

POLICY FOCUS

King v. Burwell

RECIPES FOR RATIONAL GOVERNMENT FROM THE INDEPENDENT WOMEN'S FORUM

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WHAT YOU NEED TO KNOW

On March 4, 2015, the Supreme Court will hear oral arguments in *King v. Burwell*. The key issue in this case is how the government may provide subsidies to people buying health insurance through government exchanges created by the Affordable Care Act, or ObamaCare. This case could also determine whether millions of Americans are free from the law's onerous mandates and fines.

There are effectively two categories of exchanges: those "Established by a State" (described in Section 1311 of the law's text) and the federal exchange (described in Section 1321). The statute authorizes the federal government to provide subsidies to enrollees in the state-established exchanges, but not the federal exchange.

When it became clear that many states — today as many as 37 — would not establish their own exchanges, the IRS issued a rule in 2012 allowing those who purchase insurance through the federal exchange to also receive subsidies. Plaintiffs in *King v. Burwell* claim the IRS acted illegally and did not have authority to do this.

Ultimately, it is up to the Court to declare that the Administration must uphold the law as written by Congress, not to refashion the law. A ruling in favor of petitioners in *King* could free millions of people from the law's most onerous provisions, and could present a great opportunity to move past ObamaCare's political stalemate and to seek a better path forward for healthcare policy.

WHY YOU SHOULD CARE

King v. Burwell could impact our system of government as well as our healthcare system. The Court — and the public — should consider the following:

- **The Illegal Actions of the IRS Set Bad**

Precedent: Although it may be difficult to untangle the legal issues in *King v. Burwell* from the politics of ObamaCare, this case is about far more than healthcare subsidies. It's about the Rule of Law and Separation of Powers.

- **This Case Reveals ObamaCare's True Cost:**

This case reveals how great the unsubsidized cost of insurance is under ObamaCare, something many unsubsidized consumers already know all too well. Regardless of the case's outcome, the public should understand that premiums are only "affordable" in the exchanges because much of those costs are being transferred to taxpayers.

- **No One Has to Be Harmed:** Although approximately 6 million exchange enrollees stand to lose subsidies, Congress can and should act to prevent hardship and allow states more freedom in crafting their healthcare policies.

- **The Subsidies Trigger Harmful Mandates:** If the illegal subsidies stopped flowing, millions of individuals and businesses would be freed from ObamaCare's harmful mandates and taxes.

This case could present Congress and states with a great opportunity to move beyond ObamaCare.

MORE INFORMATION

Background

Questions about ObamaCare have already been before the Supreme Court twice: In 2012, the Court heard a challenge to the individual mandate and the coercion of the states to expand Medicaid. In 2014, the Court ruled that the law's contraception mandate violated the federal Religious Freedom Restoration Act.

Importantly, *King v. Burwell* is not a challenge to ObamaCare. It is a challenge to an IRS regulation that petitioners have alleged violates the Affordable Care Act and the Administrative Procedure Act.

Legal scholars have been researching this question of ObamaCare's subsidies since 2011, and the issue appeared in several cases in 2013. The IRS ruled in May 2012 to disperse subsidies through the federal exchange, but plaintiffs had to file suits close enough to 2014 — the first year that the exchanges were to be operational — so that they could show some imminent injury.

Of these cases, *Halbig* and *King* became the most prominent. Renamed to reflect the new Secretary of Health and Human Services, *Halbig v. Burwell* prevailed at the U.S. Court of Appeals in D.C. and *King v. Burwell* lost at the Fourth Circuit Court of Appeals, forming a split circuit. These rulings came down on the same day, July 22, 2014.

Challengers in *King* filed a petition for certiorari with the Supreme Court, which was accepted in November 2014. The oral arguments will be heard March 4, 2015, and the Court will issue a ruling in summer 2015.

Summary of Legal Arguments

The petitioners argue that the language of ObamaCare is very clear: that the payment of federal subsidies is conditioned upon enrollment in an “Exchange established by the State,” as described in Section 1311.

The government argues that this was merely a drafting error. They say that the intent of Congress was to allow subsidies to flow through both Section 1311 and Section 1321 (federal) exchanges. When the language of a statute is not completely clear, administrative agencies must interpret it as best they can, consistent with the spirit of the law.

