Senate Judiciary Subcommittee on
Oversight, Agency Action, Federal Rights and Federal Courts

Testimony of Michael A. Carvin
Jones Day
June 4, 2015

Mr. Chairman and distinguished members, thank you for the opportunity to testify on "Rewriting the Law: Examining the Process That Lead To the ObamaCare Subsidy Rule."

While I am not familiar with the internal processes that resulted in the IRS Rule, I can offer three conclusions about its substance. First, it is directly contrary to any reasonable reading of the Affordable Care Act's plain language, structure and purpose. Second, the statutory "interpretation" offered to justify the Rule is nothing more than an arbitrary and unsupported *ipse dixit* at odds with every basic principle of statutory construction. Finally, the IRS's interpretation bears no relation to the *post hoc* "term of art" theory invented by the Solicitor General for the Government's Supreme Court brief in *King v. Burwell*.

I. It Is Clear That Premium Tax Credits Are Only Available On Exchanges Established By States.

The issue presented in *King* is extraordinarily simple and the correct answer is compelled by the ACA's plain language: Subsidies for insurance coverage are only available for purchases made on Exchanges established by a State. Three ACA provisions dispose of this case. First, § 1311 instructs that all states "shall" establish Exchanges. 42 U.S.C. § 18031(b). Second, § 1321 provides that, in case of a state's "failure to establish [an] Exchange," HHS "shall … establish and operate such Exchange within the State." *Id.* § 18041(c). And third, the Act then grants subsidies for coverage that is "enrolled in through an Exchange established by the State under section 1311." 26 U.S.C. § 36B(c)(2)(A) & (b)(2)(B) (emphasis added). Any English speaker would immediately understand that no subsidies are available for coverage obtained on an Exchange established by HHS under § 1321. If Congress had wanted subsidies to be available in

both Exchanges, there is simply no explanation for why it would have gone out of its way to specify that only coverage through Exchanges "established by the State under section 1311" may be subsidized. Why would Congress add unnecessary words that, on any reading, say precisely the opposite of what it supposedly meant?

1. In the face of this unambiguous text, the Government has argued that § 1321's authorization for HHS to create Exchanges (if and only if states fail to do so) somehow means that HHS-established Exchanges under this section are themselves state-established Exchanges under § 1311. But that obviously does not follow; every iteration of this argument is facially meritless.

First, the fact that the Act authorizes HHS to establish Exchanges plainly does not imply that those Exchanges are "established by the State." Just the opposite: Because the Act contemplated that two different entities could establish Exchanges, § 36B's words are a clear exclusion of HHS Exchanges.

Second, the instruction to HHS to establish "such" Exchange if the state defaults simply means that HHS is to establish the same type of Exchange. But § 36B makes subsidies turn not on the type of Exchange, but on who established it, and the word "such" does not somehow require HHS to, impossibly, establish a state-established Exchange.

Third, the notion that HHS acts on behalf of a defaulting state is both false and irrelevant. The Act directs HHS to establish an Exchange "within" the defaulting state, not on its behalf. Indeed, HHS's authority is only triggered by a state's refusal, so it cannot possibly be acting on the state's behalf. And either way, the Exchange is still established by HHS.

Fourth, the Act's definition of "Exchange" as one established "under § 1311" does not advance the ball: If anything, potential confusion over whether HHS acts under § 1321 or

indirectly under § 1311 explains why § 36B further clarifies that only Exchanges "established by the State" trigger subsidies.

Fifth, there is no merit to the Government's theory that "established by the State" is a "term of art" encompassing HHS Exchanges; the Act says nothing of the sort. Congress could have deemed HHS Exchanges to be "established by the State" for subsidy purposes, but it never did so—in contrast to other equivalences established in the U.S. Code, an early ACA draft, and elsewhere in the final Act itself.

2. The Government also contends that Section 36B's plain language should be read "in context." That is, of course, correct, but § 36B is the *only* ACA provision that defines the subsidy's scope and statutory context only *confirms* its plain text. Context shows that Congress elsewhere used broader phrases, such as "Exchange" or "Exchange under this Act," that clearly encompass HHS Exchanges, but chose not to do so in § 36B. Context shows that Congress expressly deemed other nonstate entities, such as territories, to be "states," but again, chose not to do so for HHS. Context shows that Congress did not treat state and HHS Exchanges as indistinguishable; it referred distinctly to both types of Exchanges in another subsection of § 36B itself. 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.

3. More generally, reading § 36B's plain text to mean what it says is fully consistent with the Act's other "purposes." Indeed, it is the *only* reading that faithfully effectuates the Act's other purposes.

