decision and substituted instead a political decision
22 contrary to the judgment of the career staff, but
23 consistent with the political outcome desired by
24 President Obama and the White House.

25 Mr. Cannon. What we know for a fact is that that

1 provision, that statutory provision was dropped from the
2 implementing regulations around the same time that this
3 political appointee at the Treasury Department
4 intervened. We do not know anything of the substance of
5 those discussions, what happened there, but we do know
6 that that was a statutory provision that was on its way
7 to being implemented as part of the proposed rule and
8 then it was dropped.

9 And that is significant because it tells us a couple
10 of things. One, it tells us that Treasury and IRS
11 officials never believed that the phrase -- the statutory
12 requirement "through an exchange established by the
13 State" was a term of art as the Solicitor General now
14 argues.

15 Chairman Cruz. And my understanding is at least
16 some of these documents had notations, initials that
17 appear to reflect an individual or perhaps may reflect an
18 individual who also worked in the White House as part of
19 the policymaking apparatus; is that correct? Although
20 this is all murky and opaque, by design of the
21 Administration. But is that your understanding, as well?

22 Mr. Cannon. There was White House input into the
23 development of this rule, as there was White House input
24 into the development of many rules. We do not know
25 exactly who provided that input.

1 Chairman Cruz. But the initials LF were written on
2 at least one of these documents.

3 Mr. Cannon. I have not reviewed those documents,
4 but that is what House investigators report.

5 Chairman Cruz. All right. Let me ask a final
6 question. The Administration is arguing, pursuant to
7 Chevron deference, that the courts owe deference to its
8 efforts to implement this law.

9 I want to ask Mr. Carvin. If the process that there
10 appears to be a suggestion occurred here, although quite
11 deliberately, the Administration is blocking any effort
12 for the American people to know if it occurred, but if it
13 is the case that career professionals at Treasury and the
14 IRS, in their expert judgment, read the statute to mean
15 exactly what it means on its face, that an exchange
16 established by the State means an exchange established by
17 the State, and if it is the case that political
18 operatives ordered those career professionals to
19 disregard the law and reach a political conclusion
20 instead, is it your understanding that sort of partisan
21 political decision to disregard the law is the kind of
22 decision that is ordinarily given Chevron deference?

23 Mr. Carvin. No, Mr. Chairman. As you know, one of
24 the principal things that agencies cannot do under
25 Chevron is behave in an arbitrary and capricious manner

1 and, obviously, the paradigmatic definition of arbitrary
2 and capricious is simply implementing political or
3 ideological objectives.

4 I would also point out in terms of process, you are
5 not deferring to the tax expertise of the IRS if the task
6 force, which I think is undisputed, drawing up these regs
7 was not just IRS people, was HHS and White House
8 operatives.

9 So I do not even think they went through the pretense
10 of pretending this was a mutual interpretation of the
11 law. I hasten to add, of course, Chevron is inapplicable
12 here anyway because the statute is completely
13 unambiguous. So there is no opportunity for deference.
14 And as Justice Kennedy pointed out during oral argument,
15 there is a strong canon of statutory construction that
16 because this body, Congress, controls the purse, moneys
17 will come out of the Federal Treasury only if that is
18 done unambiguously.

19 Chairman Cruz. Thank you, Mr. Carvin. And I would
20 note that if it is indeed the case that partisan
21 political operatives in the Obama Administration
22 instructed career professionals to disregard the law and
23 reach a political outcome, it is not surprising that they
24 were afraid to come here and testify and explain that
25 that is what occurs, and that perhaps gives some context

1 to why the three witnesses in the first panel chose not
2 to attend.

3 Senator Coons?

4 Senator Coons. Thank you, Mr. Chairman. I will
5 note you have taken nearly 10 minutes in your first
6 questioning. I hope I will have roughly the same period
7 of time, if possible.

8 I believe the core issue we are seeking to have a
9 conversation about here today is the availability of
10 studies that roll in the ACA and the appropriateness of
11 how the ACA has been interpreted and applied.

12 So let me first speak more broadly to that general
13 context. The ACA, as Mr. Weiner pointed out in his
14 testimony, is working. Thanks to the ACA, 16 million
15 people have gained access to affordable quality health
16 insurance and since October 2013, the uninsured rate,
17 just to take one of many positive statistics, for the
18 non-elderly adults in America has fallen by nearly 35
19 percent.

