

Cato Ramps Up Campaign to Cancel Health Law Subsidies

By John Reichard
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Opponents of health law subsidies designed to help lower income people buy health insurance are working to persuade the Supreme Court to review the legality of the federal program for distributing the financial assistance.

Using blog posts, conferences and subpoenas, the Cato Institute and other health law foes are trying to buttress legal cases challenging the subsidies and shorten the timetable for possible Supreme Court review. They also hope to embolden Senate Republicans opposed to the law (PL 111-148, PL 111-152), who could take control of the chamber in the mid-term elections.

The main target of the campaign are the Supreme Court justices, who are scheduled to meet Oct. 31 to confer over whether to grant a petition filed by subsidy opponents in the case *King v. Burwell*. The justices could decide as soon as Nov. 3 or hold the case over and respond at some future time.

“The Court should only decide the cert petition based on the briefs that have been filed, but it would be naïve to think that they don’t read the paper and blogs,” said Washington and Lee Law School Professor Timothy Jost in an email Tuesday.

In *King v Burwell*, the 4th U.S. Circuit Court of Appeals upheld an Internal Revenue Service regulation allowing the subsidies to go to qualified applicants throughout the United States.

The Cato Institute, the Competitive Enterprise Institute and other critics of the law say its actual text permits the subsidies only to be distributed in the 14 states that set up their own health insurance exchanges.

If that view is ultimately upheld by the courts the residents of the 36 states served by the federal health insurance website healthcare.gov. would no longer qualify for subsidies. Almost 5 million Americans in those states received subsidies this year to defray some premium costs.

Cato Institute analyst Michael Cannon has been blogging steadily to make the case for Supreme Court review. His latest post calls attention to language inserted into contracts negotiated by insurers with the federal government to sell 2015 coverage on the federal exchange.

First reported in the trade publication Inside Health Reform, the language allows insurers to pull out of the contracts, subject to state laws, for policies paid for with subsidies should they be declared illegal by courts.

“As beneficiaries of these illegal subsidies, insurance carriers are spooked,” Cannon said in highlighting the contracts. Cannon said it shows insurers regard the subsidy challenge as much more than frivolous.

Cannon argues that the high court will have to eventually review the subsidies. Putting it off could cause greater disruption to the insurance industry because health plans will rely on the subsidies more heavily the longer people are able to use them, he says.

In other moves, Cato has scheduled an Oct. 30 conference featuring two states attorneys general, Scott Pruitt of Oklahoma, and Greg Zoeller of Indiana, who have filed cases challenging the subsidies.

And Rep. Darrell Issa, R-Calif., chairman of the House Oversight and Government Reform Committee has subpoenaed the Treasury Department to turn over records relating to the legal basis on which the administration issued the IRS regulation. Critics of the law hope the subpoena will produce records showing there was no sound legal basis for the regulation – which would aid the court challenges.

Asked to comment on Cannon’s assertion that the industry is “spooked,” by possible cancellation of the subsidies, Clare Krusing, spokeswoman for America’s Health Insurance Plans, said, the language “recognizes that health plans’ exchange products are based on current assumptions relating to premium tax credits and cost-sharing reductions.”

Insurance industry consultant Robert Laszewski said plans viewed the possibility of subsidies being struck down as “not likely but not impossible” and hedged their bets by demanding the language in contracts.

He said negating the subsidies would “devastate Obamacare in the federal states.”

“Carriers would be faced with the consequences of immediately dropping people or at least getting to the end of the plan year but suffering enormous disenrollment,” he said. “This provision gives a health plan permission to participate in screwing its customers.”

Jost said that supporters of the law are also trying to make their voices heard. Noting that circuit courts are not split on the legality of the subsidies, “it would be an extraordinary exercise of political will for the Court to take the case at this point,” he said.