

Circuit Courts Provide Preview of Coming ACA Confrontations

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The next Supreme Court battle over the Affordable Care Act is likely brewing in the circuit courts. On July 22, 2014, in *Halbig v. Burwell*, a divided D.C. Circuit held that the ACA does not allow the federal government to issue tax credits to those who purchase health insurance on federally-operated exchanges in 36 states. The court reasoned that the ACA makes the credits available only for plans "enrolled through an Exchange established by the State," not through an exchange established by the federal government. Soon after, the Fourth Circuit reached the opposite conclusion in *King v. Burwell*. It held that the ACA is ambiguous and deferred to the Internal Revenue Service's administrative interpretation. In holding the statute ambiguous, the court reasoned that, while limiting the tax credits to state-operated exchanges had a "literal" appeal, the ACA also offered support for the opposite proposition. For example, the ACA defines an "Exchange" as one established by the state, and then provides that the federal government will establish "such Exchange" if the state does not. This creates reasonable grounds to argue that the federal government merely "acts on behalf of the state when it establishes its own Exchange." Additionally, the ACA requires both federally-operated and state-operated exchanges to report on tax credits, which arguably would not make sense unless both had tax credits on which to report. Given the ambiguity, the court deferred to the IRS's interpretation, which it held consistent with Congress's intent of "ensuring the credits' broad availability." **The losing party in either case may seek *en banc* review, and similar cases are pending in federal trial courts in Indiana and Oklahoma.** The Supreme Court is more likely to review the matter if there are conflicting decisions.

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