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Implications of the SCOTUS ruling in *King v. Burwell*

Inside

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The U.S. Supreme Court opinion in King v. Burwell *is due later this month. At issue is the legality of an Internal Revenue Service (IRS) Rule extending tax credits to people who purchased health insurance plans from the federal Health Insurance Exchanges (Exchanges) set up in the 34 states that refused to set up state Exchanges authorized by the Patient Protection and Affordable Care Act (ACA) (P.L. 111-148).*

The King v. Burwell *decision has major significance because the uncertainty over this IRS Rule means that: (1) millions of people have no idea if they can rely on the IRS's promise to subsidize their health coverage purchased through federal Exchanges; (2) employers in 34 states have no idea if they will be penalized under the ACA's employer mandate or are effectively exempt from it; (3) health insurers have no idea if their customers will pay for health coverage that they enrolled in through the federal Exchanges or if large numbers will default; and (4) the U.S. Treasury has no idea if the billions of dollars it is spending each month on federal Exchange subsidies were actually authorized by Congress.*

The Supreme Court's decision, of course, is also of great interest to the state and federal executives and legislators who will have to deal with the political fallout if the tax credits for federal Exchange enrollees are invalidated. Democrats and ACA supporters, of course, are predicting disaster if the Supreme Court rules against the IRS Rule. While Republicans and ACA opponents are not quite so dire in their predictions, they recognize that they will need to be prepared to deal with any adverse consequences, particularly those affecting individual federal Exchange enrollees who may lose their tax credits.

It is interesting to note that outside the beltway, the general public is not quite as focused on the case as are the legal community, policy makers, and pundits. According to the Kaiser Family Foundation's Health Policy News Index for April 2015, 59 percent of Americans have not been paying close attention or any attention to news stories about the case, with 25 percent following it fairly closely and only 16 percent following it closely. This is all the more reason why the health care industry and its advisors must understand the ramifications of the case—so that they can explain it to the public.

After providing a basic background on the ACA provisions in question, this White Paper leads the reader through the lower court rulings to date; the arguments contained in the litigants' briefs; the positions of certain interested parties; a summary of the oral arguments; the Court's likely legal analysis; the possible implications of a decision invalidating the IRS Rule for individual enrollees, health insurers, and employers; and potential remedial actions by states, Congress, the Obama Administration, and the Supreme Court.

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Background

The ACA's subsidy provisions are the key instrument through which the Act makes coverage affordable to individuals who purchase insurance on an Exchange. The ACA provides for advance payment of premium tax credits for people with incomes between 100 and 400 percent of the federal poverty level (FPL) ($11,770 to $47,080 for an individual in 2015) and cost-sharing reductions for people with incomes from 100 to 250 percent of the FPL ($11,770 to $29,425 per year for an individual in 2015). To illustrate the importance of the subsidy provisions, according to an HHS Assistant Secretary for Planning and Evaluation (ASPE) Issue Brief, in 2015, 87 percent of people who selected a plan in states with a federal Exchange received premium tax credits.

Section 1311 of the ACA is the provision that allows states to set up Health Insurance Exchanges and section 1321 requires the Secretary of HHS to set up federal Exchanges in states that fail to set up Exchanges. Under section 1401 of the ACA, individuals are offered premium assistance through tax credits if they meet certain requirements, including enrollment "through an Exchange established *by the State* under section 1311."

Despite the plan language of section 1401, the IRS began issuing tax credits through both federal and state Exchanges in January 2014 (26 C.F.R. Sec. 1.36B-1(k); 77 FR 30377, May 23, 2012) (the "IRS Rule"). The IRS Rule provides that the credits shall be available to anyone "enrolled in one or more qualified health plans through an Exchange," and then adopts by cross-reference an HHS definition of "Exchange" that includes any Exchange, "regardless of whether the Exchange is established and operated by a State…or by HHS" (26 C.F.R. Sec. 1.36B-2; 45 C.F.R. Sec. 155.20).

In a nutshell, the case will turn on the ACA language that ties the amount of tax credits to a health plan purchased "through an Exchange established by the State." The petitioners in *King v. Burwell* contend that this language is unambiguous and clearly means that persons who purchased their health insurance plan through a federal Exchange *do not* qualify for tax credits. The government disagrees with the petitioners' interpretation of the language, arguing that even if the language is unambiguous, the IRS' ruling to extend the tax credits to federal Exchange enrollees was reasonable and entitled to deference.

