

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3  
4  
5 JACQUELINE HALBIG, ET AL.,

6 Appellants,

7 v.

No. 14-5018

8 KATHLEEN SEBELIUS, IN HER  
9 OFFICIAL CAPACITY AS U.S.  
10 SECRETARY OF HEALTH AND HUMAN  
SERVICES, ET AL.,

11 Appellees.  
12

13 Tuesday, March 25, 2014

14 Washington, D.C.

15 The above-entitled matter came on for oral  
16 argument pursuant to notice.

17 BEFORE:

18 CIRCUIT JUDGE GRIFFITH, AND SENIOR CIRCUIT  
19 JUDGES EDWARDS AND RANDOLPH

20 APPEARANCES:

21 ON BEHALF OF THE APPELLANTS:

22 MICHAEL A. CARVIN, ESQ.

23 ON BEHALF OF THE APPELLEES:

24 STUART F. DELERY, ESQ.  
25

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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

Michael A. Carvin, Esq.  
On Behalf of the Appellants

3; 69

Stuart F. Delery, Esq.  
On Behalf of the Appellees

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P R O C E E D I N G S

THE CLERK: Case number 14-5018, Jacqueline Halbig, et al., Appellants v. Kathleen Sebelius, in her official capacity as U.S. Secretary of Health and Human Services, et al. Mr. Carvin for the Appellants; Mr. Delery for the Appellees.

JUDGE GRIFFITH: So, I guess this is the group that couldn't get into First Street this morning, is that -- okay. Good morning.

ORAL ARGUMENT OF MICHAEL A. CARVIN, ESQ.

ON BEHALF OF THE APPELLANTS

MR. CARVIN: Good morning. Michael Carvin for the Appellants. This is a very straight-forward statutory construction case where I think the plain language of the statute dictates the result. And the only two provisions of the Act explaining which insurance exchanges are eligible for the federal subsidies, it states quite clearly that the --

JUDGE GRIFFITH: Can we get to a threshold issue here. And now, is it pronounced Mr. Klemencic?

MR. CARVIN: Klemencic, yes.

JUDGE GRIFFITH: Klemencic. Does he have an adequate remedy in a tax refund suit?

MR. CARVIN: No, he doesn't, for the same reason he didn't have an adequate remedy in *NFIB*. The Court in *NFIB* could have said to him well, just pay the penalty and come

1 back in a couple of years and contest it then, but they  
2 didn't, what they said was because the AIA doesn't apply that  
3 the ban on pre-enforcement suits, pre-enforcement challenges  
4 to the collection of taxes is not applicable. I don't even  
5 think that the Government doesn't argue that the AIA applies,  
6 and therefore it can't be that equitable principles foreclose  
7 them because otherwise the AIA would be a non-entity, it  
8 wouldn't mean anything. Thirdly, under the basic principles  
9 of *Sackett v. EPA*, *Abbott Labs*, Mr. Klemencic would be facing  
10 the dilemma of either having to pay a penalty or conforming  
11 his behavior to what he considers an illegal command. And the  
12 entire point of pre-enforcement review is to make sure that  
13 Plaintiffs don't have to face that Hobson's choice.

14 JUDGE GRIFFITH: Okay.

15 MR. CARVIN: And then to return to the merits, if I  
16 could. The language in the provisions defining the remedies  
17 is relatively straight-forward, and indeed as clear as could  
18 possibly be, you need to make a purchase on an exchange  
19 established by the state under Section 1311, so it clearly  
20 does not include purchases on exchanges established by HHS  
21 under Section 1321. The Government can't offer any rational  
22 explanation of why the subsidy provision says precisely the  
23 opposite of what they contend is the rule, why would they  
24 exclude HHS. Then they make this argument that it's sort of  
25 an odd place to put the restriction on the exchanges, but it's

1 not that at all, it's not an elephant in a mouse hole. Again,  
2 these restrictions are in the only two provisions that define  
3 and limit the kind of purchases that are subject to --

4 JUDGE GRIFFITH: Does our precedent allow us to  
5 conduct a *Chevron I* analysis by looking at the text alone?  
6 Doesn't *Sierra Club*, suggest, wouldn't suggest, say that we  
7 can't arrive at the decision whether the text is clear by  
8 simply looking at the text, we have to look at structure,  
9 purpose, legislative history, is that the analysis we're  
10 supposed to follow here?

11 MR. CARVIN: *Chevron I* is, has Congress spoken --

12 JUDGE GRIFFITH: Right.

13 MR. CARVIN: -- precisely to the question at issue?  
14 If the statutory language is completely unambiguous then that  
15 should be the end of the matter, but I don't want you not to  
16 look at the structure of context, and I want you very much to  
17 look at the structure of context. The context, the first  
18 point I was making is this is the provision that deals with  
19 the precise question at issue, are these subsidies available?  
20 Everyone agrees that purchases that are not made on exchanges  
21 are not subject to the federal subsidies, well, the only  
22 reason we know that is because of precisely the same  
23 provisions I'm pointing to. The Government agrees that if you  
24 buy insurance off the exchange you can't get a subsidy, but  
25 the only reason we know that, again, is these two provisions.

1 The context, if you will, is were they treating the word  
2 stayed as a synonym for all exchanges? Let's look at the  
3 context. Throughout the Act they use phrases like exchange  
4 under the Act when they're trying to get at both kinds of  
5 exchanges; they use the word exchange; in 36B itself, the  
6 subsidy provision, it recognizes that there's two kinds of  
7 exchanges, 1311 exchanges and 1321 exchanges, so I'm not  
8 running from the context, I think it's very much --

9 JUDGE RANDOLPH: You're referring to the reporting  
10 requirement?

11 MR. CARVIN: Okay. Yes.

12 JUDGE RANDOLPH: I mean, when you say that if --

13 MR. CARVIN: Yes.

14 JUDGE RANDOLPH: -- 36B, yes.

15 MR. CARVIN: Right.

16 JUDGE RANDOLPH: But that wasn't part of the  
17 statute, of the Affordable Care Act, was it? That was added  
18 afterwards?

19 MR. CARVIN: That was added by HCERA, that's  
20 correct.

21 JUDGE RANDOLPH: Right.

22 MR. CARVIN: And my only point is it shows a general  
23 congressional awareness, I'm not attaching a lot of  
24 significance to otherwise it confirms the obvious, which is  
25 they knew there was two kinds of exchanges, they knew there

1 was 1311 exchanges, and they knew there was 1321 exchanges,  
2 one established by the state, one established by the federal  
3 government, and yet when they sat down and said where are  
4 subsidies available they limited it to those established by  
5 the state under Section 1311.

6 JUDGE EDWARDS: Well, let me raise some questions,  
7 if I can. I have parsed as carefully as I can through the  
8 legislative history, and anything that indicates a purpose of  
9 Congress, individual mandate is one of the critical prongs of  
10 the statute, I can't find anything the statute, legislative  
11 history, or purpose to indicate that Congress meant to create  
12 a connection between state-created exchanges, the availability  
13 of subsidies, and the enforcement of individual mandates. You  
14 argue that these have these provisions as they do because it's  
15 an incentive for the states to set up exchanges to ensure that  
16 their citizens will receive a subsidy, is that your argument?

17 MR. CARVIN: Sure. In other words, they  
18 conditioned --

19 JUDGE EDWARDS: Is there something to indicate that  
20 that's what they intended to do, other than you asserting it?

21 MR. CARVIN: There's three things. First of all we  
22 know they did it for the same reason they know they  
23 conditioned Medicaid --

24 JUDGE EDWARDS: No, no, no, no, is there  
25 something --

1 MR. CARVIN: Yes.

2 JUDGE EDWARDS: -- in the language or legislative  
3 history that says they meant to set up the statute this way as  
4 an incentive to encourage states to set up exchanges?

5 MR. CARVIN: There is three things, all of which are  
6 the same as Medicaid. One, they limited the subsidies to  
7 situations where the state had established the exchange.

8 JUDGE EDWARDS: You're right. I mean --

9 MR. CARVIN: No, but number two --

10 JUDGE EDWARDS: -- your proposition simply assumes  
11 the answer to the question, so that one is gone. What's the  
12 next one?

13 MR. CARVIN: They said you shall set up exchanges --

14 JUDGE EDWARDS: Yes.

15 MR. CARVIN: -- it commands it, so what's the  
16 penalty if you don't adhere to the governmental command? The  
17 penalty is you don't get the subsidies. So, we know very much  
18 that they wanted state --

19 JUDGE EDWARDS: Who's the you don't get the subsidy?

20 MR. CARVIN: I'm sorry?

21 JUDGE EDWARDS: Who is the you?

22 MR. CARVIN: The people in the state.

23 JUDGE EDWARDS: The people in the state. Now,  
24 you --

25 MR. CARVIN: Correct.

1           JUDGE EDWARDS: -- are representing people, as I  
2 understand it, who you claim in large numbers, both employers  
3 and individuals who neither want the employer assessment, nor  
4 the mandate, nor the subsidy because it will invoke the  
5 individual mandate.

6           MR. CARVIN: Correct.

7           JUDGE EDWARDS: So, how can you logically argue that  
8 states have an incentive to set up exchanges if large numbers  
9 of people in the state don't want them?

10          MR. CARVIN: I never --

11          JUDGE EDWARDS: Under your theory.

12          MR. CARVIN: The theory is they would be getting  
13 hundreds of billions of free federal dollars --

14          JUDGE EDWARDS: Who would?

15          MR. CARVIN: People in the state.

16          JUDGE EDWARDS: But not the people that you're  
17 purportedly representing, large numbers, employers and  
18 individuals, you argue want no part of this, so the state has  
19 no incentive. If it's a political look, the state has no  
20 incentive to set up the exchanges because there are large  
21 numbers of voters and supporters who don't want any part of it  
22 if your theory is correct.

23          MR. CARVIN: Judge Edwards, we're not asking what my  
24 attitude is about these things, we're asking what the  
25 proponents of the Act theory was --

1 JUDGE EDWARDS: You're the one --

2 MR. CARVIN: -- and they did view --

3 JUDGE EDWARDS: You're the one who is arguing that  
4 Congress did this to create an incentive. When I read that  
5 argument to be very honest with you so you can know where my  
6 concerns are, it seems preposterous. I don't understand how  
7 the states have an incentive to set up an exchange, and  
8 especially where there's evidence to indicate the reason  
9 Congress left it this way as opposed to Medicaid is some  
10 states didn't want to be bothered setting up the exchanges,  
11 and let the Feds do it, what do they care? It had nothing to  
12 do with this is an incentive, this is a carrot for you because  
13 then subsidies will follow because there are lots of people in  
14 the states who don't want the subsidies.

15 MR. CARVIN: First of all, no one who passed the Act  
16 thought that there was a whole lot of people who didn't want  
17 their healthcare paid for, that is as atextual and as counter-  
18 intuitive as is possible. No one thought giving people \$150  
19 billion to go buy valuable health insurance was something that  
20 the people would rise up and say don't do this. So, you can't  
21 transport whatever my idiosyncratic views are to the  
22 proponents of the Act.

23 JUDGE EDWARDS: Which people are you talking about?

24 MR. CARVIN: I am talking --

25 JUDGE EDWARDS: You're talking about the poor

1 people, right?

