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Obamacare mired by lawsuits challenging fundamentals

By Tom Howell Jr.

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The Supreme Court will rule sometime before the end of this month on the Obama administration's contraceptive mandate, but bigger challenges to Obamacare are still winding their way through the courts.

The contraceptive case will decide whether for-profit employers must cover birth control as part of company health plans, touching on an important subplot in the health care debate. That case is known as Hobby Lobby, after the chief plaintiff.

But a more obscure set of lawsuits pose bigger challenges to the fundamentals of the Affordable Care Act, ranging from whether the bill was properly written in Congress to whether the administration can pay subsidies even to states that refused to set up their own exchanges.

"If the courts vacate the IRS's tax credit rule, it could have a larger impact than if Congress or the courts eliminated the individual mandate," said Michael Cannon, a scholar at the Cato Institute who has been one of the architects of that challenge to the subsidies.

That case, *Halbig v. Sebelius*, was argued in the U.S. Circuit Court of Appeals for the District of Columbia, and a decision could come at any time.

The same is true of another case, *Sissel v. U.S. Department of Health and Human Services*, where the plaintiffs say the Affordable Care Act is unconstitutional because the bill is a tax measure that originated in the Senate, violating the Constitution's mandate that "all bills for raising revenue shall originate" in the House.

Obamacare endured the main challenge to its survival in 2012, when the justices upheld the law's "individual mandate" under Congress's taxing authority, but that left a host of other questions to be decided.

A number of businesses have sued to halt the contraceptive mandate, arguing it violates their religious rights. But whatever the ruling, it won't make a major dent in the law's workings.

“Although the case is significant for religious liberty, it will have virtually no affect on the ACA, given that it is merely a regulation that the administration imposed for its own political reasons,” said Randy Barnett, a professor at the Georgetown Law Center.

Conversely, a ruling against the Obama administration in *Halbig* would cut off subsidies to states that relied on the federal government to set up their exchanges, seriously denting the law’s effectiveness and popularity.

Raising the stakes, fines for violating the law’s twice-delayed employer mandate — a rule requiring companies with 50 or more full-time employees to provide adequate health coverage — are triggered when at least one employee takes advantage of a tax credit.

Some of *Halbig*’s plaintiffs say the law clearly says subsidies should flow to exchanges “established by the State,” so the roughly three dozen states that use the federal exchange system should be insulated from the mandate.

Yet for now, the birth control debate is snatching up headlines.

The administration then “drew a line in the sand” on the mandate among corporations, meaning defeat at the Supreme Court “would be a major loss for Obama on the ‘culture war’ front,” said B. Jessie Hill, a professor at Case Western Reserve University School of Law.

“In terms of real-world legal and constitutional impact, I think the ruling is not likely to be extremely important,” she said in an email. “In political terms, however, a ruling in favor of the employers might be quite damaging to the Obama administration, because of how it strongly has persisted in its position (albeit constantly re-configuring the rules).”