



# **Halbig v. Burwell Would Free More Than 57 Million Americans From The ACA's Individual & Employer Mandates**

By Michael Cannon  
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The U.S. Court of Appeals for the D.C. Circuit, often described as the second-highest court in the land, could rule on *Halbig v. Burwell* as early as tomorrow. *Halbig* is one of four lawsuits challenging the legality of the health-insurance subsidies the IRS is dispensing in the 36 states that did not establish a health-insurance Exchange under the Patient Protection and Affordable Care Act, or “ObamaCare,” and thus have Exchanges established by the federal government. Though the PPACA repeatedly states those subsidies are available only “through an Exchange established by the State,” and there are indications IRS officials knew they did not have the authority to issue subsidies through federal Exchanges, the IRS is dispensing billions of dollars of taxpayer subsidies through federal Exchanges anyway. The *Halbig* plaintiffs are employers and individuals from six federal-Exchange states who are being injured by the IRS’s actions because those illegal subsidies trigger taxes against them under the PPACA’s employer and individual mandates. The plaintiffs want relief from those illegal taxes, and the only way to get it is to ask federal courts to put a stop to the illegal subsidies. Recent media coverage of *Halbig*, driven by one-sided blog posts from the consultant group Avalere Health and the left-leaning Urban Institute and Robert Wood Johnson Foundation, has misrepresented the impact of a potential ruling for the plaintiffs by ignoring three crucial facts: (1) a victory for the *Halbig* plaintiffs would increase no one’s premiums, (2) if federal-Exchange enrollees lose subsidies, it is because those subsidies are, and always were, illegal, and (3) the winners under such a ruling would outnumber the losers by more than ten to one.

## ***Halbig* Critics & Media Allies Overlook Three Crucial Facts**

Avalere Health’s Elizabeth Carpenter blogs, “nearly 5 million Americans would receive an average premium increase of 76 percent if the courts ultimately rule that consumers in the federal exchange cannot receive premium subsidies.” In another brief post, Linda Blumberg, John Holahan, and Matthew Buettgens of the Urban Institute estimate “7.3 million people, or about 62 percent of the 11.8 million people expected to enroll in federally facilitated marketplaces by 2016, could lose out on \$36.1 billion in subsidies.” These brief analyses are either misleading or outright false, because they fail to note three crucial facts.

First, a victory for the *Halbig* plaintiffs would not increase anyone's premiums. What it would do is prevent the IRS from *shifting* the burden of those premiums from enrollees to taxpayers. Premiums for federal-Exchange enrollees would not rise, but those enrollees would face the full cost of their "ObamaCare" plans.

Critics will respond that, as dozens of economists who filed an *amicus* brief on behalf of the government have predicted, a *Halbig* ruling would also cause the full premium to rise by unleashing adverse selection. This claim is based on a fundamental misunderstanding of *Halbig* and the PPACA. If a lack of subsidies in federal Exchanges leads to adverse selection, *Halbig* is not the cause. The cause is Congress tying those subsidies to state-established Exchanges, and 36 states refusing to cooperate. *Halbig* will not and cannot cause adverse selection. It merely asks the courts to apply the law as Congress enacted it.

Second, Avalere Health, the Urban Institute, and media outlets that have repeated their estimates typically neglect to mention that a victory for the plaintiffs would mean the second-highest court in the land ruled the Obama administration *had no authority to issue those subsidies or impose the resulting taxes in the first place* – that those taxes and subsidies are, and always were, illegal. Regardless of one's position on the PPACA, we should all be able to agree that the president should not be allowed to tax and spend without congressional authorization. That's what's at stake in *Halbig*. It is why the *Halbig* cases are far more important than "ObamaCare."

The termination of those subsidies and the taxes they trigger takes on an entirely different flavor when we introduce that small detail. If the courts rule for the plaintiffs, I'll be interested to see how many news agencies use headlines like, "Ruling Denies Subsidies to Millions," versus the more accurate, "Court Rules Obama Gave Illegal Subsidies to Millions."

Though that small detail doesn't change the fact that 5 million people have been deeply wronged, it does clarify who wronged them: not the *Halbig* plaintiffs or a few judges, but a president who induced 5 million low- and middle-income Americans to enroll in overly expensive health plans with the promise of subsidies he had no authority to offer, and that could vanish with a single court ruling.

Third, these reports and the ensuing media coverage uniformly neglect to mention that a victory for the *Halbig* plaintiffs would free not only those plaintiffs but tens of millions of Americans from the PPACA's individual and employer mandates. Indeed, *Halbig* would free from potential illegal taxation more than *ten times* as many people as lose an illegal subsidy.

### ***Halbig* Would Free More than 8 Million People from the Individual Mandate**

In a Cato Institute study released last year, I estimated the number of previously uninsured individuals in each state who would be exempt from the individual-mandate tax if their state declined to establish an Exchange. In the 36 states that did not establish

Exchanges, those figures provide a conservative estimate of the number of residents the IRS is unlawfully subjecting to that tax simply by issuing subsidies through federal Exchanges.