20 This success would not be possible without the
21 availability of the premium tax credit which provides
22 nearly 8 million American individuals in the 37 States
23 using healthcare.gov with an average subsidy of \$3,200 to
24 purchase health insurance.

25 As we all know, this historic decrease in the number

1 of uninsured is only possible under the ACA -- is only
2 possible that it becomes affordable because the 87
3 percent of individuals who signed up under healthcare.gov
4 qualify for subsidies, and this was central to the intent
5 of the law.

6 In my view, eliminating subsidies, which may well be
7 the outcome of the Supreme Court action if they, I think,
8 rule on this in a way that is advocated by some today,
9 would result in a massive disruption in the individual
10 market, with millions losing access to affordable
11 insurance and the average cost of the remaining insured
12 increasing significantly.

13 It is my contention that that is not required by the
14 structure, the text, the history of the law. In fact,
15 the opposite, that the text and the history and the
16 structure of the ACA leads to only one possible
17 conclusion, that tax credits are available to all poor
18 working class and middle class Americans, those who earn
19 between 100 percent and 400 percent of the poverty level.

20 As we all know, there are many who have opposed the
21 ACA for principally ideological reasons. They fought it
22 in Congress and lost. They fought it before the Treasury
23 Department and lost. They fought the individual mandate
24 in the courts and have lost. Now, another group of
25 opponents has raised another legal challenge, asking our

1 courts to bless a contorted reading of the law in a way
2 that would sabotage a core provision of the act and undo
3 the way that these subsidies work to the fulfillment of
4 the core goal of the Affordable Care Act.

5 Now, neither the distinguished Chairman of the
6 Subcommittee nor myself were present as the law was
7 crafted, but there have been a number of quotes in the
8 press recently from those who were actively engaged
9 suggesting that this cramped reading that is being
10 advanced runs directly contrary to the universally held
11 understanding of those who were engaged in its drafting
12 and its implementation, from Doug Elmendorf, head of the
13 CBO at the time, to members of the Joint Committee on
14 Taxation, to Charles Clapton, the former counsel to
15 Senator Enzi, to Senator Snowe herself, who have all
16 recently been quoted saying that they did not see or
17 recall any distinction between Federal and State
18 exchanges as this was being drafted and the denial of
19 subsidies based on that would have gone contrary to their
20 understanding of the intent.

21 So let us be clear. In my view, this hearing is just
22 another part of a 5-year effort to deny working class
23 Americans any help in affording health insurance. Having
24 failed at frontal assaults, the ACA's opponents are
25 trying to contort the letter of the law, this important

1 law, to defeat its spirit.

2 And so for some insight into that, let me begin with
3 Mr. Weiner, if I might. In your view, is there any doubt
4 that at the time the ACA was adopted, it was understood
5 to mean what Treasury has subsequently said it meant at
6 the time that it was passed? And what, in your view,
7 happened to create the dispute that we are discussing
8 today?

9 Mr. Weiner. Senator, there is no doubt at all of
10 that proposition. We see, for example, Jonathan Gruber's
11 statement several years after the statute was adopted.
12 He is an economist, an academic economist. Well, I see
13 your Jonathan Gruber and I raise it with four aces,
14 Senator Orrin Hatch, who said back in January 2010 that
15 establishing an exchange is not a condition of receiving
16 Federal funds, and that was stated by other people, as
17 well.

18 In June -- well, I mentioned when the States amended
19 their complaint. October 2011, the American Legislative
20 Council -- Exchange Council, ALEC, a right-wing
21 organization, told the States, in urging them not to
22 adopt exchanges, there is no penalty for a State in
23 allowing the Federal Government to implement an exchange.

24 November 2012, Nebraska's governor, explaining why
25 States -- why the State would not set up an exchange,

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

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

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

11 Senator Coons. Thank you, Mr. Weiner.

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

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

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

1 appreciate your revisiting the point.

2 Ms. Wydra. Thank you, Senator. Yes. The Supreme
3 Court has made absolutely clear in numerous court rulings
4 by Justices of all ideological stripes that statutes are
5 to be read in their entirety, in their context, and to
6 effectuate rather than to defeat their central purpose.

