Supreme Court could hear Obamacare subsidy feud

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Let's get ready to rumble.

The U.S. Supreme Court on Thursday was asked to hear a case that is considered perhaps the single biggest current threat to Obamacare.

The case hinges on the question of whether the federal government can give billions of dollars in financial aid to people who buy Obamacare insurance on HealthCare.gov.

The request to fast-track a final decision on that issue comes a week after judicial panels in separate federal appeals circuits issued conflicting rulings on the legality of such subsidies for enrollees on that federally run Obamacare exchange. Financial aid given customers of state-run marketplaces is not being challenged.

If the Supreme Court takes the case, and ultimately rules for the plaintiffs, it would render illegal tax credits that helped nearly 5 million people buy insurance on HealthCare.gov, which sells health plans insurance in 36 states.

For now, those subsidies, which go to 86 percent of federal exchange customers, remain legal.

If the high court said the HealthCare.gov subsidies were illegal, it also would destroy or cripple in those affected states two major Obamacare mandates, which impose fines if certain employers don't offer health insurance to workers, and if individuals don't obtain health coverage.

The petition asking for the Supreme Court to rule on the issue can be read here.

The Competitive Enterprise Institute, the group that has backed several court challenges to the Obamacare subsidies, announced the petition had been filed.

For the Supreme Court to take the case, it would require at least four justices to agree to hear it. If the court takes the case, it could be heard after it opens its next term in October, and decided by next May.

"From the time these case were first filed, we've tried to get this issue resolved as quickly as possible for the plaintiffs and the millions of individual like them," said CEI general counsel Sam Kazman.

"A fast resolution is also vitally important to the states that chose not to set up exchanges, to the employers in those states who face either major compliance costs or huge penalties, and to employees who face possible layoffs or reductions in their work hours as a result of this illegal IRS rule," Kazman said

"Our petition today to the Supreme Court represents the next step in that process."

Kazman noted that two days after last week's split rulings, a 2012 video surfaced of MIT economist Jonathan Gruber, one of the architects of Obamacare, saying that residents of states that did not establish their own Obamacare exchanges would not be eligible for subsidies.

"If you're a state and you don't set up an exchange, that means your citizens don't get their tax credits. ... I hope that's a blatant enough political reality that states will get their act together and realize there are billions of dollars at stake here in setting up these exchanges, and that they'll do it," Gruber told his audience on the video.

CEI, in a press release, said Gruber's comment :contradicts the current claim by the government: that Congress never intended to withhold subsidies." The petition asking the Supreme Court to take up the case cites Gruber's remarks.

Timothy Jost, a law professor who argues that the subsidies are legal regardless of what kind of government exchange they're issued through, said, "This is an act of desperation to keep a case alive which was always an act of desperation by advocates who have been unable in succeed in Congress."

But Michael Cannon, director of health studies at the Cato Institute and one of the intellectual godfathers of the challenge to the subsidies, said it was "the right decision" to ask the Supreme Court to settle the issue once and for all.

"There are tens of millions of individuals and a quarter-million businesses, dozens of insurance companies and three dozen states that need to have this issue resolved and resolved quickly," Cannon said. "It's not a small issue."

"Even if all those people's economic decisions were" not at issue, he said. "There's a question of whether the president of the United State is borrowing, and spending and taxing tens of billions of dollars without Congressional authorization," Cannon said. He said there are "probably" enough votes on the court to grant the petition to be heard.

The Supreme Court is being asked to reverse 3-0 ruling by a panel of judges in the Fourth Circuit federal appeals court last week that upheld the legality of financial aid given to enrollees on a federally-run Obamacare exchange. That case is known as *King v. Burwell.*

Another federal appeals court panel sitting in Washington, D.C., in a bombshell, 2-1, decision, ruled those subsidies are illegal because they were issued to enrollees on the federal exchange HealthCare.gov. In that case, known as *Halbig v. Burwell,* the Obama administration intends to

seek a reversal of the decision by a so-called en banc panel made up f all judges in the D.C. appeals circuit.

The two dueling decisions can be read here.

A senior Obama administration official, speaking on the condition of anonymity, said, "We think that the Fourth Circuit's unanimous panel made the right decision, agreeing with Congress and common sense."

" As we have previously said, the government is following the normal process and seeking a full review of 2-1 decision in the *Halbig* case. If the en banc D.C. Circuit rules in favor of the government, there will be no split in the courts of appeals and no need for Supreme Court review."