2 MR. CARVIN: Well, no, the Government makes the  
3 excellent point that it's not just the poor people who would  
4 be --

5 JUDGE EDWARDS: Okay, the people --

6 MR. CARVIN: -- adversely --

7 JUDGE EDWARDS: -- the people who would benefit from  
8 the subsidy. We don't know, are the numbers equal, the people  
9 who would and would not?

10 MR. CARVIN: I'm sorry, yes, the -- obviously,  
11 anyone who gets the check who is not in the situation of  
12 Klemencic, but we're not talking about those people either,  
13 we're talking about states who are being told you can either  
14 have a very valuable benefit provided to you or not. If  
15 you're going to articulate the theory that this is not a  
16 valuable benefit, then the Government's purpose argument goes  
17 away, because then there is no purpose in distributing these  
18 benefits because Congress didn't care if these subsidies were  
19 there. But their argument is Congress was so devoted to  
20 distributing these subsidies as widely as possible you are to  
21 ignore the plain language in the subsidy provision that  
22 conditions those subsidies.

23 JUDGE EDWARDS: So, here's the problem --

24 MR. CARVIN: So, it's not --

25 JUDGE EDWARDS: -- here's the problem I'm having,

1 Counselor, as far as I can see no one understood what you're  
2 arguing now at the time this bill was passed. It's not like  
3 Medicaid -- let me finish my question if I can --

4 MR. CARVIN: Sure.

5 JUDGE EDWARDS: -- because this is a point that just  
6 leaps out --

7 MR. CARVIN: Sure.

8 JUDGE EDWARDS: -- it's so obvious, no one  
9 understood this, no one assumed that this was the effect of  
10 the Act, that is you're giving the states as with respect to  
11 Medicaid an opportunity to gut a benefit provision. And this  
12 is a critical provision, Medicaid, Congress knew how to do it  
13 if they wanted to, they said you pick it or not, and if you  
14 don't we understand, so be it. No one assumed that if you  
15 choose not to create an exchange because you don't want to be  
16 bothered with it you'll effectively gut the statute. I mean,  
17 what in your Amicus brief says hey, that's why we're here, we  
18 want to gut the statute.

19 MR. CARVIN: Terrific.

20 JUDGE EDWARDS: Congress doesn't talk about  
21 something like that if that's what their purpose is, gut the  
22 statute provision, hello, where's that coming from?

23 MR. CARVIN: Congress talked about the consequences  
24 of the state turning down the subsidies here as much as they  
25 talked about the consequences of them turning down Medicaid.

1 There's not a scintilla of legislative history --

2 JUDGE EDWARDS: The Medicaid provision is explicit  
3 on its face about the gutting possibility, that's not clear  
4 here.

5 MR. CARVIN: That is completely untrue.

6 JUDGE EDWARDS: You have a provision that can be  
7 read either the states don't want to be bothered, let the Feds  
8 set up the exchange; there's no language to indicate that the  
9 failure of the state to do it will effectively gut the  
10 statute.

11 MR. CARVIN: May I clarify the Medicaid provision?  
12 The Medicaid provision doesn't say anything about your aid is  
13 condition, all it does is add an additional eligibility  
14 criteria to the adducent ones, it said you must go to 133  
15 percent, it doesn't say if you don't take this deal. They  
16 point to 1396c as somehow putting the states on notice, but if  
17 you read 1396c it has nothing to do with whether or not  
18 turning it down you lose your Medicaid eligibility, it's all  
19 about after you've accepted the deal if you get in a fight  
20 with HHS. It says you can lose your Medicaid funds if the  
21 plan has been so changed that it no longer complies with the  
22 provisions, and it says that in the administration of the plan  
23 there's a failure to comply substantially with the Act. So,  
24 it has nothing to do with putting states on notice that if  
25 they say, if they don't satisfy the eligibility criteria they

1 are not satisfied, it is precisely parallel in the statute.  
2 1396c, by the way, was not added by the Affordable Care Act,  
3 so no, you have precisely the same --

4 JUDGE GRIFFITH: So, *Sierra Club*, if we follow the  
5 reasoning of *Sierra Club* we're supposed to look at legislative  
6 history. Is there anything in the legislative history, any  
7 floor statements, any committee reports that you can point us  
8 to that show that this was on the mind of Congress? In fact,  
9 is anyone making this point before Professors Adler and Cannon  
10 come up with it?

11 MR. CARVIN: Yes.

12 JUDGE GRIFFITH: Who, where, when? And not Chairman  
13 Baucus, sorry, you've over-read that one, so, but that, that  
14 doesn't persuade me, but others.

15 MR. CARVIN: Professor Jost made exactly the  
16 proposal, a very influential comment, the Health Committee,  
17 the other committee that was looking at this Act, conditioned  
18 subsidies on them making --

19 JUDGE GRIFFITH: Which state does Professor Jost  
20 represent?

21 MR. CARVIN: Again, if we're talking about  
22 representatives on the floor I have --

23 JUDGE GRIFFITH: I mean, *Sierra Club* says look at  
24 legislative history.

25 MR. CARVIN: Yes.

1 JUDGE GRIFFITH: There's a traditional way to go  
2 about doing that, and it's committee reports and floor  
3 statements, right?

4 MR. CARVIN: Yes.

5 JUDGE GRIFFITH: That's what we --

6 MR. CARVIN: I was getting to the Help --

7 JUDGE GRIFFITH: Yes. Okay. I'm sorry. Sorry.

8 MR. CARVIN: -- the Help Committee.

9 JUDGE GRIFFITH: Sorry. Yes.

10 MR. CARVIN: The bill there, conditioned subsidies  
11 on the states making certain insurance reforms.

12 JUDGE GRIFFITH: That didn't make it into law, did  
13 it?

14 MR. CARVIN: No, but I thought you were saying  
15 that -- well, I think what --

16 JUDGE RANDOLPH: Yes, they did that, and then, but  
17 they said that that would, they deny subsidies unless the  
18 state set up in exchange, and the denial would be for four  
19 years, right?

20 MR. CARVIN: That was one part of it, but the  
21 second --

22 JUDGE RANDOLPH: Yes.

23 MR. CARVIN: -- part, Judge Randolph, was they would  
24 be denied subsidies forever unless they applied the employer  
25 mandate to state and local government.

1 JUDGE RANDOLPH: Right.

2 MR. CARVIN: So, it's a different condition, and --

3 JUDGE RANDOLPH: There's a statute in the Internal  
4 Revenue Code right near where this one is found, and it's 26  
5 U.S.C. Section 35 --

6 MR. CARVIN: Right.

7 JUDGE RANDOLPH: -- which is a healthcare subsidy  
8 provision --

9 MR. CARVIN: Right.

10 JUDGE RANDOLPH: -- but it was limited to people who  
11 lost their jobs to manufacturing overseas --

12 MR. CARVIN: Right.

13 JUDGE RANDOLPH: -- or lost their pensions in the  
14 pension crash. I've read that statute, that statute reads  
15 almost identically to the statute we, 36B, the one that you're  
16 arguing about, and it's clear as a bell there that the states  
17 don't, the state residents, citizens don't get any subsidies,  
18 I think it was 72 percent, to pay for their healthcare unless  
19 the state goes through a whole bunch of hoops and enacts a  
20 bunch of different laws, and so on and so forth, and if the  
21 state doesn't do it then the people don't get the money.

22 MR. CARVIN: Right.

23 JUDGE RANDOLPH: Yes.

24 MR. CARVIN: And they put that, they put that --

25 JUDGE RANDOLPH: So, they copied -- I mean, it's a

1 typical drafting thing in Congress, if you've already done it  
2 once what you do is you take that provision and you copy it  
3 into the subsidy provision of the Affordable Care Act, I mean,  
4 it's clear that's what happened.

5 MR. CARVIN: And two things --

6 JUDGE RANDOLPH: They used the same terms, coverage  
7 month, eligible individual, so on and so forth.

8 MR. CARVIN: That's exactly right. The condition is  
9 contained in a section called coverage month. I think it's  
10 very relevant that the principle sponsor of that was Senator  
11 Baucus, so it wasn't just --

12 JUDGE RANDOLPH: Right.

13 MR. CARVIN: -- a coincidence, it was the same  
14 people drafting the Finance Committee thing who had a clear  
15 model for all of this showing that, and again, I don't think  
16 there was a whole lot of --

17 JUDGE EDWARDS: How did all the states miss this?

18 MR. CARVIN: None of them --

19 JUDGE EDWARDS: They didn't miss the Medicare  
20 condition, they challenged it as unconstitutional, they knew  
21 exactly what was intended there, no state, and indeed one of  
22 the brief's points is that no state made the equation that the  
23 availability of subsidies was a factor in deciding whether to  
24 create an exchange. No one.

25 MR. CARVIN: They couldn't --

1           JUDGE EDWARDS: This came out of the blue, I mean,  
2 you know, it's your job as an attorney, someone figure out a  
3 strange argument and let's run with it, we can find this  
4 language here and it'll -- as your Amicus says it'll gut the  
5 statute.

6           JUDGE RANDOLPH: I hate to --

7           MR. CARVIN: They couldn't --

8           JUDGE RANDOLPH: -- contradict my distinguished  
9 colleague, but it was widely known that unless the states set  
10 up an exchange they weren't going to get subsidies for their  
11 citizens. And in fact, there was an editorial in *Investor's*  
12 *Business Daily* in September of 2011 that pointed that out, and  
13 the Texas Congressmen knew it, they sent a letter to Speaker  
14 Pelosi complaining about it, I mean, it was clear.

15           MR. CARVIN: Thirty-five Senators opposed the IRS  
16 rule on the grounds, 35 members of Congress opposed it on the  
17 grounds that it was not compliant with law. They couldn't  
18 have sued under *NFIB* because it didn't become effective until  
19 2013, that was the date in which the states had to opt to make  
20 the decision, and if --

21           JUDGE EDWARDS: I'm asking what was the evidence,  
22 and I think my respected colleague has not addressed it  
23 either, there was no evidence at the time this bill was passed  
24 that this was the consequence.

25           MR. CARVIN: Your Honor --

1 JUDGE EDWARDS: No one assumed this. No one.  
2 Something like this doesn't hide away and then people all of a  
3 sudden oh, my goodness, look what we have, no one assumed as  
4 with respect to Medicaid that there was this connection here  
5 and that you could effectively gut the statute. And the other  
6 reading there was also plenty of evidence out there that the,  
7 in fact, I think folks on your side in one of the cases  
8 commented on look how nice Congress was, they allowed the  
9 states to, you know, take the trouble to set up an exchange,  
10 or let the Feds do it, either way, never making the connection  
11 that it had anything to do with the availability of subsidies.

12 MR. CARVIN: That makes my point, Judge Edwards.  
13 Everyone knew there was a condition in Medicaid. There's not  
14 a scintilla of legislative history confirming that truism,  
15 why, because people can read statutes, and if a statute says  
16 you don't get Medicaid unless you increase your eligibility  
17 everyone knows it, they don't need letters from Senators to  
18 Governors. And the Court has consistently instructed us that  
19 we don't psychoanalyze what members of Congress thought, we  
20 look at what Congress enacted, and if --

21 JUDGE EDWARDS: You look at the whole statute.

22 MR. CARVIN: That's true, and let's say some --

23 JUDGE EDWARDS: The whole statute.

24 MR. CARVIN: Let's --

25 JUDGE EDWARDS: What information you have to

1 require, whether there are other provisions that work  
2 differently, obviously work differently, the Medicaid  
3 provision is not the same as this provision.

