IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, ET AL.,

Plaintiffs,

vs.

KATHLEEN SEBELIUS, ET AL.,

Defendants.

CA No. 13-623
Washington, DC
October 22, 2013
10:05 a.m.

TRANSCRIPT OF ORAL RULING
BEFORE THE HONORABLE PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE COURT: Good morning, everybody.

COURTROOM DEPUTY: Civil Action 13-623, Jacqueline Halbig, et al. versus Kathleen Sebelius, et al. I'm going to ask counsel to please come forward and identify yourselves for the record.

MR. CARVIN: Michael Carvin for the plaintiffs. Yaakov Roth and Jon Berry.

MR. McELVAIN: Good morning, Your Honor. Joel McElvain for the defendants, with me today is Sheila Lieber.

THE COURT: Good morning. All right. Yesterday I heard argument on the motion to dismiss filed by the Government and on the motion for preliminary injunction filed by the plaintiffs in this case. There's been a lot of press inquiry, as you might imagine.

Just so everybody knows, there is a press room downstairs and this is all being piped in to them, so -- I don't know that that matters to anybody. But I didn't want you to think that people were listening in on our conversations without us knowing about it, and I'm sure that's not happening.

So, I said that I would give you an oral opinion today, and the reason for that, obviously, is this is of some urgency to both sides and timing is important. And to the extent that anything I do -- well, obviously, the grant or

denial of a preliminary injunction is immediately appealable, and the grant of a motion to dismiss is appealable, but the denial is not.

So, this will be an oral opinion -- or two opinions, if you like. You can get a transcript, if you want one. And there will be a very short order or two orders that follow, which will say simply, For the reasons stated in open court -- whatever. And that will be done today. So, if anybody wants to appeal, you can appeal.

As I always say when I'm about to give an oral opinion, I assume it would be much more coherent if I spent the time to write it and edit it and rewrite it. So, if I am a little redundant or not as organized, that's the way it is. I thought you'd rather have an opinion dealing with the issues as quickly as possible.

All right. By way of background, as everybody at counsel table knows and lots of the people in the room know, this case involves the Patient Protection and Affordable Care Act. And under that Act most individuals must either obtain minimum health coverage or pay a penalty imposed by the Internal Revenue Service.

The law provides for the establishment of Exchanges through which individuals can purchase health insurance. And it also provides for the availability of a premium tax credit or subsidy for many low- and middle-income individuals who

purchase insurance on at least some of the Exchanges. And larger employees are expected to share the costs of health insurance coverage for their full time employees, and employers who do not provide affordable health care may be subject to an "assessable payment" or tax.

As I said, the Exchanges, I think they are called American Health Benefit Exchanges under the statute, are for the purpose of facilitating the purchase of insurance by private individuals and small businesses. In addition to serving as the forum for health insurance shopping, an Exchange is also used to determine the eligibility of individuals to enroll through an Exchange in a health insurance plan, their eligibility to obtain advance payment of the premium tax credit and other cost reductions, and their eligibility to be deemed exempt from the individual mandate.

We spent a lot of time talking about this yesterday. The language of the statute was up here on big poster boards. The Act provides that each state shall, not later than January 1, 2014, establish an Exchange. It also provides that if a state decides not to establish its own Exchange, or fails to establish an Exchange, then under the statute the Secretary of Health and Human Services is directed to establish an Exchange in that state.

Thirty-four states have declined to establish their own Exchanges. Seven have elected to assist the federal

government with its operation of federally-run Exchanges. Twenty-six have opted out entirely. And, thus, 34 states have federal Exchanges, and 16, plus the District of Columbia, have state-established Exchanges.

The Act authorizes premium tax credits for many low- and medium-income individuals who purchase health insurance through the Exchanges. 26 U.S.C. Section 36B or Section 1401 of the Act calculates this credit based in part on the premium expenses for the health plan. I'm not going to go into all the details about how that works.

Under the Act most individuals must obtain health insurance or be subject to a penalty. Individuals who cannot afford coverage will not face a penalty if they do not obtain health insurance. The unaffordability exemption applies generally to any individual whose annual health insurance costs exceed eight percent of his or her annual household income. An individual's costs are determined with reference to the cost of the relevant health insurance premium minus the credit allowable under this section.

Then there's 26 U.S.C. 4980H, which talks about the "assessable payment" or the tax. And it may matter whether you -- it does matter whether you view it as a tax or not for certain purposes. Imposition of this payment is triggered and, thus, an employer is required to pay it when any of its full-time employees purchases coverage on an Exchange.

And as Mr. Carvin pointed out yesterday, it means that if a single employee chooses to purchase coverage on the Exchange, that that triggers the obligation of the employer under 4980H. If an individual is eligible for a premium tax credit or a subsidy, the Exchange notifies the employer that it will be assessed a payment or required to pay a tax under 4980H.

What this case is about is the regulations that were promulgated by the Internal Revenue Service, 26 C.F.R. 1.36B. And the regulations make tax credit -- the premium tax credit available to qualifying individuals who purchase health insurance in either a state-established Exchange or a federally-established or facilitated Exchange.

And that regulation defines Exchange by reference to an earlier regulation, 45 C.F.R. 155.20, which says that the Exchange referred to in these regulations is an Exchange regardless of whether Exchange was established and operated by a State, including a regional Exchange or subsidiary Exchange, or by HHS.

So, the plaintiffs in this case are a group of individuals and a group of employers that reside in states that have declined to establish Exchanges. And those plaintiffs contend that this regulation, 26 C.F.R. 1.36B and related regulations, are inconsistent with and violate the plain language of the Affordable Care Act. And, therefore,

that those regulations exceed the scope of the agency's statutory authority and, thus, are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. They say they're inconsistent with the language of the law. And they bring this action under the Administrative Procedure Act.

So, the defendants have moved to dismiss. Plaintiffs have moved for a preliminary injunction. As I said, there are two groups of plaintiffs. There are four individuals, all from states that have declined to establish Exchanges. Ms. Halbig from Virginia. Mr. Klemencic -- and if I'm not pronouncing his name, you can apologize to him, because his name will come up frequently. It's K-L-E-M-E-N-C-I-C in West Virginia. Ms. Lowery in Tennessee and Ms. Rumpf, R-U-M-P-F, in Texas.

And then there are three employers, although one of them is a group of restaurants, but they're commonly owned. Innovare Health Advocates in Missouri, which I believe has something like 55 full-time employees. And GC Restaurants and affiliated companies in Texas with about 350 full-time employees. And Community National Bank in Kansas, which I think has 80 full-time employees.

Now, all of these businesses have said, I think in the complaint, that they will comply, if they have to comply, under protest, in order to avoid sanctions. But the choices

faced by them as well as by the individuals have been described as a Hobson's choice, either complying with a statute that they -- complying with a regulation that they -- I guess complying with a statute because of a regulation which they say is an arbitrary, capricious, an unlawful regulation because it's inconsistent with the statute, and either complying or facing a penalty.

I suppose it's easier for an individual to make that choice of saying, well, I'll take the penalty, although some of them have said they will comply, than it is for an established business that doesn't want to be viewed as a law violator.

