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Obamacare's State of Crisis

Halbig, but King bigger

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In their final push to enact Obamacare, Nancy Pelosi urged her fellow Democrats to "pass the bill so that you can find out what is in it." They probably should have found out first. Now they need the Supreme Court to "find" once again in their favor.

Last week, the Court announced that it will hear *King* v. *Burwell*, one of several challenges to the administration's interpretation of a key Obamacare provision regarding health insurance markets. Unlike the plaintiffs in the Court's last Obamacare case, *National Federation of Independent Business* v. *Sebelius* (2012), the *King* plaintiffs do not claim that the Constitution nullifies Obamacare. Rather, they claim that the Obama administration itself is nullifying one of Obamacare's key provisions. They ask the Court to require the administration to enforce the act's plain terms as written—and this, the law's critics hope, may cause Obamacare to collapse under its own weight.

The case arises from Obamacare's provision for health insurance "exchanges"—statewide markets for health insurance designed to enable people to obtain health insurance from a source other than employers. While the House's version of health care legislation provided for a single nationwide exchange, the version of Obamacare that was enacted provides for the creation of an exchange for each state and the District of Columbia.

But the law does not require the states themselves to set up the exchanges—in fact, the Constitution prohibits the federal government from forcing states to administer a federal program. Instead, each state had the opportunity to set up its own exchange; and if it declined to do so, the federal Department of Health and Human Services would "establish and operate such [an] Exchange within the State."

President Obama long had urged that the federal government needed to subsidize health insurance purchased on exchanges to make it sufficiently attractive to poor and middle-class consumers. But the version of Obamacare signed by the president after a flurry of legislative gamesmanship was not written in such generous terms.

The act does provide expressly for federal tax subsidies, called "premium assistance," for health insurance purchased "through an Exchange established by the State." But that subsidy—and related penalties, for in Obamacare as in life there is no free lunch—finds no corresponding provision for health insurance purchased "through an Exchange established by the Federal Government." Absent such a provision, the federal government is left to argue that this provision must be construed broadly to cover all exchanges, not just state-created ones. Or, as the administration argues, the courts should treat federally created exchanges as actually state-

created exchanges, with the secretary of health and human services "stand[ing] in the shoes of" the states.

Perhaps the act's differential treatment of state and federal exchanges was simply a case of shoddy legislative draftsmanship—the sort of thing that happens when Congress passes a law first and reads it later. Or perhaps it serves as an incentive for states to set up their own exchanges.

The latter is the view of Jonathan Gruber, a Massachusetts Institute of Technology economist widely credited as an "architect" of Obamacare (or, as the *New York Times* called him, "Health Care's Mr. Mandate"). At least it was Gruber's stated view until the moment that this interpretation became a legal and political threat to the act's own viability.

As the *New Republic* reported in its congratulatory account of Obamacare's enactment, "Gruber, one of the plan's architects, led a group of center-left intellectuals who hyped the [Massachusetts] experiment's success and touted it as a model for national action in articles, speeches, and consultation with prominent Democratic Party politicians." Gruber certainly has a way with words: In a video uncovered last week, he crowed that Obamacare's "lack of transparency" was "a huge political advantage," as was "the stupidity of the American voter," which "was really, really critical for the thing to pass."

But it was one particular line of Gruber's advocacy that now merits notice. In videos of 2012 addresses uncovered earlier this year, Gruber boasted that the act was structured to let the administration "squeeze the States to do it"—to set up exchanges themselves. "I think what's important to remember politically about this is, if you're a State and you don't set up an exchange, that means your citizens don't get their tax credits," he added. "I hope that's a blatant enough political reality that States will get their act together and realize there are billions of dollars at stake here in setting up these exchanges, and they'll do it."

