NATIONAL REVIEW

If *Halbig* Stands, What Happens to Obamacare?

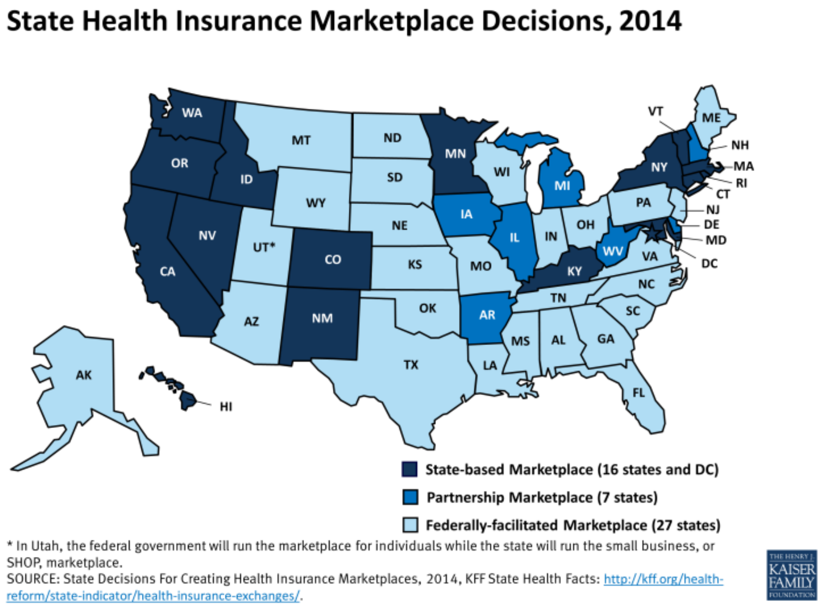
By Callie Gable
July 22, 2014

With the D.C. Circuit Court's decision today that Obamacare, as written, doesn't authorize the provision of subsidies on federal health-care exchanges — it just does so for those established by states — residents of 36 states may stop receiving insurance subsidies under the law.

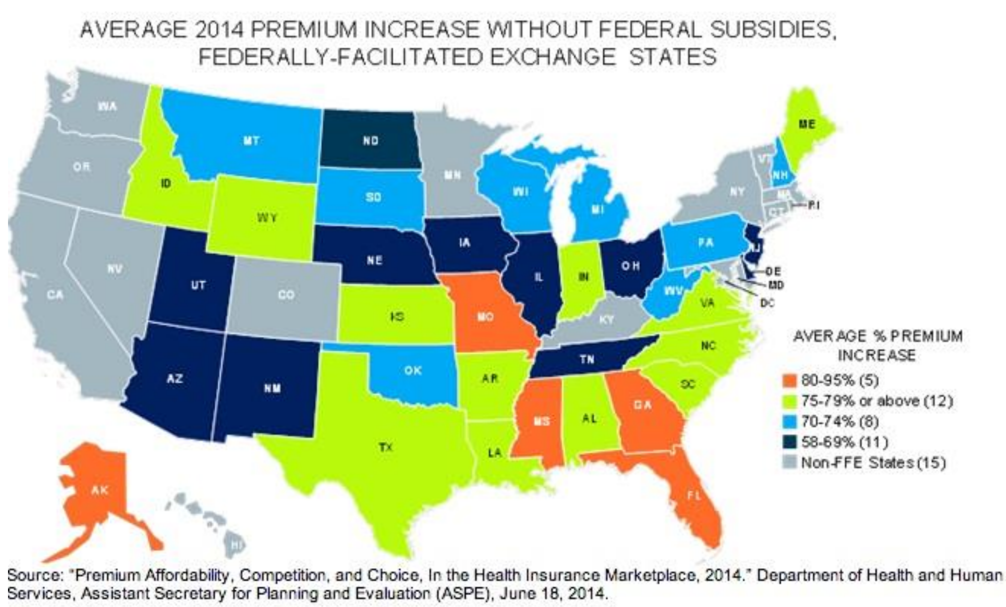
President Obama could well ignore the decision, which he asserts is perfectly legal, but he'll also certainly appeal it — either to an en banc hearing of the D.C. Circuit Court (more judges than the three that just heard it) or to the Supreme Court. If the president chooses to ignore the ruling, we can bet a messy legal battle — and maybe even an impeachment attempt — will ensue.

The decision has been stayed and the appeals process could take years, so there's a long way to go until courts actually order the state subsidies to stop. But if the ruling stands, what will health care in America and the future of Obamacare look like? It's a complicated question with a lot of potential answers, but here are some possibilities.

