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& POLICY INNOVATION  
Harvard Law School

122 Boylston Street, Jamaica Plain, MA 02130  
Phone: 617-522-3003 • Fax: 617-522-0715  
Web: [www.chlpi.org](http://www.chlpi.org) • Email: [chlpi@law.harvard.edu](mailto:chlpi@law.harvard.edu)

**KING V. BURWELL ACA CASE UPHELD:  
THE SUPREME COURT RULING ALLOWS FIVE MILLION AMERICANS  
IN STATES WITH FEDERALLY-RUN EXCHANGES  
TO CONTINUE TO RECEIVE HEALTH INSURANCE SUBSIDIES**

**Introduction**

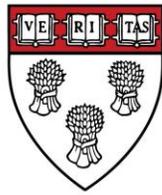
On June 25, 2015, the Supreme Court announced its decision in favor of the Government in *King v. Burwell*, a case challenging an IRS rule holding that individuals purchasing private health insurance in both Federal and State-run health insurance exchanges (Exchanges) are eligible for tax subsidies as a valid interpretation of the Affordable Care Act (ACA). This case had the potential to severely undermine and possibly implode the ACA. At issue was language in the ACA that the challengers argued limits such subsidies only to State Exchanges. If the challengers had prevailed, potentially five million Americans who recently gained coverage under the ACA would have lost their access to health insurance and health care<sup>i</sup> and the health insurance industries of 34 States would have been seriously harmed. This decision is a major victory for advocates of health care reform.

**One short, problematic phrase: The challenge to the ACA brought in *King v. Burwell***

The recent challenge to the ACA was to the validity of an IRS rule<sup>ii</sup> that allows individuals to receive tax subsidies (also known as premium tax credits, or advanced premium tax credits) for qualified health plans purchased on either State or Federal Exchanges.<sup>iii</sup> In particular, plaintiffs in several courts across the country, including the challengers in *King*, alleged that the ACA only authorizes subsidies for individuals who purchase plans through State Exchanges, and not those run by the Federal Government. These plaintiffs do not want to be required to purchase health insurance. If they are ineligible for subsidies the challengers would be exempt from the ACA's coverage requirements because the cost of available health insurance would be over 8 percent of their household income, allowing them to qualify for a hardship exemption. To support their contention that they are not eligible for subsidies, the challengers pointed to the section of the ACA that describes how the subsidies are calculated.<sup>iv</sup> When describing what premium assistance means, this section refers to taxpayers who purchase qualified health plans "through an Exchange *established by the State.*"<sup>v</sup> The *King* challengers argued that this particular language means that only individuals who purchase health plans in Exchanges set up specifically by individual States are eligible for tax credits or subsidies. They further suggested that this was intentional on the part of lawmakers in order to place additional pressure on States to establish their own Exchanges. They therefore contended the IRS exceeded its authority in allowing individuals in Federal Exchanges to be eligible for subsidies.

**Understanding health care economics: The Court acknowledges the three-prong structure of the ACA**

Chief Justice Roberts, writing the majority opinion for the Court and joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor and Kagan, focused initially on the three-prong structure of the ACA as well as previous efforts at health care reform. The Court acknowledged that previous efforts at health care reform failed when they prohibited insurers from screening out or charging enrollees higher premiums for pre-existing conditions without requiring individuals to purchase health insurance before they became sick. This created economic "death spirals" in which only sick individuals would buy insurance, which would raise the price of premiums and which would, in turn, discourage even more healthy people from purchasing health insurance, leading to further price increases. The Court noted that the ACA, like the 2006 Massachusetts health care reform on which it was based, sought to avoid death spirals by adopting three interlocking, key reforms: (1) removing pre-existing conditions screening and premium pricing; (2) requiring individuals to either purchase



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health insurance coverage or pay a tax penalty; and (3) providing refundable tax credits (subsidies) to individuals with household incomes between 100-400 percent of the federal poverty level to make health insurance more affordable.

The grasp on health insurance economics displayed by the Court was impressive. More importantly, the keen understanding of the ramifications of removing the subsidies in 34 States informed the rest of the Court's decision and its interpretation of Congressional intent when it came to the purpose of the ACA. Many amicus briefs, including one submitted by the Center for Health Law and Policy Innovation and its partner organizations, helped explain the consequences of removing the subsidies to the Court.

