

SCOTUS Once Again Saves the Affordable Care Act

By James A. Robertson, John W. Kaveney and Cecylia K. Hahn

On June 25, 2015, in a highly anticipated decision, the Supreme Court of the United States issued a ruling in King v. Burwell holding that tax credits available to some taxpayers under the Affordable Care Act (“ACA” or “Act”) to help subsidize their health insurance costs would be available to individuals living in all 50 states regardless of whether the state is operating under a State or Federal Exchange. Many have heralded the decision as saving the President’s legislation by protecting a key cornerstone of its ability to ensure affordable health insurance for the poorest individuals. While the Supreme Court has now saved the legislation twice, many experts believe the challenges to various aspects of the ACA will only continue in the future.

I. Why Is the Supreme Court’s Decision in King v. Burwell so Critical?

The ACA combines three specific reforms that provide the foundation of this legislation and the hope of affordable health insurance for all Americans. First, the ACA adopts guaranteed issue and community rating requirements.¹ These requirements disallow insurers from denying coverage or from raising the cost of coverage to any person because of his or her health. Second, through the individual mandate, the ACA requires individuals to either purchase health insurance or pay a tax to the IRS.² The goal of the individual mandate, in combination with the other reforms included in the ACA, is to make health insurance premiums more affordable by encouraging populations to purchase health insurance before they become ill and thereby creating a more favorable risk pool. Third, in the spirit of trying to make health insurance more affordable, individuals with household incomes between 100 and 400 percent of the federal poverty line are provided refundable tax credits to help offset the cost.³ These three reforms are intended to work together to increase the number of individuals covered by health insurance and simultaneously lower the cost of health insurance nationwide.

To facilitate the purchase of health insurance as required by the individual mandate, the ACA also requires the creation of an Exchange in each state. Section 1311 of the ACA mandates that each state provide an Exchange for the purchase of health insurance within that state.⁴ Section 1341 of the ACA

provides that the Secretary of Health and Human Services is responsible for creating and operating Exchanges in states that do not establish their own Exchanges.⁵

The issue in King v. Burwell was whether individuals purchasing insurance in states with Federal Exchanges were entitled to the same tax credits as individuals residing in states operating a State Exchange given the language in the ACA that state tax credits will be available to taxpayers enrolled in an insurance plan purchased through “an Exchange established by the State under Section 1311” of the ACA. Thus, with approximately 29 of the states not operating their own exchange and instead leaving it to the government to run a Federal Exchange, a significant percentage of the indigent population was left with the possibility of not receiving tax credits essential to affording health insurance.

II. How Did the Supreme Court Reach Its Decision?

Section 36B of the Internal Revenue Code provides that tax credits are allowed for any “applicable taxpayer” and the determination of the amount of the tax credit partially depends on the taxpayer’s enrollment in an insurance plan purchased through “an Exchange established by the State under Section 1311” of the ACA. The Rule promulgated by the IRS in response to this statutory section makes no distinction between

continued on page 20



James A. Robertson



John W. Kaveney



Cecylia K. Hahn

continued from page 19

an Exchange established by the State and one operating under the control of the Secretary of Health and Human Services.⁶ In *King v. Burwell*, the petitioners challenged the validity of the IRS treating Federal and State Exchanges as synonymous, and instead, argued that based on Section 36B, tax credits were meant to be available only to individuals who purchase health insurance on State Exchanges. Residing in a state that did not create its own Exchange, the petitioners did not wish to have access to the credit because it would legally deem health insurance affordable for them thereby mandating its purchase, which they preferred not to do.