For some Americans, not much will change. In the 14 states (plus D.C.) with state-based exchanges, the federal subsidies will continue, and health insurance will be more or less business as usual. With a few recent adjustments, states in dark and royal blue here are the ones that are going to be affected:



According to consulting firm Avalere Health, of the 8 million or so exchange enrollees, 5 million people receive subsidies and live in one of the states above, that haven't set up a state-based exchange. Across those states, subsidized enrollees' premiums would increase 76 percent, and even more in poorer states. Here's a map of how much they would spike, Avalere thinks:



That sounds disastrous — will subsidies be cut off in every one of the 36 states with federally facilitated exchanges? Probably not. For one, i's likely that there will be an increase in state-based exchanges. Don Taylor, a health-policy expert from Duke University, has estimated that as many as 20 states would pass laws saying their state will use the federal mechanism for a state exchange, sort of like subcontracting with the federal government.

That number sounds somewhat high, though, given some states' staunch opposition to Obamacare. Some states, like Ohio, have passed laws or constitutional amendments that would make setting up exchanges illegal in their state. These could quickly be undone if state legislatures want to, but they're an indication of just how staunch opposition to Obamacare is. And as Michael Cannon, a Cato Institute health-care scholar who provided much of the intellectual firepower for this lawsuit, pointed out on a conference call today, establishing an exchange would also mean implementing the employer mandate — it's a little complicated why, but if Halbig stands, the IRS can't collect the taxes associated with the employer mandate. States who decide to set up exchanges will be imposing this new tax on businesses by choice – a politically problematic decision that some state legislatures may not be willing to make and that the business community will likely oppose.

But there are also plenty of reasons why setting up state exchanges will be tempting: Unlike the Medicaid expansion, the federal government is planning to pay for all of the exchange subsidies in perpetuity. Beneficiaries of the subsidies on the health exchange are also, on average, wealthier and therefore endowed with more political clout than Medicaid beneficiaries (and the sense that they had had something taken away from them, rather than just missing out on a new benefit like Medicaid, will be powerful too).

Moreover, Taylor argues, reluctance to set up exchanges hasn't entirely been about opposition to the law. It's also because so much uncertainty has surrounded the implementation of the law that many states took a "wait and see" approach to building their own policies. However, given the choice between losing federal subsidies and setting up their own exchanges, a good number of them will do the latter. This clearly won't be the case in all states, and it's hard to imagine it happening in deep-red states like, say, Texas.

So what will health care look like in a state where federal subsidies are likely to stop flowing? It's hard to say exactly what the impact will be, but it's fairly certain that the individual insurance market will contract significantly, and possibly even disappear completely.

Individual-market premiums will become unaffordably high for many Americans in the states that lack Obamacare's generous subsidies (which average thousands of dollars per enrollee per year). So then insurers will have to decide if it's a good investment to continue offering policies on the individual market, a large proportion of which is the subsidized exchanges. Only 13 percent of exchange customers bought their policy without help from a subsidy in 2014 — plenty of people will be priced out of the market as soon as subsidies disappear.

Moreover, higher prices will make purchasing insurance less attractive to young, healthy people, meaning they'll be the ones more likely to drop out of the market. Conversely, people with preexisting conditions and older people are likely to try to afford the more-expensive coverage.

At the same time, the individual mandate will apply to a shrinking number of people because those whose health costs exceed 8 percent of their annual income are exempt. In an amicus brief on behalf of the IRS, Jonathon Gruber and other top academics reported that 99% of individuals currently receiving subsidies would be exempt from the mandate for this reason.

That's one way we get a real death spiral: Prices will rise until either overage is unaffordable or insurers simply stop offering it because they aren't likely to profit. Obamacare does have measures, such as its risk corridors, to prevent such a cycle, but they would only be able to limit insurers' losses to some extent. Moreover, the exchanges aren't the entire individual market: There are unsubsidized consumers, millions of them, in all states who've bought Obamacare-compliant insurance without using the exchange's subsidies. But even with them remaining in the market for the short term, the loss of all the subsidized customers from the exchanges would wreak havoc on insurance risk pools (which combine the non-exchange enrollees and the exchange enrollees).

Even in the states without exchanges, those with employer coverage, Medicare, or Medicaid aren't likely to be affected. But if a large number of people who are currently getting subsidies become uninsured, that's a lot of people.

We don't know what Congress will look like when or if a ruling finally comes down in Halbig's favor, but timing could be important. Even if the November midterm elections bring a Republican majority in both houses, Obama would almost certainly veto any bill that majorly alters the law, though it's possible he could agree to some modifications that could make life easier for noncooperative states — allowing them to deregulate their exchanges, for instance. On the other hand, there will also be pressure for Congress to pass a law authorizing Obamacare subsidies to the federal-exchange states — but the Republican House's commitment to repealing and replacing Obamacare makes this look extremely unlikely.

And if the legal process takes more than two years, it's hard to say how a President Christie or Clinton and the future Congress would handle the matter.