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FOR THE

HEARING OF THE SENATE JUDICIARY COMMITTEE, SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL COURTS -- "REWRITING THE LAW: EXAMINING THE PROCESS THAT LED TO THE OBAMACARE SUBSIDY RULE"

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Thank you, Chairman Cruz, Ranking Member Coons, and the Members of the Subcommittee, for inviting me to testify today regarding the Internal Revenue Service rule on subsidies under the Affordable Care Act. My name is Robert Weiner. I am a partner at the law firm of Arnold & Porter LLP in Washington, D.C., where I have practiced for more than 30 years, with periodic intervals of government service. From 2010 to 2012, I was an Associate Deputy Attorney General at the U.S. Department of Justice, where I oversaw the legal defense of the Affordable Care Act ("ACA"). Since leaving the Justice Department, I have written, lectured, testified, and debated about the ACA and its implementation. I also taught a course at the Georgetown University Law Center on "The Litigation of Politics and the Politics of Litigation," based in part on my experience with the ACA. I appear today solely to present my personal views, not as an attorney or spokesman for any individual or organization.

Administrative agencies exercise power delegated by Congress. It is appropriate for this Committee and for the Congress as a whole to conduct oversight to ensure that agencies are properly using that delegated authority. If Congress finds that they are not, it has legislative remedies at its disposal. Proper oversight and legislative action flowing from it are integral to our democratic system of checks and balances.

Opponents of the Affordable Care Act, however, have disrupted and circumvented this system of checks and balances through lawsuits and other efforts to stymie implementation of the law. The President signed the Affordable Care Act on March 23, 2010. The first lawsuit came seven minutes later. Even though the Supreme Court in that lawsuit upheld the constitutionality of the Act, litigation seeking—in the words of one opposition advocate—to "drive a stake through the heart of Obamacare" has continued unabated for every minute, except those first seven, of the five years the Act has been in force. This trench warfare against the ACA includes a case rejected by the Court of Appeals for the Fifth Circuit in April alleging that the ACA violated the Origination Clause of the Constitution. It includes another case, dismissed a few weeks ago, attacking the "transitional policy" and "hardship exemption," which permit individuals temporarily to maintain health insurance coverage through plans not compliant with the general requirements of the Act. It includes a lawsuit by a Senator rejected in the Seventh Circuit last month, and one by the House of Representatives, presumably under some mythical "one-House lawsuit" power enumerated in Article I, Section 8 of the Constitution. And it includes the pending Supreme Court case, *King v. Burwell*, asking the Court to interpret the ACA in a manner that Congress plainly did not intend and that would take subsidies away from 9.3 million people who need the money to afford health insurance.

Lawsuits, moreover, are only part of the assault. Opponents of the ACA at the state, local, and federal level have sought at every turn to impede its implementation, to discourage organizations from helping people get insurance, and, along the way, to block access to affordable health insurance.

And yet, despite it all, the ACA is working. Since the beginning of open enrollment in October 2013, 14.1 million adults have gained health insurance coverage, not including the 2.3 million young adults who have been able to stay on their parents' insurance policies until the age

of 26.[1] The uninsured rate has dropped from 20.3 percent of the U.S. population to 13.2 percent.[2]

But those numbers do not tell the whole story.

In the *King* case, the Hospital Corporation of America (HCA), the nation's largest non-governmental health care provider, filed an *amicus* brief identifying other ways in which the Affordable Care Act is working effectively. HCA reported, for example, that the Act is encouraging personal responsibility. While 90 percent of uninsured patients pay HCA nothing at all for their health care, patients who purchased insurance on the federal exchanges pay an average of $390 out-of-pocket for their care. This gives them a direct financial stake in maintaining their health, making better health care choices, and using less expensive types of care. HCA reported further that patients on federal exchanges are three times less likely than uninsured patients to seek health care in an emergency room. Reducing the use of emergency rooms for primary care was one of the ACA's objectives, and it both reduces costs and fosters better preventive care.[3]

That success is currently in jeopardy as a result of the attack on the Treasury Department regulation in *King v. Burwell.* If that attack succeeds, subsidies will no longer be available to enable millions of consumers who need the help to afford health insurance in states with federal exchanges. Further, insurance markets in those states could well descend into a death spiral. In evaluating this attack, it is useful first to consider its etymology. The ACA does not say, and no

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[1] *See* U.S. Department of Health and Human Services, *HEALTH INSURANCE COVERAGE AND THE AFFORDABLE CARE ACT* (May 5, 2015) available at http://aspe.hhs.gov/health/reports/2015/uninsured_change/ib_uninsured_change.pdf.

