Responses by Michael A. Carvin (Jones Day) to Questions for the Record
Senate Judiciary Committee
Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts
Hearing: "*Rewriting the Law: Examining the Process that Led to the Obamacare Subsidy Rule*"
Thursday, June 4, 2015

I. Question from Senator Vitter.

Q: Ms. Wydra and Mr. Weiner invoked Principles of Interpretation, particularly the Presumption Against Ineffectiveness and the Presumption Against Absurdity, in their justifications for the IRS rule subsidizing coverage for individuals from States that opted not to create exchanges. Do you think these principles are applicable in this circumstance? Why or why not?

A: The principle of interpretation that controls this case is a fundamental one: "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (quoting *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984)). The text of 26 U.S.C. § 36B is clear and unambiguous that ACA subsidies are available only for insurance purchased through an Exchange "established by the State under § 1311" of the ACA, and not through an Exchange established by HHS under § 1321 of the Act. That is therefore the end of the matter.

Ms. Wydra and Mr. Weiner invoked the principle that departure from statutory text is permitted in the "extraordinary" circumstance in which that text creates an objectively absurd result. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 494 (D.C. Cir. 2004) (Roberts, J.). The absurdity must be "so clear as to be obvious to most anyone," such that it is "quite *impossible* that Congress could have intended the result." *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring in judgment) (emphasis added). That principle is completely inapplicable here. Providing subsidies only for coverage through state-established Exchanges is plainly not absurd. Given the plausible concern that at least some states would be reluctant to undertake the thankless job of establishing and operating Exchanges, offering them an incentive—billions of dollars in "free" federal subsidies to their citizens—is a most sensible tactic, and one that Congress often uses and used elsewhere in the ACA itself (such as with respect to its expansion of Medicaid). Put differently, it makes good sense not to treat states that reject the request to establish Exchanges just as favorably as those who agree to bear that burden. Indeed, treating them equally is plainly not sensible, as it eliminates any incentive to establish Exchanges and thus lead to most states declining to do so.

For the same reason, construing the ACA in accordance with its plain text does not render any part of the Act "ineffective." To the contrary, § 36B's subsidy condition serves the eminently sensible purpose of inducing states to create Exchanges, as Congress wanted.

II. Question from Senator Coons

Q: You testified that Treasury's rulemaking qualified as "arbitrary and capricious" and therefore, in your view, not subject to *Chevron* deference, because you asserted that Treasury was motivated to achieve the preferred policy outcome of the administration when developing its rule. There remains, however, overwhelming evidence that Congress both intended the bill to assure "Quality, Affordable Health Care For All Americans" and understood the tax subsidies to be available to all Americans, regardless of whether they access coverage through HealthCare.gov.

Is it ever appropriate for agencies, when interpreting statutes, to be guided by Congress' preferred policy outcome? When Congress' preferred policy outcome is in accord with that of the administration, does taking guidance from that policy preference become inappropriate?

A: Contrary to the premise of the question, there is *no* evidence whatsoever that anyone in Congress intended, at the time of the ACA's enactment, that tax subsidies would be available through the federal Exchange. The best evidence of Congress's intent is, of course, the language that it used in the statute. And nobody, including the Solicitor General during the Supreme Court argument, has been able to explain why Congress used the language it did in § 36B (limiting subsidies to Exchanges "established by the State under § 1311" of the ACA) if Congress actually "intended" just the opposite. Nor has anyone been able to explain how Congress could have expected states to establish the Exchanges—as many Senators insisted that they do—without offering them any incentives to do so. Nor is there *any* contemporaneous legislative history in which *any* Member of Congress says that subsidies will be available through the Exchange established by HHS. The only person involved in the drafting of the Act who addressed this issue prior to institution of litigation was Jonathan Gruber, one of the leading ACA architects and an HHS consultant, who affirmed that "if you're a state and you don't set up an Exchange, that means your citizens don't get their tax credits." Jonathan Gruber at Noblis, at 32:00, Jan. 18, 2012, https://www.youtube.com/watch?v=GtnEmPXEpr0&t=31m25s. Of course it is true that Congress in general wanted "Quality, Affordable Health Care For All Americans," but the way it chose to achieve that goal was to incentivize states to establish Exchanges by limiting subsidies to coverage purchased through such state-established Exchanges. The plain text of the Act is therefore fully consistent with that general purpose.