7 And I think it is important to note that there are
8 basically three main features of the Affordable Care Act
9 that make its insurance market reforms work. You have
10 the individual mandate, which ensures that either you
11 sign up for health insurance or pay a tax penalty,
12 assuming you have the income to do so; the important
13 market reforms such as preventing insurance companies
14 from discriminating against individuals with preexisting
15 conditions; and then, of course, you have what we are
16 talking about here today, which are the tax credits which
17 make it affordable for Americans to enter the insurance
18 market and to make the entire Affordable Care Act reforms
19 work as they are intended to by the law.

20 So in looking at the statute as a whole and in
21 looking at the issue that is before the Supreme Court in
22 King v. Burwell, it is important to note the role of the
23 tax credits in effectuating the key purpose of the
24 Affordable Care Act to make insurance available for all
25 Americans.

1 And so I think when we are looking at the exchanges,
2 it is important to note that when you are talking about
3 who is going to run the exchange, whether or not the
4 State establishes its own exchange or the Federal
5 Government does it according to Section 1321 standing in
6 the shoes of the State, the idea is still to ensure that
7 tax credits are nationwide available to all Americans
8 who need them.

9 Otherwise, the act simply does not work and numerous
10 provisions of the law are rendered absurd if you take the
11 reading of the tax credit provision that critics of the
12 Treasury rule have put forth.

13 You know, we talk about what Congress intended and
14 when you look at what they intended, it was, again,
15 because of the purpose of the act and the way that it is
16 structured, integral to achieving the purposes of the law
17 that every American who needs these tax credits be able
18 to have them. That is the way that it was scored by the
19 Congressional Budget Office, the statute. That is the
20 way that the Joint Committee on Taxation understood the
21 law to work. That is the clear congressional intent
22 behind the law.

23 And so when you look at the law in the way that the
24 Supreme Court tells us, looking at it in context, reading
25 the text of the law, looking against the backdrop of

1 cooperative federalism, which Justice Kennedy raised in
2 oral argument, noting that if you take the critics of the
3 Treasury Department's rule, you can basically put the
4 States to an irrational choice, either set up an exchange
5 or if you take the Federal fallback, which the statute
6 allows you to do, we will take away millions, perhaps
7 even billions of dollars from your constituents who need
8 them, need those tax credits desperately.

9 That just simply does not make sense and it is not in
10 line with the way the Supreme Court tells us that we
11 should read statutes.

12 Senator Coons. Thank you, Ms. Wydra. That was very
13 helpful. I appreciate the testimony of both witnesses.

14 Chairman Cruz. Thank you.

15 Senator Sessions?

16 Senator Sessions. Thank you, Mr. Chairman.

17 Well, the fact that you say there is a goal to make
18 insurance available for all Americans does not mean the
19 statute can be written in any way you would like to to
20 effectuate some theory of care.

21 Congress will be faced with the legislative
22 responsibility if the court rules to deal with the
23 statute as it is left standing. It is going to be a
24 difficult challenge, but I think that is what we are paid
25 to do.

1 The President does not get to make up the law, as he
2 has done so often, and it is really troubling to me the
3 extent to which this has become the theory around here,
4 that the Executive office must do something, Congress
5 would fail to act.

6 But when Congress fails to act, it acts. It makes a
7 decision and it says no to some of these things. They
8 did not pass the law unless the State exchange language
9 was in there. That is what Congress passed.

10 So I really think we are on dangerous ground when we
11 get this far away from plain statutory law.

12 With regard to the health care costs, I see in *CNN*
13 *Money*, a recent report from *CNN Money*, United Health Care
14 costs in Florida is up 18 percent, Humana up 30 percent
15 in Texas. That is two of the biggest States and two of
16 the biggest insurers in America. But I do not know how
17 well it is doing in the practical world.

18 Now, Mr. Grewal, let us take another area that I
19 think is even simpler that you raised in your study, that
20 the Affordable Care Act provides tax credits to U.S.
21 citizens with incomes between 100 percent and 400 percent
22 of the Federal poverty level.

23 Are you aware of anything else in the Affordable Care
24 Act that would alter that number, that range, 100 to 400?

25 Mr. Grewal. No. It is -- for aliens, there is an

1 exception. Congress decided that for aliens they would
2 come up with a special rule because aliens could not get
3 Medicaid. But for citizens, there is absolutely no
4 statutory exception and the IRS has affected that
5 amendment by regulation.

