

The Washington Post

Health-care law's critics see court case over subsidies as their last shot

By [Sandhya Somashekhar](#)

December 3

Opponents of the [health-care law](#) took their latest legal challenge to a federal courtroom in the District on Tuesday in a case that many critics of the law view as their last and best chance to gut it before key provisions kick in Jan. 1.

Though some legal scholars view the case as a long shot, it could have significant consequences if it is successful. Millions of people in 34 states could be denied the government subsidies established by the law to help low- and middle-income people pay their health-insurance premiums starting next year.

Even those who think the case has no merit are closely watching it unfold.

“You can no longer take a look at an allegation that on its face appears to have no merit whatsoever and simply dismiss it out of hand,” said Sara Rosenbaum, a health-law professor at George Washington University and a supporter of the [Affordable Care Act](#). “All you need is a very energetic plaintiff and a sympathetic judge. It takes very little to set a case in motion.”

It is one of a number of cases bubbling up through the court system more than a year after the Supreme Court upheld the law, dealing a blow to those who have viewed the law as an unconstitutional and un-American infringement of their freedom. Now, the lawsuits are centering more on the way the law is being implemented.

The most visible lawsuits are those questioning the law's requirement that businesses provide people health insurance that covers contraception. Last week, the Supreme Court agreed to consider a case brought by the [owners of Hobby Lobby](#), an arts-and-crafts chain, who said the new mandate that they cover birth control runs counter to their religious principles.

Supporters of the mandate have said it protects the rights of workers to get certain benefits regardless of their employer's religious views.

Also on Tuesday, AIDS advocates in St. Louis filed suit against the state of Missouri for passing laws that restrict the activities of “navigators” — helpers who are paid through federal grants to assist people as they sign up for health insurance. They argue that the rules, which among other things require navigators to be certified by the state, conflict with federal law.

Supporters of the navigator restrictions say they were necessary to protect consumers from being misled by poorly trained or unethical navigators.

But the case heard before District Court Judge Paul L. Friedman on Tuesday could have more serious consequences for the overall health-care law.

At issue are the subsidies that low- and middle-income people are set to receive next year. The plaintiffs — three private employers and four individual taxpayers — argue that Congress intended the law’s subsidies for low- and middle-income people to go only to people in states that set up their own health-insurance exchanges.

The exchanges are online marketplaces where people are supposed to be able to log on to browse health-plan features and prices, apply for subsidies and enroll in coverage. Thirty-four states opted not to set up their own marketplaces, leaving the task up to the federal government.

Advocates of the law say Congress’s intent was clear when it wrote the law that people in both sets of states would be entitled to subsidies.

On Tuesday, Michael Carvin, the attorney for the plaintiffs, contended that Congress wanted to cajole intransigent states into setting up their own exchanges by depriving their citizens of the subsidies if they went that route. As a result, he said, the law’s authors wrote that the subsidies would be available only to those who enrolled in health insurance “through an Exchange established by the State,” purposely leaving out the states that let the federal government set up the marketplace.

But Joel McElvain, an attorney representing the government, argued that the passage was being taken out of context and that Congress did mean for all qualified people to get subsidies, even if they live in states where the federal government is setting up the exchange. “You cannot look at the phrase alone,” he said, arguing that “the entire structure of the act” must be taken into account to suss out the intent of Congress.

Carvin countered that it was pointless to “psychoanalyze” Congress.

Friedman has promised a speedy decision. The subsidies are set to kick in on Jan. 1, which is also when a rule takes effect that most Americans must carry health insurance.

The plaintiffs’ rationale is based on a paper written by Michael Cannon, a health-policy scholar at the libertarian-leaning Cato Institute, and Jonathan Adler, a Case Western University law professor. The paper is the basis of three other cases moving through the courts right now; the D.C. case is the furthest along.

Cannon traveled the country over the past year urging states not to set up their own health exchanges, in part to bolster these legal cases. Time has proved that the Affordable Care Act is a “highly unstable law that cannot work unless states give their cooperation,” he said Tuesday after the hearing.

Advocates of the law, however, said the case smacked of desperation. “The lawsuit heard today is a last-minute attempt to undermine the Affordable Care Act and is unlikely to succeed,” Ron Pollack, executive director of the nonprofit Families USA, said in a statement. “It is like a desperation ‘Hail Mary’ pass thrown with a deflated football.”