



## **Will 9.6 million Americans lose their health insurance?**

**The future of ‘Obamacare’ is at stake in today’s King v. Burwell arguments at the Supreme Court**

By David K. Jones

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The Supreme Court today will hear oral arguments in King v. Burwell, another challenge to the Affordable Care Act (ACA). The case concerns tax subsidies for lower-income people (those earning 100 to 400 percent of the federal poverty level) who purchase coverage through an insurance exchange.

The challenge hinges on the meaning of four words in the law, “established by the State.” Opponents of the law argue that this should be read to mean that no one outside the 16 states (plus D.C.) that chose to create their own insurance exchanges may receive subsidies.

The law’s supporters believe reading this passage out of context is misleading and inconsistent with the many parts of the law articulating the goal of affordable health care for all Americans. For example, Nicholas Bagley, a law professor at the University of Michigan and a former clerk to Supreme Court Justice John Paul Stevens, argues, “As the Supreme Court has said time and again, no provision of a statute should be read in isolation. Laws must be read as a whole, with an eye to harmonizing their interdependent parts.”

The case largely hinges on what Congress intended when it wrote the law. Opponents say that this wording was a deliberate threat to scare states into creating their own exchanges. This claim is only partly true. The law did threaten resistant states with the loss of control over regulation and governance — but not with the loss of subsidies. I am one of 36 health policy scholars who submitted a brief to the Supreme Court providing evidence from the congressional record that Congress intended the subsidies to be available in every state.

This is consistent with how states decided whether to do an exchange. I interviewed more than 150 state and federal leaders from 2011 to 2014 for a book I am writing about the creation of health insurance exchanges. Nobody I spoke with suggested that congressional Democrats wrote the ACA to limit financial assistance to cooperative states. I did not encounter the idea until early 2012 when a handful of tea party activists quoted Michael Cannon, the director of health policy studies at the conservative Cato Institute, describing this as an unfortunate typo.

Only three more states — Idaho, New Mexico and Minnesota — would go on to create exchanges. I interviewed nearly everyone involved in the debates of two of those states (Idaho and New Mexico) and heard a lot of concern about the federal government overstepping its bounds and intruding on state regulation of health insurance. Some lawmakers believed premiums and user fees would be more affordable in a state-based exchange, but none of them said they supported an exchange to ensure that their state's residents received subsidies.

Steven Brill makes the same observation about researching his book on the ACA's enactment. He explains that as a journalist, he typically does not take sides in the stories he's investigating but that this case is clear. He says he interviewed nearly everyone involved with creating the law, in most cases before *King v. Burwell* and its companion case *Halbig v. Burwell* offered the obstructionist arguments du jour. "In no document from start to finish, in a legislative process that spanned more than two years, is there even a hint of anything but the unambiguous assumption that the law would indeed provide these insurance subsidies for all Americans who needed them," Brill says. Federal and state legislators submitted a brief affirming that this is what they understood the law to mean.

The implications of the case go well beyond a technical debate about the meaning of four words. Scholars are predicting drastic consequences if the Supreme Court rules in favor of the plaintiffs. The deans of 21 schools of public health, along with dozens of professors, submitted a brief arguing that eliminating the tax credits would "lead to a loss of improvements in access to care, worsening health and more preventable deaths."

In all, an estimated 9.6 million people could lose coverage as a result of this case, with the average premiums in the nongroup market increasing by as much as 35 percent. Joel Ario — the first director of the Office of Health Insurance Exchanges at the Department of Health and Human Services — and colleagues explain that this would result in "an individual insurance market even more dysfunctional than the one we had before the ACA was enacted." This outcome would be especially painful for hospitals that accepted payment cuts in Medicare and Medicaid because they expected to swallow less in uncompensated care costs as more people got insurance.

### **Subsidy showdown**

A political Catch-22 is limiting public discussions about how states and the White House can prepare for an adverse decision. Supporters of the law want to develop contingency plans to

minimize the damage they believe would result from a ruling for the plaintiffs but are afraid that discussing workarounds would signal to the court that eliminating the tax credits would not do much damage. On the other hand, opponents want to project confidence that the court will rule in their favor but are worried about a public backlash if they do not have a plan to help the millions of people who would suddenly be without coverage.

It is important to remember that the question before the Supreme Court right now is about statutory interpretation, not constitutionality. The issue is about how the Internal Revenue Service applied the law to tax subsidies, not whether the law should be struck down. As a result, there is a relatively simple fix. Congress could pass a law clarifying that everyone meeting the income requirements receives a tax credit, regardless of what state they live in.

This is not likely to happen, given the current dysfunction on Capitol Hill. Republican lawmakers are writing op-eds saying they have plans to mitigate the effects of the ruling — likely as a way to reassure conservative Supreme Court justices that it is safe to rule for the plaintiffs. But as journalist Ezra Klein points out, these plans don't have many details. And even if they did, their odds of passing in this Congress are slim. House Republicans have already passed dozens of bills to repeal the entire ACA. They are not likely to support a plan that restores, even temporarily, a key component of the law.

If Congress does anything, it is most likely to change the deadline for making a long-term decision. The recent editorial by Republican Sens. Lamar Alexander, Orrin Hatch and John Barrasso does just that. They are right that “it would be unfair to allow families to lose coverage, particularly in the middle of the year.” With such an extension in place, it is hard to imagine Congress going much further. President Barack Obama would likely veto anything that undermines the ACA, and Republicans will not settle for anything that supports the law's framework.

The congressional response to *King v. Burwell* has deftly been labeled a subsidy shutdown, bringing to mind the other policies being held hostage while a vocal minority tries to get its way. Congress even struggles to compromise on a budget to keep the Department of Homeland Security running and faces upcoming deadlines on the Medicare sustainable growth rate, the debt ceiling, the Children's Health Insurance Program and the Healthy, Hunger-Free Kids Act.

It might seem unthinkable that Congress would allow insurance coverage for 9.6 million to remain in limbo. Yet the best this Congress might be capable of — in response to *King v. Burwell* or any of these policies — is a brief extension. With less than two years until the next presidential election, Republicans may prefer to wait and see who emerges as their nominee. This will allow them to remain united and position them to get deeper changes to the ACA than would be possible while Obama is still in office. In the meantime, millions of people risk losing coverage, and the insurance markets in 36 states face actuarial chaos.