6 Senator Sessions. So by regulation, IRS altered
7 what would appear to be plain language to extend credits
8 for citizens that would affect several million people
9 below 100 percent of the Federal poverty level; is that
10 right?

11 Mr. Grewal. Right now the estimate by Kaiser is
12 about 4 million people are not eligible for Medicaid, but
13 do not get -- do not satisfy the 100 percent statutory
14 floor. So we are talking several million people. yes.

15 Senator Sessions. Mr. Carvin, you have studied
16 this. Are you aware of any exception that could be used
17 to justify adding several million people when they do not
18 fall within the statutory range?

19 Mr. Carvin. It is precisely the rationale they used
20 for the lawless IRS rule here, which is it is a good
21 thing to give poor people insurance. Congress cut it off
22 below 100 percent. We do not like that, so we are going
23 to take billions of dollars from the Federal Treasury and
24 help poor people. We do not need no statutory language,
25 we will just do what is right.

1 And so, no, it is precisely the same analysis you
2 have seen here, which is this is supposed to be available
3 for all Americans and, therefore, we can do whatever we
4 want.

5 Senator Sessions. Mr. Grewal, another one, it seems
6 to me, is dramatically clear and has been violated. As
7 you noted, Section 36(b) of the ACA grants credits to
8 some non-citizens with low incomes only if they
9 themselves are lawfully present in the United States and
10 cannot obtain Medicaid coverage.

11 IRS regulations issued pursuant to that statute,
12 however, contradict the statute and allow subsidies if,
13 quote, "the taxpayer or a member of the taxpayer's family
14 is lawfully present in the United States" and, quote,
15 "the lawfully present taxpayer or family member is not
16 eligible for the Medicaid program."

17 Do you find any statutory basis for the
18 Administration to find such an exception to what appears
19 to be plain language?

20 Mr. Grewal. Absolutely not. And the odd thing
21 about that particular change is, as opposed to the other
22 two, at least for the other two they had the courtesy to
23 announce what they were doing in the preamble to the
24 regulation, for this one there is no explanation at all,
25 just the text of the regulation goes beyond the statute,

1 without any hint that they are expanding the credit to
2 persons not lawfully residing here.

3 Senator Sessions. I think your analysis is
4 important to us. We have had a number of studies that
5 talk about really a lawless approach to governmental
6 administration and the American people have a right to
7 expect that when a law is passed, the chief executive
8 will follow that law, and this is just plain.

9 Mr. Carvin, you have studied the ACA. Is Mr. Grewal
10 correct? Is there any authority that you can find that
11 would allow the Administration to provide health care
12 coverage to individuals if a member of their family is
13 lawfully present in the United States?

14 Mr. Carvin. It is yet another revision in a series
15 of stark revisions to the ACA that the Obama
16 Administration has done all pursuant to roughly the same
17 analogy, which is we want to make this better, we want to
18 make it work in the way that we want and all the kinds of
19 legislative compromises that go into actually crafting
20 statutes will be disregarded if the people in the
21 Administration view it as inconvenient.

22 Senator Sessions. Well, I think maybe, Ms. Wydra,
23 the statute could have just been written our goal is to
24 make available health care for all Americans. That was
25 not what the law said, however.

1 Thank you, Mr. Chairman.

2 Chairman Cruz. Thank you, Senator Sessions.

3 Senator Blumenthal?

4 Senator Blumenthal. Thank you, Mr. Chairman.

5 Mr. Carvin, you argued in the Supreme Court, did you
6 not?

7 Mr. Carvin. I did.

8 Senator Blumenthal. You argued for the plaintiffs.

9 Mr. Carvin. Correct.

10 Senator Blumenthal. Are they here today?

11 Mr. Carvin. No.

12 Senator Blumenthal. This hearing has been conducted
13 with a lot of hype and hyperbole, not uncharacteristic of
14 the debate surrounding the Affordable Care Act, a lot of
15 overheated, overreaching rhetoric, but there are some
16 facts and, as Ronald Reagan said, facts are stubborn
17 things.

18 The fact is the Affordable Care Act is working. It
19 has provided insurance coverage to millions of Americans,
20 more than 10 million Americans, and not only did Congress
21 intend certain results, but what Congress intended is
22 actually happening.