"This litigation should be seen for what it is – another partisan attempt to undermine the Affordable Care Act," the senior official said.

The Obama administration survived a challenge to Obamacare at the Supreme Court, when a majority that surprisingly included conservative Chief Justice John Roberts upheld most elements of the Affordable Care Act, including the mandate that most Americans obtain health insurance or pay a tax penalty.

But neither the administration nor supporters of Obamacare relish having the high court take up the question of subsidies, particularly after a recent Supreme Court ruling that went against the administration in an Obamacare case.

In that case, known as *Hobby Lobby*, the high court said that certain companies could claim a religious exemption to the mandate that their health plans covers contraception without requiring employees to pay out-of-pocket costs.

Plaintiffs in both subsidy-related cases claim the Affordable Care Act as written only allows financial aid to be given to customers of state-run Obamacare marketplaces. The ACA, in fact, explicitly only mentions such aid in the context of it being given to state-run exchange enrollees.

The Obama administration, and Obamacare advocates, in turn argue that is a too-narrow reading of the statute, and that it ignores what they say was Congress' obvious intention to make financial aid available to all qualified individuals, regardless of where they purchased insurance.

Subsidies issued to people who buy Obamacare plans on one of 15 exchanges run by individual states and the District of Columbia are not threatened by the cases. About 2 million people receiving such financial aid this year.

There is no right to have a case heard by the Supreme Court. It will be up to the justices on the court whether to take the case.

It is possible they will let the issue be sorted out first by the lower federal appeals courts.

The administration is considered to have the edge in such a so-called "en banc" review by the full appeals court because judges appointed by Democratic presidents hold a 7-4 edge over Republican appointees in that circuit.

Last fall, US Senate Majority Harry Reid, D-Nev., changed Senate rules to remove the ability of senators to use a filibuster to prevent judicial nominations below the Supreme Court. Reid's move set in motion the seating of three judges appointed by President Obama to the D.C. appeals circuit — who are part of that three-vote margin in the administration's favor on the court now.

If the administration won an en banc review in the D.C. circuit, then there would be no split with the Fourth Circuit in their view of the subsidies' legality. That, in turn, would make it less likely for the Supreme Court to consider an appeal by the plaintiffs.

Jost, the Washington and Lee University School of Law professor who has been a key player in the debate over the subsidies, said, "The Justice Department has already said that it will file for en banc review with the full D.C.circuit."

Once that happens, it is likely that [D.C. Circuit judge Thomas]Griffith's obviously political decision will be set aside. In the absence of a division between the D.C. Circuit and Fourth Circuit, it is very unlikely the Supreme Court will take the case, unless it is willing to make an overtly politically partisan move," Jost said.

There are two other similar cases pending in federal courts in Indiana and Oklahoma, but neither has reached the appellate level.

The Wall Street Journal editorial page last week urged Michael Carvin, the lawyer who has been representing the plaintiffs in both pending appeals, to skip asking the Fourth Circuit for an en banc review of its decision, and instead to petition the Supreme Court to hear the case, and resolve the issue once and for all.

Carvin's chances with an en banc review at the Fourth Circuit are not rated very high by people on both sides of the argument.

Obamacare supporters have long scoffed at the claims of the plaintiffs, but they have readily conceded the fact that if the plaintiffs prevailed it would be a dire threat to the goals of the Affordable Care Act.

If the Supreme Court ruled for the plaintiffs, it would prevent billions of dollars worth of taxpayer funded subsidies from being given to help people buy insurance on a federally-run exchange.

Such a ruling also would destroy in those HealthCare.gov-served states a looming Obamacare rule that will require most mid- and large-sized employers to offer affordable health coverage to workers or pay a fine.

That's because those fines only take effect if a worker at such a company buys a plan from an Obamacare exchange with financial aid from the government.

And, such a ruling also would effectively cripple, again in those states, another Obamacare rule that compels individuals to have some form of health coverage or pay a tax penalty. Without subsidies, insurance sold on HealthCare.gov would be considered unaffordable for many people under the rules of Obamacare, and they would be exempt from the penalty for not having insurance.

If the Supreme Court invalidated the HealthCare.gov subsidies, states currently served by that exchange would be free — as they are now — to set up their own exchanges that would sell subsidized coverage to their residents.

While some states might do so, many others, lead by Republican governors and Republican-controlled legislatures, would be unlikely to set up an exchange because it would be seen as endorsing Obamacare.