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Obamacare Returns to the Supreme Court
Justices agree to hear challenge to insurance subsidies

By Jonathan Cohn
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The latest legal challenge to Obamacare just became very credible—and very dangerous.

The Supreme Court on Friday announced that it would take up *King v. Burwell*, one of several cases in which plaintiffs say the federal government lacks authority to distribute insurance tax credits in certain states. Unlike the previous challenge to Obamacare, on the constitutionality of the individual mandate, these cases make no similarly lofty claims about liberty or the reach of federal power. They are, instead, about statutory interpretation—how to read some ambiguous language in the text of the law and what members of Congress intended when they wrote it.

But if the constitutional stakes of this case are small, the human stakes are very large. To make health care available to anybody, regardless of pre-existing conditions, the Affordable Care Act sets up new marketplaces, through which people can buy regulated insurance policies and, depending on income, qualify for tax credits worth hundreds or even thousands of dollars a year. Those tax credits are critical. Most people now buying coverage in the marketplaces are eligible for them; without that money, many of these people could not get insurance at all.

Obamacare gives states a choice: They can choose to run their own marketplaces or they can hand that job off to the federal government. According to the lawsuits, when states choose the latter—i.e., to let the feds run the marketplaces—then their residents lose access to the tax credits. Supposedly this is what the law's architects intended. The hope, according to the lawsuits, was that making subsidies conditional upon states running their own marketplaces would entice them to do the job on their own.

The Cato's Institute's Michael Cannon and Case Western University's Jonathan Adler, who are the lawsuits' original masterminds, say the historical record backs up their argument. Pretty much everybody who actually wrote the law—and pretty much every journalist who covered it, including me—say that is utter nonsense.

Just last week, the heads of relevant congressional committees wrote an op-ed declaring publicly that they intended federal tax credits to be available to all Americans, regardless of how state officials acted. They even provided some contemporaneous evidence—a fact sheet, distributed around the time of the law's passage, indicating that the law's sponsors figured everybody, in

every state, would have access to the subsidies. There's plenty more evidence like that, including public testimonials from key congressional staffers who constructed the law.

The Court's decision to take the case is a surprise to most, though not all, legal observers. *King* is one of four lawsuits working through the federal judiciary. It came through the Fourth Circuit, based in Richmond, Virginia, where a three-judge panel ruled unanimously to reject it. A similar case, *Halbig v. Burwell*, is pending in the D.C. Circuit. There, a three-judge panel ruled initially in favor of the lawsuit; the full D.C. circuit subsequently suspended that judgment, so that it could rehear the case and have the full panel of active judges decide it.

Many observers figured the Supreme Court wouldn't touch this case until after the D.C. Circuit had ruled. If the D.C. Circuit ended up rejecting the lawsuit, the thinking went, the Supreme Court might have ignored the case altogether.

It takes four judges to "grant cert"—that is, to agree to take a case. The decision today suggests at least four justices think the case has merit. And that's alarming, for reasons Nicholas Bagley, from the University of Michigan Law School, explained in a new post at The Incidental Economist blog:

As I see it, what's troubling here is not that the Court took *King* in the absence of a split. Its rules permit it to hear cases involving "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." It's not remotely a stretch to say that *King* presents one such important question. On this, I part ways with those who claim that granting the case marks a clear departure from the Court's usual practices.

No, what's troubling is that four justices apparently think—or at least are inclined to think—that *King* was wrongly decided. As I've said before, there's no other reason to take *King*. The challengers urged the Court to intervene now in order to resolve "uncertainty" about the availability of federal tax credits. In the absence of a split, however, the only source of uncertainty is how the Supreme Court might eventually rule. After all, if it was clear that the Court would affirm in *King*, there would have been no need to intervene now. The Court could have stood pat, confident that it could correct any errant decisions that might someday arise.

Of course, it takes one additional justice, a fifth, to make up a majority. And that means we're right back to where we were two years ago, when the last case challenging the Affordable Care Act came before the Supreme Court. The guessing game then was whether Anthony Kennedy, presumptive swing vote on the Court, would side with the liberals and uphold the law. He didn't, but Chief Justice John Roberts did, except for a critical ruling striking down part of the law's Medicaid provisions.

Legal experts tell me that Roberts' past rulings indicate he'd be sympathetic to arguments that Courts should defer to executive agencies when it comes to interpreting what laws mean. If so, he'd take the government's side and reject the lawsuit. But if we've learned anything in the last few years, it's that the Court is unpredictable, particularly when it comes to Obamacare.

Easier to predict is what a ruling would mean in practice. According to Larry Levitt, senior vice president at the Kaiser Family Foundation, estimates suggest that 4.6 or 4.7 million people (depending how you count) would immediately lose subsidies if the lawsuits succeed. Overall, between 9.5 and 9.7 million people living in those state are eligible for the assistance.

A ruling for the plaintiffs would have no effect in the 16 states, plus the District of Columbia, that run their own marketplaces. And in the wake of a Supreme Court ruling upholding the lawsuits, it's likely some states who opted not to run marketplaces would move immediately to take nominal ownership, in order to keep the tax credits flowing.

But many states would not do that, because conservatives would protest and block action. That's even more true today than it was a week ago, before Republicans picked up new seats and governorships. And without the tax credits, it's not clear how well the rest of the law would survive. The sponsors of these lawsuits have made no secret of their ambitions: They want to eliminate the Affordable Care Act, state by state if necessary, even if that means millions of people will lose access to affordable health care. Friday's announcement means they are now a little closer to their goal.