Who are the *King* petitioners? The petitioners in *King v. Burwell* are Virginia residents who do not want to purchase comprehensive health insurance. Because Virginia declined to establish a state Exchange, it is served by a federal Exchange. The petitioners claim that the cost of the least-expensive unsubsidized Exchange plan through the federal Exchange would exceed 8 percent of their 2014 income, making them exempt from the ACA tax for failing to comply with the individual mandate. However, if the IRS Rule is correct and premium tax credits are applicable to federal Exchanges, the reduced costs of the policies available to the petitioners would subject them to the minimum coverage penalty. Therefore, if the IRS Rule is upheld, the petitioners contend they will incur some financial cost because they will be forced to either purchase insurance or pay the individual mandate penalty. The petitioners allege that the ACA's statutory language precludes the IRS's interpretation that the premium tax credits are also available to federal Exchanges.

District court's ruling. On February 18, 2014, the district court dismissed the petitioner's complaint, finding that the IRS Rule was a permissible exercise of administrative discretion because the ACA as a whole clearly evinced Congress's intent to make the tax credits available in both state and federal Exchanges (see *Subsidies for health coverage through Exchanges within authority of IRS*, February 26, 2014).

Court of Appeals and the path to SCOTUS. On July 22, 2014, a three-judge panel of the Fourth Circuit unanimously affirmed the district court's ruling that the IRS Rule was a permissible exercise of administrative discretion, finding that the applicable statutory language was ambiguous and subject to multiple interpretations (see *Appellate court creates circuit split by upholding IRS Rule*, July 22, 2014).

That same day, in *Halbig v. Burwell*, the U.S. Court of Appeals for the District of Columbia Circuit reached the opposite conclusion, with its three-judge panel ruling 2-1 that the IRS did not have the authority to rewrite the wording of the ACA to allow federal Exchange subsidies (see *Federal appeals court axes subsidies for federally-run Health Insurance Exchanges*, July 22, 2014). The White House then filed a motion for rehearing of the *Halbig* ruling before a full panel of the D.C. Circuit, which has seven judges appointed by Democratic presidents and four appointed by Republicans (see *Halbig panel was wrong: Government seeks rehearing to avoid 'perverse consequences,'* August 6, 2014). The plaintiffs in *Halbig* opposed the motion for rehearing by the full D.C. Circuit, relying for the most part on the fact that the plaintiffs in *King v. Burwell* had petitioned the Supreme Court for review in that factually related case (see *Halbig team asks to skip straight to SCOTUS*, August 20, 2014).

The D.C. Circuit granted the government's motion for a rehearing of the *Halbig* appeal by the full panel of judges (see *Halbig decision on premium subsidies to be reheard by full D.C. Circuit*, September 10, 2014); however, after the Supreme Court agreed to hear *King v. Burwell*, the D.C. Circuit ordered that *Halbig* be removed from the oral argument calendar and held in abeyance pending the Supreme Court's decision in *King v. Burwell* (see *Federal court waits for SCOTUS to rule on health insurance subsidy*, November 19, 2014).

Supreme Court Briefs

Petitioners' brief argues that in the ACA, Congress expressly provided tax credits only for state Exchanges focusing on the plain language of the Act, while the government's brief argues that the ACA text, structure, and history demonstrate that tax credits were meant to be available through both state and federal Exchanges.

Petitioners' brief. The petitioners argue that there is no legitimate way to construe the phrase "an Exchange established by the *State* under section 1311" to include one "established by *HHS* under section *1321*." Therefore, because Congress expressly provided tax credits only for state Exchanges, and not federal Exchanges, the court must give effect to that plain meaning of the ACA.

The petitioners concede that tax credits are important to the ACA's statutory scheme, but argue that *conditioning* subsidies on state creation of Exchanges is not contrary to that scheme, any more than the ACA's conditioning of Medicaid funds on state expansion of Medicaid eligibility was contrary to Congress' obvious desire to extend Medicaid funds to all states. To further prove the point that Congress reasonably expected states not to reject the chance to provide their citizens with billions of dollars in tax credits, the petitioners point out that when the IRS Rule eliminated the incentive to set up state Exchanges by providing the tax credits to federal Exchanges, most states declined to set up the state Exchanges.

The petitioners also argue that the pre-ACA debate shows that Congress tied the availability of tax credits to state cooperation in setting up the Exchanges. A draft Senate bill did just that, and a House bill without incentives was a nonstarter in the Senate for that reason.

The petitioners' brief rejects the government's contention that giving section 1401 its plain meaning would lead to anomalous results as to other provisions of the ACA. The anomalies are simply contrived by the government, according to the petitioners, because all of the ACA's other provisions are just as compatible with the plain meaning as with the government's allegedly unlawful revision of it.

Finally, the petitioners argue that deference to the IRS cannot save the IRS Rule for three reasons. First, Congress would never have delegated a decision of such economic and political significance to the IRS. Second, deference is inapplicable here because tax credits must be unambiguous, i.e., the Constitution itself demands that congressional authorization must be plainly stated where the expenditure of Treasury funds is at stake. Third, the IRS is never afforded deference in construing critical language that is not found in the Internal Revenue Code (Title 26 of the U.S. Code), and the critical language at issue in *King* is found in Title 42 of the U.S. Code, which governs the public health and welfare.

