



SCOTUS pick up of 'Obamacare' appeal rooted in cynicism, say legal critics

Analysis: Justices will hear challenge to health care subsidies centered on deliberately narrow interpretation of act

[Elijah Wolfson](#)

November 9, 2014

Over four years ago, an employee benefits lawyer named Tom Christina volunteered to join a team at his Greenville, South Carolina, law firm tasked with reading through the massive piles of paperwork generated by the recent signing into law of the Patient Protection and Affordable Care Act (ACA).

Despite “not really looking for holes in the law,” he ended up uncovering a small piece of language — an error, a flaw or an unfortunate piece of sloppy drafting, depending on whom you ask — that could threaten the fabric of the Obama Administration’s health care reform.

The discovery was a statutory phrase buried deep in the documentation: the law says that people qualify for health insurance tax credits when they buy their insurance policies on an online marketplace “established by the state.”

Those four words launched a plethora of legal salvos against the ACA, or "Obamacare" as it is more commonly known. After hearing Christina present his findings at an [event](#) hosted by the American Enterprise Institute, Jonathan Adler, a law professor at Case Western Reserve University ran with it. Adler highlighted the discovery at a [symposium](#) at the Kansas University Law School, publish a [peer-reviewed paper](#) on the subject and, collaborating with economist Michael Cannon of the conservative think tank the Cato Institute, [worked tirelessly to bring it to the public’s attention](#).

In the course of the next few years, the four-word phrase became increasingly relevant. "Obamacare" rolled out; about 7.3 million Americans enrolled, according to an [Administration announcement](#) in September. An earlier Department of Health and Human Services (HHS)

report stated that 87 percent of those enrolled had purchased plans with tax credits attached to them — that’s about 6.35 million subsidies.

Adler, Cannon and others argue that a massive chunk of these subsidies are illegal. This is because only 14 states decide to set up their own insurance exchanges; the rest chose to use the federal government’s, known to the public as HealthCare.gov. And, they say, by the letter of the law, subsidies can only be given to those people who bought their insurance on exchanges that were “established by the state.”

Soon, the issue was taken to the courts. In *King v. Burwell*, a three-judge panel in the Fourth Circuit Court, based in Richmond, Virginia, voted unanimously to reject the plaintiff’s complaint. The plaintiff appealed. Meanwhile, in the nearby D.C. Circuit Court, a three-judge panel ruled in favor of the plaintiff in a similar case, *Halbig v. Burwell* — however, soon afterwards, the full D.C. Circuit stated they would review that decision as a whole.

On Friday, the Supreme Court [granted review](#) — or certiorari, or cert, to give it the technical term — of *King v. Burwell*.

Many legal experts were surprised by the Supreme Court’s decision [to hear the King case](#) before the *Halbig* review was completed. The thinking was that if the D.C. circuit voided the original decision, the Supreme Court would have ignored both the *King* and *Halbig* cases — with no split between the Circuit courts, there’d be no reason for them to weigh in.

Which is one reason many of those same experts are now suggesting that cynicism is at the heart of the Supreme Court decision.

“If cert had been granted after there was a circuit split, then I think it would have been completely expected and legitimate,” said Russell Korobkin, a professor of health care law at the University of California, Los Angeles. “But the fact that cert was granted at this time does to me strongly suggest there are four justices who are more interested in killing the ACA than in any question of proper judicial etiquette.”

Though he did not name them, Korobkin appeared to be referring to Justices Antonin Scalia, Clarence Thomas, Samuel Alito and Anthony Kennedy — the four who voted in the minority against the constitutionality of the ACA’s individual mandate in the summer of 2012, and, some say, want another shot at kicking “Obamacare” to the curb.

There are major political overtones to the decision, added Korobkin’s colleague, law professor Allison Hoffman. “The fact that the court took this case in the very week that Republicans had a major win at the polls and the fact that they are taking the case at all when they did not have to suggest that it is possible that the court could be reaching to try to deliver a blow to the ACA,” she said.

Of course, there is no way to tell what the Supreme Court is thinking, given that they do not disclose their reasons for granting cert. Abigail Moncrieff, an expert in health care law at Boston University, said that they may just be genuinely playing a “useful” role in “policing the

relationship between the executive branch and Congress.” These cases, Moncrieff said, are in part about whether the rules put in place by the president undid the careful bargain Congress struck when finally coming to terms on the ACA. “There is a high-minded debate going on alongside the lowbrow crass political debate over whether or not the ACA should stand,” said Moncrieff.