But challengers have a counter-argument: They make the case that the conditioning of subsidies was intentional, that it was meant to coerce states into creating their own exchanges in order to relieve the federal government of that cost and responsibility. Evidence in the legislative history indicates that the law’s creators meant to use the subsidies as an incentive to prod states into compliance. MIT Professor Jonathan Gruber, a key advisor on ObamaCare’s creation, also confirmed this interpretation in a [videotaped lecture on the law](#) in January of 2012.

The petitioners are asking that the Supreme Court undo the illegal IRS rule. Their main argument is that when the IRS acted to disperse monies from the federal treasury without Congressional authorization, the agency violated the Constitutional Rule of Law and the Administrative Procedures Act, a statute that governs how agencies can regulate.

The petitioners also argue that the IRS rule has resulted in harm for many, including themselves. The subsidies trigger the law’s individual mandate and employer mandate, meaning that without the IRS rule (and without the illegal subsidies) millions of people would be freed from the law’s mandates.

For example, if John Doe’s only option for coverage in the exchange is to pay more than 8 percent of his income in premiums, he can apply for a “hardship exemption” and isn’t required to buy the coverage. He also isn’t required to pay the penalty. This makes sense: If someone is too poor to afford health insurance, penalizing him won’t make the situation any better. Furthermore, in this scenario, John becomes eligible to buy more affordable “catastrophic” coverage that might actually be closer to his needs than other ObamaCare plans.

But, if the IRS sends out an illegal subsidy to a health insurance company on John Doe’s behalf, his part of his premium becomes lower (lower than 8 percent of his income). As a result, John loses his hardship exemption and faces two options: pay his part for the coverage or

pay a penalty. Either way, John Doe must pay. Absent the subsidy, he would have been left unharmed, and could have purchased the more affordable catastrophic plan.

Similarly, if a business owner has employees who qualify for subsidies in the exchanges, the employer faces steeper penalties. All of the petitioners in *King v. Burwell* are either individuals or businesses who stand to be harmed by the illegal IRS rule that sends subsidies to those in non-establishing states.

In the 37 federal-exchange states, it's estimated that a King victory could free **8 million** individuals from the individual mandate and **57 million** workers from the employer mandate.

King Case Reveals ObamaCare's True Costs

To date, approximately 8.6 million people have signed up for ObamaCare through the federal exchange, and 2.8 million have signed up in state-established exchanges. Of course, “signed up” and “enrolled” are different; only about **84 percent** of these signups are expected to pay their premiums, officially “enrolling” them.

According to the Department of Health and Human Services, 87 percent of ObamaCare enrollees rely on federal subsidies to pay part of their premiums. That means that 87 percent of enrollees in the federal exchange, or approximately 6.3 million people, could lose subsidies if the Supreme Court sides with petitioners. But their

loss wouldn't be the fault of SCOTUS; it would be because of ObamaCare itself.

A Kaiser Health survey suggests that **as many as 40 percent** of subsidized customers *do not know* that they are subsidized. It would be easy to miss: The subsidies in the law do not go directly to individuals. Rather, they go to insurance companies on behalf of enrollees so that insurance companies can charge those consumers less.

Therefore, if the subsidies disappear, millions would feel as though their premiums are being hiked. In reality, the higher premiums would only expose how much ObamaCare has driven up the cost of health insurance. After all, the law did much more than create exchanges: It required that all plans provide a long list of benefits and strictly regulated how insurers could design and price their products. All of these regulatory measures come with costs. Unsubsidized customers have sharply felt these effects with rapidly rising insurance premiums.

ObamaCare relied on the artificial mechanism of government subsidies to hide and shift the law's hefty costs away from subsidized consumers and onto the government and ultimately taxpayers. The *King* case reveals how misguided, costly, and unsustainable ObamaCare's structure truly is.

But it doesn't have to be this way.

Possible Solutions

While it would be educational for exchange enrollees to see the full costs of their

unsubsidized coverage, this ultimately could create hardship for many. Congress should act to keep premiums low for the affected consumers.

