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Can Obamacare Withstand Another Showdown Before the Supreme Court?

Federal judges issued opposing rulings today on whether the IRS overstepped its authority writing rules for the ACA. The cases could be a major blow to the new health law.

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July 22, 2014

It's been four years since the Affordable Care Act passed into law--promising sweeping reforms in the way Americans receive health-care coverage. And though the law has overcome numerous challenges--including being thwarted by Congress and potentially the Supreme Court--along the way, a little known quirk in the system may be its undoing.

That quirk, which boils down to whether the Internal Revenue Service overstepped its rule-writing jurisdiction related to subsidies it provides in the state exchanges, was the subject of two legal challenges decided Tuesday. Although the federal circuit judges in the cases decided in opposite directions, that discrepancy is likely to mean that the High Court will once more need to adjudicate the fate of the ACA.

And what's at stake now is likely to have a far bigger impact on the ACA than the much cited *Hobby Lobby* case, which the Supreme Court decided at the end of June. Unlike *Hobby Lobby*, where the High Court ruled narrowly to allow for-profit companies to exempt themselves from aspects of the health-care law for religious reasons, the latest cases deal with broader elements that underpin the ACA.

A critical component of the ACA mandates operation of a federally-run exchange in states that choose not to participate, and subsidies for people who cannot afford coverage. Thirty-six states have refused to set up their own exchanges, and more than 5 million people in those states have made subsidized purchases already, experts say.

The first case, known as *Halbig v. Burwell*, contests the tax subsidies individuals get through exchanges run by the federal government. The plaintiffs in *Halbig* charge that the health care law is only authorized to provide subsidies for people who buy policies through state-run exchanges.

By authorizing tax credits to those who purchase on federal exchanges, the plaintiffs say, the IRS has exceeded its authority.

In his decision today, Judge Thomas B. Griffith, a George W. Bush appointee for the U.S. Court of Appeals for the D.C. Circuit, writes:

Although both appellants and the government argue that the ACA, read in its totality, evinces clear congressional intent, they dispute what that intent actually is…We conclude that the appellants have the better of the argument: a federal Exchange is not an "Exchange established by the State," and section 36B does not authorize the IRS to provide tax credits for insurance purchased on federal Exchanges.

Separately on Tuesday, a judge for the U.S. Federal Court of Appeals for the Fourth Circuit, ruled narrowly in favor of the subsidies in a case called *David King. V. Sylvia Burwell*. In his opinion, Judge Roger Gregory, a Clinton-era appointee, wrote:

The court is of the opinion that the defendants have the stronger opinion, although only slightly. Given that Congress defined "Exchange" as an Exchange established by the state, it makes sense to read 1321 (c)'s directive that HHS establish "such Exchange" to mean that the federal government acts on behalf of the state when it establishes its own exchange. However, the court cannot ignore the common-sense appeal of the plaintiff's argument; a literal reading of the statute undoubtedly accords more closely with their position.

The suits are part of a group of at least four other cases with similar arguments in various courts around the country, and they make legal experts wary, particularly as the differences in opinion seem to indicate their destiny to go before the Supreme Court. That could prove a perilous prospect for the ACA, based on the High Court's recent ruling in *Hobby Lobby*, which said that closely-held companies can exempt themselves from key parts of their coverage requirements, such as for birth control products and services, based on their religious beliefs.

"The structure of the exchanges is a seminal part of the ACA, and if it turns out the subdsidies provided on the exchanges are not available, it will be a devastating blow to the president and the ACA," says Steve Friedman, co-chair of the employee benefits practice and healthcare reform consulting groups at Littler Mendelson, in San Francisco.

The rulings are likely to add confusion to small business owners who are trying to figure out who and how much they should insure by 2015, when the ACA kicks in to gear for small businesses, Friedman says.

A third case, called *Pruitt v. Burwell*, was brought by Oklahoma Attorney General, Scott Pruitt in 2011. Yet another, called *Indiana v. IRS*, was brought by 15 school districts in the state in 2013. Both suits challenge the ACA on similar grounds to Halbig, but Halbig is furthest along in the court process.

The key argument in the cases 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.

Michael Carvin, of the law firm Jones Day, is the lead attorney in Halbig. 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.

The lead plaintiff in that case, Jacqueline Halbig, was a director of the White House Office of Faith Based and Community Initiatives under George W. Bush.