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Conservatives Are Hoping These 10 Words Will Finally Destroy Obamacare

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Last week, the Supreme Court weakened Obamacare's contraception mandate, but that was only a very minor setback for the law.

Alive and well, however, is a fresh and potentially far more damaging lawsuit — one that rivals 2012's challenge to the law's individual mandate in terms of its potential effect on Obamacare.

The case is aimed at federal insurance subsidies, a key mechanism of the President Obama's signature law that have helped millions of lower-income Americans sign up for private insurance plans through the federal exchange. The challenge aims to block subsidies in states where insurance exchanges are handled by the federal government.

And any day now — perhaps as soon as Tuesday — the U.S. Court of Appeals for the D.C. Circuit is expected to hand down a ruling in Halbig v. Burwell, setting in motion a chain of events that could again lead to the Supreme Court.

The plaintiffs in the case argue the way the law was written does not allow for subsidies to be provided by the federal government, pointing to a statute that says subsidies should be issued to plans purchased "through an Exchange established by the State under Section 1311" of the Affordable Care Act. Section 1311 establishes the state-run exchanges. But plaintiffs say the law does not permit subsidies in federal exchanges, according to Section 1321 of the law.

Even as the challenge isn't viewed as a completely serious one yet, given the lack of success of the subsidies argument in federal court so fur, one turn could make the stakes extraordinarily high.

Handing out subsidies to lower-income people is one of the most basic functions of the law, and helps provide otherwise unaffordable health insurance. If federal subsidies are ruled illegal, it could torpedo the law — not to mention wreak havoc on the subsidies already dished out.

"If the courts took the argument seriously, it could seriously damage the implementation of the Affordable Care Act," Timothy Jost, a law professor at Washington and Lee University and a supporter of the law, told Business Insider.

"It has the potential to destroy the individual insurance market in two-thirds of the states," he said.

The challenge all began with a simple email that set the wheels in motion. Jonathan Adler, a law professor at Case Western Reserve University in Ohio, had been asked to present a paper at the University of Kansas. While doing research for the paper, he came across the language in the statute that he says authorizes tax credits through the state exchanges but not through the federal exchanges.

No one thought much of those 10 words at the time, but it was also when the broad assumption was that each state would choose to run its own exchange. Instead, most states — 36 — opted against running their own exchanges, leaving it to the federal government.

Months later, Adler fired off an email to Michael Cannon, the libertarian Cato Institute's director of health policy studies, in which Adler argued the language presented serious potential implications for the law with the right challenge.

The pair wrote an op-ed in The Wall Street Journal in November 2011, seven months before the Supreme Court would save the heart of the law by ruling its mandate for people to purchase health insurance was a tax. For his part, Cannon was confident about the challenge.

"This is literally the simplest case I've ever had in 30 years of practicing law," Carvin said at a Cato Institute panel one year ago. "No one but a lawyer could seriously stand up here and tell you that north means south, black means white and state means federal."

The eventual challenge argued the Obama administration — specifically, the Internal Revenue Service — is breaking the law by allowing subsidies to be issued in all 50 states. The IRS finalized a rule in 2012 that allowed subsidies to flow in every state.

"I think we have a very strong case," Adler told Business Insider on Monday. "I think the statute is very clear. I think you have a situation where if it were any other statute in any other political context, I don't think our claims would be that controversial."

Supporters of the law say their claims are ridiculous — and thus far, the challengers have had a tough time convincing the courts of their argument. Most significantly, a federal judge from the U.S. District Court for the District of Columbia threw out the challenge in January.

Judge Paul Friedman seemed befuddled by the suit, which he called "unpersuasive" and wrote did not "make intuitive sense."

"The Court finds that the plain text of the statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges," Friedman wrote in his opinion.

But during oral arguments in March, two of the three judges on the D.C. Circuit Court of Appeals panel signaled they were at least somewhat sympathetic to the challengers' argument.

Judge Harry T. Edwards, a Jimmy Carter appointee, scoffed at the lawsuit, while George H.W. Bush appointee Judge A. Raymond Randolph came down firmly on the side of the challengers.

Depending on who you ask, swing vote Judge Thomas B. Griffith, a George W. Bush appointee, leaned toward the government's or the challengers' position. Jost said he "asked tough questions of both sides." And both sides agree they have no idea how he will vote.

In the event the appeals court sides with the challengers, the Obama administration likely will request an en banc ruling, which would leave it up to an overall vote of the court. Here, the prospects for an administration victory are better — the appeals court is stacked with seven Democratic and four Republican appointees, four of which were appointed by Obama himself.

"Given the overall composition of the circuit right now, I think they would stand a very good chance of winning that. I think they almost certainly would," Jost said.

Either way, the challenge has a chance to either pick up major steam or virtually die in the coming days. In addition to the D.C. appeals court's decision, the Fourth U.S. Circuit Court of Appeals in Virginia is expected to rule soon on a similar challenge. The court seemed skeptical of the challengers during oral arguments.

If the two cases both go the way of the government, it could be the death knell for the subsidies argument.

"Once the D.C. Circuit and the 4th Circuit get this sorted out, I think the other circuits will fall in line. I don't see this ever getting to the Supreme Court," Jost said.

But supporters of the challenge are quick to call to mind the initial perception of the challenge to the individual mandate as a fool's errand. It ended up becoming arguably the most closely watched Supreme Court decision of the last few years, and it took conservative Chief Justice John Roberts to unexpectedly save the law.

Adler viewed the individual mandate challenge — NFIB v. Sebelius — as a "Hail Mary." This case, he argued, is more like the lawsuit against the contraception mandate, in that it challenges the implementation of a specific statute of the law. It's an easier legal argument to make, he said.

Whether or not the challengers are successful this time, Adler expects much more similar litigation in Obamacare's future.

"Litigation over the implementation of the statute is something we're going to be seeing for a long time," he said, "given the nature of the statute, given some of the controversial aspects of the statute, and given some of the decisions agencies have to make in implementing the statute.

"Certainly on top of that, the administration has in numerous circumstances taken liberties with the text of the statute so as to try and make it work better than it's written," he added. "This is an example of that."