[2] *Id.*

[3] Brief of HCA Inc. as *Amicus Curiae* in Support of Responds and Affirmance, *King v. Burwell,* No. 14-114 (Jan. 2015), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-114_amicus_resp_hca.authcheckdam.pdf.

one in the debates on the ACA stood up and argued, "If states do not establish an Exchange, their citizens will not get subsidies." Instead, the ACA opponents' interpretation was *discovered*, like a pottery shard in an archeological dig, in late 2010, months *after* the statute was enacted, by a lawyer whose announced mission was to unearth some statutory problem -- any statutory problem -- to take down the Affordable Care Act. Nor did the interpretation the opponents now proclaim as obvious and inevitable leap out at those affected by the ACA back in 2011. For example, in early 2011 -- before the IRS proposed its rule -- 21 Republican governors outlined to the HHS Secretary their stringent conditions for establishing a state Exchange. There was no suggestion that subsidies to their citizens were at risk unless they did so. What's more, the American Legislative Exchange Council (ALEC), an influential conservative group that focuses on state legislation, adopted a resolution in October 2011 entreating states not to establish Exchanges. Notably, the resolution assured the states that, "There is no penalty for a state in allowing the federal government to implement an Exchange." State after state, in deciding whether to establish an Exchange, assessed the pros and cons without identifying the loss of subsidies for the citizens as a risk. And Michael Cannon of the Cato Institute in his initial writing on this subject, described it as "a *recently discovered glitch*" in the statute.

The unorthodox *post hoc* origin of this interpretation of the ACA has not tempered the vehemence of its proponents. They have characterized the Treasury Department rule as nothing less than an assault on liberty. A dose of reality is in order: the foundation of the Republic is not crumbling. The Constitution is not at risk. And the Treasury Department's interpretation of the ACA is not nefarious. In fact, it is compelling.

The opponents of the ACA contend that the language of the statute is so clear that there is one and only one interpretation. They need to take that position. It is the way they seek to avoid

Chevron deference to the Treasury Department's interpretation -- although the reasoning assumes the conclusion. Even absent *Chevron,* though, the ACA opponents would still bear the burden of showing that theirs is the one and only permissible reading of the statute, because they confront a strong presumption favoring any textually permissible interpretation that furthers the evident purpose of the law, over an interpretation that obstructs the statutory purpose. In their book advocating a textually focused method of statutory interpretation, Justice Scalia and Brian Garner state that this well-established canon of construction "flows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness."[4]

The central purpose of the ACA is indeed evident. The Act states it over and over again in text that Congress adopted and the President signed -- to make affordable health insurance available to "*all* Americans." The ACA repeats that phrase at least six times. "All" is a singularly inclusive word. It does not mean "some." It does mean "all in some States." It means "all in all States." The interpretation offered by opponents of the ACA would prevent the statute from achieving not only that goal, but any goal. They have conceded -- cheerfully -- that it would gut the statute.

Thus, the self-immolating interpretation that the Treasury Department was supposedly so derelict in rejecting can prevail only if it is *impossible* to construe the statute any other way. But many authoritative readers have done just that, including the Solicitor General, leading experts in statutory interpretation, Senate and House leaders involved in drafting the ACA, key Democratic and Republican staffers participating in the drafting process, the principal association of health insurers, the Hospital Corporation of America, the American Hospital Association, the American

[4] Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012).

Cancer Society, the American Heart Association, 22 states and the District of Columbia, the former director of the non-partisan Congressional Budget Office, and -- judging from the argument in the *King* case -- at least four Supreme Court Justices. All interpret the statute the same way the Treasury Department does. To deem their interpretation impermissible is to question either the literacy or the candor of *all* of them. Neither is in doubt.