In any event, there are several challenges that the Government raises in its motion to dismiss, and I think they do not all have to be decided today. The first one is whether the individual plaintiffs have -- basically there are several standing arguments. Do you have standing to bring a lawsuit? So, there was a question of whether the individuals whose names I mentioned have standing under Article III of the Constitution. Whether the businesses have standing under Article III of the Constitution. And whether those groups of plaintiffs have what's known as prudential standing.

So, the first thing I'm going to talk about is the standing requirements and how I view the arguments of counsel on this. As we all know, federal courts are courts of limited

jurisdiction, and if we don't have jurisdiction, we can't hear a case. The Court does not have subject matter jurisdiction over a case where the plaintiff or plaintiffs does not have standing or -- and I'll get to this as well -- the case or controversy is not ripe.

The case is not justiciable if the matter is not ripe for decision. So, when there's a motion to dismiss by the defendant, in this case the Government, for lack of subject matter jurisdiction, the plaintiff bears the burden of establishing that the Court does have jurisdiction.

But at the pleading stage, which is where we are now, the burden of production to establish standing is more relaxed than it would be later at summary judgment. Still, a plaintiff must allege general factual allegations of injury resulting from the defendant's conduct.

There are three requirements for Article III standing under the Constitution that must be established at -- what the courts have called an "irreducible constitutional minimum." First, that the plaintiff has suffered an injury in fact -- the invasion of a legally protected interest. Second, that the injury is fairly traceable to the defendants' conduct, that is, that there is an injury that was caused by the conduct of the defendant. And, thirdly, that a favorable decision on the merits likely will redress the injury.

There are loads of cases, I'm not going to cite

them, but Lujan, L-U-J-A-N, in the Supreme Court; Sprint Communications in the Supreme Court. Lots of cases in the D.C. Circuit. The alleged injury must be concrete and particularized and actual or imminent, not conjectural, hypothetical or speculative.

In the Clapper decision the Supreme Court recently said: The threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future harm are not sufficient. And they also said, in Clapper, that a federal court's standing inquiry is "especially rigorous" if reaching the merits of the dispute would force the Court to decide whether an action taken by one of the other two branches of Government was unconstitutional.

So, let me talk first about the four individuals. I'm going to focus on Mr. Klemencic because we have declarations from Mr. Klemencic and I think both sides have focused mostly on him. The plaintiffs maintain that these tax credits financially injure and restrict the economic choices of these individuals in the states that have declined to established Exchanges.

The Subsidy Expansion Rule, in effect, makes insurance less "unaffordable." So, they have to purchase costly comprehensive health insurance that they would otherwise forgo. In other words, if it weren't for the subsidy, they would be under the level where an individual is

required to buy insurance. Because Mr. Klemencic, for example, there's declarations that show he is self-employed, he earns about $20,000 a year, and to buy insurance would be more than eight percent of his income. He wouldn't have to do it. If he gets a subsidy, he no longer falls under that level and so he would have to do it. He doesn't want to buy insurance. That's what he's told us in his declarations.

So, because of this regulation, which the plaintiffs say is inconsistent with and not authorized by the language of the statute, he's going to be forced to buy insurance. True, it will be subsidized, but he'll be forced to do something he otherwise would not do.

And absent the regulations, he would undoubtedly be entitled to the certificates of exemption exempting him from the individual mandate penalty and from the need to buy insurance, and that would be the end of the matter. The defendants argued, at least at the initial briefing, that all of this was much too speculative. There were several levels of speculation.

I'm going to get to that in a minute because we've got several declarations from Mr. Klemencic and other people as well as much more information about how much the insurance that he would be required to buy, if he were required to buy insurance, would actually cost. Now, back to the law for just a minute.

In order to defeat the Government's motion to dismiss on standing grounds, the plaintiffs need only establish the standing of any one plaintiff at the motion to dismiss stage. They might be able to establish the standing of more than one, but all that's required is that they establish the standing of one.

So, the Supreme Court said that in Watt versus Energy Action Educational Foundation, 454 U.S. 151, a 1981 case. And that was a case, actually, where there were three separate groups of plaintiffs, the State of California, the City of Long Beach, and consumers of oil and gas products. And the Court found that California had standing, so they didn't even discuss the standing of the other plaintiffs.

In the D.C. Circuit in Mountain States Legal Foundation versus Dan Glickman, 92 F.3d Page 1228, in 1996, said -- reiterated that principle citing Watt, and specifically said, if there was any question, that for each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.

So, A, this principle of Watt applies both to constitutional and prudential standing; and, B, it's claim by claim, but in this case there is only one claim in the complaint. So, if Mr. Klemencic shows standing, nobody else has to -- or I don't have to reach the standing of the others.

So, let's talk about Mr. Klemencic first. Plaintiffs have provided a lot of information about Mr. Klemencic's financial situation and his insurance prospects, along with several declarations, and they've been updated as we've gone along. They said he earns about -- he anticipates earning about $20,000 a year. He's self-employed. As we discussed yesterday, he'd like to earn more, but $20,000 is what he anticipates. And there's some figures in the record about what the implications would be if he earned $21,000 or $25,000, I don't think it really matters.

There's a discussion about whether he would have to buy the bronze plan or the second lowest silver plan. And the data we talked about yesterday -- have I got it right? Silver? The data we talked about yesterday was the data relating -- the numbers relating to the cost of the second lowest silver plan. But in some of the earlier briefs there was talk about the bronze plan.

So, I'm focusing, I guess, on the second lowest silver qualified plan, which I'm told is the minimum coverage that he's permitted to purchase under the Affordable Care Act. In the data that has been presented by the parties is that it might cost $438 a month or $450 a month or $463 a month. But in any event, that far exceeds whatever the number is -- his eight percent -- eight percent of his monthly income.

So, I don't think the parties are in disagreement,

that if not for the existence of the premium tax credit or subsidy, Mr. Klemencic would be exempted from purchasing health insurance under the unaffordability provision, regardless of which number we're dealing with. That's what he wants to do. He told us he doesn't want to buy insurance.

The defendants -- the Government says -- first they argued that his income, his age, his family status, all these other estimates show that he would pay nothing for the relevant insurance. And, therefore, he's got no injury. And they said that the injury must be concrete and particularized, actual or imminent at the time he files suit. It wasn't. And there's a lot of speculation involved.

But if we look at the most recent declarations for Mr. Klemencic, he's averring that he anticipates adjusted gross income for 2014 for $20,000. I've just mentioned that from his affidavits and other affidavits and other documents provided by the Government and by the plaintiffs, we know that the range of cost of the insurance he'd have to buy would be between $438 and $463 a month. And he wants a certificate of exemption.

But he says in his declaration: If I'm eligible for a subsidy that would reduce my required contribution, I would be disqualified from the unaffordability exemption and unable to obtain a certificate of exemption, and would be forced to either buy insurance or pay a tax penalty. He says:

I do not want to purchase comprehensive health coverage, even if the Government subsidizes it.

