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In Supreme Court Briefs, Big Business Supports Obamacare Subsidies

By Paul Barrett
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The Supreme Court briefs are in, and we can now say that big business backs Obamacare.

The justices will hear oral arguments on March 4 in the latest case challenging the Affordable Care Act (ACA). At issue is the act's provision of federal tax subsidies to make health insurance affordable for the less-well-off. The plaintiffs are four Virginia residents who say they can't afford coverage but claim they want to be ineligible for subsidies. If that seems like an odd position, well, ordinarily it would be. The stance becomes more understandable, though, when one peeks beneath the legal papers and sees that the plaintiffs are backed by a range of conservative and libertarian interest groups whose real goal is to cripple, if not kill, Obamacare.

We'll return to the larger agenda behind the challenge. But first, a quick observation about interest groups that aren't urging the destruction of Obamacare.

Large corporate lobbying outfits, such as the U.S. Chamber of Commerce, often file "friend of the court," or amicus, briefs in Supreme Court cases affecting business and the economy. This time, they haven't joined the assault on Obamacare. The reason can be inferred from the amicus briefs of more narrowly focused insurance and health-care interests that have filed to support the White House. With a significant portion of its constituency urging the justices to leave Obamacare in place, the Chamber couldn't very well join the attack. (In response to my inquiry, the Chamber promised to comment on its non-filing but hadn't done so as of publication).

Among those filing amicus briefs defending health reform are HCA, the American Hospital Association, America's Health Insurance Plans, the National Alliance of State Health Co-ops, the Catholic Health Association of the United States, the American Cancer Society, and the National Association of Community Health Centers. The insurance and medical industries share the administration's goal of seeing millions more people covered because that translates into millions more customers seeking the services of carriers, hospitals, and doctors.

Beyond additional customers, health-care businesses argue that they also care about consumer welfare. "We will not mince words," the American Hospital Association declares in its brief. The plaintiffs' position, "if accepted, would be a disaster for millions of lower- and middle-income Americans. The ACA's subsidies have made it possible for more than 9 million men, women, and children to have health coverage—some for the first time in years; some, no doubt, for the

first time in their lives. That coverage allows them to go to the doctor when they are sick, and to do so without fear that the resulting bill could leave them in financial distress."

On the other side, the challenge to Obamacare is a production of the Competitive Enterprise Institute, a well-known anti-regulatory advocacy group. Procedural questions have arisen over whether the four plaintiffs recruited by the CEI are appropriate choices. Leaving those issues to one side, the motives of the challengers can easily be discerned from the briefs backing the plaintiffs. They include the conservative advocacy groups Judicial Watch, American Center for Law and Justice, Mountain States Legal Foundation, Pacific Research Institute, Cato Institute, Washington Legal Foundation, Missouri Liberty Project, and Landmark Legal Foundation.

The Obamacare opponents focus less on the practical consequences of sweeping aside health reform and more on principles of government. "Executive lawmaking—which has alas become commonplace—poses a severe threat to the separation-of- powers principles that undergird the Constitution and ultimately the rule of law itself," argues the libertarian Cato Institute in its amicus brief. "Accordingly, this Court should vacate the IRS rule that provides subsidies in states that did not establish exchanges. This rule violates Congress's limitation of such subsidies to insurance bought through exchanges 'established by the state.'"

The last two sentences take us to the statutory intricacies of the case. In the first Supreme Court challenge to the ACA three years ago, justices voted 5-4 that Congress possessed constitutional authority to require that people buy health insurance. This time around, the assault concerns the subsidies meant to make that mandated coverage affordable.

The ACA law has three pillars: banning insurers from denying coverage based on preexisting conditions; mandating that everyone buy insurance to assure that healthy people participate; and subsidizing less-well-off consumers. The current Supreme Court case addresses who can get those critical tax subsidies, without which the mandate would collapse, probably causing the entire program to unravel.

Read literally, the law provides subsidies for policies purchased via an "exchange established by the state." The problem with that language is that only 16 states and the District of Colombia have set up their own exchanges. Most Republican politicians refused to go along with Obamacare, meaning that residents of 34 states have to seek insurance on exchanges set up by the federal government.

Charged with interpreting Obamacare, the Internal Revenue Service (IRS) concluded that Congress couldn't have intended to gum up the statutory machinery with this state-versus-federal distinction. The IRS established a rule that everyone, regardless of their state residency, was eligible for the subsidies. The justices will rule on the reasonableness of that interpretation. In the normal course of judicial business, courts defer to agency readings of ambiguous statutory verbiage. The challengers insist there's nothing ambiguous about the words "exchange established by the state."

Business interests, or at least health-related business interests, are siding with the IRS. Now it's up to the justices.