### **Reading the ACA: The Court uses context to interpret ambiguous language relating to the subsidies**

The Court initially acknowledged that the provision at issue—that the subsidies depend in part on whether an individual has enrolled in an insurance plan through “an Exchange *established by the State* under section 1311 of the Patient Protection and Affordable Care Act”<sup>vi</sup>—initially suggests that Exchanges established by the Federal Government are excluded from the subsidy program. Indeed, elsewhere in the ACA “State” is explicitly defined as “each of the 50 States and the District of Columbia.”<sup>vii</sup>

However, the Court went on to explain that when read in the context of the broader statute, “the meaning of the phrase ‘established by the State’ ‘is not so clear.’”<sup>viii</sup> For example, elsewhere in the ACA, a provision provides that if a State does not establish its own Exchange, the Federal Government shall establish “such Exchange.”<sup>ix</sup> According to the Court, this provision suggests that “State Exchanges and Federal Exchanges are equivalent—they must meet the same requirements, perform the same functions, and serve the same purposes.”<sup>x</sup> As a result of several provisions that treat the State and Federal Exchanges as interchangeable, it is impossible to determine from the plain language of the provision “established by the State” if the phrase must be limited in its reach to State Exchanges or refers to all Exchanges.<sup>xi</sup> Similarly, the Court also noted that several other ACA provisions assume subsidies will be available on both State and Federal Exchanges, such as a requirement for all Exchanges to create outreach programs to distribute information about the availability of the subsidies.<sup>xii</sup> This again supports the position that the language at issue is ambiguous.

When statutory language is ambiguous, courts often use what is called the *Chevron* test to evaluate the validity of a governmental agency rule made under the authority of that statute by determining if the interpretation by the government agency of the relevant statute is a reasonable one.<sup>xiii</sup> Surprisingly, the Court declined to use the *Chevron* test, arguing this test “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”<sup>xiv</sup> Because whether the subsidies are available through Federal Exchanges is a question of deep economic and political significance, the Court determined that Congress would not have implicitly delegated this decision to the IRS, an agency with little experience in health care policy.<sup>xv</sup> Therefore, the Court concluded that it must interpret the problematic language of the ACA itself, turning to the broader structure of the ACA to determine the meaning of the language and to support the overall purpose of the ACA.

At this point, the Court found that “the statutory scheme compels us to reject petitioners’ interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange and likely create the very ‘death spirals’ that Congress designed the Act to avoid.”<sup>xvi</sup> The Court noted that, in 2014, 87 percent of people who bought insurance on a Federal Exchange did so with subsidies. Without these subsidies, almost all of these individuals would become exempt from the individual mandate because they would not have any affordable health insurance coverage available.<sup>1</sup> The

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<sup>1</sup> Individuals may obtain a hardship exception to the individual mandate when all available health plans would cost more than 8.05% of household income.



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massive exodus from the insurance markets, coupled with the prohibition on pre-existing condition screenings, would result in significant health insurance premium increases—47 percent in one study cited by the Court.<sup>xvii</sup> This would severely destabilize the health insurance markets in States with Federal Exchanges.

The Court found it “implausible that Congress meant the Act to operate in this manner.”<sup>xviii</sup> This is because Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.”<sup>xix</sup> Therefore, Congress would not have the viability of the ACA (and of the insurance industry in the States that do not operate their own Exchanges) hinge on a sub-sub-sub section of the Tax Code.

Lastly, the Court closed by discussing principles of statutory interpretation, most likely as a response to the dissent authored by Justice Scalia and joined by Justices Thomas and Alito. The Court warned against provisions that may seem plain when viewed in isolation but turn out to be untenable when read in the broader context of the statute. Because of the need to consider provisions in the broader context, the Court had to deviate from the plain meaning of the contested language “established by the State” and to consider the Congressional intent behind the ACA. Since “Congress passed the Affordable Care Act to improve the health insurance markets, not to destroy them”<sup>xx</sup> the Court was compelled to interpret the key language in a manner to preserve the subsidies.

### **Quite absurd: Justice Scalia’s dissent from the majority opinion**

Justice Scalia dissented and was joined by Justices Thomas and Alito. In a spirited dissent, Scalia argued that the majority’s conclusion was “quite absurd” and that “words no longer have meaning if an Exchange that is *not* established by the State is ‘established by the State.’”<sup>xxi</sup> He also suggested that “[w]e should start calling this law SCOTUScare.”<sup>xxii</sup> In general, the dissent reiterated the arguments of the plaintiffs as described above.

### **Disaster averted: The impact of the Supreme Court’s ruling in *King v. Burwell***

The Court’s decision in *King v. Burwell* is a major victory for individuals seeking affordable health care coverage. Millions of consumers across 34 States who rely on the subsidies to afford their health care insurance coverage will keep their access to health care. This is a major victory for the American health care system and a step in the right direction for achieving universal health care coverage. The loss of the subsidies could have also had major ramifications for upcoming political elections and for the health care industry. In particular, insurers and health care providers would have been extremely vulnerable and many of those companies would have had to shut down or downsize, harming the economy.

