



# The court case that could really undo Obamacare

By Claire Zillman

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FORTUNE -- On Tuesday morning, all eyes will be on One First Street in Washington, D.C., where the U.S. Supreme Court will hear arguments from Hobby Lobby and Conestoga Wood Specialties Corp. that, because of religious principles, they should be exempt from the Obamacare requirement that for-profit companies must provide insurance coverage for contraception.

Regardless of how the court rules in those cases, the bulk of the Affordable Care Act will be implemented as planned.

That's not necessarily the case for another matter being argued Tuesday, just a few blocks away. At the U.S. Court of Appeals for the D.C. Circuit, judges will hear arguments over whether the Internal Revenue Service has legal standing to grant tax credits to low and middle-income residents of the 34 states that decided not to create their own health insurance exchanges.

"The contraceptive mandate case has implications related to very big societal issues, but it doesn't threaten the ACA's core operation, whereas this [healthcare exchanges] case does," says Simon Lazarus, senior counsel at the Constitutional Accountability Center, a group that has filed a brief in this case supporting the government.

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The health care exchanges case goes back to May 2013, when individual and small businesses from states that declined to establish exchanges claimed that the authors of the ACA had only intended for tax incentives and stipends to be available to Americans who signed up for through state-run exchanges. Without such stipends, the individual plaintiffs would be exempt from buying insurance under Obamacare's affordability rule. But because of the stipends, they must purchase insurance -- a mandate they inherently oppose -- or face a fine. (Their argument is closely based on a paper by the Cato Institute and Case Western Reserve University School of Law.)

"The plain text of the [ACA] statute makes subsidies available only to individuals who enroll in insurance plans through an Exchange established by the State," the complaint says.

The plaintiffs allege that after states started opting out of running their own health care exchanges and the federal government realized it would be in charge of a majority of the programs, the IRS introduced a rule that required the Treasury to disburse subsidies regardless of whether exchanges were run by state or federal governments. That rule by the IRS, the plaintiffs contend, violates the Administrative Procedure Act. "The ACA unambiguously restricts premium-assistance subsidies to state established insurance Exchanges," they argue, and subsidies were not giveaways but intended to serve as the "biggest carrot" to incentivize states to establish their own exchanges.

In mid-January of this year, Judge Paul Friedman of the U.S. District Court for the District of Columbia granted the government's motion for summary judgement in the case, deciding that "there is no evidence that either the House or the Senate considered making tax credits dependent upon whether a state participated in the exchanges." He concluded that "the plain text of the [ACA] statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated exchanges."

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The plaintiffs appealed that ruling to the D.C. Circuit, which will hear arguments on Tuesday.

Given Judge Friedman's ruling and a nearly identical ruling in a similar case in federal court in Richmond, Va., Lazarus of the Constitutional Accountability Center characterizes the appeal as a long shot. But the stakes are high. As of March 1, 4.2 million Americans had signed up for Obamacare through the exchanges, and the Congressional Budget Office estimates that 79% of all enrollees will qualify for subsidies.

In the government's appellate brief, it argued that the plaintiffs' position undermines Congress's objective to make affordable insurance available to those who do not qualify for group plans, like those you might belong to through an employer. "It is untenable to suggest that Congress withheld premium tax credits from individuals who live in states with federally-run exchanges. Congress sought to reform the non-group market, not to destroy it," the brief says.

"Practically speaking, the stakes are huge," Lazarus says. "If 80% of people who are supposed to enroll in exchanges can't do so because they can't afford it, you can determine quickly what will be left of the exchanges."