



Obamacare challenge set for Supreme Court showdown

[Dan Mangan](#)

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An intellectual mastermind behind perhaps the biggest threat to Obamacare said Friday the Supreme Court made the right call by taking that court case now, rather than waiting what could have been several more years.

"The Supreme Court made the right decision," said Michael Cannon, a health policy analyst with the libertarian Cato Institute, about the case that will decide the fate of billions of dollars in financial help given to millions of people.

"This issue has to be resolved as quickly as possible if only to resolve the uncertainty surrounding the states, insurers, employers and consumers."

"But more importantly, this case needs to be resolved quickly to put an end to the greatest scandal of the Obama administration," Cannon said. "This is about whether the Obama administration was subverting democracy."

Cannon was waiting to board a plane in Dallas when he got a call from CNBC notifying him that the high court had agreed to hear the appeal of the case, known as *King versus Burwell*.

He and law professor Jonathan Adler have been the leading advocates of the theory that the specific language of the Affordable Care Act does not authorize the federal government to give financial aid to people who buy health insurance through HealthCare.gov, the federal Obamacare exchange.

A federal appeals court in the *King* case ruled last summer that federal subsidies or tax credits given to nearly five million customers of HealthCare.gov were legal.

Plaintiffs in that case argued the subsidies are illegal because the Affordable Care Act only explicitly mentions those often-generous subsidies being issued to customers of state-run Obamacare exchanges. But the Obama administration says the subsidies are legal and proper because of the ACA's intent to help the uninsured afford health coverage.

At the time the Supreme Court said it would hear the case, another virtually identical case was awaiting a re-hearing in the federal circuit appeals court that serves Washington, D.C. There was speculation the Supreme Court would not take up the issue of subsidies unless there ended up being a split between four federal circuits where such cases are winding their way through the system.

The Supreme Court's move comes eight days before open enrollment in Obamacare plans is due to resume. A decision in the case could come by next June—after people have already re-enrolled or enrolled in coverage with subsidies that make their plans affordable. For now, the subsidies remain in effect.

Both Obamacare supporters and opponents agree that the issue is massive.

If the subsidies are illegal, it would make insurance unaffordable to many Obamacare customers in 36 states. If too many of them dropped their coverage, it could make continuing the plans financially unfeasible for insurers, because they would be likely to have a disproportionate number of unhealthy enrollees left.

The elimination of the subsidies also would destroy, in those same states, the looming Obamacare mandate that mid- and large-sized employers start offering health insurance to workers in 2015 or face a fine. And it would cripple in those states the "individual mandate," which requires most Americans to have insurance or pay a fine. Both mandates hinge on the availability of subsidies.

Cannon said that while there's speculation the minimum four votes needed to take the case came from the four conservative Supreme Court justices who voted against upholding the ACA in 2012, he "would not be that surprised if some of the Democratic appointees sided with the plaintiffs."

"This case is just that clear cut," he said.

Cannon has long argued that the language in the ACA is so clear that there is no question that financial assistance can only be given to enrollees on the 15 exchanges run by individual states and the District of Columbia. Because of that language, the Obama administration relied on regulations issued by the Internal Revenue Service to formally state that subsidies could also go to customers of HealthCare.gov.

Cannon said that move by the administration subverted "the legislative and political process."

He argues that the government is illegally taxing people to fund the subsidies, and that the fines related to the Obamacare mandates in HealthCare.gov states are also illegal taxation because they are based on the subsidies' existence.

Leading Obamacare supporter and law professor Timothy Jost, who has jostled with Cannon on the subsidy question, had argued the Supreme Court should hold off on taking any challenge to the subsidies unless there was disagreement among federal appeals courts on the issue.

"I think it would have been much more preferable to see what happens in the lower courts," Jost said Friday. "It's hard to avoid the impression that this is a deeply political decision."

"I hope that what is going on is they just want to get this issue settled, because it is an important issue," he said. "Unfortunately, just as we enter open enrollment in 2015, they're injecting more uncertainty into this question ... On the other hand, it's probably better that we're getting certainty now, rather than a year from now."

Jost said that if the Supreme Court adhered to its recent practice of deciding on entire laws as written, as opposed to focusing on a narrow section of a statute, it should rule in favor of continuing the subsidies.

"You really have to twist around dozens of provisions in the statute to reach the conclusion that the federal exchange cannot issue premium tax credits," he said.

Anne Filipic, president of the Obamacare advocacy group Enroll America, said, "I'm not worried that consumers will be dissuaded from signing up for coverage, because people are hungry for access to affordable health insurance."

"Opponents of the Affordable Care Act have been trying to hinder its success for years, and we've still seen more than 16 million people find coverage since the beginning of the first open enrollment," she said.

Sam Kazman, general counsel of the Competitive Enterprise Institute—the group that has financed the legal challenges to the subsidies—said he's "very happy" with the Supreme Court's move.

"You simply cannot have agencies re-writing the law to suit their purposes or whim," he said.