4 MR. CARVIN: It is, except it's more draconian  
5 consequences if the states says no, and if a state had said no  
6 and some litigant had come into court and said you know what,  
7 this is terrible in terms of the consequences, we've just  
8 eliminated the most important social welfare program in the  
9 last 50 years, so we want you to read the condition out of the  
10 statute, and we point out that there was not legislative  
11 history, no court would take that argument seriously. *NFIB*  
12 struck down that provision, it was obliged to give it a  
13 savings construction and no one on the court suggested that  
14 was remotely plausible, that is because we look at what the  
15 statute says, what was enacted by Congress, and if there's no  
16 reason to interpret the language differently than what it says  
17 because there is no absurdities as there concededly is not  
18 here, that is the end of the judicial law. We don't go around  
19 asking how much awareness there was, particularly in a  
20 context, let's face it, they had six days to debate this in  
21 the Senate.

22 JUDGE EDWARDS: I think the point is there are  
23 absurdities here.

24 MR. CARVIN: Excuse me?

25 JUDGE EDWARDS: I think there are absurdities here.

1 MR. CARVIN: Which ones. And the one they --

2 JUDGE EDWARDS: There are absurdities --

3 MR. CARVIN: -- point to is the qualified  
4 individual, okay? They say look, it says you have to be,  
5 reside in the state that established the exchange, and they  
6 say that's absurd because that would mean nobody could reside  
7 on federal exchanges, but we know that's not a consequence of  
8 our interpretation of 36B, how do we know that, because the  
9 Government agrees. If this Court agrees that 36 --

10 JUDGE RANDOLPH: That's not even an anomaly any more  
11 because they passed a regulation that nobody's challenged that  
12 defines qualified individuals, anybody on any exchange. So,  
13 it's a non-issue, it's not an anomaly, it's certainly not an  
14 absurdity. There's a regulation out there that takes care of  
15 the problem, and nobody's challenged it, unlike this  
16 regulation.

17 MR. CARVIN: And I could just elaborate on that  
18 point. Mr. Delery is not going to stand up here and tell you  
19 that if you rule our way on 36B that they will be obliged to  
20 revise that regulation and exclude everybody from federal  
21 exchanges. Even more importantly, our argument on why it  
22 doesn't create absurdity is because it only says you need to  
23 be a qualified individual with respect to an exchange, and an  
24 exchange is defined in the Act as an exchange under 1311, i.e.  
25 state exchanges. So, this requirement only applies to state

1 exchanges. Please read their opposition brief, they don't  
2 dispute that in any way, shape, or form because they know that  
3 this requirement only applies to state exchanges because  
4 they're not going to suggest this absurd result. So, what  
5 they're trying to do is take a tendentious litigation position  
6 on the qualified individual provision so they can create this  
7 fake absurdity and then transport that absurdity and that re-  
8 writing of the language to 36B where it is conceded that there  
9 is no absurdity.

10 In terms of the other anomalies of the Act, they  
11 simply don't exist. They say the Medicaid maintenance of  
12 effort requirement, which requires you to maintain your  
13 Medicaid standards until there's a state established exchange  
14 creates some kind of absurdity, no, the Government itself says  
15 the purpose of that is to freeze all Medicaid payments until  
16 the subsidies from the ACA come in to replace them. Well, if  
17 we are correct that the subsidies don't exist on the state  
18 exchanges that simply means they're going to freeze --

19 JUDGE RANDOLPH: No, on the federal exchanges.

20 MR. CARVIN: I'm sorry. Yes. Sorry. That they're  
21 going to freeze those until they create a state exchange, in  
22 other words, precisely the reason that they give, plus which,  
23 of course, it gives the states another incentive to create the  
24 state exchanges, so in that way they could then modify their  
25 Medicaid, so there's no absurdity there. They point out the

1 reporting requirements in 36B(f)(3), which as Judge Randolph  
2 pointed out earlier came from the House were stuck into this  
3 provision, which is why there's a bit of a disconnect between  
4 the title of the provision and the absolute language of the  
5 provision, and 36B(f)(3) says that, explicitly recognizes that  
6 there's a difference between 1311 and 1321 exchanges, so it  
7 completely refutes their notion that somehow Congress thought  
8 state was a synonym for 1321 federal exchanges. They say it's  
9 odd that --

10 JUDGE RANDOLPH: The notice of proposed rule-making  
11 also recognized that, if you look at the notice of rule writ  
12 making it says we interpret established by a state pursuant to  
13 1311 to mean established by the federal government pursuant to  
14 Section 1321, that's what the proposed -- we're reviewing a  
15 rule here, and that's the notice of proposed rule-making.

16 MR. CARVIN: That is the Government's position, it's  
17 also the Government's position on the funding mechanism. The  
18 funding mechanism says it only goes to exchanges established  
19 by the state, well, HHS doesn't draw on those funds for its  
20 exchanges because it knows that when the same provision  
21 talking about funding says established by the state, that  
22 that's what it means, and they didn't want to get cross-wise  
23 with Congress when they tried to dip into a fund that was  
24 reserved exclusively for the state. So, even the Government  
25 doesn't believe their own argument.

1           At the end of the day what they're trying to tell  
2 you is that it's unreasonable or irrational or not the purpose  
3 to limit some states to not have subsidies. I agree. If we  
4 were arguing that there was something in the Act that said  
5 these states don't get subsidies they'd have a point, we're  
6 not making that argument, we're making the argument that they  
7 condition subsidies on the state creating the exchanges, so  
8 what they have to argue is that was irrational. But we know  
9 it's not irrational for three reasons, that's what they did  
10 with Medicaid, they very much wanted state run exchanges. The  
11 only real incentive for the states to run the exchanges was by  
12 conditioning subsidies. The alternative policy under the  
13 IRS's re-writing of the rule creates a bizarre circumstance  
14 where it's almost impossible to fulfill the Act's purpose of  
15 having state run exchanges because it eliminates any tangible  
16 incentive for these people to go ahead and adopt the  
17 exchanges, so they've created a situation which predicably has  
18 resulted in only 14 states doing what Congress clearly wanted  
19 50 states to do, which is to set up their exchanges.

20           JUDGE RANDOLPH: So, in other words, your argument  
21 is a but for the IRS rule it may well have been that the  
22 implicit prediction of, quote, Congress that all the states  
23 would buy into and set up their own exchanges didn't happen,  
24 and the reason it didn't happen is because the IRS rule came  
25 in there and the states said there's nothing in it for us now,

1 I mean, let the federal government do it. Yes.

2 MR. CARVIN: If the D.C. Government said you get  
3 \$100 if you clear the sidewalk in front of your house of snow,  
4 or you get \$100 if you don't clear the sidewalk in front of  
5 your house of snow, there would be a whole lot of snow on the  
6 sidewalks because they have utterly eliminated the incentive  
7 to take the desired action, and the same is precisely true  
8 here. The calculus of Congress was we will only achieve less  
9 than 50 per state participation if states behave in the  
10 economically irrational thing of denying hundreds of billions  
11 of dollars of free federal money, it's not like Medicaid where  
12 they have to chip in about 43 --

13 JUDGE EDWARDS: What is the advantage, and you keep,  
14 your propositions just assume the answer to the issue, which  
15 is I don't know what to say, I keep listening to it over and  
16 over again, you just assume the answer and then you run with  
17 that. Why does it matter who creates the exchange? Now,  
18 forget your alleged tie to the subsidy, okay? Forget that.

19 MR. CARVIN: How do we know it matters to Congress,  
20 we know it --

21 JUDGE EDWARDS: Why does it matter?

22 MR. CARVIN: Because they said states shall run the  
23 exchange, they gave the strong --

24 JUDGE EDWARDS: And they said and if they don't  
25 it'll be done by the Feds.

1 MR. CARVIN: Exactly. But what you --

2 JUDGE EDWARDS: They didn't say oh, it's a bad thing  
3 it'll be done by the Feds, they said if the states do it, it  
4 says a governmental agency or non-profit entity established by  
5 the state, and HHS will establish the exchange when the state  
6 fails to do it, isn't section exchange an entity established  
7 by a state?

8 MR. CARVIN: Yes, of --

9 JUDGE EDWARDS: Isn't that established by the state?

10 MR. CARVIN: They wanted states to run the --

11 JUDGE EDWARDS: No, no, no. Isn't there an  
12 ambiguity there if you read that language the state shall, and  
13 if not, the Feds will, that is an exchange established by the  
14 state, can't the Government say that's the way we're  
15 interpreting it when you look at the purposes of the Act?

16 MR. CARVIN: No, not at all. You can't interpret  
17 state to mean federal, you can't interpret north to mean  
18 south. They --

19 JUDGE EDWARDS: What advantage is there, forget the  
20 subsidy, what advantage is there to a state as opposed to the  
21 Fed setting up the exchange? Forget the subsidy.

22 MR. CARVIN: To get reelected. Do you want to go  
23 out and tell your citizens I have just denied you hundreds of  
24 billions of --

25 JUDGE EDWARDS: No, no, no. No, no. You have to

1 forget the subsidy. See, you keep asserting the proposition  
2 in a way that it's the answer to your question. Forget the  
3 subsidy. I'm trying to understand, because I've thought about  
4 this a lot, your argument makes no sense, who cares who sets  
5 up the exchange?

6 JUDGE RANDOLPH: Ben Nelson --

7 MR. CARVIN: The enactors of the Act --

8 JUDGE RANDOLPH: Ben Nelson cared.

9 JUDGE EDWARDS: Who cares?

10 JUDGE RANDOLPH: Ben Nelson.

11 MR. CARVIN: They couldn't get to 60 unless Ben  
12 Nelson said we are not going to have a federally run exchange,  
13 we are going to implement basic principles of Federalism and  
14 the states are going to run those exchanges or I don't vote  
15 for it and it doesn't get passed.

16 JUDGE EDWARDS: Okay. And then what Congress did --

17 MR. CARVIN: Now, then what Congress did was --

18 JUDGE EDWARDS: -- to set up a -- let me give you my  
19 question --

20 MR. CARVIN: Sure.

21 JUDGE EDWARDS: Then what Congress did --

22 MR. CARVIN: Please.

23 JUDGE EDWARDS: -- forgetting the subsidies is they  
24 set up this arrangement.

25 MR. CARVIN: Yes.

1           JUDGE EDWARDS: The states can do it if you want to  
2 do it, if not, we'll do it.

3           MR. CARVIN: It said the states shall do it, and if  
4 you don't, we will do it.

5           JUDGE EDWARDS: We will do it.

6           MR. CARVIN: And that tells you that they wanted an  
7 exchange in the state, but it doesn't -- but they preferred a  
8 state run --

9           JUDGE EDWARDS: You're not answering my question.  
10 Forget the subsidy.

11          MR. CARVIN: I am forgetting it.

12          JUDGE EDWARDS: Who cares?

13          MR. CARVIN: I am forgetting it.

14          JUDGE EDWARDS: Who cares, other than the one person  
15 you've -- what difference does it make who sets up the  
16 subsidy? There is evidence -- there's no evidence coming from  
17 the states supporting what you're suggesting, and there is  
18 evidence that some states were happy to let the Feds do it,  
19 they didn't want to be bothered.

