



Latest Challenge to Obamacare Is Long Shot

By [Joyce Frieden](#)

October 10, 2014

The Supreme Court is not likely to rule against the government in a controversial case involving subsidies for consumers on the Affordable Care Act's (ACA) federally run health insurance exchanges, if the case makes it that far, say experts.

The case, known as *Halbig v. Burwell*, revolves around wording in the ACA's provision on subsidies. Section 36B of the law says that "The 'premium assistance amount' is based on the cost of a 'qualified health plan ... enrolled in through an Exchange established by the State under [section] 1311 of the [ACA].'"

It is this wording -- its mention only of state-established exchanges -- and similar wording in other parts of the provision, which is at issue in the case. The plaintiffs contend that the wording means that only consumers who purchase insurance in state-run exchanges are eligible for subsidies, which would leave out consumers in the 34 states that have defaulted to the federally run exchange.

The defendant -- the federal government -- says it's clear from the general context of the law, as well as wording in yet other parts of it, that the ACA's intent was to make consumers in federal as well as state-run exchanges eligible for the subsidies.

Big Money at Stake

A lot of money is at stake in the decision. Subsidies paid on the federal exchanges amount to about \$10-12 billion per year, [Michael Cannon](#), MA, JM, director of health policy studies at the Cato Institute, a libertarian think tank in Washington, said in a phone interview.

The *Halbig* case and similar cases are making their way through the court system. In July, a three-judge panel of the U.S. Court of Appeals for the District of Columbia [ruled 2-1 against the government](#) in the *Halbig* case.

That unfavorable ruling prompted the White House to request a review of the decision in the case by all 11 judges on the court (a procedure known as "en banc" review). The majority of the full court's judges are Democratic appointees. The court [agreed to the request](#) and set oral arguments for the re-hearing for Dec. 17.

While all that was going on, the U.S. Court of Appeals for the Fourth Circuit, in Richmond, Va., [ruled in the government's favor](#) in July in a similar case known as *King v. Burwell*. And then in

September, a federal district judge in Oklahoma ruled against the government in still another case, [Pruitt v. Burwell](#).

It is not known yet what will happen when the D.C. court hears the Halbig case en banc, although many experts say that that court is likely to reverse the three-judge panel decision. "The full D.C. court will probably uphold subsidies for state and federal exchanges," [Nancy Nielsen, MD, PhD](#), senior associate dean for health policy at the University at Buffalo (N.Y.) School of Medicine and Biomedical Sciences, said in an email.

If that happens, "the Supreme Court will not take the case unless another circuit court rules differently," added Nielsen, who is also a former president of the American Medical Association.

An Uncertain Future

An even bigger question is what the Supreme Court would do if the case does make its way there. "I'd be astonished if it went in Halbig's favor," said [Joseph Antos, PhD](#), a health policy scholar at the American Enterprise Institute, a right-leaning Washington think tank.

"The reason partly is the fact that this court actually went along with the [ACA's] individual mandate, so if they think individual mandate is okay, I think they're perfectly willing to overlook details of interpretation on this Halbig issue," Antos told *MedPage Today* in a phone interview. "Everything is going in that direction."

This is especially true now that subsidies are already being paid out, he continued. "Every Supreme Court wants to avoid, if possible, major social disruption. This would have been a different story if it had gotten to the Supreme Court before any money had been distributed. It's too late now, in a sense."

Cannon agreed. "The law and the facts are all on the side of the plaintiffs, and the odds that they will prevail are about 20%," he said. "The reason is that whenever you sue the government, you're always betting against the house. The government ... gets a lot of deference from the courts."

The government would likely prevail even though the provision in question "uses the phrase 'through an exchange established by the states' twice explicitly, and an additional seven times by cross-reference," he said. "It's very clear, and there's absolutely nothing in this section that supports the government's interpretation ... and nothing in the law that creates any ambiguity."

[Abbe Gluck, JD](#), professor of law at Yale Law School, in New Haven, Conn., did not agree that the case had merit. "The core of the statute is getting Americans insured," she wrote in an email. "The subsidies have always been understood as critical to the statute's structure ... and it's nonsense to conclude that Congress wrote a 2,000-page law that depends on the subsidies only to take them away with four words that are ambiguous at best."

However, Gluck did agree with Cannon about the potential outcome. "This Court has always said that it does statutory interpretation by looking at statutory words in their surrounding context

-- in light of other textual provisions in the statute -- and it does not read words in isolation," she said. "And in the context of the ACA in particular, even Justice Scalia has said ... that the statute makes no sense without the subsidies."

A Potentially Serious Blow

What would happen if the Supreme Court were to strike down the subsidies? Such a decision "would be a serious setback for the ACA, but not a fatal one," said [Nicholas Bagley, JD](#), an assistant professor of law at the University of Michigan, in Ann Arbor.

"In response to an adverse Supreme Court decision, the states that had declined to set up exchanges could move to establish them," he wrote in an email. "Many presumably would to make sure that their citizens could continue to get tax credits. In the meantime, however, millions of people would lose the financial help they need to afford health insurance."

Cannon predicted that if the subsidies were to be overturned, "the [average] actual overall premium could double, and the part the enrollee would pay out-of-pocket -- after you get rid of the subsidies -- would increase seven-fold. When premiums go up like that, that will create a backlash ... and create pressure on Congress to do something" about the law.

There is a simple solution to the problem, said Nielsen, although it's unlikely to happen in the current politically divided Congress. "Congress could fix this in a minute with passage of a one-line law, stating that individuals who obtain insurance through state or federal exchanges are eligible for subsidies. Don't hold your breath."