The Supreme Court held that Section 36B's tax credits are available both in states that have State Exchanges and states that have Federal Exchanges. The Court opined that the tax credits are "among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people."⁷ Thus, whether or not they are available on Federal Exchanges is a question of such political and economic significance, and is so central to the statutory scheme of the ACA, that had Congress wanted to assign authority to make that decision to an agency, it would have done so explicitly. Further, the Court pointed out that it would make little sense to delegate such a question to the IRS given that it is an agency with no experience creating health insurance policy.⁸

Thus, the Court felt it was best suited to determine the meaning of the provision by considering both the language and the context of the overall statutory scheme. After examining the language of Section 36B and other provisions of the ACA, the Court found that the phrase "an Exchange established by the State under [42 U.S.C. §18031]" was ambiguous; it could be interpreted to reach only State Exchanges or it could be interpreted to additionally reach Federal Exchanges. Although simply reading the words of the specific provision in the statute would seem to indicate that only State Exchanges should be included, reviewing the context of the Act, the Court found several reasons that such an interpretation would not make sense. First, the Act uses the phrase "an Exchange established by the State under [42 U.S.C. §18031]" where it would make no sense to distinguish between State and Federal Exchanges. Additionally, the ACA instructs the Secretary to establish "such Exchange" where the State has not done so. The Court interpreted this language to mean that there would be no fundamental differences between a State Exchange and a Federal Exchange. (However, some believe that if tax credits were available only to those operating through State Exchanges, there would indeed be a fundamental difference created.) The Court also pointed to several provisions that it concluded assume that tax credits would be available through both types of Exchanges, such as Section 18031(i)(3)(B)'s requirement that **all** Exchanges create

outreach programs to convey "fair and impartial information concerning . . . the availability of premium tax credits under Section 36B" (which would make little sense if tax credits were not available on Federal Exchanges). Petitioners argued that Section 36B was unambiguous because the words "established by the State" would be unnecessary had Congress intended the tax credits to be available on both the State and Federal Exchanges. The Court dismissed this argument, explaining that because the ACA was drafted and passed through reconciliation, limiting the opportunities for amendment and debate, the Act does not reflect the care in drafting that would be expected of such significant legislation.

After determining the text to be ambiguous, the Court next turned to the structure of the Act to determine the meaning of Section 36B. It found that accepting the petitioners' interpretation of the Act and holding that the tax credits are only available to those purchasing health insurance on a State Exchange would "destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid."⁹ Because the three reforms integrated into the ACA only operate well in tandem, the Court held that to find the tax credits apply only in states operating on State Exchanges would be to disregard the spirit of the law. The Court pointed out that accepting the petitioners' interpretation of the statute would mean that close to 87 percent of people who bought insurance on a Federal Exchange would become potentially exempt from the individual mandate (due to the affordability requirements), thus pushing States' individual insurance markets into the 'death spiral' the ACA was designed to combat. According to the Court, "it is implausible that Congress meant the act to operate in this manner."¹⁰

For these reasons, the Court held that it was compelled to "depart from what would be the most natural reading of the pertinent statutory phrase."¹¹ In conclusion, the Court opined that Congress' intent in passing the ACA was not to destroy health insurance markets, but to improve them, and the responsibility of the Court was to interpret, if possible, the Act in a way consistent with improving the markets.

III. Why Were Some Justices Critical of the Decision?

In his dissent, Justice Scalia accuses the Court of ignoring the normal rules of statutory interpretation in order to save the ACA. He, unlike the majority, interpreted other parts of the ACA to "sharply distinguish between the establishment of an Exchange by a State and the establishment of an Exchange by the Federal Government."¹² He points out that their authority to establish Exchanges come from different provisions, as does the authority for funding the Exchanges. He also references the fact that the phrase "by the State" is included throughout

the ACA and that the Court's interpretation instructs readers to ignore this phrase as it appears throughout the entire Act.

