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Democrats still haven't learned Obamacare lesson

By David Nather and Jennifer Haberkorn

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Memo to Democrats: This is what happens when you pass a law where you can't fix simple drafting errors.

Within hours of each other, two federal courts reached exactly opposite conclusions Tuesday about whether the vague wording of Obamacare allows people to get subsidies through the federal health insurance exchange. One said, sorry, that's not what the law says. The other said, sure, they can get the subsidies — the Obama administration has the power to do that.

The conflicting rulings were another wake-up call for Democrats about the fragility of the health care law — and a reminder that whenever they think a lawsuit is no threat to the law, it's probably a threat to the law.

It's all because of what most Democrats insist is a drafting error in the law, but it's kind of a big one. The federal health insurance marketplace is now serving 36 states that couldn't or wouldn't set up their own exchanges.

And now that the two courts have issued conflicting rulings, the odds are higher that the Supreme Court may have to settle the question — once again putting the fate of a major part of the law before the high court.

There's no guarantee that the Supreme Court would take up the issue. But if it does, it's not at all certain that the justices would allow the subsidies to keep flowing in the federal exchange. If it doesn't, that could jeopardize the coverage for more than 7.3 million low- and middle-income people who would need those subsidies to be able to afford Obamacare coverage. Yes, the court upheld most of Obamacare in 2012 — but that was a different set of legal questions.

The split decision in the courts Tuesday is “the classic formula for a Supreme Court review, maybe on a fast track,” said William Galston, a domestic policy expert at the Brookings Institution.

It's a lesson, some health care experts say, in why President Barack Obama and congressional Democrats took their chances in 2010 when they passed the Affordable Care Act using a special procedure called budget reconciliation. That allowed the Senate to pass the bill with just 51 votes, because they couldn't get 60 votes after Republican Scott Brown was elected to fill Ted Kennedy's Senate seat in Massachusetts.

But it didn't allow Congress to fix simple wording mistakes in the law — an earlier version of which had squeaked through the Senate with GOP support in late 2009. The rules allowed only limited changes with a clear budget impact. It's a bit like the college student who slaps together a rough draft of a term paper, expecting to clean it up before it's handed in, only to find suddenly time is up.

The sloppy language stayed — and it came back to bite the Democrats on Tuesday.

“When you pass a bill by any means necessary, you can fix a lot, but you can't fix everything,” said Thomas Miller, a health care expert at the conservative American Enterprise Institute. “The staff writes it late at night. It's never reconciled ... and they say, ‘Oh well, we'll fix it after it's passed.’”

The Obama administration and congressional Democrats insist they still have the stronger legal hand in the long run. “We are confident in the legal position that we have,” White House press secretary Josh Earnest said during a briefing after the first ruling. “It is pretty obvious what the congressional intent was.”

Supporters of the ACA — from academics and legal experts to Democrats on Capitol Hill — have long downplayed the law's legal challenges, accusing the plaintiffs of trying to kill the law for partisan reasons. But some of those challenges have been successful. The most vivid example was the Supreme Court's *Hobby Lobby* decision last month, when the high court ruled that the administration overreached by mandating that most employers provide contraception even if they had religious objections.

And in 2012, the court ruled the law's Medicaid expansion had to be optional for states. But in that same decision the Supreme Court did uphold the individual mandate — a victory that makes the law's supporters confident that the subsidies will survive, too.

“The full law was put before the Supreme Court, and the law stood,” said Tony Carrk, director of the Health Care War Room at the liberal Center for American Progress Action Fund.

The latest legal threat to Obamacare comes from a basic mistake in the wording — that 2009 drafting error. The law encourages states to set up their own health insurance marketplaces, but it also creates a federal marketplace as a fallback.

Yet the section on health insurance subsidies says they can be paid to anyone who signs up for coverage in “an Exchange established by the State.” It doesn't say anything about the federal exchange.

Oops.

Democratic leaders insisted in a legal brief that the point always was to make the subsidies available in all exchanges, not just the state ones. But the opponents of the law say it was much more than a drafting error. They say that the law's crafters purposely made subsidies available only in the state-run exchanges to encourage states to set them up. Besides, they said, the IRS can't just change the law.