23 We are dealing here with reality on the ground. In
24 Connecticut, which has a health exchange, like 13 States
25 do, the uninsured rate has been cut by one-half from 12.3

1 percent to 6 percent; 7.7 percent of Connecticut
2 consumers have qualified for the tax credit.

3 Millions of people across the country are now
4 protected against discrimination, for example, based on
5 preexisting conditions.

6 For years and years, as the attorney general of the
7 State of Connecticut, I did advocacy on behalf of people
8 who were discriminated against because of supposed
9 preexisting conditions. There is mental health care that
10 has been expanded, along with substance use disorder
11 benefits and Federal parity protection. Sixty-two
12 million Americans have benefitted and more than 600,000
13 in Connecticut.

14 So the ACA is working and the Public Health and
15 Prevention Fund has provided Connecticut alone with \$31
16 million for tobacco cessation, obesity prevention, health
17 coverage enrollment assistance.

18 Those facts, in effect, I think, support the argument
19 that Congress not only intended certain consequences and
20 the interpretation suggested by Ms. Wydra and Mr. Weiner
21 fits as part of the statutory hole and the context of the
22 statute, but also the results of the statute.

23 I would like to ask, Mr. Weiner, whether that
24 interpretation, in effect, of the statute, the reality on
25 the ground, comports with what Congress intended.

1 Mr. Weiner. Yes. It very much comports with what
2 Congress intended. Congress did say in the statute that
3 the goal was to extend health care, affordable health
4 care to all Americans. It said it six times. That was
5 in language that was enacted by Congress, not some
6 purpose intuited by a judge.

7 It was what Congress said it was trying to achieve in
8 the statute.

9 Senator Blumenthal. Ms. Wydra, do you agree?

10 Ms. Wydra. Yes, absolutely. You know, Senator
11 Sessions joked that the statute should have been written
12 to say health care should be available for all Americans.
13 Well, in point of fact, Title 1 of the act is titled,
14 quote, "Quality Affordable Health Care for All
15 Americans."

16 So that is the stated purpose of the law and it would
17 not make any sense for Congress to have written the tax
18 credit eligibility to defeat that purpose.

19 Senator Blumenthal. And, Mr. Carvin, I assume you
20 disagree.

21 Mr. Carvin. The model that was followed in the ACA
22 for the subsidies was precisely the model for Medicaid.
23 We all agree that Medicaid was conditioned on the States
24 doing certain things.

25 My friends on the left here would say it would be

1 insane to end Medicaid payments for the neediest
2 Americans, and yet the ACA conditioned the Medicaid on
3 the States doing certain things and that is because this
4 body thought we can get the best of both worlds. We can
5 get the States to do something and we can get universal
6 coverage.

7 Precisely the same logic obtains here. You give the
8 States a real incentive to do things and then the
9 premiums will flow if the State does it.

10 So there are two purposes to the ACA. One is stated
11 in 1311, States shall run exchanges. The second is we
12 want subsidies to be available.

13 The only way to accomplish both purposes is to
14 condition the subsidies on States running the exchanges,
15 just like Congress conditioned Medicaid funds on the
16 States altering their Medicaid eligibility standards.

17 There is nothing inconsistent with the purpose, there
18 is nothing illogical, unless this body is going to say
19 that it was utterly illogical to do it what it did with
20 Medicaid.

21 So, no, it is perfectly logical, perfectly reasonable
22 public policy.

23 Senator Blumenthal. Well, let me just say that your
24 friends, who, from your perspective, are on your left
25 actually are on our right.

1 [Laughter.]

2 Mr. Carvin. I was giving a geographic description,
3 not an ideological one.

4 Senator Blumenthal. Which I think, in a sense,
5 reflects the different perspectives that we may bring to
6 these issues and I respect yours, but I would just
7 suggest, again, that Congress established a system that
8 fits together as a whole. It is working as a whole.

9 We can argue hypothetically. We can use rhetoric.
10 But the fact of the matter is Congress actually did
11 something good here. I can say that because I was not a
12 part of Congress at the time and I approach this area
13 with a lot of humility.

