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DELAWARE VOICE

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The Affordable Care Act's fate may turn on a single clause in the 900-page bill that created the law. Let's find out why that clause is so important. Then you can decide how to interpret it.

The Affordable Care Act's purpose was clear. Congress wanted to increase the number of Americans with health insurance and prevent insurance companies from discriminating against people with preexisting medical conditions.

Congress knew that forbidding discrimination against people with preexisting conditions would work only if most Americans – sick and healthy alike – purchased insurance. Otherwise, people would wait to buy insurance until they got sick. And if the pool of insured was limited to sick people, insurance companies would quickly go bankrupt.

To ensure near universal participation, Congress created the individual mandate, which requires individuals to purchase insurance or pay a tax penalty. To keep insurance prices down, Congress encouraged every state to set up a health insurance “exchange” in which people could buy insurance in a competitive marketplace.

But Congress recognized that many individuals could not afford to purchase insurance through these exchanges. To remedy this, Congress set up subsidies in the form of a tax credit.

Congress expected every state to set up an exchange, but provided that the federal government would “operate such Exchange within the state” if a state failed to do so. What Congress failed to anticipate was that the majority of states – especially those controlled by Republicans – would refuse to set up exchanges. Consequently, only 16 states set up exchanges. Others instead directed their residents to the federal exchange, HeathCare.gov.

Now we're ready for that troublesome clause. It says that the subsidy a taxpayer receives will be based upon the premium the taxpayer pays for insurance purchased “through an Exchange established by the State.”

Note those last few words: “established by the State.” The clause doesn't mention subsidies for people who purchased insurance through the federal exchange.

Nevertheless, the IRS issued a regulation that allows subsidies to be claimed by those who purchase health insurance from either a state or the federal exchange.

On Wednesday, the Supreme Court will hear a challenge to this IRS regulation. The challengers say that the IRS can do only what Congress authorized it to do. And since the ACA states that subsidies are available only for health plans purchased through a “state” exchange, the IRS cannot authorize subsidies for plans purchased through the federal exchange. The challengers say Congress made this distinction to encourage states to create exchanges.

Those defending the IRS regulation say that restricting subsidies to purchases from state exchanges would defeat the whole purpose of the ACA, to maximize the number of Americans with health insurance. They also say that the federal exchange is actually 34 separate “state” exchanges that the federal government merely facilitates. Each state still regulates which insurance companies can sell policies, and the premiums are set according to the state's specific risk pool.

If poor people can't use subsidies to buy insurance through the federally-facilitated exchanges, it could be a death blow for the ACA. Millions would be left without insurance, and the economic foundation upon which the ACA is built – that every American obtains coverage – would crumble.

Keep in mind that the Supreme Court is merely being asked to interpret a statute, not the Constitution. The President and Congress could fix the language of the Act in a heartbeat. The problem is that the Republican-dominated Congress wants the ACA to fail.

If the Court upholds the IRS rule, the ACA will likely survive. If it invalidates the rule, the ACA may unravel.

So do you interpret the ACA narrowly by focusing on a single clause and construing the clause so that an exchange “established by the State” precludes a federally-facilitated “Exchange within the state”? Or do you focus on maximizing the number of Americans with health insurance and interpret the Act in a way that furthers rather than frustrates this purpose?

Which approach is judicial activism? Which is judicial restraint?

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