The later declarations suggest that -- and other information in the record -- suggests that if he's making $20,000 a year -- the Government submitted a declaration on the 18th of this month that shows it would cost him zero. The plaintiff says it would cost him $18. If it goes -- if his income goes up to $21,000, it would cost him $3.90, according to the Government. If his income goes up to $25,000, it would cost him $51.64, according to the Government.

It seems to me, and I think that for purposes of argument yesterday, the Government said that their argument was still their argument and they think still persuasive, even if we talk about $18 a month. So, I think the information that we have in the record is -- we'll assume $18 a month is what it's going to cost him if he buys the insurance. And we assume $100 to $150 a month is what the penalty would be, which is $12 a month, if he decided to pay the penalty.

So, is there enough in this record to demonstrate standing by Mr. Klemencic? And imminent injury, not -- and concrete, particularized and actual imminent -- actual or imminent injury sufficient to give him standing. As I said a few minutes ago, at the pleading stage, general factual allegations of injury resulting from the defendants' conduct are sufficient, according to National Association of Home

Builders in this circuit.

Or as the Fourth Circuit said, general factual allegations of injury resulting from the defendants' conduct may suffice because on a motion to dismiss we presume that general allegations embrace the specific facts that are necessary to support the claim. And that's in the recent Liberty University decision. I'm told that I said that the penalty would be $100 to $150 a month. I meant to say the penalty would be the $100 to 150 a year, which translates to about $12 a month maximum.

So, based on the declarations of Mr. Klemencic and an expert declaration, based on the numbers submitted even by the Government as well as by the plaintiffs, I find it highly plausible -- I think he has shown injury and I find it highly plausible that because of this challenged regulations he will cease to be eligible for the unaffordability exemption, and instead, will be required to pay for health insurance of somewhere around probably $18, but even if it's a little less than $18, or an individual tax penalty of $12 or somewhat less than $12.

So, I think that Mr. Klemencic has done enough to show that he has been injured as a result of the defendant's conduct. And a favorable decision on the merits can redress his injury. And the merits, which I'm not going to discuss, but this is a claim brought under the Administrative Procedure

Act, and we had a lot of discussion yesterday about whether it can be brought under the Administrative Procedure Act, and about whether, at least in the context when we're talking about the employer plaintiffs, do they really get their grievances redressed if the Government could still -- if one of their employees still sought a subsidy, sought insurance. But that doesn't apply to Mr. Klemencic.

His grievance would be redressed if this regulation were vacated, it seems to me. And the same is true of the other individual plaintiffs, even though I do not have the kind of detailed information about them that allows me to make the same sort of analysis. So, Mr. Klemencic has Article III standing in my judgment.

So, what about the employer plaintiffs? Those three entities, one in Missouri, Innovare, GC Restaurants in Texas and Community National Bank in Kansas. They say that prior to the promulgation of the IRS Rule, they were planning not to offer health insurance plans that complied with the Affordable Care Act to their full time employees.

Now they say they must either pay a penalty or alter their behavior to avoid the penalty, i.e., to provide insurance under the Affordable Care Act. And Innovare Health Advocates says that they have something called a "consumer-driven" insurance plan, which they provide. They say it does not comply with the Affordable Care Act, but they

would continue to provide it and in fact expand it. But because of the IRS Rule, they would opt to offer insurance that complies with the Affordable Care Act.

The restaurants do not offer and do not wish to offer health insurance to many of their full-time employees. But they say, if forced to, they would do so to avoid the penalty. And the same with employer plaintiff Community Bank. They say they would rather not drop its full-time health insurance and provide coverage compliant with the statute, but it plans to provide such insurance rather than risk the penalty.

The Government argues that these business employers, these entities, have failed to show that they will or allege facts sufficient to show that they will incur a Section 4980H penalty. So, the Government says -- we're talking about 4980H -- they say that the plaintiffs' complaint does not allege that the employees of these businesses will necessarily obtain coverage on the Exchanges or that they will obtain premium tax credits, and that any such allegations at this stage are purely speculative.

They say that the ability of the plaintiffs, these plaintiffs to show standing, depends on third parties who are not before the Court, namely, their employees. Plaintiffs respond that, well, the injury is not the penalty, at least in part, but the cost of complying with the employer mandates,

sponsoring coverage, related administrative costs and so forth.

The plaintiffs rely on the recent Fourth Circuit opinion in Liberty University versus Lew, that's L-E-W. And they also cite State Farm Insurance. The Fourth Circuit said: Even if the coverage Liberty -- and Liberty was an employer. So, they were talking about the employer situation in 4980H. Even if the coverage Liberty currently provides ultimately proves sufficient, it may well incur additional costs because of the administrative burden of assuring compliance or due to an increase in the cost of care. So, Liberty -- the Fourth Circuit in Liberty said that the employers had standing.

The District Court in Oklahoma in Oklahoma ex rel Pruitt versus Sebelius said that the plaintiffs -- employer plaintiffs had standing. As I understood the argument yesterday, the Government isn't trying to distinguish that portion of the Liberty University case, but rather says that the Fourth Circuit is wrong in its view and that I shouldn't follow it.

I think there's a lot to what the Government says. And I think the employer plaintiffs have an uphill battle in showing that they have Article III standing. They may possibly be correct, but the Government may also be possibly correct that the injury depends on the actions of third parties.

The Government cites a number of cases. National Wrestling Coaches Association versus Department of Education, 366 F.3d 930, a D.C. Circuit case, which said: When the plaintiff is not himself the object of the government action or inaction that he challenges, standing is not precluded but it is ordinarily more difficult to establish.

And in a case called Grocery Manufacturers Association versus EPA. On the other hand, the plaintiffs argue that the theory of injury that was posited in the Grocery Manufacturer's case was far more attenuated than the theory presented here. It appears highly plausible, they say, that an employer that employees 18 full-time employees at wages between 100 and 400 percent of the federal poverty line, as set out in one of their declarations, or if you're looking at the numbers employed by the restaurants, 350 full-time employees, certainly some substantial number of them would qualify. And that even if one of them goes and buys insurance and seeks a subsidy or gets a subsidy, the employer will be subject to a penalty under the employer mandate.

So, we can go back and forth on this. The Government also argues, and this is a strong argument, on the third prong of Article III standing, redressability, that the employer plaintiffs can't have standing even if they show injury or imminent injury because of a failure to establish redressability because no judgment in this action could bind

the parties who were not present here, namely, the employees of the employer plaintiffs.

And Mr. McElvain yesterday spent a lot of time and came back to this about what happens if I was to vacate or strike down the regulation. That's not going to stop an employee from going forward and seeking -- from seeking insurance and seeking a subsidy. And if they don't get it, bring a lawsuit, for example, regardless of what happens to this regulation.

The Government argues that even if I ruled in favor of the employers, these 18 employees of the Golden Chick quick-service restaurant described in Dr. Tharp's declaration would not be bound by the judgment. There's no way that vacating the regulation could prevent the restaurant employees from seeking premium tax credits under 26 U.S.C. 36B.

So, I think these are hard questions. They implicate issues of redressability, that is, even if the plaintiffs are injured and even if the injury is fairly traceable to the defendants' conduct, is a favorable decision on the merits likely to redress the injury? I'm happy to revisit that on a motion for summary judgment, and both sides can talk more about redressability.