But most states didn't "do it." As the D.C. Circuit court noted this summer, "only fourteen states and the District of Columbia have established Exchanges. The federal government has established Exchanges in the remaining thirty-six states, in some cases with state assistance but in most cases not." The states' decision not to set up their own exchanges upset the administration's expectations, since it was counting on states to do so and thus accept federal subsidies for their citizens' insurance. That unexpected development, the Obama administration recognized, undermined the program's workability, since the absence of subsidies would decrease individuals' willingness or ability to comply with the "individual mandate" and purchase insurance.

And so the administration, in a regulation proposed in 2011 and finalized in 2012, announced that it would extend federal subsidies to all health insurance exchanges, whether established by a state or by the federal government in lieu of a state. In turn, a variety of state and private parties, spurred by an influential paper published by Case Western's Jonathan Adler and the Cato Institute's Michael Cannon in *Health Matrix*, a journal of law and medicine, filed federal lawsuits challenging the legality of the administration's refusal to distinguish between federal- and state-established exchanges.

Months later, on July 22, two federal courts of appeals issued decisions within mere hours of one another. In the first, *Halbig* v. *Burwell*, the D.C. Circuit held that "the statute's plain meaning . . . unambiguously forecloses
the interpretation embodied in the IRS Rule and instead limits the availability of premium tax credits to state-established Exchanges." The three-judge panel was split 2-1; dissenting judge Harry Edwards would have ruled that the statute's terms are ambiguous, and thus that the court should defer to what he deemed the administration's "reasonable interpretations."

Hours later, and just an hour south on I-95, the U.S. Court of Appeals for the Fourth Circuit held in *King* v. *Burwell* that the statutory language "is ambiguous and subject to multiple interpretations," and therefore that the court should defer to the administration's interpretation "as a permissible exercise of the agency's discretion."

The instant appearance of a "circuit split" between the Fourth and D.C. Circuits gave the administration a brief moment of hope that a Supreme Court showdown could be averted: President Obama had appointed four new judges to the D.C. Circuit—three in the aftermath of Harry Reid's "nuclear option" ending Senate filibusters of judicial nominations—which had swung the court's nominal ideological alignment to the left. Seven of the court's active judges were appointed by Democratic presidents, four by Republicans. Immediately after the D.C. Circuit ruled, liberal pundits announced that Obama's appointees would save Obamacare from the court's initial three-judge decision by voting for the entire court to rehear the case "en banc."

Commentary from the left displayed surprisingly low regard for judicial independence. *Slate*'s Emily Bazelon, for example, stressed that "Obamacare is safe," because "the D.C. Circuit (finally!) has four Obama appointees on it," and "the split is seven Democrats to four Republicans." "Presto," she announced, "Harry Edwards' dissent today can be a -winner tomorrow."

Senator Reid himself was, characteristically, no less blunt. Asked by a reporter whether the addition of newly appointed judges who could vote to reverse the court's initial ruling against the administration would "vindicate" the nuclear option, Reid answered, "Well, if you look at the simple math, it sure does." To hear such cynical descriptions of the newly appointed judges, one would have thought that Bazelon and Reid held the judges in even lower esteem than did the nominees' harshest Republican critics.

Obamacare's supporters breathed a deep sigh of relief on September 4, when the D.C. Circuit announced that it would rehear the case en banc later in the year. This development, supporters argued somewhat contradictorily, obviated the need for Supreme Court review: While the case was of such "exceptional importance" (to use the term of art) as to justify en banc rehearing by 11 D.C. Circuit judges, it apparently was of insufficient importance for the 9 Supreme Court justices to hear it at all.

But the Supreme Court disagreed—or at least four justices did. For it takes four votes to grant review in a case, and the Court announced on November 7 that it was taking the case, preempting en banc review.

Upon the news that the Supreme Court will hear the case this term, all eyes turned to Chief Justice John Roberts. The chief, after all, proved to be the decisive vote in the 2012 challenge to Obamacare's individual mandate, supplying the fifth vote to hold that the individual mandate was a constitutional exercise of federal taxation power.