14 Very simply, in my view, a ruling for the plaintiffs
15 in King v. Burwell would be contrary to -- would be
16 catastrophic for millions of families who owe their
17 health insurance to the statutory structure that Congress
18 approved; not a perfect structure, not absolutely perfect
19 in all of its wording and statutory language, but a
20 ruling for the plaintiffs, in my view, would be a human
21 tragedy, as well as a legal travesty.

22 So I am hopeful that the reasoning that you advance
23 to the court will not succeed. But I thank you for being
24 here today and I thank all of the members of the panel.

25 Thank you.

1 Chairman Cruz. Thank you very much. I would note,
2 on the discussions of the expansions of health care, that
3 studies have also shown that virtually all of the
4 expansion has been on Medicaid and that roughly 900,000
5 people have received private insurance, that nearly as
6 many people have had their insurance canceled as have
7 signed up on the exchanges for private insurance, and the
8 data are compelling that forcing people onto Medicaid
9 ends up predictively producing worse health care
10 outcomes.

11 With that, Senator Hatch?

12 Senator Hatch. Well, I might also add that more
13 people are now going to the emergency rooms because they
14 cannot get care. There is too long a way to get the care
15 that they need.

16 I also want to bring out that there were about 30
17 million people that did not have health care when we
18 started this issue and this bill. Guess how many there
19 are today? Between 30 million and 35 million still do
20 not have health care. Now, maybe you can make some
21 explanations about that.

22 You quoted my letter, Mr. Weiner. I will just put
23 the letter in the record, if I can.

24 Chairman Cruz. Without objection.

25 [The letter referred to follows:]

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1 Senator Hatch. Also, Mr. Carvin -- well, let me
2 just say another thing to Mr. Weiner. With respect to
3 Mr. Weiner, the quote that you made from my Law Review
4 article, where you said supports the President's
5 position, was a reference to the Supreme Court's holding
6 in South Dakota v. Dole. I do address that issue in my
7 UCLA Law Review article.

8 Let me just put that into the record, as well, just
9 the page where I address it.

10 Chairman Cruz. Without objection.

11 [The information referred to follows:]

12 *****COMMITTEE INSERT*****

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1 Senator Hatch. Mr. Carvin, you have been carrying a
2 lot of load on your shoulders here. Proponents of the
3 President's position have argued that Congress could not
4 have intended to deny subsidies to Federally-established
5 exchanges.

6 But is it not a fact that a very good reason that
7 Congress would have wanted to limit subsidies to State-
8 established exchanges was namely to incentivize States to
9 create these exchanges? And Congress could not order the
10 States to create exchanges directly, so it needed a way
11 to incentivize the States to create exchanges.

12 Is that not a perfectly reasonable argument as to
13 what was going on here?

14 Mr. Carvin. You are entirely right about the
15 constitutional provision. This body has, in countless
16 statutes, incentivized States precisely the same way. It
17 is noteworthy that the Health Committee, at the same time
18 was considering it, conditioned subsidies on certain
19 insurance reform provisions.

20 The Clinton Administration health care proposals also
21 conditioned subsidies on State cooperation. So far from
22 departing from the norm, this is the norm that this body
23 has continually used not only in the health care area,
24 not only with respect to Medicaid in the ACA, but with
25 respect to virtually every provision, which is since we

1 cannot force the States to do it, but we want them to
2 take an operational role, the best and traditional way of
3 doing it is conditioning Federal funds on having the
4 States become our cooperative partners.

5 Senator Hatch. All right. Well, let me just ask
6 this question to you and Mr. Cannon, as well. I want to
7 thank you both for your important work on this issue.

8 I would like to read for you a passage from my recent
9 UCLA Law Review article and then ask you to comment.
10 Quote, "Advocates of the President's position that
11 ObamaCare authorizes subsidies for Federally-enrolled
12 plans would have us believe that statutes are infinitely
13 malleable; up can mean down, right can mean left,
14 established by a State can mean established by the
15 Federal Government. What matters to them is advancing
16 some alleged statutory purpose regardless of what the
17 statute actually says and that furthers the President's
18 agenda. Now, those of us on the other side, however,
19 insist that text does matter, words matter. They always
20 have. What the statute says is what matters because at
21 the end of the day, the words in our statutes and in our
22 Constitution are what bind our leaders and what prevent
23 them from doing whatever they want to. Now, fidelity to
24 text is the foundation of the rule of law."