20          MR. CARVIN: If that was true that they were happy  
21 to have the Feds do it, and the Feds wanted the states to do  
22 it, that means you needed to provide them with a pretty big  
23 incentive, and the best and most closely drawn incentive for  
24 them to do what they were unwilling to do, but Ben Nelson and  
25 the Act wanted them to do was to say I'll give you hundreds of

1 billions of dollars to your voters if you do it. Now, if you  
2 say no you're going to have to go back to those people of all  
3 income strata, and to all those businesses who are adversely  
4 affected --

5 JUDGE EDWARDS: See, the great irony --

6 MR. CARVIN: -- and you have to tell them --

7 JUDGE EDWARDS: The great irony in your argument is  
8 you're standing there representing the employers and the folks  
9 and you claim there are many, many, many of these folks in  
10 many, many, many of these states --

11 MR. CARVIN: I never said that.

12 JUDGE EDWARDS: -- who want no part of this, and  
13 they are voting, too, and then out of the other side of your  
14 mouth you're saying well, but this is a great incentive for a  
15 state to set up the exchange because they have to go back to  
16 those voters, they don't want to give up that money. Well,  
17 you're saying there are lots of those voters who want no part  
18 of this.

19 MR. CARVIN: Judge Edwards, with the greatest  
20 respect, surely the interpretation of a statute can't turn on  
21 what the Plaintiffs think or believe. Sure, if I had a  
22 supporter of the Act coming in here --

23 JUDGE EDWARDS: No, no, I'm just taking you --

24 MR. CARVIN: No, no.

25 JUDGE EDWARDS: -- at your word. You start your

1 argument, the crux of your argument is there was an incentive  
2 for the states to do that. I'm reading stuff really  
3 carefully, that argument from day one has made no sense to me  
4 whatsoever, given who you're representing, and given the  
5 number of people you say you represent, who want no part of  
6 this. So, the state acting politically is not clearly going  
7 to say let's set up an exchange.

8 MR. CARVIN: Judge Edwards, let's assume one of  
9 two --

10 JUDGE EDWARDS: If Congress gives them an option to  
11 set it up or not, they're going to say let's not do it because  
12 there are a lot of people in the state who don't want any part  
13 of it.

14 MR. CARVIN: Okay. There's two propositions, one is  
15 the states are reluctant to set up the exchanges, if that's  
16 true, then you need a very large incentive to get them to do  
17 it. Number two is the state --

18 JUDGE EDWARDS: Only if it matters. Only if it  
19 matters, who does it?

20 MR. CARVIN: They wanted the states to run the  
21 exchanges, they said --

22 JUDGE EDWARDS: Because?

23 MR. CARVIN: Because they said shall run, because  
24 they needed Ben Nelson's vote to pass the Act, and because --

25 JUDGE EDWARDS: So, this all --

1 MR. CARVIN: -- it was, it was --

2 JUDGE EDWARDS: -- comes down to Ben Nelson?

3 MR. CARVIN: It was --

4 JUDGE EDWARDS: I'm not getting it. If you take the  
5 subsidy out --

6 MR. CARVIN: Yes.

7 JUDGE EDWARDS: -- of the equation --

8 MR. CARVIN: Right. Then you get --

9 JUDGE EDWARDS: -- and I'm asking, I know I've asked  
10 this seven times, I'm asking again, take it out.

11 MR. CARVIN: Right.

12 JUDGE EDWARDS: You have a provision that says the  
13 state will do it, or the Feds will do it, what difference does  
14 it make who does it? Forget the subsidy.

15 MR. CARVIN: Because if you have the Feds running it  
16 it is the first step, to quote Senator Nelson, towards a  
17 federally run healthcare exchange. We want to ensure that we  
18 have state participation. You don't have to speculate about  
19 whether Senator Nelson's views prevailed because you can look  
20 at the Act, and the Act says two very explicit things, the  
21 states shall do it, which is hardly agnostic as to whether or  
22 not the states will do it; and two, only the states will get  
23 money to set up the exchanges, we won't give any money to the  
24 federal exchanges. So, I've never mentioned the word  
25 subsidies, and that's how you know they wanted states to run

1 exchanges.

2 JUDGE RANDOLPH: I thought your argument, also, was  
3 rather broader than that, because the pattern, the model, the  
4 system that this sets up is a very familiar one. The Clean  
5 Air Act, The Water Quality Act, I mean, and all of those  
6 provide that if the state doesn't set up a state  
7 implementation plan, the federal government will take it over.  
8 It matters a great deal to the states to have control, but  
9 life's a trade off, and this statute is rather Janus-faced, I  
10 mean, it's looking in about 15 different directions on every  
11 other page, cobbled together, poorly written, but there it is,  
12 and it is modeled, I think, over on 26 U.S.C. Section 35, and  
13 that also conditions subsidies on states enacting laws, and  
14 that's what we're dealing with here is states enacting laws.  
15 And as far as the states are concerned, and we have Amicus  
16 briefs from a number of states that made the trade off that we  
17 think it's more important to preserve our liberty not to have  
18 to engage in, or not to have to buy what the federal  
19 government tells us than it is to have our citizens beholden  
20 to the federal government through subsidies. That's a trade  
21 off a state can make, maybe they'll pay a political price for  
22 it.

23 MR. CARVIN: And look, all I'm asking you is to give  
24 states the option that Congress gave them. The IRS changed  
25 the deal, it said --

1 JUDGE EDWARDS: No, no, what you're asking for is,  
2 come on, let's put it on the table.

3 MR. CARVIN: Sure.

4 JUDGE EDWARDS: What you're asking for is destroy  
5 the individual mandate which guts the statute. You admit  
6 that's what this case is about. There's nothing hidden about  
7 that, kill this, you kill the individual mandate, and we gut  
8 the statute, and we've got what we want. Now, my own personal  
9 view since we're expressing some views here is isn't that a  
10 political question, shouldn't you be in Congress fighting that  
11 fight, but that's what this case is about, gut the statute.

12 MR. CARVIN: That's the key point, right, Judge  
13 Edwards? Let's let Congress figure this out. Congress wrote  
14 it this way, if --

15 JUDGE EDWARDS: No, no, no. Let Congress undo what  
16 you say should not be properly there.

17 MR. CARVIN: If Congress said, as it expressly did  
18 in the clearest possible English that subsidies are limited to  
19 exchange established by the states under Section 1311, and  
20 they don't like that result then all they have to do is change  
21 the law. It is --

22 JUDGE EDWARDS: That's the question.

23 MR. CARVIN: No.

24 JUDGE EDWARDS: That's the question.

25 MR. CARVIN: I know. And you're saying you --

1 JUDGE EDWARDS: And if there's an ambiguity is an  
2 agency free to cure the ambiguity?

3 MR. CARVIN: No.

4 JUDGE EDWARDS: No.

5 MR. CARVIN: Not in these circumstances, because of  
6 *Shinseki*. But if I can get back to the major point, if the  
7 stakes are so high, the reason the stakes have become so high  
8 is because the IRS completely altered the incentives for  
9 states when they were making the original decision, and if the  
10 stakes are high that is when the Courts should adhere most  
11 closely to the legislative language because it shouldn't allow  
12 agencies to hijack, as the Court just put it in *Loving*, very  
13 important economic and politically significant questions.  
14 That is when the judiciaries deference to the agency is at  
15 zenith, not at its apex.

16 JUDGE RANDOLPH: Can I ask you, I'd like to get your  
17 view on it, but I'd also like to know your opponent's view.  
18 Is a state still free to set up an exchange?

19 MR. CARVIN: Yes.

20 JUDGE RANDOLPH: Even though it has to, the statute  
21 reads it has to be in effect by January 1st, 2014, can they  
22 still set up an exchange?

23 MR. CARVIN: Sure. If you read that provision  
24 carefully, the January 1, '14 is the date upon which the HHS  
25 must act, that's what triggers the HHS requirement. But

1 there's no prohibition that they come in after January, '14  
2 that they're somehow stopped, plus which there's a provision  
3 in there that says we won't give grants after January 1, 2015,  
4 which strongly suggests that they contemplated states coming  
5 in after 2015. HHS has taken the position, for example, the  
6 two states that are currently on the fence that if they get  
7 their act in they can come in. And finally, there would be a  
8 very strong --

9 JUDGE RANDOLPH: So, there's another solution to the  
10 so-called gutting of the statute beyond congressional action,  
11 and if the IRS rule is vacated, speaking hypothetically, then  
12 the 34 states who said it doesn't matter could opt in and set  
13 up an exchange and everybody would go away and, you know,  
14 there would be no issue.

15 MR. CARVIN: You won't even need a corrective  
16 action.

17 JUDGE RANDOLPH: Right.

18 MR. CARVIN: We can figure out whether or not I'm  
19 right, or, or, and Congress is right that states don't behave  
20 economically irrational by denying hundreds of billions of  
21 dollars to their voters, it would certainly dramatically  
22 change the calculus. If you have to tell your voters I don't  
23 want to take on this politically unpopular task of running the  
24 exchange, explaining to your voters because I don't want to do  
25 that you people making up to \$95,000 a year aren't going to

1 get a dime in federal subsidies, and you're not going to be  
2 able to afford the health insurance that you would if I made a  
3 separate decision, I think that will dramatically alter the  
4 attitudes of elected officials in those states. Absolutely.  
5 Thank you.

6 JUDGE GRIFFITH: Thank you, Mr. Carvin. Mr. Delery.

7 ORAL ARGUMENT OF STUART F. DELERY, ESQ.

8 ON BEHALF OF THE APPELLEES

9 MR. DELERY: Good morning, and may it please the  
10 Court. The text and structure of the Affordable Care Act  
11 demonstrate that federal tax credits are available to lower  
12 the cost of insurance on the 34 federally facilitated  
13 exchanges within individual states. The relevant statutory  
14 provisions read together as they must be preclude Plaintiff's  
15 interpretation, and show that Congress intended a nationwide  
16 system to provide affordable healthcare. Plaintiffs'  
17 fundamental error is to focus on one phrase in one provision  
18 in isolation. The Government's reading --

19 JUDGE RANDOLPH: It's not one phrase. I've heard  
20 that so many times. At one point I counted up the number of  
21 references to established by a state pursuant to 1311, just in  
22 36B, and I think that it appears seven times, not just once,  
23 do you disagree with that?

24 MR. DELERY: It does appear several times, Your  
25 Honor.

1 JUDGE RANDOLPH: Not several, I said seven.

2 MR. DELERY: Yes. I'm not sure about the exact  
3 number --

4 JUDGE RANDOLPH: Yes. Yes.

5 MR. DELERY: -- but I know it is several, multiple.

6 JUDGE RANDOLPH: So, it's not an isolated phrase in  
7 the statute.

8 MR. DELERY: Right. So, 36B(a) begins by saying the  
9 tax credit shall be allowed in the case of an applicable tax  
10 payer, and then the formula calculates the amount of the  
11 credit with respect to income level, not based on which  
12 exchange. If you look then at two references in the formula  
13 in (b)(2)(A) and (c)(2)(A)(I) the phrase says established by  
14 the state under 1311, or 42 U.S.C. 18031. So, that provision  
15 itself includes a cross-reference straight to the nested  
16 exchange requirements in Title 42, but --

17 JUDGE GRIFFITH: Well, in this case --

18 MR. DELERY: -- concludes --

19 JUDGE GRIFFITH: -- with West Virginia, Mr.  
20 Klemencic is from West Virginia, who established the exchange  
21 in West Virginia? Who?