In a nutshell, the case will turn on the ACA language that ties the amount of tax credits to a health plan purchased "through an Exchange established by the State."

Government's brief. The government contends that the phrase "an Exchange established by the State" is merely a term of art that includes both an Exchange a state establishes for itself and an Exchange HHS establishes for the state (ACA sec. 1401). In addition, it argues that the phrase "shall…establish and operate *such Exchange* within the state," which allows HHS to set up an Exchange if the state does not, conveys that an HHS-established Exchange is merely a statutory surrogate fulfilling the requirement that each state establish an Exchange (ACA sec. 1321). Therefore, according to the government, all Exchanges are Exchanges established by the state. The government offers numerous other textual references to confirm its interpretation and claims that the petitioners largely ignore the contradictions, anomalies, and absurdities their interpretation would create in other provisions of the Act.

The government provides two arguments in support of its claim that the ACA's structure and design confirms that tax credits are available in all Exchanges: (1) tax credits are essential to the Act's nationwide insurance-market reforms; and (2) the availability of tax credits in

every state is essential to the Act's model of cooperative federalism, meaning that the Act should be interpreted to avoid the disrespect for state sovereignty inherent in the petitioners' interpretation of the Act.

The government also makes three arguments to show that the history of the ACA supports its position. First, it was well understood when the Act was passed that some states would not establish Exchanges for themselves. Second, the Act's tax credits are not structured as a conditional-spending program designed to induce the states to establish Exchanges. Rather, they are federal tax credits provided to individual federal taxpayers as an integral part of national reforms that apply whether or not the states act. Third, the ACA's legislative record confirms that tax credits are available in every state.

Finally, the government argues that even if there is some question as to whether persons who purchased health insurance through the federal Exchanges were entitled to tax credits, the IRS is entitled to deference in its interpretation. The government noted that the IRS Rule was adopted after notice-and-comment rulemaking, which was conducted pursuant to an express delegation of authority to implement the ACA's tax credit provisions.

Oral Arguments

On Wednesday, March 4, 2015, the U.S. Supreme Court heard oral arguments in *King v. Burwell*. Oral arguments before the Supreme Court are always of interest because the Justices' questions and comments offer insight as to how they might vote. The inquiries of Justice Anthony Kennedy are typically scrutinized the most because he is often the swing vote between the conservative (Chief Justice John Roberts, and Justices Antonin Scalia, Clarence Thomas, Samuel Alito) and liberal (Justices Ruth Bader Ginsburg, Elena Kagan, Sonia Sotomayor, Stephen Breyer) wings of the Court. Chief Justice Roberts, who unexpectedly sided with the liberal Justices in *National Federation of Independent Business v. Sebelius* (*NFIB*) (see *Court upholds ACA, but modifies Medicaid expansion*, July 2, 2012), which upheld the ACA's individual mandate, seems to have positioned himself as the protector of the Court's reputation and, therefore, close scrutiny of his questions is also warranted.

As expected, the Justices' questioning indicated that the Court is split, with the liberal Justices dominating the questioning during the petitioners' portion of the argument, and the conservative Justices becoming more vocal once the government began its argument. The Justices' questions dealt with the issues of standing, strict scrutiny, Congressional intent, the location of the statutory language at issue within the federal tax code rather than in the public health code, constitutionality, and *Chevron* deference (see *SCOTUS hears King v. Burwell: Kennedy voices constitutional concerns, Roberts doesn't tip his hand*, March 5, 2015).

Justice Ginsburg began by questioning the petitioners' attorney regarding the standing of the petitioners to bring their suit, but under subsequent questioning by Justice Alito, the government's attorney seemed to agree that at least one petitioner had standing.

The key focus during the arguments was Justice Kennedy, who constantly raised concerns about the constitutional consequences if the petitioners' reading of the ACA prevails. Justice Kennedy's questioning clearly indicated his concern that the petitioners' reading might destroy the insurance system in states with federal Exchanges, comparing this to an unconstitutional form of federal coercion.

Possible Legal Analysis

Absent a minor miracle, we know going in that three of the four conservative justices (Scalia, Thomas, Alito) will likely vote to invalidate the IRS Rule and the liberal justices (Ginsburg, Kagan, Sotomayor, Breyer) will vote to uphold the IRS Rule. While Chief Justice Roberts is generally considered to be a conservative, because he voted to uphold the ACA's individual mandate in *NFIB*, he cannot be considered a sure thing by the petitioners. Further, because Roberts said little during oral arguments, we have no inkling what he is thinking.

