

King v. Burwell: Setting the Tone for Health Care Politics

March 25, 2015

In 2015, the Affordable Care Act (ACA) will face new challenges in a Republican-controlled Congress, and continued challenges in the courts. The Supreme Court recently granted a writ of certiorari to review a Fourth Circuit Court of Appeals decision upholding a regulation by the Internal Revenue Service, permitting the government to subsidize health insurance on either a federal or state created exchange. A Court decision to restrict the subsidies to state exchanges could make health insurance unaffordable for millions of Americans, threatening the viability of the law's entire health insurance program. Oral arguments were held on March 4.

Background The ACA expands coverage to the uninsured using two mechanisms: expansion of Medicaid and creation of regulated insurance exchanges, where the government would subsidize premiums for lower income individuals. Several lawsuits in multiple jurisdictions have addressed a May 2012 IRS rule, which provides that health insurance premium tax credits are available to certain Americans if they obtain coverage through a federal or state exchange. The plain language of ACA Section 1401 provides health insurance "tax credits" to certain taxpayers who enroll in a qualified health plan "through an Exchange established by the State." Challengers to the IRS rule contend that this wording prohibits the federal government from providing financial assistance to individuals if their state does not run its own exchange, instead relying on the federal exchange. The government points to other ACA provisions that show broader legislative intent, supporting its contention that tax credits are meant for all qualified taxpayers nationwide. Two major cases frame the debate. In *Halbig v. Burwell*, a three-member panel of the Court of Appeals for the District of Columbia issued a decision supporting the plaintiff's assertion that the subsidy is only for individuals who purchased insurance through a state exchange. In *King v. Burwell*, however, the Fourth Circuit upheld the IRS regulation granting subsidies for all qualified individuals regardless of whether they purchased insurance on a state or federal exchange, as a "permissible exercise of the agency's discretion."

Implications of a Supreme Court Ruling If the Supreme Court sides with the Administration, the status quo would be preserved, with ACA subsidies continuing. However, if the Supreme Court rules in favor of the challengers, the subsidy program would be restricted to individuals who purchase insurance through a state operated exchange. Either choice carries far-reaching ramifications. First, **a decision against the government**

might nullify the employer mandate in states that use the federal exchange. There are two major penalties under the employer mandate. The first is assessed against employers that do not offer coverage. However, this penalty only applies if at least one of the affected employees receives a subsidy from a public exchange. If, as a result of a Supreme Court ruling, there are no subsidies, then there would be no employer penalties. The other major penalty applies when an employer offers coverage that is unaffordable for some employees. Any employee who only has access to unaffordable employer-offered coverage is eligible for subsidies in a public exchange—and if the employee gets a subsidy, the employer owes a penalty. Again, with no possibility of subsidies, there is no employer penalty for providing unaffordable coverage. Second, **a victory for the challengers also would deny federal tax subsidies to individuals in the 34 affected states.** Without subsidies, many individuals would be unable to afford to purchase health insurance policies. Without affordable coverage, many individuals would be exempted from the ACA's individual mandate. Enrollees who are unable or unwilling to pay the full cost of their insurance premiums would have their coverage terminated. Those who retain insurance are likely to be sicker than those who drop coverage. This may result in skewed risk pools, exposing insurers to large, unanticipated losses. With a decision expected in mid-2015, *King v. Burwell* could redefine the ACA and health care politics in 2015 and beyond.

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