Forbes

Halbig v. Sebelius: Roundup Of Pro-Plaintiff Amicus Briefs In "The Most Significant Existential Threat" To ObamaCare

By Michael Cannon
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Halbig v. Sebelius and three related cases are, in the words of one prominent ObamaCare supporter, "probably the most significant existential threat to the Affordable Care Act." The goal of these lawsuits is to stop the IRS from creating a $700 billion entitlement without Congress. If ObamaCare cannot survive without such egregious executive overreach, perhaps it does not deserve to survive.

Here's an overview of the issue.

The *Halbig* plaintiffs have appealed an adverse ruling by the U.S. District Court for the District of Columbia to the U.S. Court of Appeals for the D.C. Circuit. (In one of the related cases, *King v. Sebelius*, plaintiffs have appealed an adverse ruling by the District Court for the Eastern District of Virginia to the Court of Appeals for the Fourth Circuit.) Oral arguments in the *Halbig* appeal take place on March 25.

What follows is a roundup of *amicus* briefs that have been filed in support of the *Halbig* plaintiffs.

Our brief makes four main arguments.

First, "the [Patient Protection and Affordable Care Act] clearly, consistently, and unambiguously authorize tax credits only in states that establish a health insurance 'exchange' that complies with federal law."

Second, we list several examples to show Congress routinely conditions such assistance to individuals on state cooperation, including via the tax code. Notably, many Senators who voted for the PPACA concurrently sponsored other legislation that offered tax credits only in cooperating states. Moreover, while the PPACA's language restricting tax credits to cooperative states was taken from the bill approved by the Senate Finance Committee, the other leading Senate bill, produced by the Health, Education, Labor, and Pensions (HELP) Committee, also

withheld subsidies from residents of uncooperative states. If a state refused to establish an Exchange or the Exchange did not comply with federal standards, the HELP bill denied health-insurance subsidies to that state's residents for four years. If the state refused to implement the HELP bill's employer mandate, the bill would have withheld subsidies from residents forever, even as residents of cooperating states received subsidies. (See section 3104(b) and (c).)

Third, ObamaCare's legislative history is completely consistent with, and indeed supports the plain meaning of the statute. In fact, before the House reluctantly approved the Senate-passed PPACA, several House members likened the PPACA's approach to Exchanges to another program that conditions federal assistance on state cooperation (i.e., the State Children's Health Insurance Program). The House members warned that in uncooperative states, the PPACA "would [mean] millions of people will be left no better off than before Congress acted." Those House members then voted to approve ObamaCare, knowing that each states could block its residents from receiving "any benefit."

Fourth, the district court variously inferred a counter-textual intent from such observations as the condition would conflict with the goal of expanding coverage, or the official cost estimates assumed tax credits would be available in all states, or the condition is not displayed prominently enough in the statute, or the legislative history offers little discussion of what would happen if states failed to comply, or such a condition would create supposed operational "anomalies." While many of these observations are irrelevant or untrue, the more important point is that each observation could also be made about the PPACA's Medicaid expansion, yet no one disputes that Congress conditioned those subsidies on state cooperation. It is therefore a fallacy to draw from any of these observations the inference that Congress did not intend to offer tax credits only in cooperating states.

The PRI-Cato brief makes three main points.

First, "The district court improperly elevated its perception of Congress's purpose over the ACA's plain meaning." The brief disputes the idea that expanding health insurance coverage was Congress' sole purpose in enacting ObamaCare. "If there were ever a case in which a court should refrain from assigning a unified congressional purpose, this is it…In truth, the 'anomalies' that concerned the district court, and drove its statutory analysis, arose not from a textual conflict between different sections of the statute, but from the perceived variance between the text of the statute and Congress's overall purpose in passing the ACA." The *amici* quote the Supreme Court in *Aldridge v. Williams*: "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself."

Second, "Article III of the Constitution does not empower this court to rewrite the ACA to ensure that it fulfills congressional objectives not set forth in the statutory text"

Third, "The IRS has no more authority than this court to usurp Congress's lawmaking authority to ensure that tax credits are available for those purchasing insurance through federal exchanges."

"Despite the multiplicity of filings and the political sensitivity of this litigation, this is a simple case that turns on a fundamental constitutional principle: neither a federal court nor an executive agency is empowered to ignore or override a law's plain meaning — period."

The IRS's attempt to offer tax credits through federal Exchanges "was a blatant invasion of the powers exclusively vested in Congress under Article I of the Constitution."

The Galen Institute advances two main arguments. First, "The IRS regulation is not entitled to *Chevron* deference, because it would decide a 'major question' not committed to agency discretion." (Whether to saddle taxpayers with a $700 billion obligation does seem like a major question.)

Second, "The statute should not be construed to displace states' authority over substantive insurance regulation — a traditional state function — absent a clear statement from Congress." Quoting the district court's conclusion, the brief explains, "the notion that the Federal Government may establish and operate a state agency 'on behalf of that state' is itself foreign to the concept of dual sovereignty in which the state and Federal governments are each presumed to be the masters of their respective spheres." Quoting the Supreme Court in *NFIB v. Sebelius*, the brief argues, "Such an arrangement would be, indeed, the very definition of unconstitutional 'commandeer[ing of] a State's legislative or administrative apparatus for federal purposes.'"

