Forbes

An Update On Halbig, And Other Lawsuits That Could Make The Decrepit HealthCare.Gov Look Like A Hiccup

By Michael F. Cannon

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Last week, I discussed the importance of generating additional legal challenges to the IRS's attempt to tax, borrow, and spend $700 billion, under the rubric of ObamaCare, yet contrary to the clear language of the statute and Congress' intent. Four lawsuits have already been filed to challenge those illegal taxes and spending. The plaintiffs include two attorneys general, more than a dozen school districts, three private employers and eight individual taxpayers. A ruling for any of these plaintiffs would make the problems with ObamaCare's decrepit HealthCare.gov web site look like a hiccup.

Last week, there was activity in one of those cases, *Halbig v. Sebelius*. Tomorrow, there will be hearing on another, *King v. Sebelius*.

Background

The Patient Protection and Affordable Care Act directs states to establish health insurance "exchanges," directs the federal government to establish Exchanges in states that do not, and offers subsidies to certain taxpayers who enroll in qualified health plans "through an Exchange established by the State." (The subsidies are technically tax credits, though they are tax reduction in name only.) The mere *availability* of those subsidies triggers penalties against individuals under the law's individual mandate, while the *issuance* of such subsidies triggers penalties against employers under its employer mandate. In a final rule purporting to implement the law's tax-credit rules, the IRS announced it would issue subsidies in *all* states, even the 34 states that do not have "an Exchange established by the State."

Jonathan Adler and I explained the problems with that rule in our law-journal article, "Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA." This Cato Institute study offers a layman's version of the arguments.

In *Halbig v. Sebelius*, three private employers and four individual taxpayers have challenged that IRS rule in a federal court in Washington, DC. All seven plaintiffs are located in states that have opted not to establish an Exchange. They allege the IRS's decision to offer unauthorized subsidies in their states will subject them to financial penalties that Congress did not authorize and force them to take costly steps to avoid those penalties.

Notes on *Halbig* Oral Arguments

Last Monday, U.S. District Judge Paul L. Friedman, a Clinton appointee, heard oral arguments on the government's motion to dismiss *Halbig*, and the plaintiff's request that the court issue a preliminary injunction against the IRS rule. Here are a few items of interest from my notes.

- The Obama administration once again reversed its position on whether the individual mandate is a tax. You may recall that President Obama has done so a number of times. In 2009, Obama told George Stephanopolous, "I absolutely reject that notion" that the mandate is a tax. In 2010, his solicitor general argued before the Supreme Court that the mandate is a legitimate use of the taxing power. After the Court upheld the mandate on that basis, the administration went back to insisting the mandate is not a tax. In court last week, the government's attorney, Joel L. McElvain, said, "There is no such thing as an individual mandate. It's a tax."
- McElvain claimed the plaintiffs could not bring this challenge because they were not within the "zone of interests" protected or regulated by the PPACA. Freidman responded, "I have written in my notes, 'This is a silly argument.'"

- Referring obliquely to HeatlhCare.gov, McElvain quipped, "As the court is aware, there are limitations on what the government can do over the past couple of weeks."

- Like many defenders of the IRS, McElvain argued that Section 1563's definition of "Exchange" means that an Exchange established by the federal government under Section 1321 is, legally speaking, also established under Section 1311. Friedman responded, "they're still not established by the state."

- McElvain advanced a new argument designed to get around that tiny problem. When Section 1311 of the PPACA says each state "shall" create an Exchange, he argued, Congress is creating a "legal fiction" that each state *has* established an Exchange. If a state does not establish an Exchange, "the premise stands" that it has. Therefore, when the federal government establishes an Exchange, it is, fictionally but legally, "an Exchange established by the State." There are at least two problems with this new theory. First, a legal fiction is when Congress asks the executive and the courts to treat a fiction as though it were true. For example, Section 1304(d) provides, "In this title, the term 'State' means each of the 50 States and the District of Columbia." Likewise, Section 1323(a) provides, "A territory that elects…to establish an Exchange…shall be treated as

a State[.]" The District of Columbia and U.S. territories are not states, but Congress directs the executive to pretend they are. For a legal fiction to exist, however, Congress must specify exactly what untrue thing it is asking the executive to believe. The executive can't just go around believing whatever untrue things it wants. There is no language in the PPACA creating a legal fiction that the federal government is a state. Sections 1304 and 1323 show that Congress knew how to create such a fiction if that was its intent. Second, this legal-fiction theory contradicts another of the government's arguments. McElvain, like other defenders of the IRS, argued that when Congress explicitly required both Section 1311 and Section 1321 Exchanges to report information relevant to tax-credit eligibility, it was signaling its intent to authorize tax credits through both types of Exchange. Setting aside the problems with that claim, the fact that Congress mentioned Section 1321 Exchanges *separately* in this information-reporting requirement undercuts the government's legal-fiction theory, and any theory that claims Congress intended for state-established and federal Exchanges to be fully equivalent. If it was Congress' intent that state-established and federal Exchanges would be fully equivalent, why did Congress mention the two types of Exchanges separately here? The fact that Congress did mention them separately supports the plaintiffs' argument that Congress did not intend for them to be fully equivalent.