Table 1 shows that in the 36 states with federal Exchanges, a victory for the *Halbig* plaintiffs would free more than 8.3 million residents from being subject to those unlawful taxes. (The correct word is “free,” not “exempt.” By law, these individuals are already exempt, because their state’s decision not to establish an Exchange exempts them. The ruling would free them from being subjected to that tax anyway.) Such a ruling would free nearly 1 million Floridians and more than 1.5 million Texans from the individual-mandate tax. In 2016, it would free families of four earning as little as \$24,000 per year from an illegal tax of \$2,085.

**Table 1 - Residents of Federal-Exchange States whom *Halbig* Would Free from Individual Mandate**

Alabama	141,495
Alaska	35,631
Arizona	289,207
Arkansas	129,162
Delaware	25,695
Florida	925,276
Georgia	420,277
Idaho	77,820
Illinois	455,272
Indiana	195,627
Iowa	89,566
Kansas	96,370
Louisiana	210,359
Maine	36,854
Michigan	288,130
Mississippi	127,693
Missouri	208,010
Montana	42,434
Nebraska	65,976
New Hampshire	40,966
New Jersey	328,802
New Mexico	94,363
North Carolina	400,994
North Dakota	18,647
Ohio	386,751
Oklahoma	167,876
Pennsylvania	357,679
South Carolina	220,882
South Dakota	25,695
Tennessee	235,565
Texas	1,553,367
Utah	103,320
Virginia	287,102
West Virginia	61,620
Wisconsin	140,859
Wyoming	26,625
<b>Subtotal</b>	<b>8,311,967</b>

Estimates of previously uninsured residents whom the IRS tax-credit rule would unlawfully subject to individual-mandate penalties, and thus would be freed from penalties by a ruling for the *Halbig* plaintiffs. Source: Michael F. Cannon, 50 *Vetoos: How States Can Stop the Obama Health Care Law*, Cato Institute *White Paper*, March 21, 2013.

Table 2 gives an indication of how many residents the 14 states with state-established Exchanges could exempt from individual-mandate penalties by opting for a federal Exchange in the wake of a *Halbig* victory. In that case, California could exempt more than 1.7 million residents from penalties under the individual mandate. Idaho and New Mexico have already switched to a federal Exchange, exempting roughly 78,000 and 94,000 residents, respectively. Oregon and Rhode Island are considering making the same move, which would exempt roughly 157,000 and 29,000 residents, respectively.

**Table 2 - Residents Potentially Exempt from Individual Mandate in Establishing “States”**

California	1,744,687
Colorado	175,169
Connecticut	82,078
District of Columbia	11,306
Hawaii	20,899
Kentucky	157,549
Maryland	198,808
Massachusetts	35,386
Minnesota	130,630
Nevada	144,187
New York	640,278
Oregon	157,304
Rhode Island	29,023
Vermont	12,187
Washington	253,282
<b>Subtotal</b>	<b>3,792,773</b>

Estimated number of previously uninsured residents whom the IRS tax-credit rule would unlawfully subject to individual-mandate penalties. Source: Michael F. Cannon, *50 Vetoes: How States Can Stop the Obama Health Care Law*, Cato Institute *White Paper*, March 21, 2013.

### ***Halbig* Would Free 250,000 Firms and 57 Million Employees from the Employer Mandate**

In the 36 states with federal Exchanges, a *Halbig* victory would free — not “exempt” — all employers with more than 50 workers from the employer-mandate penalties to which the Obama administration is unlawfully subjecting them. Census Bureau data indicate that in all, more than 250,000 firms and 57 million workers could be freed from those unlawful taxes. That’s more than the population of 27 states. Table 3 shows the number of firms and employees in each of the 36 states with federal Exchanges. In Florida, a *Halbig* victory would free more than 16,000 firms and 5.1 million employees from the employer mandate. In Texas, it would free more than 24,000 firms and nearly 7 million employees from the employer mandate.