22 MR. DELERY: The Secretary.

23 JUDGE GRIFFITH: The Secretary established the  
24 exchange.

25 MR. DELERY: Right.

1 JUDGE GRIFFITH: West Virginia did not establish the  
2 exchange.

3 MR. DELERY: That's correct, Your Honor. But under  
4 Section --

5 JUDGE GRIFFITH: So, if we're parsing this phrase  
6 established by the state, right?

7 MR. DELERY: I think the phrase is established by  
8 the state under --

9 JUDGE GRIFFITH: Under 1311.

10 MR. DELERY: -- 1311 --

11 JUDGE GRIFFITH: Yes.

12 MR. DELERY: -- which is a cross-reference. So, in  
13 order to interpret the plain text of that statute you need to  
14 go to 1311 --

15 JUDGE GRIFFITH: Right.

16 MR. DELERY: -- to see what it says, and that's  
17 where the Plaintiffs discovered the importance of context.  
18 So, Section 1311 provides that the states shall establish an  
19 exchange, as was just discussed. Plaintiffs recognize,  
20 however, that that is not the end of the story because states  
21 have an option under the framework of the statute.

22 JUDGE GRIFFITH: Well, the question isn't what type  
23 of exchange it is, right? I mean, it's an exchange, it can  
24 be -- the question here --

25 MR. DELERY: Right.

1 JUDGE GRIFFITH: -- is who established it?  
2 Apparently that phrase meant a lot to Congress, as Judge  
3 Randolph --

4 MR. DELERY: Right.

5 JUDGE GRIFFITH: -- mentioned, seven times, who  
6 established it, and by your own admission the Secretary  
7 established it.

8 MR. DELERY: Right. I think I have two answers to  
9 that, Your Honor, the first is to focus on the language of  
10 18041(c) --

11 JUDGE GRIFFITH: Right.

12 MR. DELERY: -- which provides that if a state  
13 either elects not to establish its own exchange, or is  
14 unable --

15 JUDGE RANDOLPH: You know, it would be very helpful,  
16 and I found your brief a little confusing, if you used either  
17 the sections from the Affordable Care Act --

18 MR. DELERY: Sure.

19 JUDGE RANDOLPH: -- or the sections from the U.S.  
20 Code rather than switching back and forth. When you said that  
21 I said gee, I don't, okay, you're talking about 1321.

22 MR. DELERY: Right.

23 JUDGE RANDOLPH: Okay.

24 MR. DELERY: I'm happy to do that, Your Honor.

25 JUDGE RANDOLPH: Yes. Okay.

1 JUDGE GRIFFITH: Yes. Yes, I vote for that.

2 MR. DELERY: It's 1321 --

3 JUDGE GRIFFITH: Yes.

4 MR. DELERY: -- and this appears on page 17A of the  
5 addendum --

6 JUDGE RANDOLPH: Okay.

7 MR. DELERY: -- if that's helpful. So, that if a  
8 state is not an electing state, or is unable to establish the  
9 exchange, have it operational by the date, which was January  
10 1st, then the Secretary shall establish and operate such  
11 exchange within the state. And I believe in the prior  
12 argument the phrase such exchange was not referenced by the  
13 Plaintiffs, they talk about an exchange when in fact the  
14 statutory term is such exchange, which refers back to the  
15 required exchange under 1311. I think --

16 JUDGE RANDOLPH: Well, that can't be the end of it,  
17 though, can it? I mean, because if they're establishing the  
18 exchange under 1311 then that means the federal government has  
19 got to elect state officials, which is rather odd.

20 MR. DELERY: Right.

21 JUDGE RANDOLPH: Doesn't 1311 require the election  
22 of state officials and someone to administer -- we talk about  
23 an exchange, but what we're really talking about is an entity  
24 formed under state law, the federal government I don't think  
25 can do that.

1           MR. DELERY: I think what these two provisions read  
2 together as they must be, Your Honor, mean, is that a state  
3 was given the right of first refusal, the first option to  
4 establish an exchange, if it either chose not to do so, or was  
5 unable to do so then the Secretary would step in and establish  
6 such exchange to accomplish the same functions, and I believe  
7 that the Plaintiffs can agree on page five --

8           JUDGE RANDOLPH: But the Secretary is -- excuse me,  
9 the Secretary is operating pursuant to Section 1321, which is  
10 what you're talking about.

11           MR. DELERY: Right.

12           JUDGE RANDOLPH: The states operate pursuant to  
13 Section 1311. So, some of the requirements of 1311 apply to  
14 the Secretary's establishment of an exchange, but still, is it  
15 your submission that the phrase which appears seven times in  
16 that statute, established by a state pursuant to Section 1311  
17 means that a federal exchange is established by a state  
18 pursuant to 1311? Yes, parse those words for me, and tell me  
19 where the interpretive view that you're espousing fits within  
20 that language.

21           MR. DELERY: So, make a couple of points. I think  
22 that the basic point is that the exchange under 1311 where a  
23 state has not established an exchange, slots into, provides  
24 the function of is the substitute for the state's exchange  
25 under 1311, provides the same functions, and I believe that

1 that is the position that the Plaintiffs agree with in their  
2 reply brief on page five. So, what you really have is a nest  
3 series of provisions so that --

4 JUDGE RANDOLPH: But I'm not getting the language,  
5 established by the state pursuant to 1311 means as the  
6 proposed notice of rule-making, established by the federal  
7 government pursuant to Section 1321, I mean, that is a leap.  
8 I don't know. That's not interpretation.

9 MR. DELERY: So, respectfully, Your Honor, I think  
10 if you look at the slotting in of the federal exchange you get  
11 to this result, and exchange is a defined term under Title One  
12 of the Affordable Care Act. Section 36B is in the Internal  
13 Revenue Code, exchange established by the state under 1311 is  
14 pointing back to the nested exchange provisions in what was  
15 titled Title One of the Affordable Care Act, but for purposes  
16 of that provision exchange is a defined term, meaning an  
17 American health benefit exchange under 1311. So, when the  
18 Secretary is directed to establish such exchange, that's such,  
19 American health benefit exchange under 1311. Congress is  
20 clearly indicating that it wants a system of exchanges  
21 nationwide to provide affordable healthcare for all Americans.  
22 States have the first opportunity to establish those exchanges  
23 under this framework, but if they don't then that same  
24 exchange is created by the Secretary.

25 JUDGE RANDOLPH: Yes, we know that. That's not the

1 same exchange, you have to agree to that.

2 MR. DELERY: For purposes of the operation of the  
3 statute it is.

4 JUDGE RANDOLPH: Well, it's not the same exchange  
5 because 1311 talks about state officials running it, and state  
6 laws being passed, and state budgets being charged with the  
7 responsibility with some federal subsidies, so it's not the  
8 same thing.

9 MR. DELERY: Right. Given the definitional terms,  
10 however, the point is that the, Your Honor, the Secretary's  
11 exchange stands in the shoes of, steps into the place of the  
12 defined term.

13 JUDGE GRIFFITH: I don't get it. As I -- all you're  
14 saying to me is, and maybe I'm just not hearing you, is that  
15 you're saying under, because of 1311 the Secretary can  
16 establish the type of exchange that's created in 1311, but  
17 that begs the question, the key language is who establishes  
18 the exchange, and you just keep coming back to well, the  
19 Secretary establishes it.

20 MR. DELERY: Well, I think, Your Honor, that the key  
21 language is that the --

22 JUDGE GRIFFITH: The key language is established by  
23 the state under 1311.

24 MR. DELERY: Under 1311. And --

25 JUDGE GRIFFITH: And it was West Virginia

1 established, the exchange in West Virginia was it established  
2 by the state under 1311?

3 MR. DELERY: That exchange --

4 JUDGE GRIFFITH: And the answer is no, it was --

5 MR. DELERY: That it's established by the --

6 JUDGE GRIFFITH: -- established by the Secretary --

7 MR. DELERY: Yes.

8 JUDGE GRIFFITH: -- pursuant to 1321 as it  
9 references, and it's a type of exchange that you would get  
10 under 1311 in terms of the marketplace, but it wasn't  
11 established by the state.

12 MR. DELERY: But the further point, Your Honor, I  
13 think is, you know, the Secretary, HHS establishes the  
14 exchanges --

15 JUDGE GRIFFITH: Yes.

16 MR. DELERY: -- where the state, and operates them  
17 where the state does not, but Congress can define terms  
18 however it wants, it can set up nested provision however it  
19 wants, it's not that unusual.

20 JUDGE GRIFFITH: And Congress did this for  
21 territories, right? I think in the case of territories --

22 MR. DELERY: Right.

23 JUDGE GRIFFITH: -- Congress said territories can  
24 create these exchanges and they will be treated like a state.  
25 They didn't use that language here, why not?

1                   MR. DELERY: I mean, the territory provision was  
2 needed because of the differing internal income tax --

3                   JUDGE GRIFFITH: Right, right, right.

4                   MR. DELERY: -- provisions that apply there. Here,  
5 I would submit, it's in a different form, but it has the, it  
6 reaches the same result, it has the same effect. That is what  
7 Congress did. And if you step back to the point about what  
8 the goal of the statute was here, I think it's clear from the  
9 text of the statute, and from the structure, that the purpose  
10 was to provide affordable healthcare to Americans nationwide.  
11 It was --

12                   JUDGE RANDOLPH: Is that the only purpose? Wasn't  
13 there also a purpose to have the states run the exchanges?

14                   MR. DELERY: I think what the statute reflects is a  
15 design of cooperative Federalism so that the states would have  
16 the first opportunity, certainly, to run the exchanges, but  
17 that if they did not the federal government would step in and  
18 provide them. That's why the term applicable to the states is  
19 that the state could elect to establish an exchange for itself  
20 and otherwise the states won't.

21                   JUDGE RANDOLPH: Let me give you a proposition and  
22 I'd like you to respond to it. This statute, as everybody  
23 knows, was kind of a last minute deal, and it never went  
24 through the usual legislative process of the Conference  
25 Committee, and so on and so forth, but, and there were a lot

1 of, the statute is filled with a lot of predictions, even the  
2 title, and from all reports those predictions have not been  
3 borne out, the launch was an unmitigated disaster, as  
4 everybody agrees. The costs have gone sky high, even though  
5 Congress apparently thought that competition and an open  
6 market, free, or a transparent market would drive costs down,  
7 and let us suppose that Congress made another prediction, and  
8 that prediction was that if we allow subsidies on state  
9 exchanges without allowing them on federal exchanges that all  
10 the states would line up and buy that deal, and that  
11 prediction turned out to be wrong. So, as a narrative of what  
12 is going on with the Affordable Care Act where do you  
13 disagree?