But rather than rest on the compelling inference from this authority, let's look at the textually-based logic behind it. I grant one thing regarding the interpretation advanced by the ACA opponents. It is simple -- "an Exchange established by the federal government is not an Exchange established by the State." End of argument. But this is a faux simplicity, a sleight of hand achieved by relying on ordinary parlance and ignoring the definitions that Congress specified for the terms it used. Congress can define terms however it wants -- it can define cat as dog if it so wishes -- and the definitions enacted into law control. In Section 1563 of the ACA, Congress expressly defined the word Exchange as an "Exchange established by the State under section 1311." The ACA reaffirms that definition twice in other provisions. It is the *only* definition of Exchange, and it applies each of the 282 times the ACA uses the word in this context. Just to remove any doubt about that, Congress capitalized the word "Exchange," 279 times, throughout the statute, to signify that it is a defined term.[5]

Section 1311 of the Act, to which the definition refers, requires States to establish an Exchange. Section 1321 addresses what happens if the State does not establish the "*required* Exchange," that is, the Exchange required by Section 1311. In the event that the State does not do so, Section 1321 directs the Secretary of HHS to establish "such Exchange," that is, the one the State is required to establish under Section 1311. This import of this directive is particularly

[5] Congress neglected to capitalize this use of the term in the table of contents entry for Section 1413, which appears twice, and in Section 6005 dealing with pharmacy benefit managers.

clear if we substitute the *definition* of "Exchange" for the *word* "Exchange" in Section 1321. The provision would then read:

> the Secretary shall . . . establish and operate such [Exchange established by the State under section 1311] within the State.

It fell to the Treasury Department to interpret the instruction that the HHS Secretary establish an Exchange "established by the State." Treasury could not write off the provision as commanding a physical impossibility. Agencies must seek to discern what Congress meant. They cannot and do not start with the presumption that Congress intends a nonsensical result. Nor could the Treasury Department use multiple definitions of Exchange. The statute has only one definition of the term. The proper -- certainly the permissible--reading of this section is that the Exchange established by the Secretary qualifies as an Exchange established by the State under Section 1311, which is the same thing as saying that the Secretary steps into the shoes of the State. By contrast, the interpretation offered by the ACA opponents, that the Secretary must establish some new-fangled, different and dysfunctional entity, ignores the definition of Exchange and wreaks havoc throughout other provisions of the statute.

The other way the ACA opponents contrive a false simplicity is by pretending the ACA says, "Tax credits and cost sharing subsidies are available only in states that have established an Exchange under Section 1311." The Act does not say that. Just the opposite. Subsection (a) of Section 36B of the Internal Revenue Code, the tax credits provision, states that a tax credit "shall be allowed." for taxpayers who meet the eligibility requirements. The word "shall" is mandatory. The phrase "established by the State" appears later in the next subsections of Section 36B when they set out the formula for calculating the amount and timing of the subsidy. Thus, under the opponents' reading that the Treasury Department did not adopt, Congress in subsection (a) of Section 36B tells those making less than 400 per cent of the federal poverty level that they *shall*

get a subsidy, but then calculates the amount of the subsidy as zero for millions of eligible consumers. That is not the way Congress rationally would impose such a momentous and self-destructive requirement.

In the face of this unassailable statutory logic, the ACA opponents still claim that the Treasury Department's interpretation of the statute was suspect, that the Department gave the ACA opponents' interpretation short shrift, and that the administrative process was rigged. To a significant degree, as in the law of defamation, truth is a defense. Treasury adopted a reasonable interpretation of the statute that enabled the ACA to achieve its evident purpose, instead of a myopic, hyper-literal interpretation that would gut the law. That is the what administrative agencies are supposed to do.

In any event, the Administrative Procedure Act sets forth the standards by which we judge the adequacy of the process that administrative agencies employ. One key requirement is that administrative agencies must explain their decisions. The Treasury Department did that. The preamble to the final rule specifically analyzed the textual arguments presented by the ACA opponents and concluded that the text of the statute "support[s] the interpretation that credits are available to taxpayers who obtain coverage through ... the Federally-facilitated Exchange." Treasury also addressed the legislative history, finding no evidence "that Congress intended to limit the premium tax credit to State Exchanges."[6] In attacking this decision-making, the report by the majority staff of the House Committee on Oversight and the House Committee on Ways and Means unwittingly demonstrates that the process was reasoned and procedurally appropriate.[7] The Report faults an internal Treasury Department memorandum, prepared before

[6] Health Insurance Premium Tax Credit, 77 Fed. Reg. at 30,378.