And this relates to another argument that the Government makes that I'll get to in a little bit, is they say that this is not a legitimate Administrative Procedure Act

argument -- a legitimate Administrative Procedure Act case. That it should be a tax refund case. That because of the Anti-Injunction Act and because there is a remedy under the tax laws, that's another issue that's implicated by this whole question of the Government's argument that these plaintiffs don't have standing.

And I have to say, in terms of the briefs that are coming from both sides, I guess the plaintiffs have to do a better job on redressability. The Government has to do a better job on the APA, because they have yet to persuade me that this is not a legitimate APA case. And why is it any different from any other challenge to a regulation, that if it's arbitrary, capricious, contrary to law, the courts vacate them.

The D.C. Circuit has said that when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated, not that their application to individual petitioners is proscribed. National Mining Association versus U.S. Army Corps of Engineers, 145 F.3d 1399.

In National Mining Association, the Court quoted Justice Blackmun's dissent in Lujan, which the circuit said, quote, apparently expressed the view of all nine Justices on this question. And Justice Blackmun in Lujan said: In some cases the "agency action" will consist of a rule of broad

application. And if the plaintiff prevails, the result is that the rule is invalidated, not simply that the Court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the Court.

So, these are arguably two sides of the same coin, or maybe they're separate questions. Redressability for the plaintiffs and APA for the defendants. So, for these reasons and because I've already found that one plaintiff has Article III standing, I'm going to defer a decision on the employer plaintiffs' Article III standing as well as their prudential standing until the summary judgment stage.

So, now we get to prudential standing. There is this debate about whether prudential standing is jurisdictional or not. I don't think it matters for today's purposes. Regardless, the courts have said that prudential standing -- that for a plaintiff to show prudential standing is usually not a particularly difficult thing to do.

There are arguably two elements to prudential standing, zone of interest and injury. And I say "arguably" for a reason, I'll come back to it. Clearly, one of the requirements for prudential standing is that a plaintiff's injury must be arguably, arguably within the zone of interest. That's important. Not in fact. Not provably. But "arguably"

within the zone of interest to be protected or regulated by the statutes that they allege were violated.

D.C. Circuit, International Brotherhood of Teamsters, 724 F.3d 206. This test, said the Court in International Brotherhood of Teamsters in 2013, quote: Is not meant to be especially demanding and forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Further, whether a plaintiff's interest is arguably protected by the statute within the meaning of the zone of interest test is to be determined by the particular provision of the law upon which the plaintiff relies. So, I think a pretty interesting discussion is Justice Kagan's decision in this case -- ready for this? Match-E-Be-Nash-She-Wish Band versus Patchak -- we'll give you the spelling later. There's a lot of hyphens here.

Match-E-Be-Nash-She-Wish Band -- is it the name of a band? Oh, it's the name of an Indian tribe I think -- versus David Patchak and Ken Salazar. Yes, it's an Indian tribe. It's actually a statute that arose under the Indian Reorganization Act.

Justice Kagan says, for the Court, first, that under prudential standing, the interest must arguably be

within the zone of interest to be protected. Secondly, the test is not meant to be especially demanding. Then in something that may be relevant here, she said: When enacting the Administrative Procedure Act to make agency action -- it was intended to make -- Congress intended to make agency action presumptively reviewable.

Then she says: We have always conspicuously included the word arguably in the test to indicate that the benefit of any doubt goes to the plaintiff. The test forecloses suit only when a plaintiff's interest are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

I think both sides rely on the D.C. Circuit in Safe Extensions, Inc. versus the Federal Aviation Administration, 509 F.3d 593. They talk about the zone of interest question. They talk about the APA's strong presumption of reviewability. They say that the Supreme Court has declared in Abbott Labs that judicial review of final agency action by an agreed person will not be cut off unless there is persuasive reason to believe that suit was -- to believe that such was the purpose of Congress, such being the idea of cutting off the rights.

There is one other quote I was looking for that I can't seem to find. Defendants on the prudential standing

prong argue because Congress's clear intent on passing the Affordable Care Act was to insure that health coverage is affordable, and because plaintiffs here are seeking to insure that health coverage is unaffordable by avoiding the subsidy, they're not within the zone of interest, these plaintiffs.

The Government argues because the interest is contrary to the purpose of the statute, the plaintiffs may not bring suit. Well, I'm much more persuaded by the plaintiffs' argument. And I agree with the plaintiffs that disagreement with the Government about a statute's true interest does not render plaintiff outside the zone of interest.

The Court cannot resolve the merits question of the statute's true interests, let alone accept the Government's view of the merits as a means of denying the plaintiffs the chance to make their merits arguments. Plaintiffs argue that enacting this and related provisions of the Affordable Care Act, one of Congress's interests was in limiting the expenditure of taxpayers' money and expanding the number of low income people, satisfying the exemption from the individual mandate penalty. And that both groups of plaintiffs in this case are either directly or indirectly regulated by the IRS Rule and, thus, must be considered to be within the zone of interest.

So, at least with respect to the individual plaintiffs, I think that the plaintiffs have the much better

argument. The circuit has said: In reviewing the standing question, the courts have to be very careful not to decide the questions on the merits for or against the plaintiff, and must assume that on the merits the plaintiffs would be successful in their claims.

Furthermore, as the plaintiffs' correctly note, again, citing this Supreme Court case, Match-E-Be-Nash-She-Wish Band, parties challenging agency actions will often assert that an agency has gone too far in promoting certain goals underlying a statute.

Plaintiff falls within the zone of interest if the plaintiff's interest is arguably one that is regulated or protected. And, clearly, and it says arguably regulated or protected. Clearly, the individual plaintiffs are directly regulated by the IRS Rule, and this is enough to bring them within the zone of interest, and they have prudential standing.

As for the employer plaintiffs, they may be regulated or at least indirectly regulated under the employer mandate provision, and they do rely largely on the -- largely on the Safe Extensions versus FAA decision, which I just mentioned.

So, I think that clearly the individual plaintiffs have prudential standing. I'm going to reserve ruling on the employer plaintiffs.

In addition to presenting a zone of interest argument, defendants also argue that a third party like the plaintiff employers generally may not challenge the tax liability of another. This argument comes up or some variant of it comes up as part of the prudential standing argument that the Government makes, part of a stand alone tax refund as the better route or the only route argument, and also under the Anti-Injunction Act.

So, the Government says that, you know, essentially these employers are challenging the tax liability of another and that, therefore, they don't have prudential standing. And, in fact, if they're successful, they would be increasing the tax liabilities of third parties who are not before the Court. And it is established, they say, that ordinarily one may not litigate the tax liability of another.

Plaintiffs reject the Government's contention that there is a categorical rule against challenges to laws and rules granting tax credits to others. And they list a lot of cases in which federal courts have reached the merits of third party challenges to tax laws. And there's this dispute about whether those cases all -- the Government says those cases all relate to constitutional challenges to tax laws, and the plaintiffs say, no, they're not, and they're perfectly applicable here.