On the other hand, she added, the high-minded debate “can serve as a kind of beard” to cover up what is really at stake.

Many believe that the policy argument in the King and related cases are not only disingenuous, but weak to boot. The plaintiffs argue that the legislators who wrote and signed the law in the late 2000s meant for the withholding of tax subsidies to be a big stick to force states to participate — and that, in the [words of Michael Cannon](#), “the Obama administration has been spending billions of unauthorized federal dollars, and subjecting nearly 60 million Americans to unauthorized taxes, all to hide the full cost” of the ACA.

But historical records suggest otherwise. During the Congressional debates over the ACA, there were lengthy and politically fraught discussions over plenty of aspects of the act (Medicaid expansion and abortion coverage are two of the more well-known examples) — and yet the question of whether subsidies would be limited to states that built their own exchanges never came up.

“It takes an extremely narrow and literal textual reading of the ACA to get to the result that subsidies are not available in the federal exchanges,” said Hoffman. “It is an almost implausible reading of the statute, in my opinion.”

Katerina Linos, a health care law professor at the University of California, Berkeley points out that there are provisions both above and below the phrase “established by the state” that imply that the federal exchange was meant to be a backup to the state exchanges, and that it would make very little sense to build that kind of structure and then “to have one critical point about the subsidies buried in the statute in a very weird place.”

“This case is not about nuanced judicial readings of a statute that expresses intent generated by a thoughtful Congressional debate,” said Jill Horwitz, a law professor and health care reform expert. “The people behind this case very much want to eliminate the exchanges and Obamacare. This case is only the last salvo in a war against the act. I think it is a cynical use of the courts.”

There’s a strong chance that the Supreme Court’s decision to hear the case will end up helping the cause of health care reform advocates.

Though there is no guarantee, it is thought likely that in this case, the Supreme Court will split along the same lines it did when it came to the individual mandate: Justice John Roberts will join the body’s four liberal justices and lead a 5-4 majority. If that were to occur, from the public’s perspective it may seem as though the courts are putting an even stronger stamp of approval on “Obamacare” — rendering future challenges highly unlikely.

After all, “when the court upheld the ACA [in 2012], many people took that as an endorsement,” said Linos. “I don’t think that was the intention of the court majority, but that’s what happened.” Polls at the time showed that public approval ratings for the ACA jumped up from 29 to 35 percent following the announcement of the court’s ruling — despite the fact that in his majority opinion Roberts basically told people “go to the polls and vote against it, but it does pass constitutional muster,” explained Linos.

For his part, Jonathan Adler told Al Jazeera in an e-mail that if the plaintiffs lose, and politicians “expressly [authorize] tax credits in federal exchanges, that would be a dramatic improvement over the status quo.” However, he added, “ideally, a plaintiff’s victory would encourage policymakers to take a broader look at the law and consider other reforms that more effectively and equitably serve the goal of expanding insurance coverage than does the current law.”

Others argue that such a ruling could have an immediate and disastrous impact on poor and middle-class Americans. A brief filed by a group of 49 economists and other experts on behalf of the defense in the Halbig case points out that if subsidies were taken away from those Americans who bought insurance plans in the federally-run exchange, their out-of-pocket premiums would explode, going from an average of 6 percent of annual income to a devastating 28 percent.

What would happen next is unclear. “It’s really a question of how much political power these people have,” said Korobkin. If they can organize, the people in these states have the potential to put serious pressure on their local governments to get with the ACA program. The states would then rush to change their online marketplaces to conform with the tax subsidy language, and may even end up compelled to accept Medicaid expansion as well.

“Could they get organized and demand these changes? Maybe,” said Horwitz. “But I think it will be chaotic. There will be so much [financial] pressure on these families that it will be hard to get politically active.”

“Whether health insurance actually improves health is very much debated,” continued Horwitz. “But what it does extremely well is to lead to financial stability. Insurance is a financial product, and what it does is help people suffer the financial consequences of bad health. At a time when the lower and middle classes are really suffering, to take away a product that helps them deal with fluctuations in income is, from a policy perspective, nothing more than devastating.”