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The Supreme Court and the Affordable Care Act: Round Two

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In what many consider to be an unusual move, the Supreme Court agreed to hear a high-stakes case about the legality of premium subsidies for low- and moderate-income individuals enrolling in health coverage offered under the Affordable Care Act (ACA).

The Court will review a unanimous decision by a Fourth Circuit panel in *King v. Burwell*. That panel upheld the Internal Revenue Service's (IRS) interpretation of the ACA to permit premium subsidies for individuals enrolled in health plans offered through "federally facilitated exchanges" (FEEs). On the very same day, the D.C. Circuit reached a contrary conclusion in *Halbig v. Burwell*. The panel there held that the text of the ACA "unambiguously forecloses" the IRS's interpretation and "limits the availability of premium tax credits to state-established Exchanges." The full D.C. Circuit later vacated this decision and agreed to rehear the case in mid-December sitting en banc (though the Circuit has now removed *Halbig* from its calendar pending a ruling in *King*).

Commentators, and even the government, have argued that the Supreme Court's grant of certiorari in *King* is unusual. At the time of the grant, there was no circuit split, lower courts were still actively considering the relevant legal question, and the D.C. Circuit had scheduled en banc review. However, the Rules of the Supreme Court permit the Court to grant cert to consider "an important question of federal law that has not been, but should be, settled by [the] Court." Additionally, by the customary "Rule of Four," the Court will review a case on cert if four Justices vote in favor of granting.

Stakeholders on both sides of the question in *King* agree that the Supreme Court's decision could have enormous implications. Many assert that a ruling striking down the IRS interpretation would jeopardize the overall framework of the ACA in several key ways:

Affordability of Coverage. Most obviously, striking down premium subsidies would likely make coverage unaffordable for millions of Americans. As of mid-2014, an estimated 5.4 million people had purchased health coverage through an FFE. Of these enrollees, almost 90% received subsidies due to their low or moderate incomes.

Impact on Individual Mandate. Individuals who "cannot afford coverage" are exempt from the penalty for failing to comply with the individual mandate. Because premium subsidies help determine whether coverage is "affordable," low- and moderate-income individuals without access to subsidies might be effectively exempt from the mandate. This would create a greater risk of "adverse selection," or the tendency for only the sickest individuals to enroll in health coverage, and thus drive up premiums.

Effect on Employer Mandate. Similarly, the employer mandate is only effective against employers if at least one full-time employee is enrolled in coverage for which premium subsidies are allowed. Thus, the mandate would no longer operate against employers whose employees reside exclusively in affected states.

Uncertain Application for States. It is also unclear how a ruling vacating the federal rule would affect the 37 states that participate in some way in the FFE. According to HHS, fifteen of these 37 states have hybrid "partnership" exchanges in which States and the federal government share exchange responsibilities. Another

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three states have State-based exchanges that rely on the federal exchange's information technology platform to perform certain functions. It is uncertain whether the Court will consider these eighteen exchanges to have been "established by the State" under the key statutory text. It is also unclear whether affected States that have tightened Medicaid eligibility standards since passage of the ACA would risk losing federal Medicaid funding as a result of an ACA provision that prevented such tightening until after "an Exchange established by the State . . . is fully operational." Finally, it is unclear whether States could circumvent any of the various impacts of a ruling striking down the premium subsidy rules by establishing "shell" or bare-bones exchanges that rely on the federal exchange to perform most functions.

A Supreme Court ruling in *King* is expected by late June 2015. The Court will be grappling with a difficult question of statutory interpretation. If the decision rejects the IRS position, a prolonged period of uncertainty will result with serious consequences for millions of people.

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