[7] Staff of H. Comm. on Oversight & Govt. Reform and H. Comm. On Ways & Means, 113th Cong., Administration Conducted Inadequate Review of Key Issues Prior To Expanding Health

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the Department issued the regulation at issue, but in fact, the memorandum cogently analyzed the issue:

> The term "established by a state" may be read as a restriction on the term "exchange" or it may be read as simply descriptive language. Interpreting the language as a restriction is inconsistent with the broad scheme of the ACA to increase health insurance availability. Denying a premium tax credit to taxpayers enrolled in a QHP through the fed exchange while allowing a credit to those enrolled through state exchanges would be an incongruous result and could not have been Congress' intent. The term "established by a state" should be interpreted to encompass the federal exchange because under Section 1321 of the ACA, the federal exchange steps into the shoes of a state exchange if a state declines to establish an exchange or if a state's establishment of the exchange is delayed. A conclusion that the language [of] § 36B(b)(2)(A) is descriptive and not restrictive is further supported by the language of § 36B(f)(3), which imposes information reporting requirements on exchanges, including the federal exchanges, established under [§ 18041(c)] of the ACA.[8]

And that was not the only analysis. Another official further substantiated the Treasury Department's reading of the statute, again, prior to the issuance of the rule. First, the memorandum explained what Treasury analyzed and how: "[W]e carefully considered the language of the statute and the legislative history. . . ." Based on the text and the legislative history of the Act, the memorandum discussed not policy, but Congressional intent, concluding "that the better interpretation of Congressional intent was that premium tax credits should be available to taxpayers on any type of Exchange." The memorandum then supported its conclusion with a specific example from the statute demonstrating why the opponents' interpretation made no sense:

> For example, § 36B(f)(3) provides that "Each exchange ... shall provide the following information to the Secretary and to the taxpayer with respect to any

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Law's Taxes And Subsidies 22 (Feb. 5, 2014), available at http://oversight.house.gov/wp-content/uploads/2014/02/IRS-Rule-OGR-WM-Staff- Report-Final1.pdf ("Joint Majority Staff Report").

[8] Memorandum, Pre-Final Rule Analysis Memo (Feb. 2012) (quoted in "Joint Majority Staff Report").

> health plan provided through the Exchange ...” The reference to 1321(c) is a reference to the section authorizing the federally-facilitated Exchange. There would be no reason for Congress to include—within the Code section that creates the premium tax credit—an obligation for a federally-facilitated Exchange to report data about enrollments to the Secretary unless the enrolling individuals were eligible for the premium tax credit.[9]

ACA opponents may not like that reasoning. They may not agree with it. But it reflects the process that we want and expect administrative agencies to undertake in faithfully executing the laws. Nor is it relevant that the discussion of this issue was concise. An analysis is not unreasonable because it is brief. Indeed, brevity is much to be desired in government proceedings, so long as the analysis adequately covers the subject. This analysis did. Taken as a whole, the record confirms that Treasury seriously and methodically considered the issue. That satisfies the standards of the APA.

As Professor Grewal observed last January, “controversies related to Treasury regulations usually stem from differences in perspective or judgment. Treasury regulations reflect policy-making, not blatant politicking.”[10] That is the case here.

[9] Memorandum from Cameron Atherton, Counsel, Office of Tax Legislative Counsel, U.S. Treasury Dept., to Emily McMahon, Deputy Assistant Secy., U.S. Treasury Dept. (May 16, 2012) (quoted in Joint Majority Staff Report 23).

[10] Andy Grewal, “*King v. Burwell* Amicus Briefs: Blackman/Cato Set the Context,” Yale Journal on Regulation Blog, (Jan. 15, 2015), available at http://www.yalejreg.com/blog/king-v-burwell-amicus-briefs-blackman-cato-set-the-context-by-andy-grewal.