The Galen brief helpfully notes that accepting "the credit actually *increases* the number of citizens subjected to the individual mandate penalties" because "the premium assistance credit effectively lowers the income threshold at which the individual mandate penalties are triggered."

One concern I have with this brief (and other briefs) is that it inadvertently and incorrectly conveys that the language restricting tax credits to state-established Exchanges appears only once in the statute. Indeed, it appears nine times. See 26 U.S.C. §§ 36B(b)(2)(A), 36B(b)(3)(B)(i), 36B(b)(3)(C), 36B(c)(2), 36B(e).

The attorneys general of Kansas, Michigan, and Nebraska write, "Notwithstanding its overall labyrinthine complexity, the ACA is surprisingly clear on the critical point at issue in this case[,] the statute makes perfect sense in light of Congress' objectives and our system of federalism," and their states "made a deliberate and reasoned decision not to establish State Exchanges."

"Allowing the IRS to repurpose the premium assistance tax credits — contrary to the plain text of the act and unequivocal purpose of the credits — deprives states of a choice Congress gave them."

I found this to be a good synopsis of the district court's opinion:

The District Court conceded that the IRS Rule seems at odds with the plain language of the premium assistance tax credit provision. But instead of taking Congress at its word and confining the IRS to its statutory authority, the District Court did just the opposite, turning to one-sided policy rationales, the absence of legislative history, "anomalies" in the operation of other provisions of the ACA, and a troubling theory that the U.S. Department of Health and Human

Services ("HHS") "stands in the shoes" of a State when it creates federal Exchanges in a vain attempt to justify its result.

"Congress cannot co-opt states' sovereign prerogatives," the attorneys general write, "by unilaterally nominating itself — *sub silentio* — to act on behalf of states in order to contradict states' reasoned policy judgments."

Other notable arguments include: "No general purpose to 'provide affordable health care to virtually all Americans'…can overcome the unequivocal text of the Act and purpose of the premium assistance tax credits in enticing States to establish Exchanges." And: "The Act directs the federal government to…'establish and operate such Exchange *within* the State'…not '*for*' the State or '*on behalf of*' the State as the District Court concluded." The brief asks, "could Congress authorize the IRS to pass state laws on behalf of a State, or to hire additional state sheriffs to enforce federal law on behalf of a State? Certainly not, but that is precisely the power the IRS is asserting and the District Court upheld in this case." Finally, "If the court approves the IRS rule, which extends the employer mandate to *amici* and other nonconsenting states, the employer mandate as applied to those states would violate the Tenth Amendment."

The nation's leading lobby for small businesses understandably and ably challenges the district court's conclusion that the Anti-Injunction Act bars the employer plaintiffs from challenging the IRS rule. (The case proceeded anyway because the district court found at least one individual plaintiff had standing and was not barred by the AIA.)

The brief parses the language of the PPACA's employer mandate to show that even if the district court's interpretation of Congress' use of the word "tax" were correct, the statute only applies it to one potential exaction employers face. Moreover, "Section 4980H(a) provides for an exaction that is wildly disproportionate to the minimum (and minimal) employer behavior necessary to trigger it. Section 4980H(a) is punitive and intentionally so." It is therefore a penalty for purposes of the AIA, not a tax.

U.S. Senators Orrin Hatch, Mike Lee, Rob Portman, and Marco Rubio, as well as U.S. Representatives Dave Camp and Darrell Issa — all Republicans — filed a brief arguing the relevant statutory text is unambiguous, "the ACA's unusual legislative history makes it especially inappropriate for the Court to revise section 36B(c) in an effort to harmonize it with the rest of the Act," and "given the ACA's unusual legislative history, the Court has no basis on which to presume that its disparate provisions use language consistently."

If there is any absurdity in the statute, they write, "any absurdity in other provisions of the statute would at most justify the Court in correcting the specific sections in which the absurdity was found; such absurdity most certainly would not give the Court a roving license to rewrite other provisions of the statute as it sees fit."

"More fundamentally, the district court erred in assuming that it must do, through interpretation, that which Congress deliberately chose not to do — harmonize the various provisions of the ACA into a coherent whole that fits neatly together."

"The language of section 36B(c) memorializes a legislative compromise that was necessary to the ACA's passage. To cast that compromise aside, as the district court did in the name of advancing the Act's supposed general purpose, would effectively amend the law by handing its most enthusiastic supporters a victory that they were unable to achieve through the political process."

Finally, "the statutory text before the Court — warts and all — is the *only* text that Congress had the votes to pass."

The attorneys general of six additional states argue, "Congress routinely conditions the availability of federal subsidies to citizens on their state's implementation of federal policy," including through the tax code. In addition to the examples cited by Adler and me, this brief cites the Clean Air Act, the Federal Unemployment Tax Act, the No Child Left Behind Act, the Occupational Safety and Health Act, the Personal Responsibility and Work Opportunity Reconciliation Act, the Social Security Act, the Telecommunications Act of 1996, and the Wholesome Meat Act.

The attorney generals further write, "The district court's conclusion that a federally established exchange is an 'Exchange established by the State' is contrary to legislative precedent and imposes unauthorized burdens on non-electing states."

Best line from this brief: "the district court reached the remarkable conclusion that the statute unambiguously means something completely different from what it actually says." I would say it is *the exact opposite* of what the statute actually says. But this works.

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I hope to post a roundup of the *amicus* briefs filed in support of the IRS soon.