- When McElvain argued that offering tax credits through both state-run and federal Exchanges was a "fundamental part of the House version of the bill," Judge Friedman responded, "Of what relevance is that if their bill didn't become law?"

- The government denied the existence of the legislative history that supports the plain meaning of the statute. Adler and I document much of that history in our article.

At the end of Monday's hearing, Friedman asked the parties to reconvene the very next day, when he issued an oral opinion denying both the government's motion to dismiss the case, and the plaintiffs' motion for a preliminary injunction.

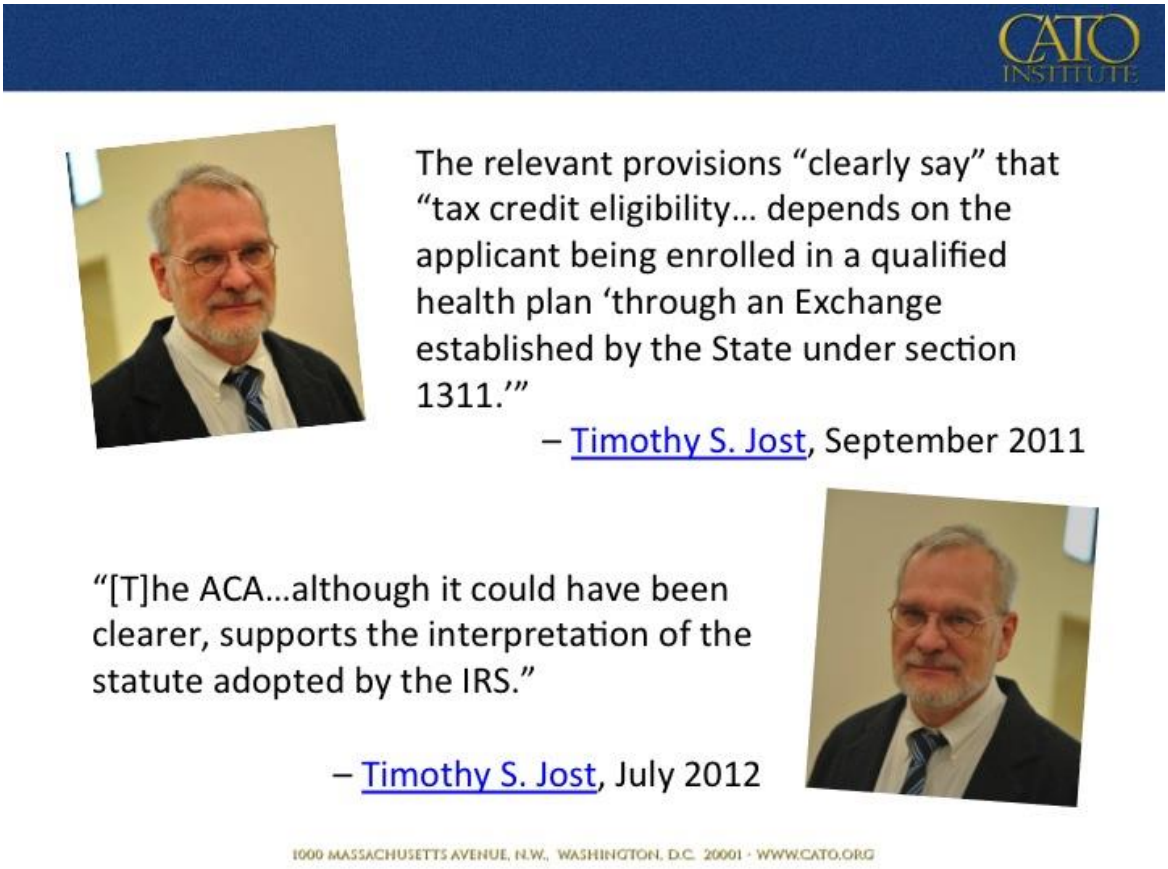
Court's Ruling Rebuffs the IRS and Its Defenders

Friedman's denial of the government's motion to dismiss was a serious blow to the IRS and its defenders. It was the second time a federal court has held that a plaintiff has standing to challenge the IRS rule. The first came in August, when a federal judge in Oklahoma ruled against the government's motion to dismiss that state's challenge to the IRS rule in *Pruitt v. Sebelius*. Friedman found that plaintiff David Klemencic likewise had standing. Both courts rejected the litanies of arguments the government offered, such as that the plaintiffs' alleged injury was too speculative and not ripe for adjudication.