To answer your question directly, it may sometimes be appropriate for agencies to be guided by Congress's *expressed* policy views *when construing ambiguity* in statutes. But when a statute's text is clear, "vague notions of a statute's 'basic purpose' are … inadequate to overcome the words of its text." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). Rather, the critical question is "not what Congress 'would have wanted' but what Congress enacted." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). Because § 36B is clear that subsidies are only available through Exchanges "established by the state," rejecting that text to achieve a policy goal desired by the Administration is lawless and illegitimate.

III. Question from Senator Hatch

Q: You're no doubt familiar with the *Chenery* doctrine, which says that government lawyers may not rely on post hoc rationalizations to defend agency decisions. That is, government lawyers may not defend agency judgments on grounds that the agency did not originally—and explicitly—rely upon when making its decision. In your written testimony, you say that nothing in the IRS subsidy rule resembles the "term of art" theory the government advanced in *King v. Burwell*. Can you elaborate on what you mean by this? And if you're right, does that mean the subsidy rule fails under *Chenery*?

A: You have correctly stated the venerable *Chenery* principle, which the IRS certainly violated in this case. When the IRS promulgated its rule, it explained in conclusory terms that the "statutory language of section 36B and other provisions of the [ACA]" support its interpretation, and further stated that "the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit" to Exchanges established by states. 77 Fed. Reg. 30,377, 30,378 (May 23, 2012). But when the *King v. Burwell* legislation reached the Supreme Court nearly three years later, the Solicitor General had devised the mind-bending theory that the phrase "established by the State" in the ACA is somehow a "term of art" that includes Exchanges created by HHS (Govt. Br. 20-23)—even though the ACA nowhere says anything of the sort and even though the IRS had never adopted that strange construction previously as to any use of that phrase in the ACA. This was a *post hoc* invention, contrary to *Chenery*.

But the flaws in the IRS subsidy rule run deeper than *Chenery*, because even if the IRS *had* relied on the Solicitor General's new "term of art" theory from the start, that theory is meritless and contrary to the statutory text. While it would be convenient, for an agency seeking to rewrite a statute, to treat an English phrase as a term of art on the Government's mere say-so, it cannot. Departure from ordinary meaning is legitimate only if Congress invoked a phrase with "a well-known meaning at common law or in the law of this country." *Standard Oil v. United States*, 221 U.S. 1, 59 (1911). Of course, "established by the State" has no such "well-known meaning" distinct from its plain-English one. And nothing in the ACA itself indicates that Congress intended to use the phrase in that counterintuitive, countertextual way in that law—even though other ACA provisions adopt special "definitions" of words or phrases. *E.g.*, 42 U.S.C. § 18024(d) ("'State' means each of the 50 States and the District of Columbia."); 42 U.S.C. § 18043(a)(1) (territory that establishes Exchange "shall be treated as a State").

Accordingly, unlike the typical *Chenery* case, there is no basis here to remand the rule to the IRS for any further consideration: That rule is clearly foreclosed by the ACA's plain text and could not be revived under *any* agency rationale or theory.

IV. Questions from Senator Cruz

Q: During her live hearing testimony on June 4, 2015, Elizabeth B. Wydra, chief counsel for the Constitutional Accountability Center, made several arguably questionable claims, including the following:

- That no one involved in drafting PPACA "understood the law to preclude tax credits for residents of states that opted to use the federal fallback provided to them in the law instead of electing to set up an exchange for themselves."

- That members of Congress and the relevant committees "all assumed that tax credits would be available in every state on any exchange without making a distinction between state-run and federally-facilitated exchanges."