According to Justice Scalia, Section 36B is unambiguous, thus, statutory design and purpose should play no role in the Court's reading of the statute. Justice Scalia recognized the potential instability that excluding the tax credit for those operating through Federal Exchanges could create as a flaw in the statutory scheme, not a reason to hold that the "statute means the opposite of what it says."¹³ He continued by pointing out that all statutes pursue more than one purpose, and here, it is plausible that the ACA discriminates against Federal Exchanges to encourage states to set up their own State Exchanges. Thus, "rather than rewriting the law under the pretense of interpreting it, the Court should have left it to Congress to decide what to do about the Act's limitation of tax credits to State Exchanges."¹⁴ Justice Scalia best summed up his position regarding the lengths to which he felt the Court went to save this legislation by claiming that everyone should start calling it "SCOTUScare" rather than the commonly used "Obamacare."¹⁵

Justice Scalia concluded his dissent by pointing out that this is not the first time the Court has transformed the ACA to make it work better and warned that in the future "the somersaults of statutory interpretation [the Court] has performed will be cited by litigants endlessly, to the confusion of honest jurisprudence."¹⁶ Thus, he warned that the unique legal application applied here would likely be applied by advocates in future cases to circumstances much less desirable than the outcome manufactured here.

IV. What Is the Political Fallout of the Decision and Will There Be More Challenges?

Immediate reactions to the decision from those in the healthcare field have been more positive than negative. Many, including Bruce Siegal, M.D., President and CEO of America's Essential Hospitals, praised the Court's ruling, pointing out that deciding this case any other way would mean that six million Americans would lose their health insurance coverage.¹⁷ Those working in the healthcare industry, including Scott P. Serota, President and CEO of Blue Cross Blue Shield Association, point out that the resolution of this decision allows those in the healthcare industry to move forward with pursuing other strategies to make health insurance become even more affordable.¹⁸ And John Arensmeyer, founder and CEO of Small Business Majority, explains that the Supreme Court's decision protects millions of small business owners, employees, and self-employed freelance entrepreneurs from losing health insurance pointing out that "employment and access to affordable health insurance historically have been tightly linked. That linkage pressures individuals to seek out and remain in jobs that provide affordable health insurance, even if they would

otherwise choose to start their own business or pursue a more attractive job opportunity with a growing small business."¹⁹ Thus, for the ACA to have any future success, this was the necessary decision and those in the industry have recognized what it will mean to many Americans.

The reactions, however, have not all been positive as some commentators have suggested that more challenges to the ACA are likely to arise in the future. According to Avalere Health, in Washington D.C., "Congress may still pursue strategies to alter the Affordable Care Act, and the debate over reform is likely to reignite as part of the 2016 presidential race."²⁰ This is especially true given that many are still not convinced that the ACA is the ideal reform to ensure affordable insurance to Americans for the sustainable future. Thus, while Senate Democrats have taken the ruling as a sign to stop wasting time trying to repeal the law and move on to addressing other pressing issues, Republican presidential hopefuls have begun to weigh in on the ruling, which is likely to once again be an issue in the upcoming presidential election. Rick Perry responded by saying that it is not the responsibility of the Supreme Court to knock down the law, but instead, that "we need leadership that understands a heavy-handed, one-size-fits-all policy does nothing to help health outcomes for Americans."²¹ Mike Huckabee, on the other hand, called the ruling "judicial tyranny" and expressed outrage at what he described as the Supreme Court "legislat[ing] from the bench, ignor[ing] the Constitution and pass[ing] a multitrillion-dollar 'fix' to ObamaCare simply because Congress misread what states would actually do."²² Other Republican presidential hopefuls have responded similarly to the Supreme Court's ruling, many expressing their agreement with Justice Scalia's dissent.²³

Although common sentiment seems to be that this case is likely to be the last major challenge to the ACA that the Supreme Court will hear, issues related to the Act are still being decided in the lower courts. House Republicans are currently challenging \$175 billion that the Obama administration is paying health insurance companies over ten years to reimburse them for offering lowered rates for people with lower incomes, arguing that Congress did not appropriate that money.²⁴ Additionally, organizations owned by religious individuals are still attempting to challenge the compromise struck by the Supreme Court between allowing women under their health plans to obtain contraceptives at no extra cost and respecting the objections of such owners of organizations to providing contraceptives.²⁵

Thus, while the two major challenges to the ACA have been rejected by the Supreme Court, it appears that additional challenges are likely to continue occurring in the future as this massive legislation continues to be implemented. In any event, the ACA appears to be here to stay and only time will tell

continued on page 22

continued from page 21

whether it will provide the sort of sustainable and affordable health insurance it has been created to provide or whether it will prove to be smoke and mirrors unable to effectively keep the cost of health insurance reasonable for Americans over the coming decades.