To be sure, subsidies are important to the statutory scheme, and Congress wanted them nationwide. But conditioning subsidies on state creation of Exchanges is not contrary to that

desire, any more than conditioning Medicaid funds on state expansion of Medicaid eligibility is contrary to Congress's obvious desire to extend those funds to all states. There is no inconsistency between desiring subsidies and conditioning their availability on certain state action, because such conditions serve a valuable purpose of the Act that is lost if subsidies are unconditional—namely, inducing states to take the desired action of establishing Exchanges. As such, there is no basis for rewriting the condition embodied in § 36B's plain text, because it is clearly not absurd. Rather, it produces the valuable benefit of inducing the state action strongly encouraged—indeed, purportedly mandated—by § 1311 of the Act, *i.e.*, having states establish Exchanges.

In fact, limiting subsidies to state-established Exchanges was the best, and probably the only, way Congress could accomplish both nationwide subsidies and state-run Exchanges. Congress reasonably could expect states not to reject a "deal" providing their citizens with billions of dollars of free federal money to purchase health insurance. Absent such a financial incentive, however, it was quite unlikely that all states would voluntarily assume this complicated and controversial responsibility. Proving the point, when the IRS eliminated the incentive of subsidies, replacing a deal too good to refuse with a "deal" that offered states nothing, a large majority of states declined the role Congress had urged upon them.

To the extent, therefore, that vacating the Rule now could have adverse policy consequences on the insurance markets, those effects are the *result* of the unlawful IRS Rule. They cannot be invoked to *sustain* it.

In short, the Government's constant refrain that Congress viewed subsidies as important is entirely beside the point. As a practical matter, the same Congress imposed conditions on Medicaid funds, which are more important and more entrenched than the new subsidies, belying

any notion that the ACA would refrain from conditioning federal funds if they were viewed as highly desirable. And as a legal matter, the perceived importance of the subsidies is irrelevant: If the condition imposed by § 36B's plain text produces an objectively non-absurd result—and even the Fourth Circuit conceded that it does—then the condition cannot be ignored, just as neither the judiciary nor the Executive would be empowered to authorize desperately needed Medicaid funds for a state that had not satisfied the conditions thereupon.

Finally, for essentially the same reasons, it is irrelevant whether Congress stated its desire to induce the states to establish Exchanges in the Act's legislative history. There is no requirement that Congress expressly articulate an objectively nonabsurd purpose in the legislative history to make unequivocal statutory text enforceable. To the contrary, even express legislative history cannot overcome plain text. Its absence is thus certainly irrelevant, and especially unsurprising for a statute negotiated largely behind closed doors.

In any case, there is ample evidence that Congress meant exactly what it said. A pre-debate proposal by an influential expert suggested that Congress tie subsidies to state cooperation. A draft Senate bill undeniably did just that, further belying the notion that any such condition would have been unthinkable to Congress. Meanwhile, a House bill that gave states no incentives to create Exchanges was a non-starter in the Senate for this reason, as everyone concedes, and the House had no capacity to push back against the Senate bill after supporters of the Act lost their filibuster-proof majority. If that were not enough, one of the Act's principal architects later explained that the point of linking subsidies to state Exchanges was precisely to politically pressure states by offering the incentive of federal funds for state residents.

4. In yet another argument even the Fourth Circuit rejected, the Government claims that giving § 36B its plain meaning would lead to anomalous results as to other provisions in the

Act. But even if the anomalies in the other provisions rose to the level of absurdity, that could not justify ignoring § 36B's text, which is concededly not absurd. In all events, the Government's contention fails on its own terms. The "anomalies" it alleges are simply contrived. All of the Act's other provisions are just as compatible with the plain meaning of § 36B as with the Government's unlawful revision of it, as the Fourth Circuit admitted. These provisions obviously do not come anywhere close to absurdity, on any terms, and they certainly do not justify "exporting" the absurdity to revise the statutory text wholesale, throughout the Act.

In sum, if the rule of law means anything, it is that text is not infinitely malleable, and that agencies must follow the law as written—not revise it to "better" achieve what they assume to have been Congress's purposes. *King* may be socially consequential and politically sensitive, but that only heightens the importance of judicial fidelity to the rule of law and well-established interpretive principles. It is clear that the IRS Rule is directly at war with these bedrock principles.

II. The IRS's Rationale For The Rule Is Facially Meritless And Contrary To The Rule Of Law.

As the foregoing reflects, there is no plausible way to magically convert the phrase "an Exchange established by the State under section 1311" to mean one "established by *HHS* under section *1321*." Nonetheless, the IRS "construed" § 36B to mean precisely the opposite of what it says. The sum total of its "reasoning" in support of such statutory revision is as follows:

> The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.

77 FR 30,377, 30, 378 (May 23, 2012).

This analysis is manifestly wrong at every turn. As just demonstrated, "the language of section 36B" plainly does not "support the interpretation that credits are available to taxpayers who obtain coverage through a . . . Federally-facilitated Exchange." Rather, it directly *precludes* the inference that subsidies are available on such federal Exchanges.

