RH Reality Check
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Federal Appeals Courts Split on Obamacare Subsidies. Now What?

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Within minutes of each other Tuesday, two separate federal appeals courts handed down conflicting rulings as to whether or not the text of the Affordable Care Act (ACA) allows the federal government to subsidize insurance premiums in its federally run exchanges.

First came the decision from a divided three-judge panel of the D.C. Circuit Court of Appeals, which ruled in *Halbig v. Burwell* that federally run health insurance exchanges cannot provide subsidies for residents of the more than 30 states that participate in the federal exchanges.

Then a panel of judges for the U.S. Court of Appeals for the Fourth Circuit unanimously ruled the opposite, in *King v. Burwell*, finding that the text of the ACA does not prevent the administration from providing subsidies in those markets where states have refused to set up their own exchanges.

The decisions, and their differing results, encapsulate the political-turned-legal fight over one of the Obama administration's most significant policy achievements.

The conservative case against subsidies in the federal health-care exchanges started in 2012, when the Cato Institute's Michael Cannon and law professor Jonathan Adler wrote a paper setting out the argument adopted by those challenging the subsidies, including one self-described "Republican operative" at the front of the D.C. Circuit case. They claim that the statutory language of the ACA only allows states, and not the federal government, to subsidize health-care payments. According to the challengers, the actual text of the law says that the sliding-scale tax credits that millions of Americans currently receive are available only for coverage purchased "through an exchange established by the state," and since only 16 states have established insurance exchanges so far, only residents in those states can qualify for subsidized coverage.

The challengers' argument is compelling in its simplicity—after all, the statute doesn't say "through an exchange established by the state *and federal government*." But accepting that argument means ignoring the entire context and purpose of the ACA, including all the ways in which the federal government is required to step in when states fail to do so, including when states throw political temper tantrums and refuse to participate in health-care reform. This is the

point made by Judge Harry T. Edwards in his dissent in *Halbig*. "This case is about Appellants' not-so-veiled attempt to gut the Patient Protection and Affordable Care Act," wrote Edwards.

The decision, Edwards notes, is effectively a "poison pill to the insurance markets in the States that did not elect to create their own Exchanges. This surely is not what Congress intended."

He continues:

> This [plaintiffs'] claim is nonsense, made up out of whole cloth. There is no credible evidence in the record that Congress intended to condition subsidies on whether a State, as opposed to HHS, established the Exchange. Nor is there credible evidence that any State even considered the possibility that its taxpayers would be denied subsidies if the State opted to allow HHS to establish an Exchange on its behalf.

But denying subsidies to taxpayers who are otherwise entitled to them because of a typo or a hyper-constrained reading of the statute is exactly the case conservatives are making in these challenges, and it's a case two Republican appointees were more than willing to advance. "We conclude that appellants have the better 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 the federal Exchanges," the majority in *Halbig* wrote.

"No one—not the people who wrote the law in Congress, not those who implemented the law in the states—understood this law to work the way that two judges of the D.C. Circuit today said it does," Elizabeth Wydra, chief counsel at the Constitutional Accountability Center, said in a statement in reaction to the *Halbig* ruling. The Constitutional Accountability Center wrote the legal brief on behalf of Senate Majority Leader Harry Reid, House Democratic Leader Nancy Pelosi, and every major committee chair involved in writing the ACA, as well as state officials from across the country.

So far about 5.4 million people have signed up for health insurance through a federal exchange, and about 87 percent of those consumers received subsidies in the form of sliding-scale tax credits to make that coverage affordable. This savings is critically important in states where mostly Republican lawmakers are politically opposed to the ACA and have refused to establish their own exchanges and expand Medicaid to increase insurance coverage and affordability. For example, as reported by the *Washington Post*, an individual in Wyoming who buys a mid-grade plan on the federal marketplaces is receiving a subsidy of around $444 per month, which cuts their monthly premium cost to a much more affordable $99 per month. So there's a lot on the line in these cases, beyond just arguing over the semantics of where the bureaucratic burdens of health-care reform may lie. Real lives are at stake.

Thankfully, the immediate impact of Tuesday's conflicting rulings will be mostly show among pundits and political organizations. Nobody will immediately lose their subsidies, nor is the ACA immediately gutted. And even though there is a momentary disagreement among the federal courts on the legality of the subsidies, that doesn't necessarily mean the Roberts Court will immediately jump in to resolve it. The Obama administration has said it plans to ask for a

full-panel review of the D.C. Circuit panel opinion, a process that could take months and which helps keep the case away from the Supreme Court for the time being.

The full D.C. Circuit Court of Appeals now comprises mostly Democratic appointees; while that doesn't guarantee a ruling in the administration's favor, it doesn't hurt its chances either. Should the full D.C. Circuit Court of Appeals rule in favor of the administration, that could mean, at this point at least, that there's no longer any disagreement in the federal courts as to whether or not insurance purchased via a federal exchange qualifies for subsidies. Without that kind of split in the federal courts, the Supreme Court may not have any means to get involved in the case, which is good news, since the Roberts Court is not known to respect precedent, especially if there's a good political reason not to.

In the meantime, federal courts in both Indiana and Oklahoma have similar legal challenges pending, which means that like the legal challenges to the contraception coverage requirement that persist despite the *Hobby Lobby* ruling, we're as far away from resolving the legal challenges to the various provisions of the Affordable Care Act as we are from resolving the political ones.