14 MR. DELERY: I disagree with several of the first  
15 premises, among other things, there are millions of Americans  
16 who have been rolled through exchanges for healthcare that  
17 they otherwise could not have afforded, or could not access  
18 because of pre-existing conditions. And the structure of the  
19 Act was to provide an integrated system of reforms that would  
20 reform the individual market. So, now insurance companies  
21 have to cover people no matter how sick they are, and the  
22 structure as designed was to bring otherwise healthy people  
23 into the insurance market through a combination of the  
24 mandate, as was discussed, and the subsidies, which make them  
25 affordable. Without the subsidies on the exchange the

1 exchanges and the insurance markets won't function, because  
2 the sick people will buy the insurance that they're entitled  
3 to, otherwise healthy people will not be in the risk pool, the  
4 pool, therefore, will be more expensive to insure, premiums  
5 will continue to go up, and the cycle will repeat, that's the  
6 death spiral that we and other Amici have talked about. Right  
7 now millions of Americans have enrolled and are getting the  
8 benefit of tax credits which are key to provide this  
9 affordable health insurance.

10           The Plaintiffs' counter-narrative which provides a  
11 different purpose --

12           JUDGE RANDOLPH: Well, you left one thing out of the  
13 calculation, and that is that Congress acted on the assumption  
14 that dangling this carrot in front of the states and the  
15 politicians and the governors of the states would lead to the  
16 fact that the states themselves would set up exchanges rather  
17 than the federal government, and there's some pretty strong  
18 evidence of that, because how much was, what was the budget  
19 allocated to the federal government to set up exchanges? It  
20 was only \$304 million, as I recall, and yet the, at last time  
21 I checked it's cost well over \$2 billion, so that the budget  
22 allocation, appropriation indicated that there wouldn't be if  
23 any federal exchanges.

24           MR. DELERY: I don't think that that's the case,  
25 Your Honor, either. Certainly there were reports at the time

1 that states were considering not establishing exchanges, and  
2 obviously, the statute provides that flexibility, the term and  
3 the title of the provision is state flexibility, a state is  
4 allowed to elect not to. There were reports at the time --

5 JUDGE RANDOLPH: Aren't there only like three or  
6 four that indicated they were considering not setting one up  
7 prior to the IRS rule?

8 MR. DELERY: Right. Again, I'm not sure about the  
9 exact timing. I think certainly there were some who said that  
10 at the time, more now ultimately decided not to do it.

11 JUDGE EDWARDS: You're not agreeing with the  
12 premise, are you --

13 MR. DELERY: No.

14 JUDGE EDWARDS: -- that subsidies were a carrot?

15 MR. DELERY: No, and I was coming to that, Your  
16 Honor. I'm absolutely not. I think it's an after the fact  
17 account manufactured without evidence from the record at the  
18 time, and in fact, there's no credible indication, I would  
19 submit, that Congress intended to sacrifice the principle  
20 subsidy that would provide affordable care for Americans  
21 across the country as an incentive.

22 JUDGE EDWARDS: Well, because you're going to gut  
23 the individual mandate, which is a principle part of the  
24 statute.

25 MR. DELERY: Right. And that goes --

1 JUDGE EDWARDS: Doesn't make any sense.

2 JUDGE GRIFFITH: But by the same --

3 JUDGE RANDOLPH: But Congress did, did, did do just  
4 that, not for everybody, but people who make below 100 percent  
5 of the poverty figure for a household are not eligible for  
6 subsidies, isn't that correct? Is that correct?

7 MR. DELERY: Yes.

8 JUDGE RANDOLPH: It is. It's correct. And the  
9 reason for that is that Congress assumed that the states would  
10 buy into the Medicaid expansion, and they would be covered by  
11 Medicaid, but the fact of the matter is that, I don't know how  
12 many states, was it 19 states have not bought into the  
13 Medicaid expansion, and so all these people that are 100  
14 percent or less are not even eligible for subsidies --

15 MR. DELERY: Right.

16 JUDGE RANDOLPH: -- is that right?

17 MR. DELERY: In the states that have not yet --

18 JUDGE RANDOLPH: Yes.

19 MR. DELERY: -- accepted the Medicaid expansion.

20 The Medicaid expansion, however, was clear in that the  
21 additional requirements were made part of the mandatory  
22 Medicaid requirements, and a very different situation than  
23 here because of the long-standing practice of the Medicaid  
24 program states have been operating the joint program with the  
25 federal government under established rules for decades. Here,

1 the Plaintiffs' proposition is that this incentive, which was  
2 supposedly so extreme that states would not be able to refuse  
3 it, was buried in sub-paragraphs like (b)(2)(a), and  
4 (c)(2)(A)(i), in the formula calculation you'd expect --

5 JUDGE RANDOLPH: If I gave you a table of contents  
6 of the, I don't know how many pages this thing is, but the  
7 2,000 pages, and I gave you a table of contents and I asked  
8 you please find where, or who is eligible for a subsidy, what  
9 section would you look at? Would you look at the section  
10 entitled 36B? Wouldn't that be the very first section you'd  
11 look at?

12 MR. DELERY: And 36 -- this is my point, Your Honor,  
13 if you look at 36B(a) it provides that the tax credits are  
14 available to individuals. The tax credits were not intended  
15 as subsidies to state, or grants to states, they were intended  
16 as tax credits to federal tax payers, it's a relationship  
17 between the federal government and the individuals. And if  
18 you look at these provisions in 36B the title is premium  
19 assistance, it indicates what Congress thought the purpose of  
20 the tax credit was, it was to provide support to defray the  
21 costs of the insurance premiums on the exchanges. There's a  
22 separate --

23 JUDGE RANDOLPH: Would you agree with me that 36B,  
24 which is what you're talking about, and the way it's  
25 structured is copied from the Health Coverage Tax Credit Act

1 of 2002? Have you looked at that? I don't know.

2 MR. DELERY: I have, awhile ago, Your Honor. I have  
3 not looked at it.

4 JUDGE RANDOLPH: Yes.

5 MR. DELERY: And so, I don't know the history of  
6 whether it was copied for that. My understanding is that  
7 provision expired at January 1st of this year.

8 JUDGE RANDOLPH: Yes, because the states or  
9 whatever, but --

10 MR. DELERY: Right.

11 JUDGE RANDOLPH: -- the point is that when you're  
12 talking about structure it also begins the individuals, then  
13 it goes down to coverage month, and then it says here's the  
14 subsidy, it's 72 point what percent, and then it also says  
15 that you don't get it unless your state has enacted the  
16 following laws.

17 MR. DELERY: Right.

18 JUDGE RANDOLPH: It's the same deal. But, I mean,  
19 the structure of that is the same.

20 MR. DELERY: I mean, I believe, Your Honor,  
21 although, again, I need to double-check, I think that that  
22 provision also included some forms of coverage that were  
23 available nationwide, so it's not exactly an analogy to the  
24 Plaintiffs' proposition here.

25 JUDGE RANDOLPH: Yes, that may be.

1           MR. DELERY: In addition to premium assistance,  
2 which the tax credits were intended to be in 36B, the statute  
3 also provided state assistance, and it's in Section 18031.

4 And --

5           JUDGE RANDOLPH: What is that under the Act?

6           MR. DELERY: I'm sorry, it's 1311.

7           JUDGE RANDOLPH: 1311. Okay.

8           MR. DELERY: And -- sorry about that, Your Honor.

9 So, incentives were provided to states under the cooperative  
10 Federalism model to establish their own exchanges, grants to  
11 assist in the start up costs, ultimately then the costs would  
12 have to be borne by user fees, and also regulatory authority  
13 vested in the exchanges to, among other things to find the  
14 scope of qualified health plans that would be offered through  
15 the exchanges. So, states if they wanted to elect to create  
16 an exchange they had an incentive to do it in terms of grants,  
17 and regulatory authority that they would be allowed to do.  
18 But significantly --

19           JUDGE RANDOLPH: Was it after 2015 that they're on  
20 their own?

21           MR. DELERY: The grants expire, and once the  
22 exchanges are up and running they have to be supported through  
23 user fees, not through the grant money. But --

24           JUDGE GRIFFITH: If I were to disagree with you and  
25 think that established by the state under 1311 means

1 established by the state is your argument over, or?

2 MR. DELERY: So, I think, Your Honor, no. And there  
3 are a few other provisions that indicate that at the very  
4 least if you disagree that with our reading that that's the  
5 plain reading of the statute, at the very least there's  
6 ambiguity and interpretive tension between provisions of the  
7 Act that suggest that interpretation by the agency delegated  
8 with the authority to issue the regulations here is entitled  
9 to deference, and I point to a few of them. One is the  
10 reporting requirements under 36B(f)(3), that statute makes  
11 clear that Congress expected the federal premium tax credits  
12 to be available on the federal exchange, there's the express  
13 reference to the authority of both the exchanges created by  
14 the state under 1311 --

15 JUDGE GRIFFITH: I think Mr. Carvin's response to  
16 that, I don't want to put words in his mouth, is that well,  
17 that's to monitor the individual mandate, right? It wasn't  
18 just to check on true upping premium assistance, but it could  
19 also be used to monitor the individual mandate.

20 MR. DELERY: I think that's not right, Your Honor.  
21 The title of the section is reconciliation of credit and  
22 advance credit. So, Congress is saying what the purpose is  
23 for, it also expressly contemplates that the exchanges would  
24 be, including the federal exchanges would be providing the tax  
25 credits, and so --

1 JUDGE RANDOLPH: This was not part of the Affordable  
2 Care Act.

3 MR. DELERY: It was added in the HCERA, the  
4 reconciliation bill, afterwards, and --

5 JUDGE RANDOLPH: So, it's an amendment to the  
6 Affordable Care Act.

7 MR. DELERY: Right. Which shows that --

8 JUDGE RANDOLPH: That you're using to show what was  
9 meant in the Affordable Care Act.

10 MR. DELERY: I think it shows a confirmation, Your  
11 Honor, that --

12 JUDGE GRIFFITH: Hasn't the IRS backed off that? I  
13 thought just recently they just took a different  
14 interpretation that kind of undercuts your argument saying it  
15 can't be used for that.

16 MR. DELERY: No, Your Honor, I think what IRS --

17 JUDGE GRIFFITH: Maybe Mr. Carvin can address that  
18 in his rebuttal, because I thought that.

19 MR. DELERY: I think what the IRS recently did is to  
20 stay that because some of this information might be used for  
21 other purposes they would as an administrative matter lessen  
22 the burden on insurers to provide information under a  
23 different provision. But I don't think if you're looking at  
24 it as a statutory matter in terms of what Congress understood,  
25 and that Congress understood that federal exchanges would be

1 providing federal tax credits, that the later change undercuts  
2 that all. And the Medicaid maintenance of effort provision is  
3 another example.

4 JUDGE GRIFFITH: The legislative history is a wash,  
5 right? I mean, you parry and they thrust, or they thrust and  
6 you parry, there doesn't seem to be any clear legislative  
7 history here showing that this was an item of great concern to  
8 Congress, other than the text itself, I realize the text, but  
9 I'm talking about the legislative, field of legislative --

10 MR. DELERY: Right.

11 JUDGE GRIFFITH: -- history I feel I'm not  
12 comfortable going into, but *Sierra Club* suggests that we need  
13 to look at it. But you have a special burden to bear there,  
14 don't you? Given the plain language established by the state  
15 don't you have a special burden to show from legislative  
16 history that that doesn't mean what it appears to mean?

17 JUDGE EDWARDS: Isn't the legislative history clear  
18 on the importance of the individual mandate?

19 MR. DELERY: Yes, Your Honor. I think that there's  
20 a legislative history answer, and there's also a statement of  
21 purpose that comes from the text and structure.

