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Podium

Op-Ed: A Decisive Answer in the ACA Circuit Split

Despite conflicting decisions on Affordable Care Act tax breaks, their validity is clear.

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Conservatives fiercely oppose the Patient Protection and Affordable Care Act, and so it is not surprising that two conservative judges on the U.S. Court of Appeals for the D.C. Circuit handed down a decision that would gut the law. But their ruling is inconsistent with the most basic principles of statutory construction. As the U.S. Court of Appeals for the Fourth Circuit concluded in a decision that same day, Congress unquestionably wanted the federal government to be able to subsidize health care for those who otherwise cannot afford it.

The Affordable Care Act was intended to ensure that almost all Americans have health care coverage. A key mechanism is that the act provides for the establishment of "exchanges," through which individuals can purchase competitively priced health care coverage.

To ensure that individuals can afford to pay for the insurance, the act provides a federal tax credit to millions of low- and middle-income Americans to offset the cost of policies purchased on the exchanges.

The act calls for states to establish exchanges. But if a state decides not to do so — and only 16 states and the District of Columbia have created exchanges — the federal government creates exchanges in those places. The act also provides that tax credits will be available for those who purchase insurance on the state exchanges. The issue before the D.C. Circuit in *Halbig v. Burwell* and the Fourth Circuit in *King v. Burwell* was whether the Internal Revenue Service was correct in interpreting the section of the act (section 36B) that allows for tax credits when there is a state-created exchange to also permit tax credits when the federal government has created the exchange.

The D.C. Circuit, in a 2-1 decision, concluded that the text of the law allows for tax credits only for state-created exchanges. Judge Thomas Griffith wrote the opinion, joined by Judge Raymond Randolph, and declared: "[T]he ACA unambiguously restricts the section 36B subsidy to insurance purchased on Exchanges 'established by the State.' "

This hyper-textualism, which ignores the statute's purpose and overall structure, is inconsistent with countless U.S. Supreme Court decisions about statutory construction and can be explained only by the ideological opposition of the two conservative judges to the Affordable Care Act.

Time and again, the Supreme Court has held that in interpreting a statute, context should be taken into account. In *National Association of Home Builders v. Defenders of Wildlife*, the court held that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." In *Robinson v. Shell Oil*, the court said that in analyzing a statute it looks to "the specific context in which that language is used, and the broader context of the statute as a whole."

The D.C. Circuit's interpretation of the law makes little sense. It would mean that Congress wanted to allow states to undermine the Affordable Care Act by choosing to not create exchanges.

As Judge Harry Edwards noted in his dissent, the majority decision would interpret the 36B provision as a "poison pill" that would harm the exchanges not created by the states, and this "surely is not what Congress intended." It ignores the purpose of Congress and the overall structure of the law to say that the IRS was wrong in allowing tax credits for federally created exchanges.

DEFERENCE MUST BE PAID

Moreover, under the long-standing principle known as "*Chevron* deference," the court must defer to the federal agency in interpreting ambiguities in the law. This was the approach followed by the Fourth Circuit. As the opinion by Judge Roger Gregory demonstrates, even though there may be some ambiguity in the statute, such ambiguity must be resolved in favor of the interpretation posited by the IRS. Judge Andre Davis in his concurrence noted that "no case stands for the proposition that literal readings should take place in a vacuum, acontextually, and untethered from other parts of the operative text; indeed, the case law indicates the opposite."

He is correct; the courts must interpret laws, even when Congress' draftsmanship is less than perfect, in a manner consistent with what the Congress intended the law to accomplish.

The D.C. Circuit's decision seems so clearly ideologically motivated. At oral argument, Randolph, who joined Griffith in the D.C. Circuit majority, made clear that he saw Obamacare as an "unmitigated disaster" and lamented that costs "have gone sky-high." Griffith and Randolph undoubtedly saw this as a chance to gut the Affordable Care Act. As Oklahoma Attorney General E. Scott Pruitt, an amicus in the case, said in a Wall Street Journal op-ed, the goal of the challenge is to ensure that "the structure of the ACA will crumble." Without the tax credits, millions of Americans will not be able to afford insurance in the exchanges.

The D.C. Circuit's decision in *Halbig v. Burwell* will likely be overturned in an en banc ruling, but the ultimate showdown, almost certainly, will be in the Supreme Court. The answer there should be easy. The Roberts Court has been sympathetic to *Chevron* deference and even has upheld *Chevron* deference unanimously. Besides, as a matter of statutory construction Congress' purposes and goals could not be clearer.

But the question will be whether the Roberts Court can overcome the partisanship surrounding the Affordable Care Act and follow basic principles of statutory interpretation. One can only hope it will do much better in this regard than the D.C. Circuit.

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