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# Forget Hobby Lobby: This Case Could Finally Undo Obamacare

BY Jeremy Quittner
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You would not be alone if you thought that the Affordable Care Act was in danger of being pecked to death by repetitive lawsuits.

Post-Hobby Lobby, more than 100 outstanding legal challenges lodged by businesses and non-profits continue to question the health care law's validity based on religious objections to its contraceptive requirements. And these suits have been given new life after the Supreme Court's Hobby Lobby decision at the end of June, which essentially ruled in their favor.

But in the next few days, a federal appeals court for the D.C. circuit is expected to rule on a little-watched case that could destroy the underpinnings of the health bill. The case, known as *Halbig v. Burwell*, wants to declare the ACA unconstitutional based on wording within the Internal Revenue Code on how tax credits are to be meted out for people who purchase health care on state or federally run exchanges.

The argument goes something like this: The IRS has authorized tax credits to people who purchase insurance on either a state-run or federally-run health-care exchange. Opponents of the act say, however, that it authorizes subsidies only for people who buy policies through state-run exchanges. By authorizing tax credits to those who purchase on federal exchanges, the plaintiffs say, the agency has exceeded its authority.

It's a pretty cynical bit of reasoning that may affect up to 5 million people who have made such purchases already, experts say. These people reside in the 34 states that refused to set up a state exchange during roll out of the ACA. (A critical component of the ACA mandates operation of a federally-run exchange in states that choose not to participate.)

The suit, which is one of at least three with similar arguments in various courts around the country, has made legal experts wary--particularly as it could reach all the way to the Supreme Court. Based on the high court's recent history, that prospect might prove perilous for the ACA.

“This case clearly has the capacity to do grave damage to some of the basic underpinnings of the Affordable Care Act if the court were to hold in favor of the plaintiffs," says Steve Friedman, a healthcare and employee benefits attorney at employment law firm Littler, based in San Francisco. "One of the centerpieces of the ACA is the establishment of marketplaces, also known as exchanges, in every state, where anyone can procure health insurance."

A second case, called *Pruitt v. Burwell*, has been brought by Oklahoma Attorney General, Scott Pruitt, and Michael Carvin, of the law firm Jones Day. Carvin argued unsuccessfully against the ACA at the Supreme Court level on behalf of the National Federation of Independent Business in 2011, and successfully for George Bush in *Bush v. Gore* during the 2000 election.

Both suits argue that the implementation of the ACA, as currently worded, will have the effect of excluding and penalizing many individuals and businesses covered under the law.

The key argument was crafted by Michael Cannon, an economist at the CATO Institute, and Jonathan Adler, a law professor at Case Western Reserve University. Based on the way the law is worded, they argue, only states that set up and operate insurance exchanges will be eligible for federal subsidies designed to help low-income people purchase insurance. The law makes no mention of subsidies for states that let the federal government operate their exchanges instead. The subsidies the IRS authorizes, the scholars say, function as an illegal tax on employers.

"The ACA gives subsidies to those who buy on the state exchanges, and the IRS says it gives them to those in the federal exchanges, which it does not have the authority to do," Yaakov Roth, the lead associate working on *Halbig* for Jones Day, told this reporter last year.