Congress has many options, and both Houses already have established task forces of legislators dedicated to finding the best solutions. For example, Congress could effectively block grant the subsidies to affected states and give these states the opportunity to reform their healthcare policies in a more market-driven, patient-centered way. Congress could exempt the 37 states from other parts of ObamaCare, like the coverage mandates and insurance regulations that have caused insurance to become so expensive.

States, given this greater freedom, might reevaluate state-level coverage mandates and give consumers more choice to decide what's covered in their plan. They could empower insurers to re-offer plans that ObamaCare cancelled. They could pursue alternative policy prescriptions to protect people with pre-existing conditions, like high-risk pools, or expanding the Health Insurance Portability and Accountability Act. In any case, the choice would be up to states, allowing the laboratories of democracy to seek the best policies.

The bottom line is this: Current-day subsidy recipients in federal-exchange states don't have to face hardship as a result of a ruling in favor of King. Congress can find a responsible solution enabling states to create a better path forward. The Administration should work with Congress

and states to make this a reality. In fact, a ruling against the government in *King v. Burwell* could present a great opportunity to move past ObamaCare's political stalemate and to seek a better path forward for healthcare policy. We should all hope that the Supreme Court upholds the rule of law and sides with petitioners in this important case.

Which Type of Exchange is Your State?

There are actually four different types of exchanges: 14 State-based Exchanges; three Federally-supported Exchanges; seven State-Partnership Exchanges; and 27 Federally-facilitated Exchanges.

The 13 states and Washington, D.C., which use state-based exchanges, would not be affected. The subsidies in these exchanges were clearly authorized by Congress. These states are: California, Colorado, Connecticut, Hawaii, Idaho, Kentucky, Maryland, Massachusetts, Minnesota, New York, Rhode Island, Vermont and Washington State.

The seven state-partnership exchanges would be affected. While these states offer customer assistance, the federal government manages the other aspects of the exchange, like enrollment through Healthcare.gov. Legally, these are Section 1321 exchanges, just like the federal exchange. These states are: Arkansas, Delaware, Illinois, Iowa, Michigan, New Hampshire, and West Virginia.

There is some controversy about how a ruling might affect the federally-supported exchanges in Nevada, Oregon, and New Mexico. Therefore, some analysts say the ruling will impact 37 states; some say 34.

It is clear, however, that consumers in the 27 states in the federally-facilitated exchange would lose subsidies and experience changes in the implementation of the law's mandates if the Court rules against the government.

WHAT YOU CAN DO

- **Get Informed:** Learn more about the *King v. Burwell* case. Visit:
 - [Competitive Enterprise Institute \(CEI.org\)](http://CompetitiveEnterpriseInstitute.org)
 - [The Galen Institute \(Galen.org\)](http://TheGalenInstitute.org)
 - [The Cato Institute \(Cato.org\)](http://TheCatoInstitute.org)
- **Talk to Your Friends:** Help your friends and family understand these important issues. Tell them about what's going on and encourage them to join you in getting involved.
- **Become a Leader in the Community:** Get a group together each month to talk about a political/policy issue (it will be fun!).

Write a letter to the editor. Show up at local government meetings and make your opinions known. Go to rallies. Better yet, organize rallies! A few motivated people can change the world.

- **Remain Engaged:** Too many good citizens see election time as the only time they need to pay attention to politics. We need everyone to pay attention and hold elected officials accountable. Let your Representatives know your opinions. After all, they are supposed to work for you!

ABOUT THE INDEPENDENT WOMEN'S FORUM

The Independent Women's Forum (IWF) is dedicated to building support for free markets, limited government, and individual responsibility.

IWF, a non-partisan, 501(c)(3) research and educational institution, seeks to combat the too-common presumption that women want and benefit from big government, and build awareness of the ways that women are better served by greater economic freedom. By aggressively seeking earned media, providing easy-to-read, timely publications and commentary, and reaching out to the public, we seek to cultivate support for these important principles and encourage women to join us in working to return the country to limited, Constitutional government.

We rely on the support of people like you! Please visit us on our website www.iwf.org to get more information and consider making a donation to IWF.

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