Justice Kennedy, however, actively questioned the litigants, giving us some indication of his thought process. During oral argument Kennedy seemed to be concerned that under a plain reading of the ACA, the federal Exchanges are clearly not entitled to subsidies and, under this reading, there will be resulting damage to the enrollees, the insurers, and the states through the loss of subsidies. This damage to the states and their citizens, according to Kennedy's purported thinking, could coerce the states to set up their own state Exchanges. The coercion, therefore, may be questionable under the Tenth Amendment to the U.S. Constitution, known as the concept of Federalism, which reserves to the states all powers not given to the federal government under the U.S. Constitution.

While the Supreme Court has rarely declared laws unconstitutional for violating the Tenth Amendment, it has done so when the federal government compels the states to enforce federal statutes. The Supreme Court

also has said that the federal government can encourage the states to adopt certain regulations through the spending power (e.g., by attaching conditions to the receipt of federal funds).

Kennedy countered his own Tenth Amendment argument by raising the possible application of a concept called constitutional avoidance (judicial restraint), which says that a court should endeavor to decide a case on nonconstitutional grounds (i.e., based on statutory construction rather than on concepts like due process, equal protection, or, federalism).

Based on Kennedy's questions and comments, it seems as though he is struggling whether to: (1) ignore the concept of constitutional avoidance and find that the plain meaning of the ACA results in an unconstitutional coercion on the states; or (2) examine the ACA language under the two-part analysis as set forth in *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Under *Chevron*, the court must first ask whether the statutory language used by Congress clearly authorizes the IRS Rule. If the statute is clear, the inquiry ends, because, under *Chevron*, the courts and agencies must "give effect to the unambiguously expressed intent of Congress." If the statute, however, is silent or ambiguous regarding the specific point, the court must decide whether the IRS' interpretation is "based on a permissible construction of the statute." If the IRS' interpretation of the ambiguous statute is reasonably within its discretion, then the court will defer to the IRS ruling.

The Supreme Court briefs of both the petitioners and the government focus the majority of their arguments on the first part of the *Chevron* legal analysis. The petitioners contend that the ACA is clear that subsidies are available only in state Exchanges, while the government contends that the ACA is clear that subsidies are available in all Exchanges, including states with a federal Exchange. In the second part of the *Chevron* legal analysis, the petitioners argue that deference to the IRS' interpretation of the statute is inappropriate, while the government argues that the Court should defer to the IRS Rule.

Interested Parties Weigh In

Prior to March 4, 2015, many interested parties weighed in on the case not only to set the stage for the Supreme Court arguments, but also in an attempt to influence public opinion and presumably the Justices. ACA supporters typically have offered a doomsday scenario if the IRS Rule is invalidated, while ACA opponents claim that the Republicans will simply offer legislation to protect those who enrolled in federal Exchanges in reliance on premium tax credits (see *King v. Burwell friend of the court filers joust in spirited debate*, February 11, 2015).

For example, the American Academy of Actuaries (AAA) is certainly in the camp that thinks that invalidation of the IRS Rule will result in very serious consequences. On February 24, 2015, the Health Practice Council of the AAA sent a letter to HHS Secretary Sylvia Burwell urging her to consider implementing measures to counter the potential adverse consequences on health insurance premium rate filings in the event the Supreme Court rules for the petitioners in *King v. Burwell*.

While Chief Justice Roberts is generally considered to be a conservative, he cannot be considered a sure thing by the petitioners. Further, because Roberts said little during oral arguments, we have no inkling what he is thinking.

The Kaiser Family Foundation (KFF) has estimated the state-by-state effects of a ruling for the petitioners in *King v. Burwell* (see Table 1). According to KFF, in the 34 federal Exchanges, there are over 6.3 million enrollees receiving premium subsidies as of March 31, 2015. The total federal subsidy dollars being paid to these enrollees is over $1.7 billion per month, which results in an average subsidy of $272 per month for each enrollee, according to KFF. KFF estimates that if the tax credit is eliminated, the premiums for these enrollees will rise by an average of 287 percent. These estimates by KFF do not include the premium increases that could result if subsidies are eliminated and healthy enrollees drop coverage, resulting in a deterioration of the insurance risk pool.

Under the KFF analysis, Florida would be most affected in terms of the number of people losing subsidies (1.3

million) and the total monthly value of those subsidies ($389 million), with Texas ranked second (832,000 residents losing a total of $206 million per month). Subsidized enrollees in Mississippi would face an average premium increase of 650 percent if they had to pay the full cost of coverage. Enrollees in Alaska and Utah could face premium hikes of 520 percent. The states with the highest percentage of enrollees receiving subsidies are: Mississippi (94.5 percent), Florida (93.5), North Carolina (93.2), Wyoming (92.9) Louisiana (92), Arkansas (91.1), Georgia (91.1), Alabama (90.7), Wisconsin (90.7), Alaska (90.5) and South Carolina (90.2).