Until Tuesday, most supporters of the ACA dismissed the possibility that the wording presented any real legal threat. Congress obviously meant to include the federal exchange, they said, and that's how the courts will see it.

But then, the three-judge panel for the U.S. Court of Appeals for the D.C. Circuit ruled 2-1 that the law has to be read literally. It's not our job, the judges wrote, to go beyond the clear wording of the law and guess about congressional intent.

"This limited role serves democratic interests by ensuring that policy is made by elected, politically accountable representatives, not by appointed, life-tenured judges," Judge Thomas Griffith wrote in the opinion.

Hours later, the 4th Circuit Court of Appeals came to the opposite conclusion. It wasn't exactly a ringing endorsement of the language, and there was no declaration that "this is clearly what Congress meant." The wording was sloppy, the court wrote, even "self-contradictory" and "ambiguous." But they said Supreme Court precedent says that the federal agencies have significant deference when crafting rules — so the IRS decision was valid.

"Simply put, the statute is ambiguous and subject to at least two different interpretations," the judges wrote. "Confronted with the Act's ambiguity, the IRS crafted a rule ensuring the credits' broad availability and furthering the goals of the law."

That ruling gave Democrats just enough cover to predict with confidence that the subsidies will be fine — and blast Republicans for continually trying to kill a health care law that's already covering millions of people and lowering the rate of uninsured Americans.

"The American people deserve better than Republicans' lawsuits and legislative nihilism. We are confident that as these cases advance, the plaintiffs' obviously false interpretation of the law will be exposed as the baseless and desperate Republican distraction that it is," House Minority Leader Nancy Pelosi said in a statement.

Democratic Sen. Chris Murphy of Connecticut, who's leading his party's Obamacare messaging in the Senate, tweeted a dismissive reaction. "We've seen this play before. Outlier lower court dents #ACA, higher courts correct. Fed. exchange subsidies will be upheld."

But Republicans insisted that the Democrats brought the mess upon themselves by using a partisan process and skirting House-Senate negotiations in which language problems are typically worked out.

“If the government’s position [that Congress intended to have subsidies go to all states] was right, this should have been sorted out in the conference between the House and the Senate,” said Tevi Troy, a former deputy secretary of Health and Human Services during the George W. Bush administration.

For now, the subsidies aren’t going to screech to a halt. They’ll continue for everyone who has signed up this year. The Obama administration plans to seek a ruling from the full D.C. appeals court, and Democrats predict the full court will uphold their reading of the law. They’re already dismissing the ruling because it was written by two Republican-appointed judges.

“I believe it will be appealed to the full D.C. circuit court and will lose there. Two other [courts] have turned thumbs-down to similar suits, and I expect the D.C. court will do the same,” said John McDonough, a health care expert at Harvard who helped write the law as a Democratic Senate staffer in 2010.

AEI’s Miller isn’t so sure. “It’s uphill [for the other judges] to say, ‘Well, we disagree with you because we were appointed by Democrats,’” he said.

But the real issue, health care experts say, is what happens if the dispute eventually reaches the Supreme Court. That could be more perilous for the law given the court’s conservative majority.

And if the subsidies do eventually lose in the high court, Obamacare opponents say, that’s no one’s fault but the law’s authors.

“If people lose those subsidies, it is because the courts have ruled that those subsidies are and always have been unlawful,” said Michael Cannon, who is director of health policy studies at the Cato Institute and strongly backed the lawsuit in amicus briefs.

The issue also has serious implications for Obamacare’s employer mandate — an unpopular piece of the law that has proved troublesome for the administration. The mandate is triggered only when a company’s employees go to the exchange to get subsidies. So if a person cannot get subsidies, there is really no mandate and no fine on the employers.

And if the subsidies are ultimately struck down, it would also cripple the individual mandate.

In a brief filed with the D.C. court, several economists who support the law wrote that if subsidies couldn’t go to federal exchange states, insurance would be unaffordable for 99 percent of the people who qualify for subsidies today. That means they would be exempt from the individual mandate because coverage was unaffordable under the ACA.

“So the individual mandate would still be on the books, it would still operate in those states, but far more people would be exempt from penalties in those states,” said Cannon.