



## **Appeals court voids big Obamacare ruling, will rehear case**

By Dan Mangan  
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Obamacare advocates caught a potentially big victory Thursday in an ongoing legal battle to protect billions of dollars worth of subsidies for nearly 5 million people who bought insurance on HealthCare.gov.

A leading federal appeals court Thursday vacated a bombshell decision by a three-judge panel that had threatened to yank those subsidies, and invalidate another major part of Obamacare in 36 states.

That court in Washington, D.C., said its full judicial line-up will rehear arguments on Dec. 17 in that case known as *Halbig v. Burwell*, where plaintiffs claim the financial aid given customers on the federal insurance exchange HealthCare.gov are illegal under the Affordable Care Act.

The move by the D.C. appeals court, which was requested by the Obama administration, also may well prompt the U.S. Supreme Court to hold off, for now, on considering an appeal of a second, virtually identical case. That could protect the subsidies for at least a year or more.

Legal experts anticipate that December's rehearing by the full court, a so-called en-banc review, will lead to a victory for Obamacare advocates who want to maintain those subsidies.

That's because a majority of judges on the U.S. Court of Appeals for the District of Columbia Circuit are appointees of Democratic presidents. In contrast, the two appeals judges on the court who voted in late July to invalidate the subsidies were both appointed by Republican presidents, while the one judge who voted to uphold them was a Democratic appointee.

Democratic appointees would hold a three-vote margin in an en-banc review of *Halbig*. That margin came into effect last winter, when President Barack Obama finally got Senate approval for three of his nominees to that bench over Republican opposition.

The confirmations came only after a dramatic political move by Senate Majority Leader Harry Reid, D-Nev., who forced through a series of rule changes that allowed confirmation of most federal judges to be approved by a simple majority of senators, instead of the former 60-vote rule that Republicans were using to block the nominees.

The en-banc review panel will include not only the 11 active judges on the circuit, but also the two senior judges who were on the panel that issued the now-vacated decision in July. One of the senior judges, Raymond Randolph, was part of the majority opinion written by active Judge Thomas Griffith that found the subsidies were illegal. The other senior judge on the panel, Harry Edwards, strongly dissented.

Obamacare expert Timothy Jost said it is "quite unusual" for the D.C. Circuit to grant an en-banc review, and suggests that a majority of the judges will reject the challenge to the subsidies.

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"They wouldn't have taken a review unless they thought there was something questionable about the opinion" by the three-judge panel, said Jost, a law professor at Washington and Lee University who has repeatedly jostled with advocates of the subsidy challenge.

That decision, which came as a stunning blow to the Obama administration, was based on arguments that the Affordable Care Act explicitly authorizes federal subsidies only for people who buy health plans on exchanges set up by individual states.

Because the ACA is silent on any subsidies being issued to enrollees on a federally run exchange, such as HealthCare.gov, such financial aid is not legal, according to a theory advanced by Michael Cannon of the libertarian Cato Institute and Jonathan Adler, a professor at Case Western Reserve University School of Law. Just 14 states and the District of Columbia set up Obamacare exchanges—the rest of the country is served by HealthCare.gov.

Obamacare proponents scoff at the plaintiffs' argument, saying that it ignores the overall intent of the ACA, which is to provide affordable health coverage to millions of Americans. They also note that the creation of a federal exchange was contemplated in that law, and that the drafters of the law have said they never intended to deprive enrollees on that exchange of the financial assistance available to state-run exchange customers.

Despite their differences of opinion, both sides of the argument agree that the stakes are immense.

HealthCare.gov sells insurance in the 36 states that did not operate their own exchanges this year, And 4.7 million enrollees on that marketplace—nearly 90 percent of all sign-ups—received financial assistance in the form of subsidies, which often greatly reduced their premiums, as well as their out of pocket health costs.

If the original ruling Halbig were to be upheld, it would have several dramatic effects.

First, those people would lose their subsidies. Second, many of those people would then become exempt from Obamacare's mandate that they obtain health insurance as of this year or pay a penalty, because the ACA exempts people whose insurance options cost more than a certain percentage of their incomes.