**Table 3 – Firms and Employees Whom *Halbig* Would Free from the Employer Mandate in Federal-Exchange States**

	<u>Firms &gt;50</u>	<u>Employees</u>	<u>State Employees</u>	<u>Total Employees</u>
Alabama	6,070	1,143,499	77,517	1,221,016
Alaska	1,165	170,449	24,918	195,367
Arizona	7,745	1,597,199	58,514	1,655,713
Arkansas	4,004	705,692	57,847	763,539
Delaware	2,497	262,049	23,291	285,340
Florida	16,264	4,969,299	164,607	5,133,906
Georgia	11,397	2,470,358	112,991	2,583,349
Idaho	2,539	310,726	18,373	329,099
Illinois	16,156	3,728,559	103,578	3,832,137
Indiana	8,657	1,810,843	75,516	1,886,359
Iowa	4,886	921,166	40,529	961,695
Kansas	5,043	795,207	43,464	838,671
Louisiana	6,399	1,134,086	72,132	1,206,218
Maine	2,258	317,344	18,437	335,781
Michigan	10,574	2,417,281	110,576	2,527,857
Mississippi	3,785	636,616	52,720	689,336
Missouri	8,272	1,682,209	76,691	1,758,900
Montana	1,743	191,009	16,670	207,679
Nebraska	3,363	576,718	26,690	603,408
New Hampshire	2,694	388,255	14,911	403,166
New Jersey	10,911	2,388,145	132,767	2,520,912
New Mexico	3,225	405,826	39,561	445,387
North Carolina	10,577	2,381,206	131,676	2,512,882
North Dakota	1,691	204,117	15,721	219,838
Ohio	13,437	3,302,101	108,649	3,410,750
Oklahoma	5,280	874,569	57,853	932,422
Pennsylvania	14,914	3,736,101	141,130	3,877,231
South Carolina	5,940	1,098,946	70,684	1,169,630
South Dakota	1,763	212,882	13,062	225,944
Tennessee	8,176	1,739,701	75,441	1,815,142
Texas	24,019	6,715,193	274,987	6,990,180
Utah	4,289	748,401	44,301	792,702
Virginia	10,121	2,218,226	107,379	2,325,605
West Virginia	2,666	401,871	36,387	438,258
Wisconsin	8,061	1,708,445	56,094	1,764,539
Wyoming	1,396	123,377	12,463	135,840
<b>Subtotals</b>	<b>251,977</b>	<b>54,487,671</b>	<b>2,508,127</b>	<b>56,995,798</b>

Sources: U.S. Census Bureau, “Number of Firms, Number of Establishments, Employment, and Annual Payroll by Small Enterprise Employment Sizes for the United States and States, NAICS Sectors: 2011,” 2011 County Business Patterns, release date: 12/2013; and U.S. Census Bureau, “State Government Employment and Payroll Data: March 2012,” 2012 Census of Governments, Initial Data Release: 3/6/2014.

A *Halbig* victory would not directly affect subsidies for Exchange enrollees in the 14 states (plus D.C.) that established their own Exchanges. But it would create pressure for those states to switch to a federal Exchange. Such a ruling would (finally) give those states’ officials the power to exempt large employers in the state from the PPACA’s employer mandate. Table 4 shows how many firms and individuals each state and D.C. could exempt.

**Table 4 – Firms and Employees that Establishing “States” Could Exempt from Employer Mandate after a *Halbig* Victory**

	<u>Firms &gt;50</u>	<u>Employees</u>	<u>State Employees</u>	<u>Total Employees</u>
California	31,532	9,025,806	326,477	9,352,283
Colorado	7,724	1,389,145	54,751	1,443,896
Connecticut	5,541	1,041,638	52,297	1,093,935
D.C.	2,980	380,270	41,843	422,113
Hawaii	2,177	345,315	51,888	397,203
Kentucky	5,806	1,074,182	74,613	1,148,795
Maryland	8,094	1,508,341	77,971	1,586,312
Massachusetts	9,550	2,213,965	86,528	2,300,493
Minnesota	8,172	1,766,990	65,879	1,832,869
Nevada	4,630	769,242	23,454	792,696
New York	19,549	5,197,289	225,854	5,423,143
Oregon	5,546	890,784	56,703	947,487
Rhode Island	2,142	280,571	17,149	297,720
Vermont	1,407	170,255	13,630	183,885
Washington	8,340	1,626,495	94,477	1,720,972
<b>Subtotals</b>	<b>123,190</b>	<b>27,680,288</b>	<b>1,263,514</b>	<b>28,943,802</b>

Sources: U.S. Census Bureau, “[Number of Firms, Number of Establishments, Employment, and Annual Payroll by Small Enterprise Employment Sizes for the United States and States, NAICS Sectors: 2011](#),” 2011 County Business Patterns, release date: 12/2013; “[State Government Employment and Payroll Data: March 2012](#),” 2012 Census of Governments, Initial Data Release: 3/6/2014; and “[2012 Public Employment and Payroll Data: Local Governments; WASHINGTON DC](#),” 2012 Census of Governments: Employment.

Officials in these states might be reluctant to exercise that option because it would come at the price of forgoing the Exchange subsidies many residents are currently receiving. But switching to a federal Exchange would benefit employers and individual residents seeking relief from their respective mandates. For example, many of the 32,000 firms, 1.7 million individual taxpayers, and 9.4 million employees California could exempt from those mandates could pressure state officials to make the switch. Opponents of the PPACA are also likely to apply political pressure.

Finally, state officials would also feel pressure to make the switch in order to maintain their tax bases. The employer mandate increases the cost of doing business. States where the employer mandate is operative would therefore be at a disadvantage when competing for employers against states where it is inoperative. Establishing states might fail to attract new firms and could even see existing firms relocate to federal-Exchange states. That fear alone could spur a state to make the switch.

## Conclusion

Defenders of the IRS and uncritical media outlets are doing the public a disservice by misrepresenting the nature and the facts of *Halbig v. Burwell*. It is crucial that the

public get the straight story. The *Halbig* cases are much bigger than partisan squabbles over “ObamaCare.”

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