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## Contrasting judgments on Obama's health care hours apart; appeals court calls subsidies unlawful

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Opponents of President Obama's health care law notched their biggest legal win to date Tuesday, when the second-most-powerful court in the country said the administration had unlawfully extended Obamacare subsidies to millions of Americans.

But their victory party was short-lived, as hours later another federal appeals court sided with the Obama administration on the subsidy question, almost certainly setting up an extended legal battle that could reach the Supreme Court.

A final loss for the White House would strip premium assistance from dozens of states and blow a massive hole in President Obama's signature health overhaul, which Democratic majorities muscled through Congress in 2010 with no Republican support.

"Today's conflicting court rulings highlight the flaws and ambiguity of Obamacare," said Sen. Rob Portman, Ohio Republican. "This is the predictable result of forcing a partisan piece of legislation through Congress without amendment, proper consideration or bipartisan input."

The Court of Appeals for the D.C. Circuit held that people living in states that relied on the federal government to set up their insurance market exchanges cannot receive the subsidies considered critical to making coverage affordable.

The panel's 2-1 decision invalidated an IRS rule that, plaintiffs in *Halbig v. Burwell* had argued, stretched the meaning of the Affordable Care Act, which said financial aid to low- and middle-income people should flow to exchanges "established by the State."

If that means only exchanges established by the state, it cuts off subsidies to about two-thirds of the nation. In 2011, the IRS issued a regulation declaring that residents of all states were eligible for subsidies regardless of whether the state established exchanges. Critics of Obamacare called that a lawless attempt to cover up a flaw in the law as written.

“We reach this conclusion, frankly, with reluctance,” Judge Thomas B. Griffith said in his opinion for the court. “At least until states that wish to can set up Exchanges, our ruling will likely have significant consequences both for the millions of individuals receiving tax credits through federal Exchanges and for health insurance markets more broadly.”

Hours later, the 4th U.S. Circuit Court of Appeals said subsidies may flow to all states, creating a split in the federal appellate courts. The judges in Richmond reasoned that Obamacare’s language was ambiguous and that the IRS rule was “a permissible exercise of the agency’s discretion.”

The Obama administration said it plans to appeal the D.C. Circuit’s decision because the subsidies are a huge draw for Obamacare customers. Without that selling point, the reforms would effectively collapse under the weight of premiums that are no longer affordable.

The White House likely will ask the entire D.C. panel to hear the case as the makeup of the court leans in Democrats’ favor. The losers in the 4th Circuit may make a similar request.

Some legal analysts said the decisions to date have been swayed by judges’ political designations, a key factor if the issue reaches the Supreme Court.

“Given the 5-4 partisan split on the Supreme Court, this does not bode well for the ACA,” said David Bernstein, a professor at George Mason University School of Law.

White House press secretary Josh Earnest said the D.C. ruling will not affect consumers’ ability to receive tax credits right now.

“While this ruling is interesting to legal theorists, it has no practical impact,” he said.

Virginia Gov. Terry McAuliffe, a Democrat, said the conflicting rulings “should not discourage Virginia families from seeking affordable health insurance through the federal marketplace.”

But Republicans wasted no time in highlighting the partial blow to Obamacare, which follows the Supreme Court’s decision to let closely held corporations ignore Obamacare’s contraception mandate if they have religious objections to it.

“For the second time in a month, the courts have ruled against the president’s unilateral actions regarding Obamacare,” said House Speaker John A. Boehner, Ohio Republican. “The president has demonstrated he believes he has the power to make his own laws. That’s not the way our system of government was designed to work.”

Under the D.C. Circuit’s ruling, only the District and the 14 states that have taken on the responsibility for their exchanges would be able to dole out premium tax credits to their residents. Other states, most of which have Republican governors or legislatures, refused to set up the exchanges, forcing the federal government to step in for them.

If the Obama administration loses this legal battle, about 5 million Americans who used the federal exchange will see their health costs soar because they no longer have subsidies to knock down their premiums, according to Avalere Health, a Washington-based consultancy.

“The responsibility for that lies squarely on the shoulders of the president,” Michael Cannon, director of health policy at the libertarian Cato Institute and key architect of the legal theory behind the *Halbig* case, told *The Washington Times* in a recent interview.

He has argued that Congress wanted to entice states to set up their own marketplaces, yet the IRS unlawfully extended subsidies to all states.

“We thought at first it was a glitch,” he said of the law’s text. “Then we started researching it. They meant to do this.”

The plaintiffs in *Halbig* come from states that opted not to set up their own health exchanges. They said the subsidies produce a ripple effect in which companies in their states are no longer insulated from the law’s twice-delayed employer mandate, which requires companies with 50 or more full-time employees to offer health coverage or pay fines.

The rule is triggered when an employee takes advantage of government subsidies on an Obamacare health exchange. Without any subsidies, the plaintiffs reasoned, they wouldn’t have to worry about the employer mandate.

The Obama administration says Congress always intended the Department of Health and Human Services to “stand in the shoes” of states that decided not to run their own marketplaces. That’s what it did during the law’s first enrollment period, setting up HealthCare.gov to serve the three dozen states that deferred to the federal government.

“You don’t need a fancy legal degree to understand that Congress intended for every eligible American to have access to tax credits that would lower their health care costs, regardless of whether it was state officials or federal officials who were running the marketplace,” Mr. Earnest said. “I think that is a pretty clear intent of the congressional law.”