On the other hand, some people who didn't qualify for that exemption would be faced with significantly higher premiums, which they would have to pay or be liable for tax penalty equal to 2 percent of their income. The consultancy Avalere Health in July, before the Halbig decision came down, estimated that subsidized HealthCare.gov customers would face premium hikes of whopping 76 percent on average if they lost their subsidies.

Lastly, a decision finding HealthCare.gov subsidies illegal would destroy, in the affected states, Obamacare's so-called employer mandate, which beginning next year will require medium- and large-sized employers to offer workers affordable health plans or pay a fine. That mandate only kicks in if a worker of those employers buys subsidized coverage from an exchange.

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On the same day Halbig was decided in July by the D.C. Circuit, another case challenging the subsidies was rejected by the Fourth Circuit Court of Appeals in Virginia, in a 3-0 decision that found the aid is legal.

Plaintiffs in that case had recently asked the Supreme Court to hear an appeal of that ruling. At the time, there was still a split between the D.C. Circuit and the Fourth Circuit in the legality of the subsidies.

But without any such split—as is the case now with the D.C. court's move—the Supreme Court is considered much less likely to take an appeal, particularly if an en banc review is still pending, like it is in D.C.

A senior Obama administration official called Thursday's decision by the D.C. Circuit to rehear Halbig "an important and welcome next step in the process of the Halbig case."

"The 2-1 decision of the panel was wrong, and we are confident that the full court will recognize that the text of the statute, the clear intent of Congress and common sense all demonstrate that premium tax credits are available to Americans in every state—as a unanimous panel of the Fourth Circuit has already concluded," the official said.

"These lawsuits won't stand in the way of the Affordable Care Act and the millions of Americans who can now afford health insurance because of it. In the meantime, to be clear, people getting premium tax credits should know that nothing has changed as this case makes its way through the courts; tax credits remain available."

The Competitive Enterprise Institute, the group that is coordinating and funding the legal challenges to the subsidies, said that the Supreme Court should ultimately decide the issue.

"We believe we are correct on the merits in this case," said CEI general counsel Sam Kazman. "As even the Fourth Circuit noted when it ruled against us in the *King v. Burwell* case, our position is supported by the text of the Affordable Care Act, and we intend to present our arguments forcefully before the full D.C. Circuit."

"Meanwhile, in the *King* case, our petition for review is before the Supreme Court, and we continue to believe that it is the only court that can resolve this issue in the quick and final manner that the country deserves," Kazman said.

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Cannon, one of the intellectual godfathers of the challenges to the subsidies, quickly posted a reaction to the court's move on his *Forbes.com* blog.

"Today's decision by the D.C. Circuit to grant en-banc review of *Halbig v. Burwell* is unwise and unfortunate," Cannon wrote. "It has the appearance of a political decision, and will likely only delay Supreme Court review. It does not necessarily presage the outcome of these cases, and I predict that even if the administration wins, it will lose ground before the full D.C. Circuit."

"It is more likely that *en banc* review of *Halbig* will delay Supreme Court review of this issue than obviate it. The same factor that made *Halbig* a candidate for en-banc rehearing—its 'exceptional importance'—makes it an equally likely candidate for Supreme Court review," Cannon wrote.

Earlier this week, the Supreme Court gave the Obama administration another month, until the beginning of October, to respond to the request by the plaintiffs in the *King* case that the high court hear their appeal.

There is no legal right for a losing party to be heard by the Supreme Court. The high court decides which appeals to hear.

Even if the Supreme Court ends up punting on the issue for now, the issue could eventually land before the high court via another avenue. Two other federal district court challenges to the subsidies have been filed, one in Indiana and the other in Oklahoma. Neither has been decided at the district level as of year.

The side that loses those cases would have the right to appeal any ruling to the appellate court level. And then the loser on the appellate level could, as the subsidy challengers in the *King* case did, ask the Supreme Court to review any adverse decision.