



Appeals court swings a sledgehammer at the ACA

By Steve Benen
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Most of the nation has been working under the assumption that the fight over the Affordable Care Act's existence is over. The Supreme Court has already endorsed the law's legality; Congress has effectively given up on its repeal crusade; and the law's implementation is proving to be a great success. End of story, right?

Well, no. There's one last court case that we've been following that, in theory, could still destroy much of the federal health care system. At a distance, it's a genuinely ridiculous case, but as Adam Serwer reports this morning, its absurdity didn't stop Republican-appointed judges from making the wrong call this morning.

A federal court has struck down a rule from the Internal Revenue Service making Americans in federally-run health insurance marketplaces eligible for subsidies, a decision that could seriously imperil implementation of the Affordable Care Act. [...]

The ruling was a 2-1 decision by a three judge panel. Judge Harry Edwards, the lone Democratic-appointed judge on the panel, dissented.

If you've been ignoring this lawsuit, it's understandable. In January, a federal district court heard the case and not only sided with the Obama administration, the ruling practically mocked conservatives for filing such a ludicrous case. A separate federal judge recently reached the same conclusion.

But arguably the two most far-right jurists on the D.C. Circuit nevertheless overruled the lower courts, effectively swinging a sledgehammer at the core of the Affordable Care Act. If the ruling stands, there would be a very real possibility that this one outrageous decision could unravel much of the ACA itself.

Which is why it matters a great deal for millions of American families what happens next.

The basis for the lawsuit gets a little complicated. Under the ACA, consumers go to exchange marketplaces and sign up for coverage. Most Americans are eligible for subsidies from the government that makes the insurance far more affordable.

However, according to a lawsuit filed by Case Western University law professor Jonathan Adler and Cato Institute health policy analyst Michael Cannon, there's some ambiguity in text of the law: if you read the statute in a certain way, it makes it seem as if the subsidies are only intended

to go to consumers who enroll through state-created exchanges. Their lawsuit says consumers who went through the federal exchanges shouldn't be able to get subsidies at all.

This is, of course, insane. As the ACA's architects are made abundantly clear, the point was to make these subsidies available to all consumers, regardless of which exchange they used. The wording may be confusing, but the legislative intent is obvious, and destroying the American health care system over an alleged drafting error is madness. As Serwer once put it, the lawsuit "is like arguing a typo in your passport invalidates your citizenship."

But the right doesn't care if it's grasping at straws; it's clung to an unusually malicious lawsuit because the case offers a slim chance of taking health care benefits away from millions of American families.

Why? Because if families in the 36 states that rely on the federal exchange lose their ACA subsidies, they won't be able to afford health insurance. And if they can't afford coverage, they drop out of the system. And if they drop out of the system, the "death spiral" kicks in to the point that the basic American health care structure unravels.

If you're thinking this sounds absurd – would Republican judges really destroy health security for millions of people over a drafting error? – that's because it is.

So what happens now? The Obama administration will appeal to the full D.C. Circuit, seeking an en banc ruling from the entire bench. For most legal observers, there's a strong likelihood that today's ruling will be reversed – judges appointed by Democratic presidents currently outnumber judges appointed by Republican presidents on this bench.

One other alternative is Congress could simply pass a one-page bill, clarifying that all U.S. consumers are eligible for existing subsidies, but since Republicans eagerly want the American health care system to fail catastrophically, this seems like a long shot.

I suppose the bottom-line question is this: if you and your family need the ACA to survive in order to have access to basic medical care, how worried should you be about today's decision? Timothy Jost, a law professor at Washington and Lee University, recently made the case that everything will be all right.

Fortunately, courts do not read statutes by cherry-picking single phrases to defeat the entire purpose of laws.... If one views the totality of the ACA – its purpose and its other provisions – it's clear that tax credits are available in the federal exchange.

The Affordable Care Act was meant to "provide affordable ... coverage choices for all Americans." A key section says, "Each state shall ... establish an ... Exchange," but another section provides that if a state "elects" not to establish the "required Exchange," the secretary of health and human services must "establish and operate such Exchange." These sections both require states to establish exchanges and allow them not to do so.

Congress gave the IRS the responsibility to resolve such contradictions, and the IRS adopted the only reasonable approach. If a state does not create the "required Exchange," HHS steps into its shoes and sets up "such Exchange." The law, in other words, requires the federal government to create the "Exchange established by the state," with the same authorities and responsibilities as state exchanges, including offering premium tax credits.

This may be a convoluted way of writing a statute, but it is the only way of reading the statute that makes sense of the entire statute and carries out its purpose. It is how the states that decided not to establish exchanges understood the law. It is how the only two federal courts to rule on this issue so far have read it. It is how Judge Harry T. Edwards of the D.C. Circuit panel read the statute when he called the plaintiff's argument "preposterous."

In effect, Professor Jost is arguing that Republican federal judges are not lunatics, so the public really shouldn't worry. The trouble, of course, is that two far-right jurists today ruled against the ACA anyway, proving that some judges are perfectly content to "cherry-pick single phrases to defeat the entire purpose of laws."

Watch this space.