

**THE EVOLUTION OF KING V. BURWELL:
IS SUPREME COURT REVIEW THE PROBLEM OR THE SOLUTION?**

By: Brandon Zarsky¹

“Love it or hate it, Obamacare is the law of the land. It was passed by Congress, signed into law by President Obama, declared constitutional by the U.S. Supreme Court and ratified by a majority of Americans, who re-elected the president for a second term.”²

As Representative Hank Johnson’s statement suggests, the Affordable Care Act (“ACA”), or “Obamacare” to many, has polarized the American political system even prior to being signed into law by President Barack Obama in 2010. It seems only natural that this polarization would find itself lingering throughout the American judiciary, even after *National Federation of International Business, et al., v. Sebelius* almost “destroyed” the ACA several years ago.³

According to Medicare.gov, the ACA provides Americans with better health security by putting in place comprehensive health insurance reforms that will expand coverage, hold insurance companies accountable, lower health care costs, guarantee more choice, and enhance the quality of care for all Americans.”⁴

The Affordable Care Act actually refers to two separate pieces of legislation — the Patient Protection and Affordable Care Act (P.L. 111-148) and the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152).⁵ These two Acts will potentially expand Medicaid to millions of low-income Americans while making a vast amount of additions and “improvements to both Medicaid and the Children's Health Insurance Program (CHIP).”⁶

It seems that Representative Johnson’s statement, however, may not be completely on point since the Act may not make it all the way through the judicial gauntlet. A string of recent

cases across the country have dealt what legal scholars and political pundits alike consider a heavy blow to the Obama Administration's ACA.⁷ However, some of the effects of these holdings could prove to be short-lived.

The text of the ACA provides tax credits and cost-sharing subsidies for the purchase of qualifying health insurance plans by qualified individuals on health insurance exchanges. After some states announced their intention not to create state exchanges, the Internal Revenue Service ("IRS") created a regulation authorizing tax credits and subsidies in exchanges established by the federal government under Section 1321 of the ACA, in addition to state exchanges established under Section 1311. However, the plaintiffs in several cases challenging the federally established exchanges argue that the literal language of the statute describes the exchanges which receive subsidies as only those which were "established by the State under Section 1311" of the law and not federal exchanges. A divided three-judge panel in *Halbig v. Burwell* held on July 22, 2014 that an IRS rule allowing federally facilitated exchanges to grant premium tax credits was invalid.⁸

It would seem that the issue currently being debated is one of statutory interpretation. Specifically, whether or not the language is meant to include all of the exchanges or only those explicitly created by the states.⁹ Many disagree, citing the partisan tension encircling the ACA as the main point of contention.

The effects of partisan policies on the outcome of the cases were discussed in an op-ed by Erwin Chemerinsky, Dean of University of California School of Law, Irvine. Dean Chemerinsky stated that, "The D.C. Circuit's decision seems so clearly ideologically motivated. At oral argument, Judge Randolph, who joined Judge Griffith in the D.C. Circuit majority, made clear that he saw Obamacare as an 'unmitigated disaster' and lamented that costs 'have gone

sky-high.’ Griffith and Randolph undoubtedly saw this as a chance to gut the Affordable Care Act.’¹⁰

On September 4, 2014, the United States Court of Appeals for the District of Columbia granted a request by the government for a rehearing *en banc* (by the full court) in *Halbig v. Burwell*.¹¹ The D.C. Circuit’s decision to hear the case *en banc* vacated the panel’s judgment and the oral arguments were to be heard in the new case on December 17th, 2014.¹²

However, on November 7, 2014, the unexpected happened. The Supreme Court of the United States granted *certiorari* in *King v. Burwell*¹³; a decision that has been condemned by many as highly political in nature.¹⁴ And now, as the D.C.’s Circuit’s original decision was already vacated – and the fact that the D.C. Circuit issued an order on November 12, 2014, removing *Halbig v. Burwell* from its oral argument calendar and holding the case in abeyance pending disposition of *King v. Burwell* – there is presently no circuit split, meaning the case fails to fit into the standard criterion for Supreme Court review.¹⁵ In addition to *Halbig* and *King*, there are two more lawsuits that challenge the IRS rule: *Pruitt v. Burwell* (formerly *Pruitt v. Sebelius*) and *State of Indiana v. IRS*.¹⁶ To be sure, this whole procedural history begins to raise the question of whether this is just an attempt by the conservative justices to ‘gut’ the act after failing to do so in 2012.¹⁷

And now we wait. Oral arguments in *King v. Burwell* were heard by the United States Supreme Court on March 4, 2014. A decision will likely be handed down in June of this year.

But the question remains: what exactly will happen if the Supreme Court holds the federally-created exchanges invalid? At this point in time, many conservative spectators in the legal world question whether a decision in *King* invalidating the rule would make much of a difference at all. They have argued that the states that have refused to create exchanges will

buckle under heavy political pressure and end up restoring large tax credits to the large number of low- and middle-income citizens who are affected. In addition, it is likely the Department of Health and Human Services (HHS) would assist them through the relaxation of applicable rules.¹⁸

On the other hand, liberal pundits argue that absent some sort of alternative plan, the states that refused to create their own exchanges could face intense destabilization within their insurance markets following the invalidation of the federal exchanges.¹⁹ Those unable or unwilling to pay their now un-subsidized insurance premiums could have their coverage terminated. In addition, those that keep their coverage will likely be in higher risk groups. This will only serve to further skew the risk pools causing unanticipated losses and high costs for many.²⁰

Although the Supreme Court generally intervenes in only circuit splits, in this particular scenario, others theories have also been advanced that explain the court's actions. But from these other theories, two such theories have gained more traction as to why the court took the case in the first place.