These dual rulings dealt a further blow to the credibility of the IRS's defenders. The agency's earliest and most ardent defender is a law professor at Washington & Lee University named Timothy Jost, who was influential in the drafting of the PPACA and has been influential in its implementation. He even attended the signing ceremony along with, in his words, "secretaries and congress people and various other leaders who had worked on the bill."

In 2010, when 18 state attorneys general first challenged the PPACA's mandate that states expand their Medicaid programs, Jost dismissed their legal claims as being so "devoid of legal authority" that the attorneys general should be sanctioned under Rule 11 of the Federal Rules of Civil Procedure and be held *personally* liable for the government's defense costs. As we all know, the Supreme Court ruled 7-2 for the attorneys general on their Medicaid challenge.

In 2011, when critics first noted the IRS's tax-credit rule was illegal, Jost admitted that the statute plainly restricts tax credits to states that establish Exchanges, but later backtracked and changed his story.



He initially claimed this statutory restriction was merely a drafting error, but again backtracked.

"That this is a drafting error is obvious to anyone who understands the ACA."
– Timothy S. Jost, September 2011

"I agree with Cannon and Adler that the courts are unlikely to find the 'established by the state' language a 'scrivener's error.'"
– Timothy S. Jost, July 2012

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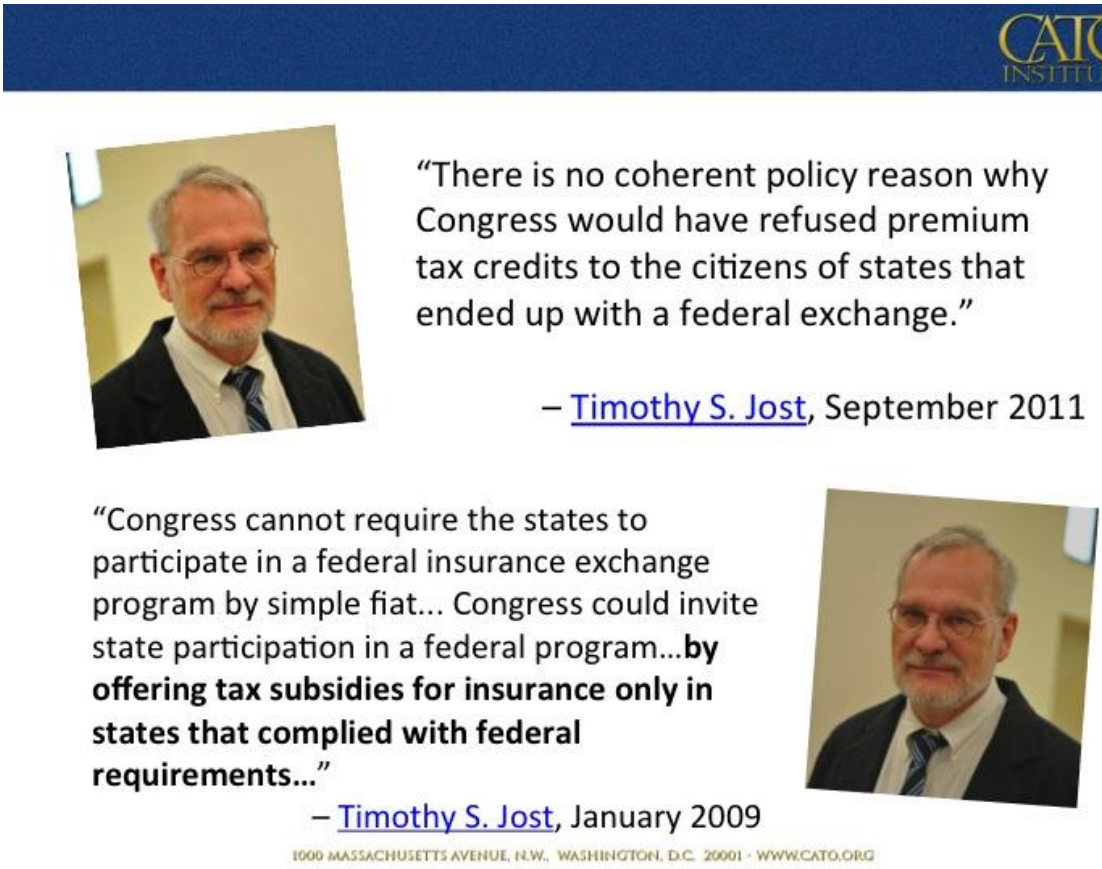
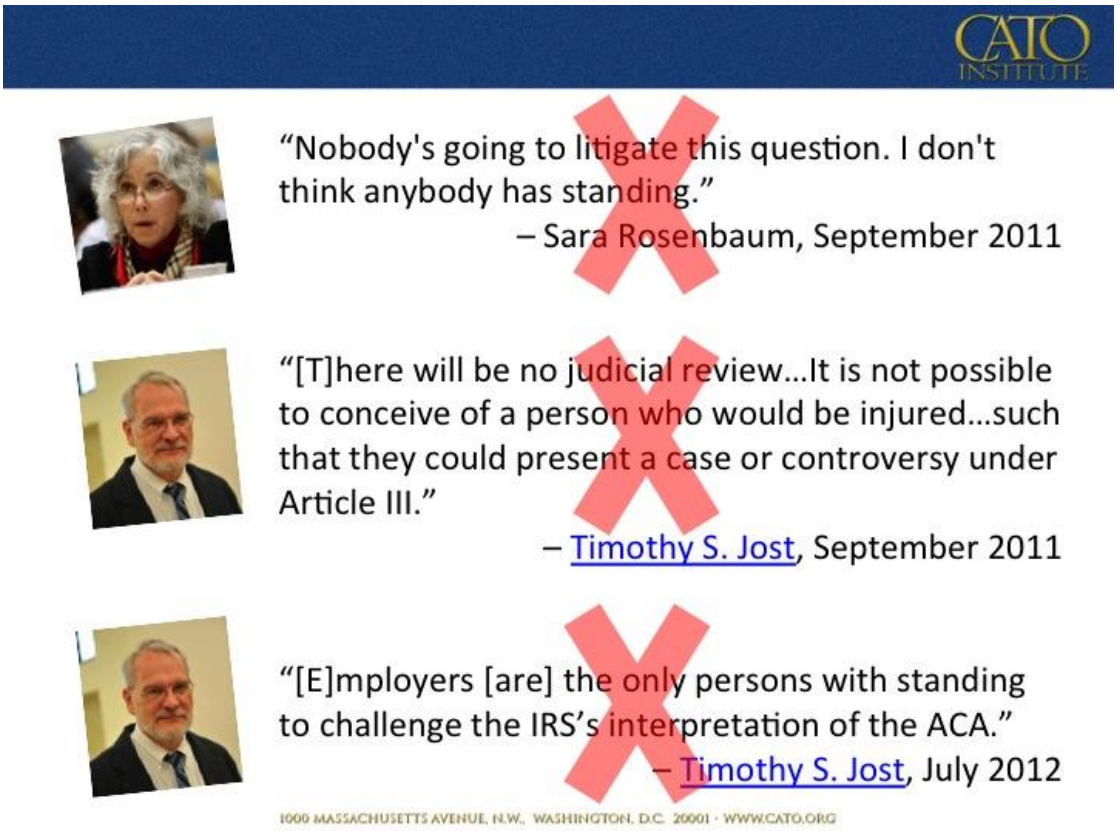
Jost also dismissed the critics' reading of the statute as absurd by claiming there was "no coherent policy reason" for restricting subsidies to state-established Exchanges. Only later did we learn that *Jost himself* had offered the rationale for this feature of the law in early 2009.