I guess I'm going to invite both parties to

further address the issues and, you know, highlight the cases that you think are -- plaintiffs should highlight the cases that they think are most apt in this situation, most analogous.

So, bottom line on standing. Since at least one plaintiff has both Article III and prudential standing, the Government's motion to dismiss must be denied on standing grounds.

So then we get to ripeness. I have an intern here who is still in law school, so now he can skip his federal jurisdiction course, he knows about standing and ripeness and all of that after today. The ripeness doctrine limits the power of federal courts to decide only judicial matters. It finds its roots both in the 'case or controversy' requirement of Article III of the Constitution, and the same sort of prudential considerations I was previously talking about which favor the orderly conduct of the administrative and judicial processes.

Now, in the context of administrative action, the ripeness doctrine prevents courts through premature adjudication from entangling themselves in abstract disagreements over administrative policies, and it protects agencies from judicial interference until the administrative decision has been formalized and its effects are felt in a concrete way.

I'm going to get to this, but all you have to do is -- and that's from Abbott Laboratories, 387 U.S. 136. I mean, this is a final agency rule. It's out there. It's beginning to affect people now. And I just don't -- I just don't accept the Government's argument that this case is not ripe for review. But now I'll tell you why.

The cases say that in considering a ripeness challenge, the Court has to consider the fitness of the issues for judicial decision and the hardship to the parties of withholding judicial review. And a dispute is generally fit for judicial review if it is legal in nature and no other institutional concerns militate in favor -- concerns militate in favor of withholding review. And under the hardship prong, the Court has to consider what the plaintiffs are in securing review now rather than later.

The Government argues that the claims are not ripe. They make a number of arguments. But because it's not clear how this regulation will affect the plaintiffs, and they can raise the issues at a later proceeding -- I can't remember whether we're talking about 2015 or 2016 or 2017, but in a later proceeding. And I just don't buy that. The lawfulness of this regulation is a purely legal question. No further factual development will help me in deciding whether or not to vacate this regulation.

The case law is pretty clear, what's going on --

what I should be looking at. American Petroleum versus EPA, 683 F.3d 382, D.C. Circuit, 2012. In the context of agency decision making, letting the administrative process run its course before binding parties to a judicial decision prevents the Court's from entangling themselves in abstract disagreements over administrative policies, and protects the agencies from judicial interference.

In this case we've got a final regulation. And when considering the fitness of an issue for review, the Court said, we ask whether it is purely legal. Okay. In this case we have a final regulation, it's purely legal. What does it mean? Is it consistent with the statute or isn't it?

On the hardship question, the circuit said in American Petroleum Institute: Considerations of hardship that might result from delaying review will rarely overcome the finality and fitness issues inherent in attempts to review tentative positions. So, what they're saying is if somebody comes in and claims hardship to review an interim rule, you shouldn't do it just because of hardship.

But it seems to me that the Congress also makes sense, that if you've got a final rule, how much hardship does the plaintiff need to show? In this case, whether Mr. Klemencic has shown irreparable injury -- justifying preliminary injunction is something I'll talk about later. But we know he's shown that he will be forced to do something

he doesn't want to do. And if I can decide the validity of that regulation, he will not have to do that.

Again, Electric Power Supply Association versus F.E.R.C., another D.C. Circuit case, 391 F.3d 1255. When you've got a final regulation and no further factual development is necessary to clarify the issues before the Court, then the matter is as fit for judicial review, as it can be -- in that case it says, it can be wholly resolved by an analysis of the Sunshine Act, the Act's legislative history, and its construction by relevant case law.

In this case, this can be decided looking at the language of the Affordable Care Act, to the extent it's relevant, the legislative history, and the regulation that issued under it. Quote: The hardship prong under the ripeness doctrine is largely irrelevant in cases, such as this one, in which neither the agency nor the court has a significant interest in postponing review.

Now, if one accepts this case as an APA -- plaintiffs have no interest in postponing review. They're not claiming -- they are claiming hardship if I do postpone review. From the Government's point of view, if you view it as an APA case, I don't see there's any hardship involved. Only if you view it as the plaintiffs are relegated to a tax refund case later -- if there's some argument that I shouldn't get to the matter now.

The Supreme Court's decision in National Park Hospitality Association versus Department of the Interior, 123 Supreme Court 2026, and Cohen versus U.S., 650 F.3d 717, the en banc decision of the D.C. Circuit. Again, APA challenges presumption of reviewability. In the context of APA challenges, we have previously said lack of hardship cannot tip the balance against judicial review. So, I think the case is ripe. The issue is ripe for review.

Moving right along -- and then, Lisa, we'll take a break before I discuss the preliminary injunction question. The Government next argues that this is not appropriate -- this is not an appropriate case under the Administrative Procedure Act. That APA review of this regulation is precluded -- maybe that's too strong a word, maybe it's not -- by the existence of another review mechanism.

They say that the plaintiffs may not bring this action as an APA action because Congress has specified that the judicial remedy that the plaintiffs must pursue is an action for tax refund. In other words, pay the tax, apply for a refund, if you're right, you'll get your money back and you'll be vindicated on this issue of law.

I think I made myself clear yesterday, I am very skeptical of this argument. Maybe I'm too simplistic, but the APA is there for a reason, and there's a challenge to an APA -- there's a challenge under the APA to a regulation that

is arbitrary, capricious, contrary to law -- why shouldn't that be resolved, even if it doesn't mean that other people aren't going to -- employees of these employers, for example, aren't going to feel free to seek subsidies and to proceed. We may still have the question -- well, I won't get into that.

I'm skeptical that the tax refund action would provide the individual plaintiffs with an adequate remedy, as they are requesting certificates of exemption at the outset and not tax refunds. And the employer plaintiffs say they will choose to comply with the regulations that they think are unlawful rather than violate them. And it just seems to me that this argument undermines the purposes of the APA, which seems imminently appropriate here.

There is some support for that view and for the plaintiffs' view on this point in the Cohen versus United States, en banc decision, 650 F.3d 717, where the IRS and the dissenters, because it was an en banc decision, says you should use the tax refund mechanism.

And, again, I haven't read the statute at issue there, but the Judge Brown in her opinion said: This suit is an APA action. It questions the administrative procedures by which the IRS allows taxpayers to request refunds for wrongfully collected taxes. The dissent assumes a refund suit provides an adequate remedy at law. But she goes on to say: Congress has not required exhaustion in APA suits challenging

the adequacy of IRS procedures, and we're not going to impose it here.

I know that that case is not -- the portion of the Internal Revenue Code there is different and nuanced, but I think there is some support for the notion that the APA is an appropriate remedy here. This sort of melds into the Anti-Injunction Act question, although they're presented as and are separate questions.

The Anti-Injunction Act argument, as I understand it, is raised by the Government only with respect to the employer plaintiffs, not with respect to the individual plaintiffs. The Anti-Injunction Act provides that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The courts have said, it's intended to protect the Government's ability to collect a consistent stream of revenue by barring litigation to enjoin or otherwise obstruct the collection of taxes. Normally, because of the Anti-Injunction Act, taxes can only be challenged after they are paid by suing for a refund. That's why I say it melds into this other APA argument.

