Plaintiffs in ObamaCare Subsidy Case Appeal to Supreme Court

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The plaintiffs in a case challenging ObamaCare's insurance subsidies on the federal exchange have asked the Supreme Court to take their case after a circuit-court panel ruled against them.

The plaintiffs in the case, *King v. Burwell*, argue that the Affordable Care Act (ACA) plainly states that such subsidies, in the form of refundable tax credits, are available only to taxpayers "covered by a qualified health plan ... enrolled in through an Exchange established by the State under section 1311 of the [ACA]." Taxpayers in states that chose not to establish their own exchanges, therefore, are not eligible for subsidies, the plaintiffs contend.

On July 22, a three-judge panel of the Fourth Circuit Court of Appeals in Richmond, Virginia, found in favor of the government, which argued that Congress intended to make subsidies available to all Americans regardless of whether they bought insurance on a state or federal exchange. Despite agreeing that the plaintiffs' argument had a "common-sense appeal," the court ruled that "the applicable statutory language is ambiguous and subject to multiple interpretations" and deferred to the Obama administration's interpretation of the law.

The court's decision, and particularly the concurring opinion of Judge Andre Davis, appeared to be driven by a desire to further the cause of ObamaCare. With obvious disdain for the plaintiffs in the case, Davis wrote that they "can either pay the relatively minimal amounts needed to obtain health care insurance as provided by the [ACA], or they can refuse to pay and run the risk of incurring a tiny tax penalty." "What they may not do," he added, "is rely on our help to deny to millions of Americans desperately-needed health insurance through a tortured, nonsensical construction of a federal statute whose manifest purpose, as revealed by the wholeness and coherence of its text and structure, could not be more clear."

By contrast, a D.C. Circuit Court of Appeals panel, finding in favor of the plaintiffs in the similar *Halbig v. Burwell* case the same day, while recognizing the "significant consequences" of prohibiting subsidies on the federal exchange, nevertheless wrote that it felt compelled to rule as it did in order to uphold "the principle of legislative supremacy," i.e., that Congress, not the executive branch, makes the laws. The lone dissenter in that decision, Judge Harry Edwards, attacked the plaintiffs' motives and called the lawsuit an "attempt to gut" the ACA. (The Obama administration has asked the full circuit court to rehear the case.)

Edwards is correct that prohibiting subsidies on the federal exchange would "gut" the healthcare law. Preventing millions of Americans from obtaining subsidies for the purchase of health insurance — insurance whose cost continues to rise as a direct result of ObamaCare — will make such coverage unaffordable for them under the ACA's own terms, which will exempt them from the individual mandate. That will reduce the number of people with insurance, making it more difficult for insurers to absorb the costs of all the new, unhealthy people they are now forced to cover. In addition, it will vastly shrink the scope of the employer mandate: Employers in states using the federal exchange will no longer be subject to the mandate because its penalties only apply when employees obtain subsidized coverage.

In their petition, the *King* plaintiffs make the case that the subsidies were limited to state exchanges in an effort to induce states to establish their own exchanges — an argument that "both the *King* and *Halbig* panels agreed ... is entirely plausible." The plaintiffs in these cases aren't the only ones to offer this argument.

The Cato Institute's Jonathan Adler and Michael Cannon, in a post at the Health Affairs blog, pointed out that prior to the ACA's passage "a group of House Democrats ... warned that hostile states could block their residents from receiving 'any benefit' by refusing to establish an Exchange, just as some states denied their residents the benefits of the just-passed Children's Health Insurance Program Reauthorization Act of 2009 by refusing to participate."

Furthermore, it has recently come to light that one of ObamaCare's chief architects, Massachusetts Institute of Technology economics professor Jonathan Gruber, repeatedly stated that subsidies are limited to state exchanges. The *King* petition quotes just one such instance, a 2012 appearance in which Gruber said, "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, who signed an amicus brief supporting the Obama administration's position on the subsidies, now dismisses his earlier statements to the contrary as "a speak-o — you know, like a typo."

"On ObamaCare, last week started with a circuit split and ended with a Jonathan Gruber split," Competitive Enterprise Institute (CEI) general counsel Sam Kazman said in a July 31 statement. "Our hope is the Supreme Court will at least resolve the former." (CEI is coordinating the *King* lawsuit.)

The *King* petition calls on the Supreme Court to hear the case for three reasons. First there are the opposing circuit court decisions; the petitioners note, however, that while the panels came to different conclusions, both conceded many of the plaintiffs' arguments. Second, delaying a definitive ruling on the case could have "profound consequences" for individuals, employers, insurers, states, and taxpayers, particularly if the high court ends up invalidating subsidies on the federal exchange. Third, "the Fourth Circuit plainly erred by finding ambiguity in [the ACA] and by deferring to the IRS to resolve it."

"From the time these cases were first filed, we've tried to get this issue resolved as quickly as possible for the plaintiffs and the millions of individuals like them," Kazman said in his

statement. “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. Our petition today to the Supreme Court represents the next step in that process.”

Now comes the hard part: waiting to see whether the Supreme Court will hear the case and, if so, how it will rule. There’s also the concern over whether the D.C. Circuit Court will rehear the *Halbig* case. And all the while, ObamaCare is becoming ever more deeply entrenched in the fabric of American society, precisely as the administration and its allies desire — and constitutionalists and other friends of liberty fear.