22 JUDGE GRIFFITH: But is there discussion in the  
23 individual mandate that talks about whether the subsidy is  
24 conditioned upon being a federal or state exchange? I don't  
25 think there's anything --

1           MR. DELERY: No, but there is a provision, it's in  
2 1501A of the Affordable Care Act, Your Honor, that lists out  
3 several findings about the operation of the individual  
4 mandate. It makes clear that the subsidies were viewed as an  
5 integral part of the effectiveness of that program, and that's  
6 in the text of the statute, we don't need to resort to  
7 legislative history on that point. If you do resort to  
8 legislative history, Your Honor, you know, I think --

9           JUDGE GRIFFITH: But how does that undercut Mr.  
10 Carvin's argument? They needed the individual mandate, they  
11 needed the subsidies, and IRS messed it up, right?

12           MR. DELERY: Right.

13           JUDGE GRIFFITH: By changing the deal, how does  
14 that --

15           MR. DELERY: Right.

16           JUDGE GRIFFITH: -- undercut his argument?

17           MR. DELERY: I think that there are several aspects  
18 of the, again, of the legislative history, and I think closely  
19 related to text and purpose. I think given that the text  
20 itself said what the purpose of the statute was, which was to  
21 provide affordable care for all Americans, it's in the name of  
22 the statute, and it's in the title of Title One --

23           JUDGE GRIFFITH: Well, so that raises the next  
24 question, if we know a clear purpose of Congress, and yet they  
25 don't legislate clearly enough to achieve that purpose is it

1 our job to fix the problem?

2 MR. DELERY: I think what the Supreme Court has  
3 said, and what this Court has said, so the Supreme Court in  
4 *Brown & Williamson*, and *Maracich* and other cases in this Court  
5 in cases that have been discussed here have said that in order  
6 to answer that question about whether, you know, what text of  
7 a statute means, whether it's clear or whether it's ambiguous  
8 you need to look at all of the canons of statutory  
9 interpretation.

10 JUDGE GRIFFITH: Right. Right.

11 MR. DELERY: And in *Brown & Williamson*, for example,  
12 the Supreme Court looked to the structure of the law to  
13 identify the overall purpose and concluded that given that,  
14 again looking at text and structure, a potential reading of  
15 one provision was off the table --

16 JUDGE GRIFFITH: Sure. Sure.

17 MR. DELERY: -- because, you know. And so, it's the  
18 same here.

19 JUDGE RANDOLPH: Do you know of any cases, do you  
20 know of any let's just stick to the Supreme Court, any Supreme  
21 Court cases that stand for the following proposition that  
22 although we have the text of the statute it seems perfectly  
23 clear on its fact if we look at another provision and we give  
24 that a plain meaning, that other provision we give a plain  
25 meaning, then we have an anomaly and what we have to do is

1 change the provision that seems to be clear rather than change  
2 the provision that causes the anomaly. You know, I know the  
3 absurdity principle, and that, but if Congress is Janus-faced,  
4 if it's pointing in one direction here and one direction there  
5 I don't know of any, there's an absurdity principle, but I  
6 don't think there's a stupidity principle.

7 MR. DELERY: Right.

8 JUDGE RANDOLPH: If the legislation is just stupid I  
9 don't see that it's up to the Court to save it.

10 MR. DELERY: And I would strongly disagree, Your  
11 Honor, with the proposition that that applies here. But I  
12 think on the question about the Supreme Court --

13 JUDGE GRIFFITH: Or to spin it a little bit, or also  
14 if there's a political compromise that's --

15 MR. DELERY: Right.

16 JUDGE GRIFFITH: -- struck that may not achieve the  
17 total purpose, I mean, there's purposes of statutes, and then  
18 sometimes those can be attained, sometimes those can't be  
19 attained until political compromises are struck. How are we  
20 supposed to take that into account?

21 MR. DELERY: Right.

22 JUDGE GRIFFITH: Your argument seems to be there's  
23 an overall purpose, we ought to be hell bent on pursuing that,  
24 and that ought to be our goal.

25 MR. DELERY: Right.

1 JUDGE GRIFFITH: How does that account for the fact  
2 that there may be political compromise along --

3 MR. DELERY: Right.

4 JUDGE GRIFFITH: -- the way that detracts from that  
5 purpose but maybe has some ancillary --

6 MR. DELERY: Right.

7 JUDGE GRIFFITH: -- political purpose?

8 MR. DELERY: So, I think the short answer, Your  
9 Honor, I'll come back to it in a second, is that this is not  
10 an untethered purpose argument, this is a purpose argument  
11 based on the text and structure of the law where Congress  
12 legislated as it did, it spoke the way it did, it set up a  
13 system of nested provisions that when you walk through them  
14 lead to the conclusion that the federal exchange stands in the  
15 place of a state exchange where the state elects not to set it  
16 up.

17 On the Supreme Court case question, Your Honor, and  
18 I'll come back, actually, to the political compromise point  
19 because I want to respond to Mr. Carvin on that, but on the  
20 Supreme Court case I think one that comes to mind is the  
21 *Maracich* case, which if I'm pronouncing that correctly is one  
22 about the Driver Privacy Protection Act, and Justice Kennedy's  
23 opinion says if we look just at this particular provision it  
24 seems to have a very broad scope, nothing about this paragraph  
25 suggests that it wouldn't cover what's at issue here. But if

1 we look at other provisions of the case --

2 JUDGE RANDOLPH: Yes, well, that's a common method,  
3 that's a common method of --

4 MR. DELERY: Right.

5 JUDGE RANDOLPH: -- of, but what we've got here is  
6 language that doesn't seem to be malleable in any way, shape,  
7 or form for many of the reasons that Judge Griffith mentioned.  
8 I mean, it's an exchange established by a state pursuant to  
9 1311, means an exchange established by the federal government  
10 pursuant to 1321, that doesn't -- look, the reporting  
11 requirement it seems to me cuts against you, because there  
12 Congress in amending the statute recognized the dichotomy  
13 between the two different exchanges, one under 1311, and one  
14 under 1321, but they didn't with respect to the subsidy  
15 eligibility.

16 MR. DELERY: I think that's not right, Your Honor.  
17 I think the reference to the two provisions, parts of 1311 and  
18 1321, and the parenthetical in 36B(f)(3) --

19 JUDGE RANDOLPH: Yes, that's what I had in mind.  
20 Yes.

21 MR. DELERY: -- A) I think it demonstrates that  
22 Congress expected that the credits would be available on both  
23 type of exchanges; but B) those are not, those are sub-  
24 references to the authority of the exchanges to contract some  
25 of the responsibilities of the exchanges to others --

1 JUDGE RANDOLPH: I understand.

2 MR. DELERY: -- that, and so, it's not speaking,  
3 it's not pointing to the states shall establish and exchange  
4 provision, it's in there for that particular reason to point  
5 to the, to make clear that if either of those two sources of  
6 authority for contracting is invoked these reporting  
7 requirements still apply.

8 JUDGE EDWARDS: There is --

9 MR. DELERY: But that would only be -- I'm sorry,  
10 Your Honor.

11 JUDGE EDWARDS: No, go ahead.

12 MR. DELERY: It would only make sense for that to be  
13 there, and for that to be true if the federal exchanges were  
14 offering tax credits. I'm sorry, Your Honor.

15 JUDGE EDWARDS: There is legislative history in the  
16 brief submitted by members of Congress and the state  
17 legislators pointing to the Senate Finance Committee report --

18 MR. DELERY: Right.

19 JUDGE EDWARDS: -- and they say, they use the  
20 words --

21 MR. DELERY: Yes.

22 JUDGE EDWARDS: -- to establish, the Feds would  
23 establish a state exchange.

24 MR. DELERY: Right.

25 JUDGE EDWARDS: And there are three -- because

1 everyone understood what was going on, and then there were  
2 three House committees --

3 MR. DELERY: Yes.

4 JUDGE EDWARDS: -- who said if that happens the  
5 individuals who would be supported by the subsidy are folks  
6 who couldn't otherwise afford it, nothing to indicate that it  
7 was conditioned on who created the exchange.

8 MR. DELERY: Right.

9 JUDGE EDWARDS: No one assumed that this was what  
10 was in play.

11 MR. DELERY: I think that is absolutely correct,  
12 Your Honor. And the point about the Senate Finance Committee  
13 report, and this reference appears on page 193 of the Joint  
14 Appendix, is important, to respond to Judge Randolph's  
15 question, because I think it, it shows, and I think this is  
16 something that Plaintiffs concede on pages six and seven of  
17 their reply brief, that there is nothing that puts outside,  
18 that puts it beyond Congress' power to define an exchange  
19 established by the state to mean an exchange established by  
20 the District of Columbia, or the territories, or the federal  
21 government, the question is, you know, has Congress done that?  
22 They would submit that there is some sort of new plain  
23 statement rule that says that the way Congress did it is not  
24 sufficiently clear. Our position is if you follow the canons  
25 of interpretation as this Court's precedent and the Supreme

1 Court precedent require, you come to the conclusion that  
2 Congress intended the Secretary to establish such exchange,  
3 which again I think is a key statutory term, it doesn't mean,  
4 it doesn't say an exchange, it means such exchange suggesting  
5 the same.

6           And so, at the very least, back to the point about  
7 interpretive ambiguity, to the extent that you conclude that  
8 our reading is not the only plausible one, although we think  
9 it is when you read it all together, it's certainly a natural  
10 reading, I would submit the most natural reading, and a  
11 reasonable reading, and so therefore it's entitled to  
12 deference under the established precedent.

13           JUDGE RANDOLPH: Mr. Delery?

14           MR. DELERY: Yes?

15           JUDGE RANDOLPH: Before you sit down, you haven't  
16 addressed this, and I don't know that Mr. Carvin did either,  
17 but I'd like to ask you, I'm trying to remember, what struck  
18 me was you were talking about canons of interpretation, and  
19 there's an ancient canon of interpretation that goes back to  
20 the 1800s, and I think the Supreme Court case is Yazoo, are  
21 you familiar with that?

22           MR. DELERY: Yes, Your Honor.

23           JUDGE RANDOLPH: Yes. And that's the one that says  
24 that you, whatever this means, you strictly interpret tax  
25 credits, and tax matters, and so on and so forth, and that if

1 it's clear you err on the side of the Federal Treasury, that  
2 is you don't give the money. Now, how much -- well, do you  
3 have a response to that?