The first of these theories posits that the cause lies in the political agenda of the more conservative Justices. First, the case itself would not have found its way to the Supreme Court unless four justices wanted it there. That being said, it is likely that those justices include the four who voted against the ACA in *Sebelius*: Justices Alito, Kennedy, Scalia and Thomas.²¹ Now, many conservatives believe (or at least hope) that Chief Justice Roberts, who voted against Medicaid expansion in *Sebelius*, but didn't vote to strike down the entire Act, will switch sides and join the *Sebelius* dissenters in *King v. Burwell*.²² It is uncertain as to why exactly Roberts sided with the ACA/Obamacare in *Sebelius* but as things stand now he could go either way.

The other theory is far less politicized and stands on the notion that the Court did not take the case simply to appease its political agenda but rather because the issue is one of great importance.²³ As stated earlier, the removal of the subsidies has the potential to cause gigantic problems. By taking this case, in many ways the Court is warning the states to put into effect contingency plans in the event that the subsidies end. An early warning by the Court could prevent the issues discussed earlier, though the outcome of a vote striking down the subsidies is far from clear.

Based simply on oral argument, one thing is certainly clear: the Justices are cognizant of the potential issues that would result if the federally established exchanges were removed.²⁴ It still remains unclear how they will choose to act, though some of the more politically leaning Justices are certainly vocal about their current stance. While Justice Kennedy is concerned over the potential fallout from an interpretation limiting exchanges to those specifically established by the states and not those established by HHS, Justices Alito and Scalia remain skeptical of the arguments made in favor of the federal exchanges.²⁵ At this point, only time will tell the fate of the Act and the true intentions of the Justices.

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² Walter McLaughlin, *Obamacare 2015: Benefits, Costs, and Politics*, DECODED SCIENCE (February 2, 2015), <http://www.decodedscience.com/obamacare-2015-benefits-costs-politics/52518> (last visited Apr. 12, 2015) (quoting Rep. Hank Johnson (D-GA)).

³ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). The *Sebelius* Plaintiffs challenged the individual mandate provision of 26 U.S.C.S. § 5000A, which imposed a “shared responsibility payment” on individuals who failed to maintain health insurance. The Court declined to uphold the individual mandate under the Commerce Clause or the Necessary and Proper Clause. However, the mandate was a valid exercise of the taxing power under U.S. Const. art. I, § 8, cl. 1. Plaintiffs also challenged the Act’s Medicaid expansion provisions. In a split decision, the Court held that 42 U.S.C.S. § 1396c could not be constitutionally applied to withdraw existing Medicaid funds from a state which had failed to comply with the expanded coverage requirements.

⁴ *The Affordable Care Act FAQ*, <http://medicaid.gov/affordablecareact/affordable-care-act.html> (last visited Apr. 12, 2015).

⁵ *Id.*

⁶ *Id.*

⁷ Alec MacGillis, *Forget Hobby Lobby. The Bigger Legal Threat to Obamacare Still Has Life*, <http://www.newrepublic.com/article/117156/obamacares-most-destructive-legal-challenge-still-has-life> (last visited Apr. 12, 2015).

⁸ *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014).

⁹ *Id.*

¹⁰ Erwin Chemerinsky & Samuel Kleiner, *An Op-Ed: A Decisive Answer in the ACA Circuit Split*, THE NATIONAL LAW JOURNAL (July 28, 2014), <http://www.law.uci.edu/news/in-the-news/2014/NLJ-dean-kleiner-op-ed-072814.pdf> (last visited Apr. 12, 2015).

¹¹ *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014).

¹² *Id.*

¹³ *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014). Here, the plaintiffs in *King* were Virginia residents who did not want to purchase comprehensive health insurance. Overall, the Fourth Circuit was satisfied that the IRS Rule (26 C.F.R. § 1.36B-1(k), Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (collectively the "IRS Rule")), was a permissible construction of the statutory language. The Fourth Circuit was therefore required to apply Chevron deference and uphold the IRS Rule, which, in part, interpreted the Patient Protection and Affordable Care Act as authorizing IRS to grant tax credits to individuals who purchased health insurance on federally-facilitated "Exchanges".

¹⁴ *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014).

¹⁵ *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014), *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014).

¹⁶ *Oklahoma ex rel. Pruitt v. Burwell*, 135 S.Ct. 1178 (2015) *cert. denied*, *Indiana v. IRS*, 38 F. Supp. 3d 1003 (S.D. Ind. 2014).

¹⁷ *Sebelius*, 132 S. Ct. 2566 (2012).

¹⁸ Nicholas Bagley et al, *Predicting the Fallout from King v. Burwell*, 372 NEW ENG. J. MED. 101-04 (2014), available at <http://www.nejm.org/doi/full/10.1056/NEJMp1414191> (last visited April 12th, 2015).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See Sebelius*, 132 S.Ct. 2566 (2012).

²² *King*, 135 S. Ct. 475 (2014); *see also* Barry Freidman & Dahlia Lithwick, *Obamacare is Doomed! Everybody Panic!*, SLATE (Nov. 10, 2014, 6:45 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/king_v_burwell_why_progressives_shouldn_t_worry_that_the_supreme_court_will.html (last visited April 12th, 2015).

²³ Tom Goldstein, *Commentary: The Fate of the Obamacare Subsidies in the Supreme Court*, SCOTUSBLOG (July 23, 2014, 10:10 AM), <http://www.scotusblog.com/2014/07/commentary-the-fate-of-the-obamacare-subsidies-in-the-supreme-court/> (last visited April 12th, 2015).

²⁴ Transcript of Oral Argument at 16, *King v. Burwell*, 135 S.Ct. 475 (2014) (No. 14-114).

²⁵ *Id.* at 65.