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Hobby Lobby isn't today's most important case: Column

Halbig v. Sebelius could force Obama administration to follow its own law.

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Tuesday, all eyes will be on a high-profile Obamacare case before the Supreme Court. But just a few blocks away, a lower court will hear a lesser-known Obamacare case that could have a far greater impact on the future of the law.

The Supreme Court hears oral arguments Tuesday in *Sebelius v. Hobby Lobby*, a case challenging the Obama administration's attempt to force private companies to purchase contraceptives for their employees contrary to the owners' religious beliefs. A ruling for Hobby Lobby would restore the religious freedom of potentially millions of employers and workers.

Just down the street, the Court of Appeals for the D.C. Circuit will hear oral arguments in *Halbig v. Sebelius*. Obamacare supporters call *Halbig* "the greatest existential litigation threat to the Affordable Care Act."

That description, while colorful, is not quite accurate. *Halbig* does not ask the courts to strike down any part of the law. It merely asks the court to force the administration to implement the law as Congress intended, a prospect that absolutely terrifies Obamacare supporters.

The issues in *Halbig* are simple.

Obamacare authorizes the IRS to provide health-insurance subsidies (nominally, tax credits) to consumers who purchase health insurance "through an Exchange established by the State." That's not a drafting error. The subsidy-eligibility rules employ that language a total of nine times, without deviation. The rest of the statue is fully compatible with this language.

The statute is therefore clear and unambiguous: the IRS may issue subsidies in the 14 states that established an exchange, but not in the 34 states that left the job of establishing and operating their state's exchange to the federal government. Congress' purpose is likewise clear. It wanted states to operate the exchanges, so it conditioned subsidies on state cooperation. Medicaid and countless other federal programs do the same.

The IRS's philosopher-kings have decided to issue subsidies in those 34 states anyway.

The Obama administration has acquired a reputation for unilaterally rewriting laws (to say nothing of abusing the IRS's powers) for political purposes, but this one takes the cake. The IRS is literally spending billions of taxpayer dollars not only without congressional authorization – itself a federal crime – but contrary to the clearly expressed will of Congress. And it gets worse. Since that spending triggers penalties under Obamacare's employer and individual mandates, the IRS also plans to tax millions of Americans without congressional authorization.

Dozens of employers and individuals who would be subject to those illegal taxes have filed four separate lawsuits to stop the illegal spending that triggers them. *Halbig* is the first to reach the appellate level.

When a statutory provision is clear and the rest of the statute is consistent with that provision, that's supposed to be the end of the story. The Supreme Court has long held, "[If] Congress has spoken directly to the precise question at issue…that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Yet the Obama administration fears that if consumers in 34 states experience the full cost of Obamacare, Congress will have no choice but to reopen the law. It has therefore offered numerous arguments in defense of its unauthorized spending and taxes – not because any of these arguments have merit, but because none of them do.

Nevertheless, a district court ruled against the *Halbig* plaintiffs based on a severely distorted view of Congress' intent. The court wrote, "there is no evidence that either the House or the Senate considered making tax credits dependent upon whether a state participated in the Exchanges."

On the contrary, the evidence is clear. The words of the statute themselves show that both chambers not only considered but approved that idea. The senators who enacted Obamacare routinely supported and enacted legislation conditioning health-insurance tax credits and other assistance on states establishing exchanges or taking other actions. The seven members of Congress most responsible for Obamacare – former Senate Finance Committee chairman Max Baucus (D-Mont.), Senate Health, Education, Labor, and Pensions Committee chairman Tom Harkin (D-Ia.), then-House Ways & Means Committee chairman Sander Levin (D-Mich.), then-House Education & Workforce Committee chairman George Miller (D-Calif.), then-House Speaker Nancy Pelosi (D-Calif.), Senate Majority Leader Harry Reid (D-Nev.), and then-House Energy and Commerce Committee chairman Henry Waxman (D-Calif.) – even admit in an *amicus brief* that conditioning subsidies on states establishing exchanges was part of the congressional debate. Finally, when House Democrats first read the Senate-passed bill – what we

now call Obamacare – in 2010, they recognized that it conditions subsidies on states establishing exchanges, and complained that this feature would allow recalcitrant states to block those subsidies. In this instance at least, Congress knew what it was enacting.

The purpose of these conditional subsidies was to create an incentive for states to establish exchanges. The judiciary has an obligation to make them conditional again, so that process can work. Whether the result is that Congress will reopen Obamacare or 34 more states will establish exchanges remains to be seen.

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