On March 10, 2015, HHS estimated that out of the 11.7 million current ACA enrollees, 8.84 million were insured through the federal Exchanges, with nearly 7.7 million (87 percent) qualifying for a tax credit, and with more than half (55 percent) paying $100 or less per month after tax credits. Then, on June 2, 2015, HHS announced that ACA enrollment had fallen to 10.2 million as of March 31, 2015, due to enrollees failing to pay premiums. HHS Secretary Burwell noted that 8.7 million enrollees (85 percent) were receiving government premium subsidies at of that date.

ACA proponents offer these figures as proof of the ACA's affordability, while opponents view this data as evidence that the ACA does not pay for itself, as was advertised.

Effect of a Ruling for the Government

If the Supreme Court rules for the government, the IRS Rule authorizing premium subsidies in all Exchanges will remain in effect, and premium tax credits currently available for all individuals will continue regardless of whether they are enrolled in a plan in a state Exchange or in a federal Exchange.

While a ruling for the government might bring this issue to a close, are there other unintended consequences of such a ruling? Consider these possibilities:

- Will courts ignore "plain language" in the future and re-write laws from the bench?
- Will all statutory language be subject to speculation about Congressional intent?
- Will "states" matter anymore—or just the "State"?
- Will this encourage poor drafting of statutes by Congress?
- What will be the damage to the *Chevron* rule, i.e., will federal agencies just claim that statutes are unclear to reach a politically expedient construction?
- Will the clear language of existing laws, such as those giving authority to the Environmental Protection Agency and the Food and Drug Administration be challenged?
- If the IRS Rule is found to be a valid exercise of administrative interpretation, can the next Administration simply change the IRS' interpretation and invalidate the rule?

During oral arguments, Chief Justice Roberts suggested that a subsequent administration could simply change the IRS interpretation and thereby eliminate the tax credits. The government's attorney did not deny this, but responded that a subsequent administration would need very strong reasons to take such a step in view of the disruptive consequences.

Effect of a Ruling for the Petitioners

Simply stated, if the Supreme Court rules for the petitioners and finds the IRS Rule invalid, ACA enrollees in the 27 states presently relying on a federal Exchange and the seven states with a state-federal partnership Exchange would lose access to premium subsidies.

While a ruling for the petitioners could have significant policy implications for these states, a decision invalidating the IRS Rule will not invalidate other parts of the ACA. For example, a ruling for the petitioners will not affect the subsidies for state Exchanges or the Medicaid expansion provisions of the ACA.

But let's dig a little deeper and consider some of the practical results of an invalidation of the IRS Rule on three parties: ACA enrollees, health insurers, and employers.

Enrollees. Without premium tax credits, most enrollees will not be able to afford coverage (remember, 87 percent of enrollees currently receive tax credits) and may be forced to drop coverage, resulting in a smaller pool of enrollees in the federal Exchanges. The remaining enrollees would likely be those with more serious health conditions who would be more expensive to insure. With less healthy enrollees remaining in the Exchanges, premiums will likely rise, causing even more enrollees to drop out. This may result in a "death spiral" for the Exchanges. This is not "chicken little" crying, "the sky is falling"; it is the position of the American Association of Actuaries.

Health insurers. This smaller pool of enrollees, with higher health costs, also could lead to health insurers ceasing to participate in the Exchanges. This will lead

Table 1

Location	Marketplace Type	Number of People at Risk of Losing Tax Credits	Total Monthly Tax Credit Dollars at Risk	Average Tax Credit per Enrollee	Percent Increase in Average Premium if Tax Credit Is Not Available
United States	34 Federal Marketplaces	6,387,789	$1,737,476,989	$272	287%
Alabama	Federal Marketplace	132,253	$35,708,310	$270	321%
Alaska	Federal Marketplace	16,583	$8,888,488	$536	520%
Arizona	Federal Marketplace	126,506	$19,987,948	$158	132%
Arkansas	Federal Marketplace	48,100	$13,660,400	$284	270%
California	N/A	N/A	N/A	N/A	N/A
Colorado	N/A	N/A	N/A	N/A	N/A
Connecticut	N/A	N/A	N/A	N/A	N/A
Delaware	Federal Marketplace	19,128	$5,068,920	$265	191%
District of Columbia	N/A	N/A	N/A	N/A	N/A
Florida	Federal Marketplace	1,324,516	$389,407,704	$294	359%
Georgia	Federal Marketplace	412,385	$112,993,490	$274	381%
Hawaii	N/A	N/A	N/A	N/A	N/A
Idaho	N/A	N/A	N/A	N/A	N/A
Illinois	Federal Marketplace	232,371	$49,030,281	$211	169%
Indiana	Federal Marketplace	159,802	$51,136,640	$320	271%
Iowa	Federal Marketplace	34,172	$8,987,236	$263	244%
Kansas	Federal Marketplace	69,979	$14,695,590	$210	231%
Kentucky	N/A	N/A	N/A	N/A	N/A
Louisiana	Federal Marketplace	137,940	$44,554,620	$323	347%
Maine	Federal Marketplace	60,939	$20,536,443	$337	383%
Maryland	N/A	N/A	N/A	N/A	N/A
Massachusetts	N/A	N/A	N/A	N/A	N/A
Michigan	Federal Marketplace	228,388	$62,349,924	$273	294%
Minnesota	N/A	N/A	N/A	N/A	N/A
Mississippi	Federal Marketplace	75,613	$26,540,163	$351	650%
Missouri	Federal Marketplace	197,663	$54,950,314	$278	327%
Montana	Federal Marketplace	41,766	$9,606,180	$230	198%
Nebraska	Federal Marketplace	56,910	$14,625,870	$257	265%
Nevada	N/A	N/A	N/A	N/A	N/A
New Hampshire	Federal Marketplace	29,996	$7,918,944	$264	218%
New Jersey	Federal Marketplace	172,345	$53,943,985	$313	199%
New Mexico	N/A	N/A	N/A	N/A	N/A
New York	N/A	N/A	N/A	N/A	N/A
North Carolina	Federal Marketplace	458,738	$144,961,208	$316	336%