So, I guess from the Government's point of view, the Supreme Court sort of threw a monkey wrench into this AIA

discussion by its decision in National Federation of Independent Business versus Sebelius. Nevertheless, I think that HHS and the Government and the President are happy to have to deal with that monkey wrench rather than to deal with what the alternative was going to be -- because we can all count to five.

So, the Supreme Court in National Federation of Independent Businesses versus Sebelius held that the label that Congress gives to a payment matters for purposes of the Anti-Injunction Act. They said -- the Anti-Injunction Act -- the Chief Justice said: Both the Anti-Injunction Act and the Affordable Care Act are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text.

Congress cannot change whether an exaction is a tax or a penalty for constitutional purposes, they say, but for purposes of whether the Anti-Injunction Act applies. It's what they call things that matters. The Supreme Court then noted that the penalty imposed on individuals who failed to obtain essential minimum coverage under the Affordable Care Act, the individual mandate, cannot be considered a tax for purposes of the Anti-Injunction Act since Congress consistently used the term penalty when discussing the individual mandate and not the term tax.

In other aspects of the Affordable Care Act they

use the term tax or taxes, said the Supreme Court. In fact, I believe the Chief Justice in his opinion said the word tax or taxes are used several hundred times, maybe over 600 times, in other parts of the statute.

The Court found that the distinction between the terms tax and penalty is important for purposes of the Anti-Injunction Act. So, the Government asserts that in contrast to the individual mandate at issue in the National Federation of Independent Businesses case, the exaction under Section 4980H, the so-called employer mandate, is a tax. And it's true that sometimes the word tax is used here, but the term assessable payment is also used.

This question came before the Fourth Circuit in Liberty University versus Lew. Liberty University was an employer plaintiff. The Fourth Circuit concluded that the, quote: Assessable payment reference in 4980H did not in fact constitute a tax under the Anti-Injunction Act.

In an opinion -- we don't know who wrote it, it's signed by all three judges and I'm not sure why. They didn't say per curiam and they didn't say who, but Judge Motz, Judge Davis and Judge Wynn issued an opinion jointly. And they said that in this part of the Act, the employer mandate part, the use of the word tax is used infrequently, and assessable payments is used more frequently.

And while they couldn't explain why it's mostly

called one thing and occasionally called something else, they did say that they saw no distinction between what the Supreme Court did in National Federation of Independent Businesses and what was before them in Liberty University. No distinction between the employer mandate and the individual mandate in terms of what is and is not a tax for purposes of the Anti-Injunction Act.

And they specifically said, under the Secretary's theory: An employer subject to the employer mandate can bring only a post-enforcement suit challenging the employer mandate. The Fourth Circuit said: It seems highly unlikely that Congress meant to signal with two isolated references to the term tax -- that the mandate should be treated differently. And, therefore, they ruled against the Secretary on this.

The Government's argument on this question is that the Fourth Circuit is wrong and that I should reject the Fourth Circuit reading. They say that the employer plaintiff suit is barred by the Injunction Act -- barred by the Anti-Injunction Act because, they say, 4980H imposes a tax. And what the employer plaintiffs are seeking is to be relieved from a tax under that section applied to them.

The Fourth Circuit has analyzed this. The Tenth Circuit in the Hobby Lobby case has analyzed this and has followed the Fourth Circuit. And the question is: Are the employer mandate, the language of the relevant provision of

the statute and the structure and affects sufficiently similar to the individual mandate penalty to call it a tax -- I mean, to call it a penalty, or is this different and is it a tax?

So, you know, the Government's got an uphill battle on this. But since I found that one individual plaintiff has both Article III and prudential standing, and I found that the case is ripe for decision, I don't have to decide this now since this AIA argument applies only to the employer plaintiffs.

The Government can brief it further. The Government can see if they can try to persuade me, in the summary judgment papers, not to follow the Fourth Circuit, not to follow the Tenth Circuit, to see if there's a distinction between this and what the Supreme Court previously did. And it seems to me, finally, that until I decide the standing of the employer plaintiffs in this issue, I really don't need to decide the Rule 19 question of indispensable parties.

And, again, the Government can give me more on Rule 19 if they think it's worth a candle, but I'm not going to decide that one today either. So, bottom line, it took a long time to get there. Anything I missed? Bottom line is that the motion to dismiss is denied and the case goes forward with summary judgment briefing.

And we will talk about a schedule for summary judgment briefing at the end of this hearing. So, should we

take a 10-minute break and then I'll come back and tell you what I think about the preliminary injunction motion?

BRIEF RECESS

AFTER RECESS

THE COURT: The second motion that I heard argument on yesterday is the plaintiffs' motion for a preliminary injunction. And, again, we focus on Mr. Klemencic, and because -- one of the things that one has to show for preliminary injunction is irreparable harm, and so the effort was made with respect to him to show irreparable harm.

Essentially what the plaintiffs are asking is that the regulation be enjoined, or its effectiveness or its application be enjoined, pending a final determination on the merits of this case. And now that I've denied the motion to dismiss we know that there will be a final determination on the merits in this case. If I had granted the motion to dismiss, then the motion for preliminary junction would have been moot, as the case would have been gone.

So, as all the lawyers in the room know, a preliminary injunction is considered an extraordinary remedy that may only be awarded on a clear showing that the plaintiff is entitled to such relief. A plaintiff seeking a preliminary injunction has the burden by a preponderance of establishing that, one, he's likely to succeed on the merits; two, he's likely to suffer irreparable harm in the absence of the

preliminary relief that he's requested; and that the balance -- third, that the balance of equities tips in his favor; and fourth, that an injunction is in the public interest.

Traditionally, in this circuit, these factors were viewed as a continuum, and if there were more than one factor that could compensate for less than another. So, for example, if you had a really, really strong likelihood of succeeding on the merits then you had to show less injury. And if you had really significant injury, then maybe not so much on the merits.

Under this sliding scale test, if the argument for one factor was particularly strong, an injunction may issue even if the arguments in other areas are weak. The Supreme Court decided a case called Winter versus Natural Resources Defense Council, 129 Supreme Court 365.

And in Sherley versus Sebelius, 644 F.3d 388, the D.C. Circuit suggested, but did not decide, that the likelihood of success and irreparable harm factors each are independent requirements, and that you couldn't get a preliminary injunction unless you showed both -- likelihood of success and likelihood of irreparable harm.

So, regardless of whether I adopt a more or less flexible approach to this, the D.C. Circuit has said in Chaplaincy of Full Gospel Churches versus England, among other

cases, and a case which I lost called Sea Containers versus Stena, 890 F.2d -- that's when I was practicing law -- F.2d 1205. I shouldn't cite that, I guess. I won part of the case, but I lost the preliminary injunction part of the case.

The circuit has said, regardless, it has said that a movant has to demonstrate at least some injury for a preliminary injunction to issue. And if the moving party fails to show any irreparable harm, that's grounds for denying the motion.