But to assume such a direct connection between Roberts's vote in the previous case and the new case has much more to do with politics, and politicking, than with law. The individual mandate case, *NFIB* v. *Sebelius*, raised deep issues of constitutional first principles; *King* v. *Burwell*'s challenge to the federal exchanges, by contrast, asks the justices to interpret a single sentence of statutory text in the nearly thousand-page Affordable Care Act. Even if Chief Justice Roberts's 2012 decision affirming Obamacare exemplified judicial restraint by granting Congress great leeway under a Constitution written in broad terms two centuries ago, it would be quite another thing for him now to grant regulators such leeway under a statute written in precise terms just four years ago.

Nevertheless, liberal analysts immediately called on Chief Justice Roberts to defer to the administration's policy. Emily Bazelon's colleague at *Slate*, Dahlia Lithwick, and coauthor Barry Friedman announced passive-aggressively that "Roberts is savvy enough to know how a ruling against the federal government in this case could be perceived"—namely, that it "would look like nothing but a political swipe." Similarly, Jeffrey Rosen, the *New Republic*'s longtime legal contributor and now also president of the National Constitution Center, said that the case could "pose a challenge to Chief Justice John Roberts's legacy," because to rule against the administration's broad interpretation would "drive a stake through the heart of the Affordable Care Act, which he had previously voted to uphold."

On that point, it is quite clear that the left, having already claimed Roberts's entire legacy hinged on the *NFIB* case, intends to do the same with *King*. Striking the same note as Rosen and others, Harvard's Noah Feldman warned on *Bloomberg* that Roberts might "go along with the conservative tide" because he has been "scarred" by the individual mandate case, although "to strike down Obamacare now, having upheld it before, might look like opportunism or wishy-washyness. Given how weak the law increasingly appears," Feldman added, "it would be a high price for Roberts to pay before the judgment of history if he now struck it down."

Poor John Roberts—the Constitution gives him life tenure, but liberals would have him spend the rest of it keeping Obamacare afloat.

Indeed, surveying the Court's recent decisions, the most direct analogy isn't *NFIB*'s constitutional decision, but rather the Court's decision last June in a statutory dispute arising from another of the Obama administration's landmark policies, the Environmental Protection Act's climate change rules. In *Utility Air Regulatory Group* v. *EPA*, states and private parties challenged the administration's interpretation of the Clean Air Act. As with Obamacare, the administration was attempting to construct and enforce a broad regulatory program that poorly fit the statutory text. In that case, the EPA recognized that to impose its climate change regulations, using the threshold emissions levels required by the Clean Air Act's plain terms, would have rendered the program ruinously expensive for the public, and thus politically and practically

infeasible. To avoid such "absurd results," the EPA announced that it would not bind itself by the Clean Air Act's specific requirements.

The Supreme Court rejected that argument by a 5-4 vote—with, in case you are curious, Chief Justice Roberts joining the five-justice majority. "The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration," the Court explained, "but it does not include a power to revise clear statutory terms that turn out not to work in practice."

Judicial deference is one thing, but judicial dereliction is quite another: "We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery," Justice Antonin Scalia wrote for the majority. "We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."

And while conservative and liberal justices might hold different views about how these principles apply in a given case, the principles themselves are hardly partisan. In the other big EPA case decided by the Court this year, *EPA* v. *EME Homer City Generation*, Justice Ruth Bader Ginsburg wrote for the Court that "however sensible (or not)" a policy argument might be, "a reviewing court's 'task is to apply the text [of the statute], not to improve upon it.' " As it happens, the six-justice majority included the Court's usual "swing vote," Justice Anthony Kennedy, but also the chief justice.

To be sure, no case that reaches the Supreme Court is simple, and so Chief Justice Roberts and his colleagues will have their work cut out for them in *King*. But the job of interpreting laws is hard enough already; one wishes that liberals didn't expect the justices to write the laws, too.