

Modern Healthcare

Will the Supreme Court accept the Obamacare subsidy challenge Friday?

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The [U.S. Supreme Court](#) justices are scheduled on Friday to discuss whether to accept a case with the potential to severely disrupt health coverage for millions of Americans under the [Patient Protection and Affordable Care Act](#). If they take the case, it could introduce an unexpected issue into next Tuesday's elections over the future viability of the healthcare reform law.

But constitutional law experts predict it's unlikely the justices will decide that day whether to hear the Obamacare opponents' appeal of the 4th U.S. Circuit Court of Appeals decision in *King v. Burwell*. That ruling upheld the legality of federal premium subsidies in the 36 states served by the federal insurance exchange. They say the justices are more likely to wait at least a couple more months to see what the lower courts decide.

“There's no way we're going to get a grant on this case on Friday, if we ever do,” said Lisa McElroy, an associate professor of law at Drexler University and an expert on the Supreme Court. “Were the Supreme Court to step in right now before mid-term elections and grant cert in this case, we've got a move that could be seen as highly political. The court tries to have others perceive it as an institution of law, not of politics.”

On the other hand, it takes only the votes of four justices to accept a case. And four of the conservative justices clearly expressed their opposition to Obamacare in their dissent to the high court's landmark 2012 decision upholding the law's constitutionality.

The question in *King v. Burwell* is whether the language of the ACA allows consumers to receive premium tax credits in states that have not established their own exchange and instead are relying on [HealthCare.gov](#). One part of the law says the tax credits are available only to Americans who enrolled “through an Exchange established by the State.” But the Obama administration argues that the law's clear intention, shown by an overall reading of the law, was to offer subsidies and expand coverage to Americans in every state.

In July, a 4th Circuit panel in Virginia unanimously ruled in favor of the administration in *King v. Burwell*, saying the law was ambiguous and therefore the Internal Revenue Service offered a plausible interpretation of the law in allowing subsidies in all 50 states.

Earlier that same day, a panel of the U.S. Circuit Court for the District of Columbia ruled the

opposite way in a split decision in *Halbig v. Burwell*. The panel held that the law was clear that subsidies were not allowed in states that did not establish their own exchange and therefore the IRS did not have the discretion to allow subsidies in those 36 states. That decision was vacated in September when the full D.C. Circuit court decided to hear the case en banc. Oral arguments are scheduled for Dec. 17.

The plaintiffs in the King case appealed to the Supreme Court. The justices are scheduled to discuss the issue Friday in conference, behind closed doors. At that point, the justices could decide to hear the case, to not hear the case, or to put off a decision until a later time, called re-listing it.

The court likely will re-list the case, McElroy predicted. The Court prefers to take cases when there's a split in opinions between circuit courts, and right now there is no split because the D.C. Circuit voided the panel ruling in *Halbig*. Obamacare opponents have urged the high court to take the case now even without a split, hoping the conservative majority on the court will reject the premium subsidies.

"I doubt very seriously the Supreme Court will take it up until we have a final decision from the D.C. circuit (court)," McElroy said. "The Supreme Court only takes cases that it really, really needs to take. It much prefers cases are resolved without ever getting to them."

Brandon Garrett, a law professor at the University of Virginia, said it's always risky to make predictions about what the justices will do. But he also anticipates the justices might want to wait until the D.C. court issues an en banc ruling. "With that en banc process underway in the D.C. Circuit, and likely to take many months and itself perhaps resulting in split decisions, the justices may view the issue as premature," he said. "The court may want to wait and see."

Ian Milhiser, a senior constitutional policy analyst with the Center for American Progress, which supports the ACA, said he also believes chances are slim that the justices will decide Friday to hear the case given that there's no disagreement among the lower courts at the moment. If the justices do decide Friday to take it, it likely would likely be for partisan reasons, but they're unlikely to go that route, he believes.

McElroy said in recent months, the justices almost always have decided not to accept cases the first time the cases come before them in conference. Nearly every case has been re-listed at least once, which she said may be an attempt by the justices to make sure cases are procedurally correct before they agree to hear them, so they don't have to dismiss them as improvidently granted. That's embarrassing for the justices.

If the justices decide to re-list *King v. Burwell* on Friday, the case would not be included on the list of cases granted cert, which will likely be publicly released Monday, McElroy said.

Of course, it's a tricky business trying to predict what the justices may or may not do behind closed doors. Michael Cannon, director of health policy studies for the Cato Institute and a key figure behind the legal challenges to the subsidies, acknowledged that no one knows what will happen.

But he argued that the question of whether people in states without exchanges should be allowed to get subsidies is such an important and pressing one that the justices might take up the issue sooner rather than later.

“Only the Supreme Court can bring final resolution to this question and give states, insurers, employers and consumers the certainty they need to plan their affairs,” Cannon said. “The longer it takes until we get that sort of resolution, the more disruptive a ruling would be. So all of these things are not just (pointing) the Supreme Court to take this case, but to take it immediately and give it expedited consideration.”