Location	Marketplace Type	Number of People at Risk of Losing Tax Credits	Total Monthly Tax Credit Dollars at Risk	Average Tax Credit per Enrollee	Percent Increase in Average Premium if Tax Credit Is Not Available
North Dakota	Federal Marketplace	14,115	$3,274,680	$232	169%
Ohio	Federal Marketplace	161,011	$41,057,805	$255	190%
Oklahoma	Federal Marketplace	87,136	$18,211,424	$209	243%
Oregon	N/A	N/A	N/A	N/A	N/A
Pennsylvania	Federal Marketplace	348,823	$79,182,821	$227	177%
Rhode Island	N/A	N/A	N/A	N/A	N/A
South Carolina	Federal Marketplace	154,221	$43,336,101	$281	335%
South Dakota	Federal Marketplace	16,811	$3,849,719	$229	178%
Tennessee	Federal Marketplace	155,753	$33,954,154	$218	222%
Texas	Federal Marketplace	832,334	$205,586,498	$247	305%
Utah	Federal Marketplace	86,330	$17,956,640	$208	520%
Vermont	N/A	N/A	N/A	N/A	N/A
Virginia	Federal Marketplace	285,938	$73,772,004	$258	287%
Washington	N/A	N/A	N/A	N/A	N/A
West Virginia	Federal Marketplace	26,145	$8,209,530	$314	234%
Wisconsin	Federal Marketplace	166,142	$52,334,730	$315	252%
Wyoming	Federal Marketplace	16,937	$7,198,225	$425	340%

Source: Kaiser Family Foundation

to fewer plan options for enrollees. With fewer plan options, there will be less competition and higher premiums.

Employers. In addition, invalidating the IRS Rule would essentially eliminate the requirement that large employers offer coverage to full-time employees in these states. This is because the penalty associated with the employer mandate is triggered when a full-time employee is not offered employer-sponsored coverage and qualifies for an Exchange premium or cost-sharing subsidy. Therefore, if Exchange subsidies are unavailable in states with a federal Exchange, the penalty against a large employer that fails to offer coverage is not triggered. Of course, employers located in states with state-run Exchanges, where the IRS subsidy regulations would remain in place, would still be subject to these penalties. This would create a complicated situation for employers operating in numerous states (see *Halbig and King decisions create uncertainty for employers*, September 3, 2014). Finally, without the penalty on large employers, the government will have less money to run the Exchanges and provide subsidies to anyone.

Response to Invalidation by Interested Parties

If the IRS Rule is invalidated, how will the Obama Administration, the Republican Congress, and the various states respond and what, if anything, can the Supreme Court do to ameliorate the consequences?

Obama Administration response. Despite the concerns of the AAA, the Kaiser Family Foundation, and others, the New York Times reported on March 3, 2015, that the Obama Administration claims that it has no Plan B in the event the IRS Rule is invalidated. According to Administration officials, "any steps they could take to prepare for the potential crisis would be politically unworkable and ineffective, and that pursuing them would wrongly signal to the justices that reasonable solutions existed." In addition, the Administration claimed that "no one is strategizing with governors or insurance company executives or lawmakers. There is no public relations plan to reassure people who might suddenly have to pay more for insurance."

The New York Times further reported that during a Monday, March 2, 2015, interview with Reuters, President Obama said "If they rule against us, we'll have to take a look at what our options are. But I'm not going to anticipate that—I'm not going to anticipate bad law."