About the Authors

James A. Robertson is a Partner and head of the health care practice at McElroy, Deutsch, Mulvaney & Carpenter, LLP, with ten offices in New Jersey, New York, Connecticut, Massachusetts, Pennsylvania, Delaware, and Colorado. John W. Kaveney and Cecylia K. Hahn are associates in the health care practice of McElroy, Deutsch, Mulvaney & Carpenter, LLP. A special thank you to Cassandra J. Neugold, a Seton Hall law student in MDM&C's summer associate program for her contribution to this article.

Endnotes

- ¹42 U. S. C. §300gg-1(a).
- ²26 U. S. C. §5000A.
- ³26 U.S.C.S. § 36B.
- ⁴42 U. S. C. §18031(b)(1).
- ⁵42 U. S. C. §18051(c)(1).
- ⁶45 CFR 155.20 (2014).
- ⁷King v. Burwell 576 U.S. ____ (2015), slip op. at 8.
- ⁸ Id.
- ⁹King v. Burwell 576 U.S. ____ (2015), slip op. at 15.
- ¹⁰Id. at 17.
- ¹¹Id. at 20.
- ¹²King v. Burwell 576 U.S. ____ (2015), Scalia, J., dissenting, slip op. at 4.
- ¹³Id. at 14.
- ¹⁴Id. at 19.
- ¹⁵Id. at 26.
- ¹⁶ Id. at 21.
- ¹⁷Becker's Hospital Review, Immediate Reactions to the King v. Burwell Decision, June 25, 2015, <http://www.beckershospitalreview.com/hospital-management-administration/immediate-reactions-to-the-king-v-burwell-decision.html>.
- ¹⁸Id.
- ¹⁹Id.
- ²⁰Id.
- ²¹Perry for President, Statement by Gov. Perry on SCOTUS ObamaCare Decision, June 25, 2015, <https://rickperry.org/statement-by-gov-perry-on-scotus-obamacare-decision>.
- ²²Huckabee 2016, Gov. Huckabee blasts Supreme Court, calls ObamaCare ruling "judicial tyranny," June 25, 2015, <http://www.mikehuckabee.com/2015/6/gov-huckabee-blasts-supreme-court-calls-obamacare-ruling-judicial-tyranny>.
- ²³Modern Healthcare, Obama hails Supreme Court ruling in King v. Burwell, June 25, 2015, <http://www.modernhealthcare.com/article/20150625/NEWS/150629930>.
- ²⁴Modern Healthcare, Obama hails Supreme Court ruling in King v. Burwell, June 25, 2015, <http://www.modernhealthcare.com/article/20150625/NEWS/150629930>.
- ²⁵Modern Healthcare, Obama hails Supreme Court ruling in King v. Burwell, June 25, 2015, <http://www.modernhealthcare.com/article/20150625/NEWS/150629930>.



- Reduce Energy Costs by 40-60%
- Never Lose Power Again
- Improves Power Quality
- Fed & State Incentives
- Green Initiative – Low Emissions
- NO Capital Expenditure Programs
- Power Purchase Agreements
- On-Site Utility Benefits



According to the U.S. Dept. of Energy, "Hospitals are ideal candidates for combined heat and power (CHP/Cogeneration) systems, because hospitals function 365 days a year, 24/7, and they require round the clock energy. CHP systems enable hospitals to reduce energy costs, improve environmental performance, and increase energy reliability. Resources saved are often redirected to improve patient care".

Call NOW for a FREE Site Survey
1-877-308-2727
GreenCrownEnergy.com
 GREENCROWN energy
 Turnkey Providers of Cogeneration System & Full Energy Advisory Services