Finally, in 2011, both Jost and George Washington University law professor Sara Rosenbaum confidently claimed that no one would have standing to mount a legal challenge to the IRS's attempt to issue subsidies through federal Exchanges. Jost later backtracked to say that only employers would have standing.



The courts proved both professors wrong. The federal court in Oklahoma showed they were wrong on employer standing, while Judge Friedman has shown they were wrong on individual taxpayers having standing.

***Halbig* Proceeds to the Merits**

Though Friedman denied the plaintiffs' request for a preliminary injunction, which would have immediately blocked the IRS rule, he acknowledged the issue is "of some urgency to both sides" and announced, "I want to do it quickly." Attorneys for both sides agreed to make all motions and file all relevant briefs in November. Friedman will hear oral arguments on December 3, and will enter final judgment by February 15 – though he certainly could (and ideally would) rule before the IRS begins dispensing the disputed funds on January 1.

Friedman did not tip his hand on the merits of the case, but here's what he had to say (according to a transcript of his oral opinion that's not yet available online):

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…

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.

(Emphasis added, based on my recollection.)

Oral Arguments in *King* Tomorrow

A federal court in Richmond will hear oral arguments tomorrow in a similar case. In *King v. Sebelius*, four individual taxpayers are challenging the IRS rule and have requested a preliminary injunction. Tomorrow, the court will hear arguments on that motion. Again, if granted, an injunction could stop the IRS from issuing subsidies in the 34 states with federal Exchanges.

For more, have a look at this *Los Angeles Times* article on the lawsuits.

And keep checking back here for more updates.