

Could SCOTUS nix the ACA after all?

High Court decision 'substantially increases the odds that the government will lose this case'

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After considerable back and forth in federal district and appeals courts, the U.S. Supreme Court is going to consider the most audacious and pernicious challenge to the [Affordable Care Act](#) — the argument that only state-based exchanges can administer federal subsidies.

Three days after a new Republican majority swept into Congress vowing to limit if not repeal the ACA, the Supreme Court has agreed to hear *King v. Burwell*, one of a family of cases brought with the intellectual help of Cato Institute health policy analyst Michael Cannon and Case Western Reserve law professor Jonathan Adler.

Cannon and Adler scoured through the pages of the Affordable Care Act and discovered that sections authorizing insurance tax-credits subsidies use the phrasing "exchanges established by the State."

The drafters of the ACA specifically intended only for exchange subsidies to be available in state-based exchanges and so the subsidies given to consumers via the federal exchange that operated in 36 states were illegal, argue Adler, Cannon and a range of other advocates involved in the cases, including Oklahoma attorney general Scott Pruitt.

While ACA supporters and other legal advocates call the argument ludicrous and the appeals court in *King v. Burwell* agreed with the [Obama](#) Administration that state and federal exchanges are equivalent, other federal courts have split and at least four Supreme Court justices think the challenge is worth hearing.

The fact that the high court is even considering the argument from challengers "substantially increases the odds that the government will lose this case," surmises University of Michigan law professor Nicholas Bagley, writing in [The Incidental Economist](#). "The states that refused to set up their own exchange need to start thinking — now — about what to do if the Court releases a decision in June 2015 withdrawing tax credits from their citizens."

Indeed, by the time the Supreme Court gets around to ruling on the issue next year, close to seven million Americans could be receiving subsidies for insurance plans purchased through the federal exchange. They would lose coverage and, at least in the short term, the new individual

insurance market would probably fall apart in a “death spiral” where only sick individuals purchase health plans.

In the long-term, though, if the court does nullify subsidies through federal exchanges, there would be some options for a work-around.

The federal government "could try to make it easy for states to set up state exchanges with a [HealthCare.gov](https://www.healthcare.gov) back-end," suggested Larry Levitt, senior vice president of the Kaiser Family Foundation, earlier this year. Perhaps the biggest challenge in that strategy, however, is "that a governor would have to want to do it."