President Obama recently made a spirited defense of the ACA in a speech in front of the Catholic Health Association. Rather than acknowledging the imminent Supreme Court decision or suggesting a solution, the President instead decided to laud the ACA's accomplishments, claiming:

- Nearly one in three uninsured Americans now have coverage—more than 16 million people—driving the uninsured rate to its lowest level ever.
- Americans can no longer be denied coverage because of preexisting conditions.
- Women can't be charged more just for being a woman and they get free preventive services like mammograms.
- There are no more annual or lifetime caps on the care patients receive.
- Medicare has been strengthened and protected, with 13 years added to its actuarial life.
- Health care prices have risen at the lowest rate in 50 years.
- Employer premiums are rising at a rate tied for the lowest on record.
- The average family premium is $1,800 lower today than it would have been had trends over the decade before the ACA passed continued.
- Children can stay on their parents' health plans until they're 26.

President Obama also claimed during his Catholic Health Association speech that although "we were told again and again that Obamacare would be a job-killer—amazingly enough, some critics still peddle this notion—it turns out in reality, America has experienced 63 straight months of private sector job growth—a streak that started the month we passed the Affordable Care Act. The longest streak of private sector job growth on record—which adds up to 12.6 million new jobs."

In her June 10, 2015, testimony before the House Ways and Means Committee on the President's fiscal year 2016 budget, HHS Secretary Sylvia Burwell was asked by Chairman Paul Ryan (R-Wisc) what the Obama Administration plans to do if the Supreme Court strikes down the subsidies. Secretary Burwell indicated that the resolution of that problem resides with Congress or the states. Burwell also suggested that states set up their own Exchanges and that HHS would assist them in this process.

This, however, would require many Republican-led states to cooperate with HHS and, so far, they have declined to do so. When Republicans on the committee said they were interested in a temporary extension of the subsidies to the federal Exchanges but they would expect something in return, the Secretary stated that the President will not sign anything that repeals the ACA or any of its core elements.

When Republicans said they were interested in a temporary extension of the subsidies but they would expect something in return, HHS Secretary Burwell stated that the President will not sign anything that repeals the ACA or any of its core elements.

Republican Congressional response. To Republicans, the possibility that people might lose their federal Exchange subsidies is not the real problem, it is that the ACA itself is making health care way too expensive. According to CNN, health insurers are proposing huge premium increases for their ACA plans in 2016. For example:

- In Florida, United Healthcare (UNH) wants to raise the rates of the ACA's Exchange-based plans by an average of 18 percent. Individual policies available outside the exchange through UNH or through a broker would go up by 31 percent, on average, with hikes as high as 60 percent for certain plans in certain locations.
- In Texas, insurer Scott & White is looking for a 32 percent increase for Exchange-based plans, while Humana (HUM) is asking for an average 30 percent boost for its exclusive provider organization policies, which generally cover only in-network services.

Reuters also reported that many people are forgoing ACA policies. Beth Pinsker wrote that "despite the promise of coverage through the ACA, the number of people applying for noncompliant, short-term health-insurance policies was up more than 100 percent in 2014, according to new data available from companies

that broker these policies. The government does not count these gap plans as qualifying health insurance, so people who have them are subject to penalties for being uninsured."

The data seems to support the claim that the high cost of the ACA plans is a major problem with the ACA. According to the Los Angeles Times, a recent survey in California showed that 44 percent of ACA policyholders find it difficult paying their monthly premiums. In addition, a similar percentage of uninsured Californians said the high cost of coverage is the main reason they go without health insurance. The LA Times also cited a Kaiser Family Foundation survey of 4,555 Californians that examined the experiences of people in Covered California, Medi-Cal, other private coverage, and the uninsured from September to December 2014. KKF found that 44 percent of Exchange policyholders surveyed said it is somewhat or very difficult to afford their premiums, compared to only 25 percent of adults who had employer-based or other private health insurance.

Therefore, regardless of what the Supreme Court decides, the Republicans believe that any real solution would give patients more choices, more control over their health care—and more affordable coverage.

Nevertheless, on March 1, 2015, in a Washington Post op-ed, authored by Senators Orrin Hatch (R-Utah), Lamar Alexander (R-Tenn), and John Barrasso (R-Wyo), the Senators wrote that if the Supreme Court finds that the IRS Rule is invalid, Republicans will have a plan to provide financial assistance to help Americans keep the coverage they picked for a transitional period. The likely reason: 26 of the 34 states that would be affected by the ruling have Republican governors, and 22 of the 24 Republican Senate seats up in 2016 are in those states.

On March 3, 2015, Sen. Ted Cruz (R-Texas) introduced the Health Care Choice Act of 2015, which would allow people to buy health insurance across state lines and repeal the ACA provisions mandating the purchase of insurance, the insurance Exchanges, and subsidies to help people afford coverage. The bill is cosponsored by Senators Barrasso, Mike Crapo (R-Idaho), and Marco Rubio (R-Fla).

