



## **Little-Known Legal Challenge That Could Torpedo Obamacare**

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While the Supreme Court considers one challenge to a provision of the Affordable Care Act (ACA), a federal appeals court located just blocks away is contemplating a separate challenge that could have much more dire consequences for the future of the law.

“What you’re asking for is to destroy the individual mandate, which guts the statute,” Judge Harry T. Edwards of the U.S. Court of Appeals for the District of Columbia said to an attorney representing the challengers during a hearing on March 25.

The case — *Halbig vs. Sebelius* — was heard by Edwards and two other judges and they are expected to rule in the coming months.

It concerns the American Health Benefit Exchanges (known as “exchanges”). The ACA provides for the establishment of the exchanges that are meant to help individuals (who in general are not getting insurance from an employer) to purchase competitively-priced health insurance. The philosophy behind the exchanges is that collective purchasing power will lead to more affordable insurance.

The ACA states that states can establish or operate the exchanges, or the federal government will step in to do so.

So far, 16 states and the District of Columbia have elected to set up their own exchanges, while 34 states rely on federally run exchanges.

The conflict at the center of the *Halbig* case (and three other challenges across the country) has to do with tax subsidies granted to those who seek to obtain insurance from the exchanges. The ACA grants the credits to qualifying individuals in order to defray the cost of the insurance. Millions of Americans are expected to take advantage of the subsidies.

But challengers to the law dispute who is eligible for the tax credits.

On one side, the IRS interprets the law as authorizing the agency to grant tax credits to individuals using either the state or federal exchanges. On the other side are challengers to the law who question that interpretation.

The challengers say that while the text of the law allows the subsidies for the state-run exchanges, there is nothing in the law that says the subsidies should be available for the federal exchanges.

“This is yet another example where the president and his agencies are playing fast and loose with the text of the law because they are trying to get the result they want,” said Carrie Severino, chief counsel for the Judicial Crisis Network, who is a critic of the ACA.

Michael A. Carvin, a lawyer for the challengers, argued in court briefs that the IRS is wrong in its interpretation of the law and the agency purports to “dispense billions of dollars in federal spending that Congress never authorized.”

Carvin is representing individuals and employers who are likely to face fines because of the IRS rule.

Michael Cannon, of the Cato Institute, was a very early critic of the IRS interpretation of the law. Cannon said he believes that the supporters of the law never imagined that so many states would decline to set up the exchanges. “Congress gave states the power to veto exchange subsidies,” Cannon said. “That’s the last thing President Obama wants, so the president decided to issue the subsidies in federal exchanges, even though he only had the authority to issue them for state exchanges.”

As of March 7, 2.6 million people have selected a federal exchange and 85% of them have selected a plan with financial assistance, according to U.S. Health and Human Services statistics.

Ron Pollack of Families USA is a strong supporter of the law and the exchanges. He dismisses Carvin’s arguments about costs. “If you just look at the provision of subsidies, it does cost money — there is no question. But the overall budget impact of the ACA is that it reduces the federal deficit,” he said. “There are many provisions in the ACA that create significant economies. Those economies more than offset the overall additional costs in the ACA.”

Pollack said the law and the intent of Congress is clear: subsidies should be available for all those who qualify, whether the exchanges are run by the state or the federal government.

The Department of Justice says the challengers are reading the ACA the wrong way. “Congress made clear that an exchange established by the federal government stands in the shoes of the exchange that a state chooses not to establish,” the agency argued in court briefs.

The challengers in *Halbig vs. Sebelius* are simply political foes of the law giving an artificial read to the statute, Pollack said. He worries if the challengers ultimately prevail, “it would mean that the key purpose of the ACA — which is to extend affordable health coverage to the many millions of people in the country who don’t have it today — would be frustrated.”

During the Halbig argument, Judge Edwards (appointed to the bench by President Jimmy Carter) strongly supported the government's interpretation of the law. He told the challengers' lawyer that Congress' intent was to expand the availability of affordable health coverage not to restrict subsidies for the states that have opted for the federal exchanges. At one point he called Carvin's arguments "preposterous."

But he was contradicted by his own bench mate, Judge A. Raymond Randolph (appointed by George H.W. Bush). Randolph made clear his disdain for the law as a whole calling it "cobbled together" and "poorly written."

Randolph suggested that the textual ambiguity in the law represents not a drafting error, but Congress' intent. "Congress acted on the assumption that dangling this carrot in front of the states and the politicians and the governors of the state would lead to the fact that the states themselves would set up exchanges, rather than the federal government," he said.

The third judge on the panel, Thomas B. Griffith (appointed by George W. Bush), held his cards more closely to the vest. But at one point he suggested that if Congress hadn't made itself clear, "is it our job to fix the problem?"

If this panel of judges rules against the law in this case, the government could ask that a larger panel of judges on the same court hear the case. But supporters are concerned that one of the challenges, currently playing out in four different federal courts across the country, could one day end up, front and center, at the highest court in the land.