So, I'm going to start by talking about plaintiffs' injuries in the irreparable harm prong. So, the minimum coverage provision, under which individuals who do not obtain minimum coverage are assessed a tax penalty, will be effective starting in 2014. Plaintiffs have asserted that unless the challenged regulations are enjoined before the end of this calendar year, David Klemencic will be irreparably deprived of his right to obtain a certified exemption from the Affordable Care Act's individual mandate for calendar year 2014.

He's got to obtain that certified exemption, it was said in the briefs, before December 31st. And if he doesn't get relief before December 31st, he would be forced either to buy comprehensive health coverage that he doesn't want or risk incurring a penalty; and he would be foreclosed from getting the catastrophic coverage for 2014.

In the briefs it was said that once 2014 begins, he would no longer be able to obtain a certificate of exemption and that his remedy -- his injury could not be remedied after the fact. In short, the rule that's at issue in this lawsuit, the IRS rule that's at issue in this lawsuit, is preventing him from obtaining a certificate of exemption, and the window for him to do so is going to close.

Now, I think what I understand from the recently filed declarations by Mr. Klemencic, by the representations made by counsel for both sides yesterday, that the actual deadline for enrolling in an Exchange is March 31, 2014. And under the applicable regulation, an individual who seeks a certificate of exemption under the unaffordability provision may apply for such a certificate any time before the final date on which he or she is eligible to enroll in a qualified plan offered under the Exchange. And that's 45 C.F.R. Section 155.605(g(2).

In looking at the penalty provision of the statute, this deadline appears consistent with the exemption for short coverage gaps of less than three months. Thus, it seems, that an individual who waits until March 30, 2014, to obtain health insurance would not be subject to a penalty and that you can get a certificate of exemption anytime before that date.

It was said in court yesterday by plaintiffs'

counsel, with the necessary lead time, they think the date that it becomes crucial -- they may still be sticking to their December 31st date -- but I understood them to say that with the necessary lead time leading up to March 30, 2014, and getting the exemption and other things, that would be February 15th, 2014.

And, so, the question is, if there is no risk of injury until February 15th, 2014, or possibly later, is there irreparable injury in this case for Mr. Klemencic? And I guess I would add, is there irreparable injury if I can decide the merits of the case before February 15th, 2014? And I see no reason why I can't with expedited briefing. And some of the issues -- some of the issues that were briefed on the motion to dismiss have either been resolved or one side or the other is going to abandon them or tell me they are not that important to them.

Other issues that have previously been briefed have to be briefed further, if you want to persuade me, and I've said some of that earlier this morning. The main issue that still needs to be briefed, in my judgment, is the Chevron Phase I and the Chevron Phase II, but there are others.

So, without a preliminary injunction, Mr. Klemencic and possibly other plaintiffs will have to choose between paying a penalty estimated for Mr. Klemencic at about $12 a month, or obtaining health insurance that he

doesn't want, after being awarded a subsidy that he says would be illegally granted, around $18 a month. If he chooses the penalty -- if he chooses the penalty or tax, if you want to call it a tax, and ultimately prevails in this lawsuit, he'll be able to recover the money expended through a tax refund. If he chooses to buy the insurance, that money is, I think, not retrievable.

So, I would make a couple of points. One, this case can be resolved on the merits before February 15th, 2014, and I think that really undercuts Mr. Klemencic's irreparable injury argument. Two, if he pays the penalty and wins ultimately, if I didn't get to it by that date, which I will, he would get a tax refund. So, I don't see any irreparable injury. And if there's no irreparable injury, then there's no preliminary injunction.

But he says he may choose to take the insurance under protest. In fact, I think he says he will choose to take the insurance under protest rather than pay the penalty. And if he does that and later wins the lawsuit, he doesn't get a tax refund. So, I raise the question, without deciding it, although -- and that's this.

Preliminary injunction is an equitable remedy. Is it fair to let someone create his own irreparable injury and then get a preliminary injunction because he's created his own irreparable injury? This gets to the Hobson's choice

discussion we've had before. But if he pays the penalty, no irreparable injury.

If he takes the other option, for whatever reason, can he thereby create irreparable injury? Even if he did -- if he could -- is the amount, $18 a month, so de minimis that it's not really irreparable injury, because surely, even if I didn't require expedited briefing, which I will, this case can be decided by me quickly. And, so, maybe he pays one month of insurance, maybe he pays two months of insurance, that's not going to happen. What you all do with respect to the Court of Appeals and what kind of stays and injunctions you ask for, depending upon how I rule, is another question.

There's a second and independent reason that the Government raises, and that's that traditionally economic harm is not a basis for a preliminary injunction, and certainly de minimis economic harm cannot constitute irreparable harm for preliminary injunction purposes. And, again, we're talking about a penalty of $150 a year, is the estimate, or $12 a month, or $18 a month in insurance.

The cases -- there are a lot of cases on this point. Hi-Tech -- but, again, you know, other than a tax refund, you can't sue the Government presumably because of sovereign immunity. But even in cases where the Government is a defendant, the courts have invoked that principle where the

economic harm is de minimis.

In an opinion by Judge Bates, Hi-Tech Pharmacal Company versus the Food and Drug Administration, 587 F.Supp.2d Page 1. He says: To demonstrate irreparable injury, a plaintiff must show that it will suffer harm that is more than simply irretrievable; it also must be serious in terms of its effect on the plaintiff. To warrant emergency injunctive relief, the injury must be certain, great, actual, and imminent.

Harm that is merely economic in character is not sufficiently grave under this standard, citing Wisconsin Gas. To shoehorn potential economic loss into a showing of irreparable injury, plaintiff must establish the economic harm is so severe as to cause extreme hardship to his business or threaten his very existence. That's one example, there may be others.

Chaplaincy, which I mentioned, of Full Gospel Churches versus England, 454 F.3d at 290, the D.C. Circuit also discusses that, and says: The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.

The possibility that -- in Gulf Oil Corporation versus Department of Energy, 514 F.Supp. 1019, a 1981 decision by Judge Flannery says: Some concept of magnitude of injury

is implicit. The injury must be more than simply irretrievable, it must be serious in terms of its effect on plaintiff.

Another case is American Association for Homecare versus Leavitt by Judge Urbina, at 2008 Westlaw 2580217. And -- let's see if I think this is relevant. In a case of mine, Sterling Commercial Credit-Michigan versus Phoenix Industries, 762 F.Supp.2d Page 8. I said that, under some circumstances, courts have held economic harm may qualify where a plaintiff's alleged damages are unrecoverable. But even unrecoverable losses must have a serious effect on a plaintiff in order to be considered irreparable. And I cited a case called Sandoz versus FDA 439 F.Supp.2d 26. A loss of less than 1 percent of total sales is not irreparable harm. So, it's a second reason for why I find that the injury to Mr. Klemencic is not irreparable.

So, what about success on the merits? Even if I assume that there -- even if there were some threat of irreparable harm to Mr. Klemencic, what about the merits? If the sliding scale analysis still applies, the plaintiffs would have to show, since I've said I didn't find any irreparable harm, a particularly strong likelihood of success on the merits. And I don't think the plaintiffs have made that showing. And let me be very clear what I'm saying here because this is important to you and to the world at large.