- That the context of the language at issue in this case supports a reading that would necessarily extend premium tax credits to individuals who obtained their health insurance from federally run exchanges.

- That any claim that PPACA requires tax premium credits only go to individuals who purchased their health insurance via state-run exchanges would "subvert[PPACA's] structure and design and basic purpose and render[] important provisions absurd."

- That the "plain text" of PPACA requires the extension of premium tax credits to all individuals who purchase their health insurance on any exchange, regardless of whether that exchange was created by a state or the federal government.

Please respond to Ms. Wydra's above assertions, as necessary.

A: None of those assertions is accurate. Notably, the only person involved in drafting the ACA who spoke out about the availability of subsidies on federal Exchanges prior to the institution of litigation was Jonathan Gruber, one of the leading ACA architects and an HHS consultant, and he affirmed that "if you're a state and you don't set up an Exchange, that means your citizens don't get their tax credits." Jonathan Gruber at Noblis, at 32:00, Jan. 18, 2012, https://www.youtube.com/watch?v=GtnEmPXE pr0&t=31m25s. There are no contrary contemporaneous indications from any Member of Congress or committee (perhaps in part because the ACA was constructed largely behind closed doors, without much meaningful substantive participation by Members of Congress). If anything, however, the Senate Health, Education, Labor, and Pensions Committee confirmed that Congress was contemplating conditions on subsidies; its version of the bill would have conditioned subsidies for a state's residents on the state's adoption of certain "insurance reform provisions" and agreement to sponsor coverage for state and local employees. S. 1679, § 3104(a), (d), 111th Cong. (2009). If a state did not take those steps, "the residents of such State shall not be eligible for credits." Id. § 3104(d)(2).

As to the "context" of the language at issue, it only *confirms* § 36B's plain text. Context shows that Congress elsewhere used broader phrases that clearly encompass HHS Exchanges, but did not do so in § 36B. *E.g.*, 42 U.S.C. § 18032(d)(3)(D)(i)(II) (ACA § 1312(d)(3)(D)(i)(II)). Context shows that Congress expressly deemed other non-state entities to be "states," but again, chose not to do so for HHS. 42 U.S.C. § 18043(a)(1) (ACA § 1323(a)(1)) (a territory "shall be treated as a State" for certain purposes). Context shows that Congress did not treat state and HHS Exchanges as indistinguishable; it referred distinctly to both types of Exchanges in another subpart of § 36B itself. 26 U.S.C. § 36B(f)(3) (referring to an "Exchange under Section 1311(f)(3) or 1321(c)"). Finally, context shows that § 36B's formula for computing the value of the subsidy, far from being a "mousehole" in which Congress would not have naturally limited subsidies, is the provision that sets the substantive parameters of the subsidy in *all* relevant respects.

Ms. Wydra's claim about the ACA's purpose is doubly wrong. At the outset, "vague notions of a statute's 'basic purpose' are … inadequate to overcome the words of its text." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). In any event, the plain text of the ACA is fully consistent with Congress's purposes. While Congress surely wanted subsidies, § 36B's plain text is not at all inconsistent with this desire because it does not *eliminate* such subsidies; it merely *conditions* them on states creating Exchanges. Such a condition is the best (and probably only) way to accomplish *both* the Act's goals of widely available subsidies *and* state-established Exchanges. Nor does this reading render any other provision of the Act absurd or unworkable.

Finally, Ms. Wydra's claim about the ACA's plain text is mystifying. The Act could hardly be any clearer that subsidies are available only for coverage purchased through an Exchange "established by the State under § 1311" of the ACA. There is simply no way to read those words, consistent with the English language, as authorizing any subsidies for coverage purchased through an Exchange established by the HHS under § 1321 of the Act.

Q: Are there any other points or issues that were not explored (or sufficiently explored) during the hearing that you would like to bring to the Subcommittee's attention?

A: No. I am grateful to the Subcommittee for the opportunity to testify regarding this important rule-of-law issue.