



King v. Burwell: What Color Is Obamacare's Parachute?

A plaintiff win may be unlikely but would send ACA supporters scrambling, experts say.

Shannon Firth
May 12, 2015

Policy experts, government officials, and industry executives dissected the potential fallout of the Supreme Court's decision in *King v. Burwell*, at the Summit on Health Insurance Exchanges on Monday.

At issue is whether or not healthcare exchanges that are federally run, as opposed to regulated by the state, can legally provide subsidies to low-income participants. Federal exchanges were not explicitly named in parts of the legislation. In theory, the plaintiff's case hinges around the court's interpretation of four words: "[established by the state.](#)"

A decision is expected by the end of June.

If plaintiff King wins, around 6.7 million Americans could stand to lose their health insurance as their premium costs could triple or quadruple.

Policy experts agree that a plaintiff win is unlikely but not impossible.

"I think it's about 60-40 that the government wins, but I will not be amazed if it loses," said [Timothy Jost, JD](#), professor at the Washington and Lee University School of Law in Lexington, Va.

An administration win would be "pretty much the end" of direct challenges to Obamacare, with the exception of contraception cases. "Those will go on forever," he said.

[Michael Cannon, MA, JM](#), director of health policy studies at the Cato Institute and a former domestic policy analyst for Republican Policy Committee in the Senate, said he supports the plaintiff but gave even lower odds for a plaintiff victory.

Cannon places the plaintiffs' chances of winning at 20%, "because the courts are just so famously deferential to the government in cases like this," he added.

He and Jost agree that if the administration loses the case, the sickest people will likely continue to pay their premiums while healthy people will stop their payment and lose their coverage. "And that will skew the risk pools," Cannon added.

"It's going to be a great big confusing mess," he said.

An Answer for Both Parties

[Stuart Butler](#), senior fellow in economic studies at the Brookings Institution and an adjunct public policy professor at Georgetown University in Washington said Republicans are looking for an "off-ramp" from Obamacare while Democrats are trying to save face politically.

"I think you do have, within this law, an opportunity for a solution to this problem that both sides could in fact see as a gain," Butler said.

The answer lies in one provision of the Affordable Care Act -- section 1332 -- which in essence provides a "super waiver"; it offers "a lot of wiggle room" and very few boundaries, Butler said.

He described what he termed a GOP "alternative to repeal" in a recent [article](#) on the Brookings Institution's website.

Effective in 2017, section 1332 would enable states to craft their own plans to suit their needs. For example, red states could avoid the individual and employer mandates, redesign the subsidy system, and even eliminate the exchanges altogether. And blue states could work on resolving the ["family glitch"](#) that prevents some spouses and children from gaining coverage.

This option would relieve Democrats from losing too much ground.

"They really want to see as many Republican states at least in name only accept the basic core of the Affordable Care Act," Butler said.

[Chris Condeluci](#), founder and president of CC Law and Policy and a former staffer for the Tax and Benefits Counsel of the Finance Committee in the Senate, said that some of his Republican friends in Congress are considering plans that are "1332-like" but they are not talking about modifying the 1332 provision itself.

The "off-ramp" Republicans envision would "hold harmless" consumers in the federal exchange who are currently receiving subsidies. It would allow the states to decide whether to apply the individual mandate and the employer mandate or not. The premium subsidies would remain and consumers would still be guaranteed eligibility.

But [Yvette Fontenot, MA](#), a partner with Avenue Solutions, former deputy director for the Office of Health Reform at the Department of Health and Human Services and former Senate staffer for

the Finance Committee, said there's no contingency plan broad enough to compensate for the damage a plaintiff victory would incur.

"There's just absolutely no way they'll be able to offer the same number of people the same benefits they have right now, and there's no way they'll be able to do that without some sort of state participation," she said.

And the states below the Mason-Dixon line are not inclined to play along.

While Fontenot agrees with the concept of a 1332 waiver, there are "endless" questions that need to be answered that relate to tax credit levels and eligibility as well as any possible proposals that would take the place of an individual mandate. "I don't know how you get there in a reasonable time frame."

A New Look for Obamacare

[Chini Krishnan](#), CEO and co-founder of GetInsured, said one possibility is to take the current federal exchange system and "give it its own skin." Creating a "lean state-based exchange" would be possible in 60 days. It would use federal systems for eligibility and for plan information, and states could even share a common platform but configure it differently. "Doing anything meaningful ... that is a serious and big technical lift" would take months, though.

[Kevin Coughlin](#), director and Marketplace CEO of the Center for Consumer and Information and Insurance Oversight for the Centers for Medicare and Medicaid Services and a former CEO of the Connecticut Health Insurance Exchange, who spoke prior to the panel, said converting to a state marketplace would be tremendously complex. "It would not be something that folks could do for this open enrollment."