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A frivolous challenge to the Affordable Care Act: Guest opinion

By Ofer Raban

In November, the U.S. Supreme Court granted review in a case that may spell the demise of the Affordable Care Act (ACA). Astoundingly — given the stakes involved and an impending review by our highest court — the legal argument in the case is totally frivolous. I do not use the term "frivolous" lightly. Lawyers can be sanctioned for filing frivolous lawsuits. But there are no two ways about this one: This is a frivolous lawsuit.

At the time that the ACA was enacted, it was hoped that all states would establish health care "exchanges" — paid for by the federal government — where people could shop for and purchase health insurance. Indeed, one provision of the ACA provides that "Each State shall...establish an American Health Benefit Exchange" — thereby implying that states *must* establish such exchanges. It is not surprising, therefore, that the provision extending health insurance subsidies for low income households speaks of insurance purchased on exchanges "established by the state[s]."

However, other provisions of the ACA declare that it is up to the states whether to establish a health care exchange and that if a state chooses not to establish one, the federal government would establish a federally operated substitute. In the end, relentless Republican opposition meant that only 16 states established their own exchanges. In the remaining 34 states, consumers purchase health insurance through federally established exchanges.

Roughly 5.4 million people have purchased insurance through these federal exchanges. Almost 90 percent of those receive federal subsidies. These subsidies are the heart of the ACA: Without them, millions of people would not be able to afford health insurance and would be exempt from purchasing it. And this, in turn, would deprive insurers of the broad-based participation that makes it financially feasible to forbid them to deny coverage or charge higher premiums of sick or high-risk individuals.

The frivolous claim in the case is simple: Since the language in the subsidies provision refers to insurance purchased on exchanges "established by the state[s]," the government is precluded — so goes the claim — from giving those subsidies to those who purchased their insurance on the federally operated exchanges that came to substitute for those state-exchanges that were never established.

This statutory interpretation makes no sense. As one federal judge put it: This "literal reading of the [statute] renders the entire Congressional scheme nonsensical." The ACA stretches over 900 pages, and contains hundreds of provisions which, as often happens, are not always perfectly consistent. (I already mentioned the provision that seems to require state-established exchanges,

and the other that makes it optional.) When faced with such inconsistencies, judges are supposed to effectuate statutes in a sensible manner. But the main argument in the case does not appeal to any good sense. Instead, it appeals to a theory of legal interpretation that abjures good sense in favor of textual literalism: This is the text, they say, and that is all that matters — even if the ensuing result is an "odd" one.

This interpretive fundamentalism, whose most vocal advocate is Justice Antonin Scalia, remains a marginal theory among American judges — and thankfully so. Interpreting statutes in such a senseless manner would have long discredited the law as a useful social institution. It is no surprise, for example, that Scalia was left to protest alone when the Supreme Court recently read the Federal Bankruptcy Code in a nonliteral way, after determining that the literal reading "would produce senseless results that we do not think Congress intended." And yet, the current challenge to the ACA is squarely based on such senseless interpretation.

A frivolous claim is sometimes defined as a claim that no reasonable person could accept. This is clearly mistaken. Reasonable people are known to accept highly frivolous, indeed laughable, claims — because these claims serve their interests, their ideologies or simply their wishes. They may be disingenuous in accepting frivolous claims, or they may be blinded to their frivolity. And besides, not all people are reasonable.

Make no mistake about it: The U.S. Supreme Court is certainly capable of making frivolous legal decisions, and has done so in the past. If the court will adopt this literalist reading of the Affordable Care Act, it will have done so again

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