Then, on April 20, 2015, Sen. Ron Johnson (R-Wisc) unveiled a bill with 29 other cosponsors, including Senate Majority Leader Mitch McConnell (R-Ky), John Cornyn (R-Texas), John Thune (R-SD), Barrasso, and Roy Blunt (R-Mo). Sen. Johnson's bill, S. 1016, named "Preserving Freedom and Choice in Health Care," would allow people to keep any health care plan and any federal Exchange subsidy they currently have until August 2017. They also would have the freedom to purchase any new insurance plan the free market offers. The bill would stop the IRS from imposing penalties (taxes) on people who choose not to buy costly government-designed health plans by eliminating the individual mandate. In addition, it would end the shifting of people into part-time work by ending the employer mandate. Finally, it would help control the cost of health insurance by repealing the ACA's mandated coverage and returning insurance decisions back to individuals and the states.

State response. Some obvious state responses include legislative action: (1) approving the establishment of state-run Exchanges; or (2) adopting the federal Exchanges as state Exchanges. How quickly states can accomplish these actions, even with HHS cooperation, is open to question. Time is of the essence because health insurers are preparing to submit their health plans for 2016, and the state Exchanges must approve the plans and get them up on their websites. Some have suggested that President Obama may take unilateral executive action to give states more time to set up their Exchanges. If he were to take this action, will it be seen as illegal and be challenged in court?

Despite these options for the states, there is no certainty that they will be inclined to exercise them. According to The Hill, "several high-profile Republican governors are pressuring Congress to come up with a plan if the Supreme Court decides to void subsidies for millions of people in their states." Florida Gov. Rick Scott and Wisconsin Gov. Scott Walker are both opposed to a state-level fix to restore the subsidies. The Hill also reports that Gov. Walker told the Washington Post, "This is a problem created by this President and the previous Congress…it's something that requires a solution at the federal level."

In addition to Florida and Wisconsin, The Hill reported that "Louisiana, Mississippi, Nebraska and South Carolina have all previously said that they would not act on the state-level to restore the subsidies." In addition, "Pennsylvania's Democratic Gov. Tom Wolf [has announced that] he has created a blueprint to start a state-based exchange, which would allow it to continue receiving ObamaCare subsidies," according to The Hill.

Will the Supreme Court soften the blow? Based on statements by Justice Alito during oral arguments, it is expected that any Supreme Court decision invalidating the IRS Rule would be prospective and stayed through the end of 2015. This would prevent the government from clawing back subsidies (never a serious possibility anyway) and allowing enrollees to receive the tax credits they relied upon when they signed up.

During arguments, Alito asked the government's attorney, "Would it not be possible if we were to adopt petitioners' interpretation of the statute to stay the mandate until the end of this tax year as we have done in other cases where we have adopted an interpretation of…a statute that would have very disruptive consequences?" The government's attorney conceded that it was possible, but that as a practicable matter it would be unrealistic to think that states would be able to set up Exchanges within the six months between when a decision is rendered by the Court and the new insurance year.

Conclusion

In late June, we should receive the Supreme Court's decision. We will then analyze the reasoning of the majority opinion and likely dissents. Perhaps we will be surprised again, as we were in *NFIB*, or maybe the Justices will fall in line, true to form. While it is likely that Kennedy will be the swing vote, maybe Roberts will side with the liberal justices again, giving the government a 5-4 or even a 6-3 victory if Kennedy joins them.

What we do know is that regardless of the decision, opposition to the ACA will not go away. The legal wrangling in the courtroom may subside somewhat, but as a political issue it will not go away unless the Democrats retain the White House in 2016. If the Republicans gain the White House in 2016 and retain the House and Senate, the most unpopular parts of the ACA—such as the federal mandate on individuals and employers—likely will be repealed and replaced with something much more limited in scope. Should the court uphold the IRS Rule, the federal subsidies will continue unabated. But will other unforeseen consequences ensue? Will such a decision encourage the courts and federal agencies to read into statutes whatever they find to be politically expedient? Will the next administration simply change the IRS' interpretation and invalidate the Rule?

President Obama has repeatedly said that he has no Plan B should the IRS ruling be invalidated. Most pundits believe, however, that his Plan B will involve playing politics and blaming the Republicans for any adverse consequences. How long this "blame game" goes on will likely depend on how successful it is and whether the Republicans are able to counter the narrative by convincing Americans that they have a better plan. The debate, however, is likely to continue through the 2016 general election.

The Republicans have been intransigent too. Even in the face of a decision that could eliminate subsidies for citizens of their states, Republican governors have not indicated a willingness to set up state Exchanges. In addition, it is extremely unlikely that the proposed federal legislation merely extending the federal Exchange subsidies until August 2017, and simultaneously repealing the individual and employer mandates, will ever be enacted. If President Obama were to agree to that, the ACA would become entirely voluntary, which would not only stifle its growth and eliminate the tax penalties needed for funding, but likely cause its enrollment to significantly decline.

But if a catastrophic "death spiral" ensues, and real pain is being felt by voters, perhaps the President and Congress will be willing to put partisan politics aside and compromise.