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CEI challenges govt. authority, wins big

By Lawson Bader

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Editor's note: The Competitive Enterprise Institute (CEI) helped to file a case challenging the IRS' regulation in authorizing tax credits. In a 2-1 vote, the U.S. Court of Appeals ruled the regulations are invalid. The following is a reprint of an article published last week describing the case:

Last fall, I compared the U.S. health care system to the game of Jenga – a tangle of layer-upon-interlocking-layer of inconsistent and half-baked policies and attempted reforms (or quick fixes to the unintended consequences of those half-baked policies and attempted reforms). But Jenga is also a metaphor for the reality that, administration triumphalism aside, Obamacare is only a few weak links away from collapsing.

My organization, the Competitive Enterprise Institute, is part of the team that is kicking loose those fragile Jenga pieces. In 2013, we helped file two major court challenges to the Patient Protection and Affordable Care Act— *Halbig v. Sebelius* (now called *Halbig v. Burwell*) which is now in the D.C. Circuit, and another case in the Fourth Circuit. We expect rulings in these cases any day. As others have noted, the White House is nervous.

The philosophical principles and the legal issues here are important. Markets flourish best with transparency and clear "rules of the game." Obamacare violates both. More importantly, by masking the true price of health care, the President's healthcare law distorts the market and makes that Jenga tower even higher and more unstable. That's the philosophical violation.

The legal issue is also straightforward. In implementing the law, the Internal Revenue Service ignored the fundamental distinction that Congress drew between states that set up their own insurance exchanges and states that choose not to. Under the law, people buying insurance in these latter states (known as "refuseniks") were not supposed to receive any subsidies, but at the same time their employers were to be free of the huge penalties that could be triggered by those subsidies. It was assumed that these subsidies would persuade most states to buy into the program, but in fact about 36 states have done just the opposite and chosen refusenik status. And so the IRS decided to simply ignore the statute and make the subsidies available nationwide. And that, of course, means imposing the attendant penalties nationwide as well.

But while the IRS can implement the law, it cannot rewrite it. That is a basic aspect of the Constitution's separation of powers—Congress writes the laws, and the President and his agencies carry them out.

If we win, it will be a welcome relief to small businesses in refusenik states, and to many of their employees as well. The rule would have cost them crippling fines, destroyed jobs, and forced Americans to pay for insurance that they didn't want or need.

A victory would end this IRS power grab. More importantly it would reaffirm the fact that we are a nation of laws enacted by Congress rather than rules issued by unelected bureaucrats.

If we lose, it will be a blow to those same small businesses and employees. By upholding the IRS regulation, the ruling would stomp on states' prerogative to opt out of the exchange program. It would impose unauthorized Obamacare penalties on individuals and employers.

Perhaps worst of all, it would give the Administration a stamp of approval to substitute its version of Obamacare for that passed by Congress. It would be but one more step in the ongoing shift from a true separation of powers to a government dominated by the executive branch and its uncontrollable agencies.

A ruling in our favor would force the PPACA to be implemented *the way it was written*. If that means that those who enact and the law, and those who administer it, actually pay attention to its wording, that would be excellent. And if they pay attention to the proposals that would actually address our overly complicated health care system, and its hidden costs, that would be better still.

We are not acting in a vacuum with these cases. One attorney with whom we've long worked, Tom Christina, was the first to discover the illegal nature of the IRS rule. Case Western Reserve University Law professor – and CEI alumnus – Jonathan Adler and the Cato Institute's Michael Cannon wrote a major law review article that became the intellectual foundation for our cases. And Michael Carvin and his colleagues at Jones Day are now expertly handling the litigation itself.

This is not a conspiracy, but it is taking a village to make this happen. We see it as a meeting of the minds of people who understand principles matter, and laws exist for a reason. That is something that none of us should forget.