The plaintiffs make a very good argument. We spent a lot of time on this yesterday. That the words in the statute, an Exchange, quote, established by a state, should be construed literally and that federal Exchanges are not established by a state. The defendants have a good argument, too, at least a credible argument, that when you view this in the context of the entire statute and the overall scheme of things, and when you apply Chevron to the regulation, that they're likely to win on the merits.

We haven't had a lot of discussion about Chevron. I think both sides suggested that we don't get beyond Chevron Step 1 that the statute is unambiguous. But I think the briefs that I'm going to get from you on summary judgment are going to have to discuss both Chevron Step 1 and Chevron Step 2.

So, all I'm saying is that if, on preliminary injunction, in a case where I find no irreparable harm, the plaintiffs have the burden of showing a particularly strong likelihood of success on the merits, I don't think they've done that. They have made an argument that may ultimately be successful. The defendants have made an argument that may ultimately be successful.

And as I delve further into the statute, with the assistance of additional briefing by the parties, the strength of each party's position will become clearer. So, that's what

I have to say about irreparable harm -- about merits. I guess implicit in my irreparable harm discussion is that because of the February 15th/March 31st as opposed to December 31st discussion, the employer plaintiffs probably couldn't show irreparable harm either, although, as I understand the preliminary injunction motion, it's brought only on behalf of Mr. Klemencic.

What about the balance of the equities, the public interest. You know, I've spent a lot of time on this, but it's not worth spending a lot of time on this in light of what I've said so far. The plaintiff said there's a public interest in ensuring that a government agency acts within the limits of authority. No doubt that's true. But until I decide the merits, it's hard to know whether they have not done that.

They also argue that lots of people are going to be affected by this if I don't adjudicate this matter promptly, and plaintiffs, the employers, the employees, are making health insurance decisions based on the current regulations, and that's undoubtedly true. So, that's why I want expedited briefing so that I can deal with this.

The defendants argue that there is inherent harm to an agency in preventing it to enforce its regulations that Congress found it in the public interest to direct the agency to develop and enforce. Well, yeah, but only if the

regulations are lawful. And they also argue that the ability to award relief in this case is limited -- it would not affect -- any relief I granted would not affect many people not before the Court. Well, that goes to arguments on the merits -- on the -- partly on the APA argument and partly on the other prudential issues. And I don't need to talk about that further today.

So, I think what we need is further briefing. And I'm assuming that the plaintiffs have filed a motion for summary judgment. So, what we'll get next is an opposition to the motion for summary judgment and a reply. Or are we going to get an opposition to the motion for summary judgment plus a defendant motion for summary judgment? In which case, we get -- the Government files a summary judgment motion/opposition, or in two separate documents on the same day.

The plaintiffs then file their reply to the opposition and an opposition to the Government's motion, and then the Government files a reply. But I want to do it quickly. The parties can address the remaining arguments on jurisdiction and on the merits. They could revisit, if they wanted to, any of the things I've already decided. But, certainly, the question of the standing of the employer plaintiffs, the redressability question, the APA versus tax refund question, the APA question more broadly, I said

redressability, and Chevron Step 1 and Step 2. I'm sure that when all of the lawyers get back to their office they will think of other things they want to brief, too.

So, that's where I am. Who wants to say anything?

MR. CARVIN: Just a brief inquiry of the Court, Your Honor. If I remember correctly, the extant order was for them to file an opposition within two weeks of you ruling on the motion to dismiss. Do I remember that correctly? Or are you planning on -- do you want us to suggest a briefing schedule?

THE COURT: I think we should revisit the briefing schedule because it seems to me that you want an answer quickly.

MR. CARVIN: As fast as possible.

THE COURT: And I think you should have an answer quickly. Mr. McElvain can tell me whether they've already decided whether they're going to file their own summary judgment motion, but that --

MR. CARVIN: Did you want to --

THE COURT: Do you want to do it now or do you all want to get together and talk and try to submit something in the next couple of days?

MR. CARVIN: Because time is of the essence, I'd rather do it now, but...

MR. McELVAIN: Your Honor, I'll need to return to my office and consult with people in -- Your Honor, I'll need to engage in consultations as to dates. I think there should be no problem arranging a schedule that would build towards reaching a decision by the February 15th date.

THE COURT: Or earlier.

MR. McELVAIN: Or earlier. We would intend to file a cross motion for summary judgment, so we would work out a schedule for cross briefing. One potential X-factor, which I won't ask the plaintiffs to make a representation one way or the other right now, but there is one potential issue, which is, I don't know if the plaintiffs intend to take an appeal from the denial of the preliminary injunction motion, and that may affect scheduling.

THE COURT: Well, I don't know whether it does. I mean, if you take an appeal from -- does it affect my jurisdiction to consider summary judgment?

MR. CARVIN: It's a nonfactor, Your Honor, right. And with all respect to Mr. McElvain, if he wants us to get back to the Court, that's fine, but the Justice Department is a big place. I think a deadline for getting back to you with proposed schedules by COB tomorrow will maybe make those wheels spin a little quicker.

THE COURT: Today is Tuesday.

MR. McELVAIN: Your Honor, I'm going to be out of

the office for the afternoon for a previously scheduled medical appointment. So, if I could have until Thursday close of business, that would be --

THE COURT: Let's do this. If you can reach an agreement and file something by close of business Thursday -- if you can't, I'll make myself available for a conference call on Friday. I'm going to be away the first couple of days of next week, so I would like to get it resolved this week.

MR. CARVIN: That's fine with me, Your Honor. We could also submit something in writing Thursday before the conference call --

THE COURT: Here's what I'm suggesting. Why don't we do this. Submit something in writing by close of business Thursday. If you're in agreement there's no need for a conference call.

MR. CARVIN: Right.

THE COURT: But if you're not in agreement -- I don't think I've got anything in court on -- I've got my calendar right here. I don't have anything in court on Friday, I do on Thursday. So, do you want to set a time now for a tentative conference call?

MR. CARVIN: 10:00 cloak.

MR. McELVAIN: 10:00 o'clock would be fine. I doubt that we'll need it, but that would be fine.

THE COURT: So, let's say 10:00 o'clock Friday

morning for a tentative conference call. I don't know how you want to do it, with a call-in number or whatever. My law clerk, Julie Dona, will send you both an e-mail so we can get the logistics set up. And then if you don't need it, you can respond to her by e-mail at the same time you file something on Thursday by close of business. I mean, no need to do it if you're in agreement on a schedule.

MR. CARVIN: Thank you, Your Honor.

THE COURT: And I'll issue an order today saying, motion to dismiss denied for reasons, and preliminary injunction denied for reasons, blah, blah, blah. So, if you do want to appeal the preliminary injunction, you'll have a piece of paper or an electronic thing or both.

MR. CARVIN: Thank you, Your Honor.

THE COURT: Okay.

MR. McELVAIN: Thank you, Your Honor.

THE COURT: Okay.

END OF PROCEEDINGS

C E R T I F I C A T E

I, Lisa M. Foradori, RPR, FCRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date:_____ _____

Lisa M. Foradori, RPR, FCRR