25 Do you agree with that passage?

1 Mr. Carvin. I do and I want to make it clear that
2 we are not talking about ripping text out of context. I
3 fully agree with my friends that you need to read this in
4 context. I have said that approximately 400,000 times
5 and I have always supplemented it with the point that
6 context reinforces, for the reasons I have already
7 articulated, at every turn, that 36(b) should be
8 interpreted to mean what it says.

9 So we are not talking about some green eye shade
10 pulling words out of context, that is not statutory
11 interpretation. Read in context, this serves a very
12 valuable, sensible purpose and there is on reason to
13 depart from the plain language.

14 Senator Hatch. Mr. Cannon, in your written
15 testimony you discuss an investigation that two House
16 committees conducted into the IRS' drafting of the
17 ObamaCare subsidy rule.

18 Now, what are your take-aways from that
19 investigation? And if you could add this, too, in your
20 view, what are the most troubling things that the House
21 investigators found?

22 Mr. Cannon. Well, as I mentioned in my testimony, I
23 think the most troubling things are those that show -- or
24 that indicate that the Treasury Department and the IRS
25 recognize that this statutory language posed an obstacle

1 to how they wanted to implement the statute. So they
2 jettisoned what the statute says and they implemented the
3 law as they saw fit or they exercised power as they saw
4 fit.

5 And this is not a victimless sort of scenario here.
6 There are 57 million individuals and employers in this
7 country who are being subjected to illegal taxes because
8 the IRS decided that it would ignore the clear language
9 of Federal law.

10 One of those people is Kevin Pace, who I mentioned in
11 my testimony. His income -- he took a hit to his income
12 of \$8,000. He is a jazz musician. If you think \$8,000
13 is a lot of money to you, it is a lot more money to a
14 jazz musician.

15 Others who are affected by this rule are seeing their
16 incomes hit by \$1,000. Others are paying penalties to
17 the IRS, employers and individuals, from which they are
18 statutorily exempt. That is -- and the IRS -- it
19 appears, from what little we know, that the IRS knew that
20 this language prevented them from doing that, but they
21 tried to find a workaround. They tried to disregard it.

22 The other problem -- the other thing that this
23 investigation shows is how the -- the arguments that the
24 government has made before the Supreme Court are not the
25 -- were not the reasoning that the IRS used when it

1 developed this rule.

2 The fact that they jettisoned the statutory phrase
3 "through an exchange established by the State" from their
4 implementing regulations tells us that they knew it was
5 not the term of art the Solicitor General claims.

6 If it were a term of art that incorporated an
7 exchange established by the Federal Government, there
8 would be no reason to take it out of the draft proposed
9 regulations. You could keep it in there if it is a term
10 of art, but they knew it was not.

11 They knew it was an obstacle to implementing these
12 taxes and spending that money, and so they threw it out.

13 Senator Hatch. Mr. Carvin, let me just ask you
14 this. Under the well known Chevron doctrine, if a
15 statute is ambiguous, an agency interpretation can be
16 sustained only if it is a product of, quote, "reasoned
17 decision-making," unquote.

18 From the evidence we have, do you believe that the
19 IRS subsidy rule was the product of reasoned decision-
20 making and if not, why not? And what does that tell us
21 about the lawfulness of the rule? And you can also
22 answer, if you care to, the arguments of the two who are
23 arguing for the Administration's position.

24 Mr. Carvin. Well, with respect to your specific
25 question, Senator Hatch, no. As I have indicated to

1 Senator Cruz, fulfilling the Administration's ideological
2 agenda is the opposite of reasoned decision-making
3 because they are simply substituting their policies for
4 that of the enacted law.

5 And I would, in addition, point out that it strikes
6 me as incredible -- and I believe the Solicitor General
7 more or less admitted this during oral argument -- that
8 from anybody's perspective, the notion that this body was
9 delegating to the IRS the seminal decision on whether or
10 not to have these subsidies, which my friends to the left
11 agree is very important to the act, strikes me as quite
12 counterintuitive.

13 This was not filling in the gaps in the statute. This
14 was the basic policy decision. So, no, Congress spoke
15 precisely to the question that is at issue, as the
16 Chevron phrase has, and Congress made a decision. So
17 there was no room for the IRS, much less White House
18 operatives to change the basic policy decision embodied
19 in the statute.