Moreover, it is quite understandable why the IRS did not deign to identify *which* "other provisions of the Affordable Care Act" purportedly support the notion that subsidies are available on HHS-established Exchanges: There are no such provisions for the reasons outlined above. Indeed, as noted, all the relevant provisions reinforce the conclusion that subsidies are limited to State-established Exchanges. The IRS's wholly unsupported conclusory assertion cannot alter this reality, or the plain language of § 36B itself.

Perhaps most dangerous of all is the IRS's notion that an Executive Branch agency can ignore or modify the plain meaning of statutory text because "the relevant legislative history does not demonstrate that Congress intended" to do what the statutory text demonstrably does; *i.e.*, "limit the premium tax credit to State Exchanges." This fundamentally distorts the role of legislative history in interpreting statutes and authorizes agencies to flout clear statutory text. Even if legislative history expressly contradicts unambiguous statutory language, that is of no moment. *See, e.g., Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 808, n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute," and so "inconsistency with the legislative history need not detain us."). Obviously, therefore, the *absence* of legislative history "demonstrating" Congress' intent by *repeating* the text's plain language cannot possibly be relevant. Thus, the IRS's bizarre notion that legislative history echoing statutory text is somehow necessary to "demonstrate" congressional intent is wholly

lawless. *See, e.g.*, *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of the statute.")

Indeed, all agree that, under the ACA, subsidies are limited to coverage purchased on an "Exchange" and that Medicaid funds are limited to states that expand eligibility. Yet nowhere does the ACA's legislative history reject subsidies for coverage purchased directly from insurers, or Medicaid funds for states that decline to expand their eligibility. This reinforces the legal point that such legislative history "amens" are irrelevant, and the practical point that the ACA's legislative history does not discuss all important issues.

In sum, the *ipse dixit* supporting the IRS Rule is directly contrary to the plain language of § 36B, inconsistent with other provisions of the ACA and improperly uses the absence of legislative history as a means to flout clear statutory text.

III. The "Interpretation" Set Forth To Support The IRS Rule Is Entirely Different Than The "Interpretation" Advanced In The Supreme Court By The Government.

Significantly, nothing in the IRS's "interpretation" supports or resembles the statutory interpretation offered by the Solicitor General in the Supreme Court. Compelled to acknowledge that subsidies are limited to Exchanges "established by the State" and that HHS is not a "State," the Government offered a "term of Art" theory to the Supreme Court in *King*; *i.e.*, that "Exchange established by the State" is a term of art that includes an Exchange established by HHS. (Govt. Br. 20-23). Notably, the IRS did not hint at any such theory in its Delphic pronouncement concerning "other provisions" of the ACA. That is presumably because nothing in the provision relied on by the Solicitor General—Section 1321—remotely converts § 36B into a "term of art" that means the opposite of what it says.

Specifically, the Government argues that § 1321 provides "flexibility," by "furnish[ing] alternative means" for states to "fulfil[l]" § 1311's "requirement" to establish Exchanges—namely, by using HHS as a "surrogate." (Govt.Br.20, 22.) The Act, however, says exactly the opposite: HHS must establish upon a state's "[f]ailure to establish" an Exchange. 42 U.S.C. § 18041(c). A "failure" to establish the Exchange obviously does not "fulfil[l]" the "requirement" to establish it; and an "Exchange established by the State" does not paradoxically result even when a state exercises its "flexibility" not to establish it. If anything, § 1321 therefore refutes the claim that an HHS Exchange is "established by the State." (And, even if HHS could somehow serve as surrogate for an unwilling state, § 36B does not authorize subsidies for "Exchanges established by surrogates of the State.")

The word "such" in § 1321 cannot fill this gaping hole. (Govt.Br.22.) "[S]uch Exchange" clarifies what HHS is establishing; it does not alter the reality that HHS, not the state, is establishing it. Further, plain text and common sense refute the notion that "such Exchange" necessarily connotes an Exchange where subsidies are available. (Govt.Br.24.) In describing a territorial Exchange, the ACA likewise crossreferences § 1311 and refers to "such an Exchange," 42 U.S.C. § 18043(a)(1), but the Government admits that subsidies are not available on "such" Exchanges. (Govt.Br.23 n.7.) Whether established by the state, HHS, or a territory, the Exchange itself is the same; the only difference is that consumers who buy on state-established Exchanges will (sometimes) be reimbursed by Treasury under § 36B. The latter distinction controls only the IRS's expenditures, not HHS's operation of the Exchange. If a law told the Transportation Secretary to build "such highway" if a state fails to, the "highway" is identical even if the state's failure decreases its federal highway funds.

* * * *

In sum, the IRS Rule vividly exemplifies the sort of abusive agency rulemaking that courts are obliged to invalidate. It is difficult to believe that this facially meritless "interpretation" was the result of reasoned decision-making about the law actually enacted by Congress, rather than the naked policy desires of the Executive Branch.