Not only did the Court uphold the subsidies available on the Federal Exchanges, the reasoning behind the decision provides strong protection for consumers under future presidential administrations. Had the Court applied the *Chevron* test, the subsidies would have been upheld by the current IRS rule. However, an IRS in the future, perhaps under a more conservative president, could have chosen to interpret the language differently and removed subsidies from the Federal Exchanges. Because the Court itself decided that the only permissible statutory reading of the contested language was to permit subsidies on both the State and Federal Exchanges, future administrations cannot remove the subsidies from the Federal Exchanges without Congressional action.

### **Won the battle, winning the war: Next steps in a post-*King v. Burwell* world**

Meaningful health care access, however, is still not guaranteed for all Americans. Because of an earlier Supreme Court ruling, *NFIB v. Sebelius*,<sup>xxiii</sup> States are not required to expand their Medicaid programs to all individuals under 138 percent of the federal poverty level. As a result millions of Americans across 22 States are still denied health care access because



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they are too “poor” for subsidies and too “rich” for traditional Medicaid. Advocates must continue to put pressure on State policymakers to accept Medicaid expansion in every State. Additionally, because of the uncertainty of the impact of *King*, Federal regulators, such as the Department of Health and Human Services, were reluctant to implement many regulations needed to improve the experience of consumers in the current Exchanges. Advocates must remind Federal regulators that now that the subsidies are here to stay, it is the responsibility of the Government to make sure that individuals enrolled in plans through the Exchanges actually receive the promises of the ACA in the form of meaningful health care access and coverage.

*CHLPI welcomes questions about King v. Burwell and other health care law, policy, and reform issues, including questions relating to next steps. If interested, please contact Carmel Shachar at [cshachar@law.harvard.edu](mailto:cshachar@law.harvard.edu).*

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<sup>i</sup> Since its enactment in 2010, there have been many challenges to the Affordable Care Act, including, most notably, *NFIB v. Sebelius*, in which the United States Supreme Court upheld the individual mandate but effectively made Medicaid expansion optional for states. More recently, in *Burwell v. Hobby Lobby*, the Supreme Court found that closely held corporations (such as Hobby Lobby), may request an accommodation (based on religious objection) to the requirement that employer sponsored insurance plans provide coverage, without cost-sharing, of all methods of birth control approved by the FDA. Employees of such businesses will have access to birth control, but it is presently unclear how such coverage will be provided, as the government has yet to respond to this issue since the decision was rendered (the government can either expand the existing program that provides for such coverage for employees of non-profit corporations or it can create an entirely new program). Despite these rulings, the ACA continues to provide health coverage to millions of Americans, with over 8 million people newly enrolled in health coverage through marketplaces, with an additional 4.8 million in Medicaid.

<sup>ii</sup> 26 C.F.R. § 1.36B-1(k) (2012).

<sup>iii</sup> To ensure that millions more Americans can purchase health care, the ACA provides for the establishment of “exchanges” on which people can purchase health insurance. These exchanges can be run by either the state or federal government.

<sup>iv</sup> 26 U.S.C. 36B (2011).

<sup>v</sup> 26 U.S.C. § 36B (2010).

<sup>vi</sup> 26 U.S.C. §§ 36B(b)-(c).

<sup>vii</sup> 42 U.S.C. §§ 18024(d).

<sup>viii</sup> *King v. Burwell*, No. 14-114, slip op at 10 (June 25, 2015) (available at [http://www.supremecourt.gov/opinions/14pdf/14-114\\_q011.pdf](http://www.supremecourt.gov/opinions/14pdf/14-114_q011.pdf)).

<sup>ix</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1321, 123 Stat. 119 (2010).

<sup>x</sup> *King*, slip op at 10.

<sup>xi</sup> *King*, slip op at 11-12.

<sup>xii</sup> 42 U.S.C. § 18031(i)(3)(B).

<sup>xiii</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>xiv</sup> *King*, slip op at 8 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

<sup>xv</sup> *King*, slip op at 8.

<sup>xvi</sup> *King*, slip op at 15.

<sup>xvii</sup> *King*, slip op at 17 (citing E. Saltzman & c. Eibner, *The Effect of Eliminating the Affordable Care Act’s Tax Credits in Federally Facilitated Marketplaces* (2015)).

<sup>xviii</sup> *King*, slip op at 17.

<sup>xix</sup> *King*, slip op at 20 (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)).

<sup>xx</sup> *King*, slip op at 21.

<sup>xxi</sup> *King* dissent at 1-2.

<sup>xxii</sup> *King* dissent at 21.

<sup>xxiii</sup> 567 U.S. \_\_\_ (2012), 132 S.Ct 2566.