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Obamacare Just Took a Hit in Court. Will SCOTUS Care?

District judge backs lawsuit that would end subsidies for millions

By Jonathan Cohn

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The latest legal challenge to Obamacare just won a round in court. On Tuesday, a federal district judge ruled in favor of a lawsuit challenging the federal government's authority to provide millions of people with tax credits for buying private health insurance. The decision, in a case called *Pruitt v. Burwell*, came from a Republican-appointed judge in Oklahoma. His opinion was succinct, strongly worded and betrayed not a hint of self-doubt.

The decision has no immediate effect. The judge stayed his ruling, pending the Obama Administration's likely appeal to the Tenth Circuit Court of Appeals. The real question now is what effect (if any) Tuesday's announcement has on the justices of the Supreme Court, who are contemplating whether to hear a similar lawsuit and make a definitive ruling on the matter.

As you may know, the dispute in these lawsuits isn't about constitutional philosophy. It's about the statutory language of the Affordable Care Act—and what Congress was trying to do when it wrote the law. Obamacare creates insurance marketplaces, through which people can buy regulated insurance and, depending on their incomes, receive tax credits that are worth hundreds and sometimes thousands of dollars a year. For many people buying coverage, these tax credits are the difference between being able to buy coverage and having to go without it. But States have the option of building their own marketplaces or asking the federal government to do the job instead. According to the lawsuits, the law does not authorize the federal government to disperse those tax credits unless states are running the marketplaces on their own.

The two men who thought up the lawsuit and created its legal template, Michael Cannon of the Cato Institute and Jonathan Adler of Case Western Law School, say this was no mere drafting error—that Congress intended to write the law this way, in order to give states incentive to take on responsibility for creating the marketplaces. The people directly responsible for writing the law, along with most of us who covered its enactment, say that's nonsense. The goal, in our view, was always to make sure residents of all states had access to the tax credits, regardless of what state officials decided. (There's a separate, but also important, question of whether to read

one particular passage of the law literally and in isolation, or to consider it in context of other provisions.

Previously, federal district judges in two other parts of the country rejected the lawsuits. Initially, appeals of those decisions produced a split decision. One three-judge panel, from the Fourth Circuit Court of Appeals, ruled unanimously to reject the lawsuit. Another panel, at the District of Columbia Circuit, upheld the lawsuit by a two-to-one majority. That second case is under further review, however, because the D.C. Circuit granted an “en banc” hearing, which means the entire active panel—that is, all the sitting judges on the Circuit—have agreed to hear the case.

So far, only Republican-appointed judges have sided with the plaintiffs. Tuesday’s ruling, in a case called *Pruitt v. Burwell*, came from Ronald White, whom President George W. Bush appointed in 2003. The rulings against the plaintiffs have come predominantly from judges appointed by Democrats, although one district judge who rejected the lawsuit, James Spencer, was a Reagan appointee, and one of the Fourth Circuit judges got his permanent appointment from President George W. Bush—although this was after getting a recess appointment from President Bill Clinton.)

The conflicting rulings from the D.C. and Fourth Circuits prompted the lawsuit’s plaintiffs to appeal the case they lost, *King v. Burwell*, to the Supreme Court. But once the D.C. Circuit agreed to hear the case en banc, that eliminated the “split”; technically speaking, the Fourth Circuit has now ruled to reject the lawsuit and the D.C. Circuit is still pondering the matter. Without a split, most legal experts say, the Supreme Court is less likely to hear the case.

Does Tuesday’s ruling change that likelihood? Does it make it more likely the Supreme Court will hear the case? I put that question to a few legal scholars who have followed the case closely. Here’s what I heard back from Nicholas Bagley, a law professor at the University of Michigan who has written extensively on this subject for *The Incidental Economist*:

It probably doesn't matter much what one district court says. But the cert petition in *King* asks the Supreme Court to take the case because splits could arise down the line. *Pruitt* makes that possibility seem a little more real, which may slightly increase the odds that the Court takes *King* even in the absence of a split.

Timothy Jost, law professor at Washington and Lee University, seemed if anything more skeptical:

If the Tenth circuit affirmed, that would make cert likely. But I doubt the Supreme Court will weigh in until there is an actual split between the circuits.

But Adler seemed to think the case could loom a little larger:

If this decision has any effect it will increase the likelihood of Supreme Court review. It shows that the validity of the IRS rule may remain in dispute no matter what the D.C. Circuit does, and given the significant reliance interests that counsel a quick and final resolution of this controversy, it could encourage more careful consideration of the cert petition even before the D.C. Circuit rules en banc. In the end, however, whether the high Court takes this case will depend on how significant the Court considers the issues at stake.

Added Cannon:

It's a judicious ruling, and it could push the Supreme Court to review the related case of King v. Burwell. Not because the Eastern District of Oklahoma sets the high court's agenda, but because Judge White exposed how silly the government's and the Fourth Circuit's arguments really are.

Bagley and Jost have said they oppose the case on the merits. Adler and Cannon support it. Make of everybody's comments (including mine) what you will.