20 Senator Hatch. Thank you. Now, let me ask
21 Professor Grewal. Now, you identify in your written
22 testimony several other IRS regulations that grant
23 ObamaCare subsidies to statutorily ineligible recipients.
24 These include regulations granting subsidies to
25 individuals outside this statutory income range,

1 individuals automatically enrolled in employer health
2 care plans, and even some categories of unlawful aliens.

3 Now, what does the fact that the IRS ignored limits
4 on its authority to grant subsidies in other instances
5 tell you about its general attitude toward obeying limits
6 on statutory authority?

7 Mr. Grewal. Regarding the King v. Burwell issue, if
8 that regulation is valid, it is impossible to believe
9 that it is because they closely paid attention to the
10 statute and their statutory authority.

11 It could be by accident that the regulation is valid,
12 but I think with so many instances, it is obvious to me
13 that they are implementing the law that they wanted to
14 see enacted rather than what actually was enacted.

15 Senator Hatch. All right. Well, I appreciate the
16 extra time that the Chairman and Ranking Member have
17 granted to me. I appreciate you both.

18 Chairman Cruz. Thank you, Senator Hatch.

19 I would like to thank each of the witnesses here. We
20 have heard, I believe, incredibly important testimony,
21 testimony that I think has particular salience to the
22 millions of residents in the States that have not
23 established State exchanges, to the millions of young
24 people, young people fresh out of college, millenials,
25 who the Obama Administration is trying to exact billions

1 of dollars in illegal taxes from each of you, to a legal
2 immigrant like my father 58 years ago, if you live in a
3 State that has not established an exchange, the testimony
4 we have heard today at this hearing is that the Obama
5 Administration is trying to impose on you personally
6 thousands of dollars in penalties that are flatly
7 contrary to law.

8 And I would note that these penalties coming from the
9 individual mandate disproportionately hurt the most
10 vulnerable among us. The people being hurt by these
11 illegal taxes are not the Warren Buffetts and the Bill
12 Gates of the world. They are young people, they are
13 single moms, they are Hispanics, they are African-
14 Americans, that are suddenly finding a big tax bill that
15 is due from an Administration that is ignoring and
16 violating Federal law to extract illegal taxes.

17 And I would note the testimony this panel has given,
18 that the career professionals at the IRS and the Treasury
19 Department recognized they were bound by law not to
20 collect those taxes from millions of people who did not
21 owe them until political operatives, the testimony
22 suggests, overruled them, instructed them to disregard
23 the law and collect taxes from people who did not owe
24 them and could not afford them.

25 That testimony is quite stunning and it is testimony

1 that every American ought to consider.

2 I want to thank each of the witnesses from the
3 Subcommittee.

4 The committee will keep the hearing record open for
5 an additional 5 business days, which means the record
6 will be closed as of the close of business next Thursday,
7 June 11, 2015.

8 I note Senator Coons wishes to make a closing remark.
9 So I will allow him. Senator Coons?

10 Senator Coons. Thank you, Mr. Chairman.

11 We came to this hearing today with differing views of
12 the history, the structure, the purpose and the impact of
13 the ACA, and I thank the witnesses for their testimony,
14 but I think we leave with sharply different views of the
15 path forward and of what the purpose was of this hearing
16 today.

17 In my view, this is just another part of a 5-year-
18 long effort to deny working class Americans any help in
19 affording health insurance. Having failed at repeated
20 frontal assaults, the ACA's opponents are now trying to
21 advance a contorted view of the letter of this important
22 law in order to defeat its very spirit.

23 And I too will raise the specter of a tax increase.
24 These opponents of the Affordable Care Act apparently
25 find the idea that every American should have access to

1 affordable health insurance so offensive that they are
2 willing to advance a cause which, if successful, would
3 immediately raise taxes for 7.7 million Americans by an
4 average of \$3,200 a year, in order to destabilize this
5 law, and ultimately in an effort to bring it down.

6 I hope they are not successful and I hope instead the
7 Affordable Care Act continues to be improved and to
8 strengthen access to quality health care in this country.

9 Thank you for holding this hearing. I appreciate the
10 fairness with which you have conducted it.

11 Chairman Cruz. Thank the members of the panel and
12 the hearing is now adjourned.

13 [Whereupon, at 4:45 p.m., the hearing was concluded.]

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