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Why the Supreme Court will overrule the IRS

By Michael F. Cannon

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Kevin Pace is a jazz musician who teaches music appreciation in Northern Virginia. When the IRS announced it would impose the Affordable Care Act's employer mandate here in the Old Dominion, Pace's employer cut hours for part-time professors in order to avoid steep penalties. Pace lost $8,000 in income. That would be bad enough if the penalties the IRS is now imposing on Virginia employers were legal. Yet two federal courts have held they are not.

In King v. Burwell, four Virginia taxpayers are challenging the IRS's decision to impose Obamacare's major taxing and spending provisions in states that refused to establish a health-insurance "exchange." As provided in the Affordable Care Act, the federal government established fallback exchanges (HealthCare.gov) in those states.

But the act authorizes premium subsidies — and certain taxes that those subsidies trigger — only "through an Exchange established by the State." In spite of that clear statutory requirement, the IRS is issuing premium subsidies and imposing those taxes in 34 states, including Virginia, that did not establish exchanges. The King challengers allege the IRS is subjecting them, Kevin Pace and 57 million other Americans to illegal taxes in the form of Obamacare's individual and employer mandates. The Supreme Court heard oral arguments earlier this month, and will likely rule by June.

Times-Dispatch columnist A. Barton Hinkle's "The case against Obamacare is looking weaker," March 23 — is skeptical of the challengers' claim that Congress intended to authorize the disputed taxes and spending only in states that established exchanges. I used to share his skepticism. I no longer do.

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In 2011 and 2012, I researched and wrote — along with Case Western Reserve University law professor Jonathan H. Adler — a law-journal article that explains why the IRS's actions are illegal. Our work laid the foundation for King and three similar cases. To our knowledge, we have done more research on the question of what Congress really meant than anyone.

When we began, we knew Congress routinely conditions benefits to individuals on states implementing federal programs. The Supreme Court has held that Congress cannot compel states to implement such programs, but it can create incentives for states to do so. Medicaid is an

example. Congress offers states billions of dollars — but only if the states run health-care programs for the poor that meet federal standards.

Still, we assumed Congress must have made a drafting error when it authorized premium subsidies only in states that establish an exchange. Personally, I thought the ACA's authors would never intentionally condition this essential piece of the law's regulatory scheme on state cooperation. Our research forced me to re-evaluate that assumption.

First and most important, we examined the ACA itself, which is clear and consistent. It authorizes exchange subsidies only "through an Exchange established by the State." It neither defines the federal government as a "State," nor defines federal fallback exchanges or exchanges generally as having been "established by the State." Every jot and tittle of the statute is completely consistent with the plain meaning of this limitation, which was added to the bill in multiple places and at multiple stages of the drafting process.

Second, we researched the legislative history. We researched the Congressional Record and examined every single mention of "exchanges" during the debate over the ACA. We pored over hundreds of media accounts. We spoke to dozens of reporters who covered the debate. We found that not a single member of Congress ever claimed the ACA authorized subsidies in federal exchanges. Not. Even. Once.

Our prior assumption about what Congress intended was uninformed. It literally had no support in either the statute or the legislative history. To this day, I am surprised, and a little embarrassed, that I could have been so wrong.

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What we did find surprised us even more. Everything in the legislative history that sheds light on what Congress intended supports the plain meaning of the language limiting premium subsidies to those who obtain coverage "through an Exchange established by the State."

- The lead author of the ACA, then-Senate Finance Committee Chairman Max Baucus, D-Mont., had proposed — and even gotten Congress to enact — other health-insurance tax credits and subsidies that were conditioned on states taking certain actions.
- Senate Democrats similarly considered letting individual states opt out of the Democrats' cherished "public option."
- Congressional Democrats considered other bills in 2009 that explicitly did authorize subsidies in federal exchanges. But they discarded that language in favor of the ACA's approach.
- More than a dozen Senate Democrats championed a bill that explicitly conditioned exchange subsidies on states implementing that bill's employer mandate. Those senators discarded that condition in favor of the ACA's approach of explicitly conditioning premium subsidies on states implementing exchanges.

- Eleven House Democrats from Texas recognized and even complained that states could prevent their residents from receiving "any benefit" under the ACA, including premium subsidies, simply by refusing to establish exchanges. In early January 2010, they pleaded for House Speaker Nancy Pelosi and President Barack Obama to support one of the bills that explicitly authorized subsidies in federal exchanges. Yet all 11 of them ended up voting for the ACA, despite their reservations.
- One of the ACA's architects and a paid consultant to the Obama administration, Massachusetts Institute of Technology health economist Jonathan Gruber, repeatedly described the ACA by saying: "If you're a state and you don't set up an exchange, that means your citizens don't get their tax credits."

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The sole source Hinkle cites to support his continued skepticism is Washington & Lee University law professor Timothy Jost. Ever since Adler and I first blew the whistle on the IRS in 2011, Jost has been our most persistent critic.

Which is not to say Jost has been our most consistent critic. In 2011, he wrote the ACA "clearly says" what we claim. He now argues the ACA clearly says the opposite. Where he once described the relevant language as an "obvious" "drafting error," a "scrivener's error," and a "mistake," he now admits it was none of these things. He also claimed, variously and confidently, that "it is not possible to conceive of a person" who would have standing to challenge the IRS in court, then that only employers could, and finally that no one could until 2015. Each claim proved false.

Most interesting, Jost wrote in 2011 that there could be "no coherent policy reason" to offer subsidies only through state-established exchanges. We later discovered that in early 2009, Jost himself proposed "offering tax subsidies for insurance only in states that complied with federal requirements," complete with his own coherent policy reason: to induce state cooperation. To my knowledge, Jost has never explained the contradiction.

For four years, Jost and other IRS defenders have gone on a fishing expedition in the ACA and its legislative history to find something, anything to support what they too assumed Congress intended. Every time they claim they have a nibble, however, we find a car tire or an old boot on the end of their line.

It's fair to be skeptical of the King challengers. Skepticism should yield to evidence, however, and all the evidence is on the challengers' side.

Moreover, we should be far more skeptical of those with power than those without it. King v. Burwell asks whether the IRS is reaching beyond its statutory powers and imposing taxes by fiat. This is no small matter. This nation fought a war — its first war — over taxation without representation.

The burden of proof should be on the IRS to show that the people's elected representatives clearly authorized any tax the agency seeks to impose. Unfortunately for the King challengers, Kevin Pace and 57 million other Americans, that's not where the burden lies, the American Revolution notwithstanding.

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