



Obamacare on Trial

A Supreme Court decision in *King v. Burwell* that nixes tax subsidies could derail the president's signature achievement.

By Kimberly Leonard

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The U.S. Supreme Court will consider Wednesday whether four unremarkable words tucked into President Barack Obama's signature health care law have the power to do what Republican lawmakers have failed at in five years since the reforms were approved: unravel Obamacare.

In *King v. Burwell*, the justices will examine whether it is legal to distribute tax subsidies to middle- and low-income Americans who bought health insurance through an online marketplace, called an "exchange," set up by the federal government. The Affordable Care Act offered states the option of creating their own exchanges or relying on the federal marketplace, HealthCare.gov, which 37 states opted at least partially to do.

But the plaintiffs and their lead lawyer, Michael A. Carvin, argue that tax subsidies were intended to be withheld from those who purchased insurance through the federal exchange so states would have an incentive to set up their own marketplaces. They point to a four-word phrase in the law that links the subsidies to marketplaces "established by the state." The administration disputes that there was any such intention, countering that the phrasing is simply a "term of art" that was also meant to include the federal exchange. The law's architects have said subsidies were always meant to be distributed through both channels, and neither side is attributing the language of the law to a drafting error.

"The availability of tax credits was crucial to achieve reforms in health care," says Elizabeth Wydra, chief counsel for the Constitutional Accountability Center, which filed an amicus brief on behalf of members of Congress who drafted the law. "The challengers' reading of the text makes no sense. It is taking four words out of context versus reading it all taken together."

But Michael Cannon, director of health policy studies for the libertarian Cato Institute and an architect of the court challenge, says the case is about executive overreach.

"It's not political," he says. "We're trying to get better health care by stopping a law that makes health care worse."

If the court rules against the administration, experts from the Rand Corp. estimate that 8 million people would become uninsured, and many others would see their health premiums spike. “If the law guts the act by ruling in favor of King, it’s going to cause not just millions of Americans to lose health insurance, but substantially disrupt the entire system across the country,” Wydra says.

A decision is likely in June, when the court’s term typically ends. Residents of the District of Columbia and the 13 states that are running their own exchanges will continue to receive tax benefits regardless of the outcome.

The impending challenge has led to vague and puzzling responses. During congressional hearings last week, Health and Human Services Secretary Sylvia Burwell said the agency – which is responsible for implementing the health law – does not have a backup plan to help those who could lose their insurance.

“Both sides have an interest in saying very little at this point,” says Ed Haislmaier, a senior research fellow for health policy studies at the conservative Heritage Foundation. “If either side puts forward too much detail, then they are opening it up for the other side to start picking it apart.”

Burwell said at a hearing Thursday that she believes the court will rule in favor of the White House, and that there are no administrative actions the agency can take.

“The government does not have a backup plan because if the court says that HealthCare.gov can’t grant tax credits then it is up to the states to set up exchanges, and the federal government can’t make them do this,” Timothy Jost, a professor at the Washington and Lee University School of Law, says in an email.

Still, not everyone is convinced that no backup plan exists. Several members of Congress last week asked Burwell whether she knew about a 100-page response and contingency plan that reportedly had been circulating within her agency. Burwell said she knew nothing about it.

Meanwhile, Republican members of Congress are hoping to come up with a backup plan of their own in case the court rules that subsidies tied to the federal exchanges are illegal.

“The Republicans are nervous because this lawsuit was brought by their allies, and if it succeeds they will be responsible for taking health care away from millions of Americans and destroying insurance markets in two-thirds of the states,” Jost says. “They will have to fix it but can’t agree on how to do it.”

Republicans have been vocal about their plans to repeal and eventually replace Obamacare, voting nearly 60 times in the last four years on measures that would repeal or roll back the law. The president, however, has made it clear that he would veto any bills that aim to do so. This gridlock means the Supreme Court case – backed by libertarian and conservative academics, legal experts and groups – is the most likely vessel for dismantling the law.

Governors, who could opt to create exchanges in their states, have largely said it is up to Congress to handle the potential fallout, and the majority of states that do not have their own exchanges host a Republican in the executive mansion. GOP governors in Louisiana, Mississippi, Nebraska, South Carolina and Wisconsin already have said they will not be creating an exchange.

The approaches of both Burwell and Republican lawmakers could be seen as strategic. Burwell's assertion that there is no backup plan places the onus heavily on the court, suggesting that the justices would be responsible for leaving millions uninsured if they strike down the federal subsidies.

"She's choosing her words carefully to create the impression that there will be massive dislocation, while leaving herself wiggle room to find a fix that would avoid that dislocation," Cannon says. "It improves the government's chances in court if they play up the potential harm after a ruling for the plaintiffs."

The court has already ruled in favor of the health care law once, issuing a 5-4 opinion in 2012 that said the requirement that Americans get insurance or pay a penalty was constitutional.

On the other hand, if Republicans come up with a contingency plan, the court could posit that a ruling in favor of the plaintiffs would be "fixed" by another law. Such a fix would be tricky, however, as allowing the new health insurance benefits to simply dissolve could prove politically perilous.

But while many Americans no doubt would be unhappy about losing coverage, the country's overall knowledge about the case and what it could mean is dim. A tracking poll released in January by the nonpartisan Kaiser Family Foundation shows that more than 6 in 10 Americans would want Congress to restore the subsidies if they are invalidated by the Supreme Court. Still, the majority of those polled – 56 percent – said they had heard nothing about the case.

The case's outcome will affect millions. Recent figures from the Department of Health and Human Services show that 8.8 million Americans have signed up through the HealthCare.gov platform or re-enrolled in previous plans. Of those, more than 80 percent are receiving subsidies to alleviate the cost of premiums.

"They've made killing Obamacare a priority," Wydra says of the law's Republican opponents. "The challengers are scrambling to try to convince the public, and probably the justices indirectly, that they have some sort of fix to mitigate the consequences of striking down tax credits."

She believes the administration has the stronger position heading into the arguments. "The challengers have an ideological opposition to the law in general, and will do whatever they can to get rid of it," she says. "This lawsuit is part of a crusade to get rid of the health care law."

But Cannon is optimistic his side will prevail.

“The more I hear the government’s arguments, the better I think our chances are,” he says.