4 MR. DELERY: I do, Your Honor, and there are a  
5 couple of them. One is, you know, there certainly are cases,  
6 Yazoo and others, that suggest that there's a, you know, a  
7 presumption in some circumstances, although Congress, I'm  
8 sorry, the Court has never said that it's the kind of clear  
9 statement rule that the Plaintiffs are talking about, and here  
10 there's no question that Congress intended tax credits, this  
11 isn't a situation of implying them out of full cloth, 36B  
12 provides for tax credits. There's also, we would submit, more  
13 important --

14 JUDGE RANDOLPH: Refundable tax credits.

15 MR. DELERY: Refundable tax credits.

16 JUDGE RANDOLPH: Which is a euphemism for subsidy.

17 MR. DELERY: Yes.

18 JUDGE RANDOLPH: Yes.

19 MR. DELERY: But I think there's a more important  
20 principle reflected again in the Supreme Court's cases that  
21 revenue laws are to be construed to provide a nationwide  
22 system of tax administration, uniform in its application, and  
23 that ordinarily, and that's the *Irvine* case that we've cited  
24 in our brief, and ordinarily Congress is presumed not to tie  
25 the effective federal statute, or benefit on state action,

1 that is in the *Mississippi Band of Choctaw* case, as well. So,  
2 I think here given that Congress has provided for tax credits,  
3 and --

4 JUDGE RANDOLPH: I don't know about that last one,  
5 because --

6 MR. DELERY: Yes.

7 JUDGE RANDOLPH: -- 26 U.S.C. Section 35 does just  
8 that with respect to subsidies for healthcare.

9 MR. DELERY: Right. I think that here what you have  
10 is that Congress has established, you know, we would submit  
11 its day to day purpose in the text to create a nationwide  
12 system to provide affordable healthcare, and if delegated to  
13 Treasury in 36B(g) the authority to implement the provision,  
14 and in particular the authority to provide rules for the  
15 coordination of the credit with the advanced credit program  
16 administered by HHS. So, here unlike in some of the other  
17 situations --

18 JUDGE RANDOLPH: You know, I understand that. I  
19 mean, all questions of government are questions of ends and  
20 means, and if you change one you change the other, too, and  
21 that's what we're talking about here.

22 MR. DELERY: Right. And I think this goes back to  
23 Judge Edwards' point from before, I think that there is no  
24 suggestion from the time that the members of Congress  
25 understood that this is what the Plaintiffs' theory is what

1 these provisions were about. They were about premium  
2 assistance for individuals so that they could get affordable  
3 healthcare. And the states at the time, you know, the Amicus  
4 brief includes a survey of reports of commissions at the time  
5 that states decided to, whether or not to set up their own  
6 exchanges, there's no discussion of that there, either. And  
7 on the eve of the vote in 2010, as Judge Edwards mentioned a  
8 moment ago, three House committees made, and this is at 272  
9 and 273 of the Joint Appendix, published a summary indicating  
10 the exchanges, the tax credits were available on all of the  
11 exchanges. So, I think if you look at the bargain that was  
12 struck, the bargain that was struck was to pursue the ultimate  
13 goal of providing affordable healthcare, states were given the  
14 opportunity, they wanted to create the exchanges to do that,  
15 but if not the states would step in.

16 JUDGE RANDOLPH: Can I ask you about the March 12  
17 letter that you all submitted? I was a little puzzled by it.  
18 Is it the view of the Government that if we were to invalidate  
19 the IRS ruling that the force of our ruling would apply only  
20 to Mr. Klemencic? Is that the gravamen of this?

21 MR. DELERY: I do think, Your Honor, that the,  
22 obviously, we think that that should not be the result, but  
23 that any remedies should be tailored to the parties with  
24 standing here, and not more broadly. And in fact, I think  
25 that Plaintiffs' Counsel recognizes the appropriate scope of

1 the relief here because they have filed case --

2 JUDGE GRIFFITH: But if we invalidate an IRS rule  
3 that has broad applicability, doesn't it?

4 MR. DELERY: Right.

5 JUDGE GRIFFITH: Do you have any authority for that?  
6 Is this a position the Government has taken before?

7 MR. DELERY: Yes, Your Honor.

8 JUDGE GRIFFITH: Because it seems you run in the  
9 face of precedent.

10 MR. DELERY: Well, no, I disagree, Your Honor. I  
11 think that under the APA the relief should be tailored to the  
12 agency action, which here is the --

13 JUDGE GRIFFITH: If we determine that the IRS didn't  
14 have the authority to issue this rule, you're saying it would  
15 apply only to Mr. Klemencic? It wouldn't have broader  
16 applicability?

17 MR. DELERY: Well, again, because --

18 JUDGE GRIFFITH: In APA we do that all the time.

19 MR. DELERY: But I think this is not a situation,  
20 and this goes to some of the other threshold arguments that we  
21 have made, including about the refund action. This is not a  
22 situation where, you know, review of direct, direct review  
23 rule-making is vested here in this Court as an opportunity for  
24 regulated entities to come here and sue. Under the provision  
25 providing for refund actions, Congress has expressly done the

1 opposite and provided diffuse jurisdiction in all District  
2 Courts, and the Court of Federal Claims. Under 36B  
3 individuals elsewhere will have, you know, a claim for the tax  
4 refund, they can bring those cases elsewhere, and the  
5 Plaintiffs' Counsel recognizes that, so that right now a case  
6 was filed last year across the river in Virginia, four  
7 different individuals making exactly the same claim, it's  
8 pending in the Fourth Circuit, argument is scheduled for next  
9 month. And so, in the ordinary approach of allowing the law  
10 to develop where the federal government is concerned, and  
11 Circuits around the country that would be the ordinary course  
12 is that that would --

13 JUDGE RANDOLPH: You know, I have to comment on  
14 this, I think you're filing in our Court was highly improper.  
15 The fact of the matter is on page 54 of your brief you raise  
16 the class action question, and then the Plaintiffs filed a  
17 reply brief responding to that argument on page 54 of the red  
18 brief, you don't get a sur-reply in this Court without asking  
19 special leave, and for that letter to come in, as I said, I  
20 think it violated the Court's rules.

21 MR. DELERY: Okay. Sorry, I think the intent was to  
22 provide a case to the Court that seemed to be relevant, and  
23 understand your position, Your Honor.

24 JUDGE GRIFFITH: Was it a new case? Was it --

25 MR. DELERY: It was not a new case. It was

1 obviously one from a few years ago.

2 JUDGE GRIFFITH: Isn't that what 28J normally is  
3 for? 28J is normally for a new -- okay.

4 JUDGE EDWARDS: Why don't you just say --

5 MR. DELERY: Right.

6 JUDGE EDWARDS: -- respectfully, Your Honor, our  
7 argument has been submitted, I'll sit down now.

8 MR. DELERY: I will do that, Your Honor. Thank you  
9 very much. Thank you.

10 JUDGE GRIFFITH: Okay. Mr. Carvin, we'll give you  
11 five minutes.

12 ORAL ARGUMENT OF MICHAEL A. CARVIN, ESQ.

13 ON BEHALF OF THE APPELLANTS

14 MR. CARVIN: Thank you, Your Honor. I'd like to  
15 begin by answering some of the questions you asked, and Judge  
16 Randolph. First with respect to the reporting requirement,  
17 the Government argues there's a bit of a mismatch between the  
18 title which talks about tax credits, and our point, which is  
19 obviously the Government wants information on all kinds of  
20 purchases on the exchanges that are not subsidized, and I  
21 think the answer is, as Judge Randolph's pointed out, that was  
22 an amendment to the PPACA, and so they just sort of stuck it  
23 in the relevant provision, but obviously, the Government has  
24 very much interest in who's buying and how much they're paying  
25 for in these exchanges regardless of whether or not they're

1 subsidized. I'd also make the point --

2 JUDGE RANDOLPH: Isn't there another point, Mr.  
3 Carvin, about the reporting requirement?

4 MR. CARVIN: Yes.

5 JUDGE RANDOLPH: The report goes to the Secretary of  
6 the Treasury, but it also goes to each individual citizen, and  
7 in the states that have federal exchanges those people are  
8 going to get reports from the federal government saying that  
9 your subsidy, we're afraid, is zero. And that puts tremendous  
10 political pressure it seems to me on the governors and the  
11 state legislators in those states who haven't set exchanges.

12 MR. CARVIN: Just to be clear, it says the report  
13 doesn't just go to the Secretary, it goes to the tax payers,  
14 so you want to correct --

15 JUDGE RANDOLPH: Right.

16 MR. CARVIN: -- factual mistakes, you want to  
17 accomplish the point you did. I'll point out it took three  
18 declarations from the head of CMS to figure out what  
19 Klemencic's subsidy was. So, we need to figure out, we need  
20 to have this very accurate check. Their original argument  
21 before the latest 28J filing was, oh, we don't need this  
22 information from the exchanges, we get it from the insurers,  
23 but the IRS just told you we don't care about what the  
24 insurers send us because the exchange is the best source of  
25 the information.

1           The Government erects a cathedral around the word  
2 such and says that this somehow changes things, it doesn't  
3 change things, all such means is they're not telling the  
4 Secretary to set up any old exchange, it's such exchange, they  
5 want it to replicate as best they can what's in the state, but  
6 all that tells you is what kind of exchanges, and 36B doesn't  
7 turn on what kind of exchange it is, it turns on who  
8 established the exchange. So, when HHS establishes such  
9 exchange then obviously it is not the state that is  
10 establishing such exchange.

11           The key point I want to make, because I don't think  
12 we made it clearly in our brief is if you look at the  
13 provision saying the territories shall be treated like states,  
14 that's 1323 of the Act, there it says territories shall  
15 establish such exchange, the 1311 exchange, and be treated  
16 like a state. So, we know that no one in Congress thought  
17 that such exchange meant to be treated like a state because of  
18 the territorial provision.

19           In response to Judge Randolph's question about  
20 whether or not if you find it absurd in Section X whether you  
21 can sort of transport that to Section Y, I think probably the  
22 best answer is *Duke Energy*, which is at 127 Supreme Court  
23 1423, and they say normally we presume that the language means  
24 the same in differential provisions, but they didn't in that  
25 case because there was contextual differences. Well,

1 obviously, if your rationale for not interpreting state to  
2 mean state in one provision is state can't mean state because  
3 it's absurd, that provides you no justification for not  
4 interpreting state to mean state where as in 36B it doesn't  
5 lead to an absurd result.

6           In terms of whether or not you stop at the plain  
7 language, Judge Griffith, I agree you do look at other canons  
8 of construction, but one canon of construction which is  
9 ancient but is used frequently by this Court, Judge Tatel in  
10 1997 said we are not granting tax credits unless they're  
11 established unequivocally and conclusively. So, you never get  
12 to *Chevron* because if there is ambiguity in the granting of  
13 the tax credit in these circumstances then the Government  
14 loses because the canon resolves it, not the agency. He says  
15 there's a canon for a nationwide system, we are advocating a  
16 nationwide system. The same rule applies in every state, you  
17 get the subsidy, the tax credit, if you go on an exchange  
18 established by the state, that's nationwide just like saying  
19 you get a tax credit if you go to an accredited institution.  
20 The fact that only a subset of the citizenry takes advantage  
21 of it doesn't mean that we've created some kind of a dual  
22 system.

23           Finally, in terms of this whole legislative history  
24 debate, I don't think this Court or the Supreme Court could  
25 have been any clearer that if the statute says X, that's the

1 end of the inquiry, you don't go fishing around legislative  
2 history. But if you did engage in that activity here you  
3 wouldn't find a scintilla of legislative history in any way  
4 contradicting or undermining the plain language. They're  
5 making a dog doesn't bark argument that it doesn't echo the  
6 plain language of the statute, but surely no one's ever  
7 required legislative history that repeats verbatim the  
8 statutory language, and they can't point to a scintilla of  
9 legislative history to support their completely atextual  
10 interpretation of 1321, which for the first time in American  
11 history would mean that state means federal. Unless there are  
12 further questions. Thank you.

13 JUDGE GRIFFITH: Thank you very much. The case is  
14 submitted.

15 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



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Paula Underwood

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March 28, 2014

DEPOSITION SERVICES, INC.