

KING v. BURWELL

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Averting the Affordable Care Act's Demise

THE PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010

("ACA") is a landmark law dedicated to achieving widespread, affordable health care. In the five years since its passage, the ACA has faced two near-death experiences. The first was the 2012 Supreme Court case of *National Federation of Independent Businesses [NFIB] v. Sebelius*. The second came just three years later, in 2015, with the Supreme Court case *King v. Burwell*. In both cases, Chief Justice John Roberts was the ACA's unlikely rescuer, drafting both majority opinions.

In *NFIB*, Roberts was joined by the court's four liberal justices in finding that the individual mandate — the requirement that individuals purchase insurance coverage if it is affordable — is constitutional as a tax. In *King v. Burwell*, Roberts dealt with a challenge over the statutory interpretation of two lines in the ACA that authorize federal tax credits (referred to by many as insurance subsidies) for insurance bought on state-operated health insurance exchanges, without mentioning federally operated state exchanges.

In the majority opinion in *King*, released on June 25, 2015, Roberts was joined by five other members of the court in ruling that the ACA's tax subsidies for insurance premiums are available both in states with their own insurance exchanges and those relying on a federal exchange. Joining Roberts were Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, Stephen Breyer and Elena Kagan.



This artist rendering shows Michael Carvin, lead attorney for the petitioners, right, speaking before the Supreme Court on March 4, 2015, as the court heard arguments in *King v. Burwell*. Seated from left are: Justice Sonia Sotomayor, Stephen Breyer, Clarence Thomas, Antonin Scalia, Chief Justice John Roberts, Anthony Kennedy, Ruth Bader Ginsburg, Samuel Alito and Elena Kagan.



Demonstrators stand outside the Supreme Court on March 4, 2015, as the court heard arguments in *King v. Burwell*, which was a major test of President Barack Obama's health overhaul. If the case would have been successful, it would have halted health care premium subsidies in all states where the federal government runs the insurance marketplaces.

The Death Spiral

Why was the *King* case a near-death experience for the ACA?

The ACA provides that individuals can purchase competitively priced health insurance on American Health Benefit Exchanges (“exchanges”) that may be run by either the states or the federal government. It also authorizes a federal tax credit for low- and middle-income individuals who purchase insurance. But in an apparent glitch in the language of the statute, the ACA appeared to make this tax credit, referred to by many as insurance subsidies, only available through exchanges “established by the state.” The Internal Revenue Service (IRS) issued a regulation stating that the federal tax credit is available to all financially eligible Americans, regardless of whether they purchase insurance on a state-run or federally facilitated exchange.

When the ACA was passed in 2010, many expected that each state would want to run its own health insurance market exchange. However, many states opted to allow the federal system, *HealthCare.gov*, to do the work for them. Currently, between the state and federal exchanges, more than 10 million people buy insurance through exchanges. An estimated 87 percent of people receiving subsidies for insurance are those who purchased through federal exchanges.

In the days leading up to the *King v. Burwell* decision, many experts predicted that the court would find that ACA only authorized federal tax credits for insurance bought on state-operated health insurance exchanges. This would have meant that “virtually all” individuals receiving subsidized insurance on federal exchanges would lose those subsidies.

Removing subsidies would have made insurance unaffordable for many people, leading these people to avoid purchasing insurance unless they were sick. This leads to “adverse selection” — including more of those who are ill in the pool of insured

— which, in turn, further drives up the cost of insurance, causing more people who are less ill to drop insurance coverage. Thus, the loss of federal insurance subsidies could mean that a state's insurance market could be pushed into a “death spiral” of ever-increasing premiums, which in turn would lead fewer individuals to purchase insurance.

The Plaintiff's Arguments

The plaintiffs in *King* challenged the IRS rule, arguing that the ACA only authorized tax credits for individuals who purchased insurance on state-established exchanges. Among other arguments, the plaintiffs asserted that the purpose of the tax-credit provision was to encourage states to set up their own exchanges, and the penalty for relying on the federal government to do so was withdrawal of those credits and subsidies.

The Court's Opinion

The Supreme Court in *King* made quick work of the plaintiffs' argument that Congress meant to withhold subsidies in order to encourage states to adopt their own exchanges. The court emphasized that Congress obviously did not intend such destructive consequences as the “death spiral,” so it must have meant for premium subsidies to be available in all states.

The court found that Congress's actual intent could be honored by reading the phrase “established by the State” to include federal exchanges operated as a fallback in states without their own exchange.

The court acknowledged that this is not the “most natural” reading of these four words, but emphasized the need to consider the phrase in the context of the ACA's overall structure



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and purpose, rather than in isolation. "Our duty, after all, is 'to construe statutes, not isolated provisions.'"

The court explained that ...

[i]f the statutory language is plain, the Court must enforce it according to its terms. But oftentimes the meaning — or ambiguity — of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, the Court must read the words in their context and with a view to their place in the overall statutory scheme.

Petitioners' plain-meaning arguments are strong, but the Act's context and structure compel the conclusion that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.

The court cited an earlier example of the principle of statutory construction that words should be used "in their context and with a view to their place in the overall statutory scheme" as found in the 2000 case of *FDA v. Brown and Williamson*. In *Brown*, the court held that the Food, Drug and Cosmetic Act (FDCA) did not grant the Food and Drug Administration the authority to regulate cigarettes as drug delivery devices. While the FDCA provided very broad definitions of "drugs" and "devices," the court concluded that "considering the [statute] as a whole, it is clear that Congress intended to exclude tobacco products from the FDA's jurisdiction." (Congress later amended the FDCA to provide the FDA with this regulatory authority.)

The majority in *King* did concede that the ACA "contains

more than a few examples of in-artful drafting." Nevertheless, the court's closing words are strong and definite:

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. ['Established by the State'] can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

This conclusion inspired an exasperated dissent from Justice Antonin Scalia, characterizing various points of reasoning as "quite absurd," "eccentric," "feeble," "interpretive jiggery-pokery," "pure applesauce" and a "dismal failure."

The Path Not Taken

Many experts predicted that the *King* decision would be grounded on the legal principle known as "Chevron deference." Chevron deference is a doctrine that counsels that courts should generally defer to agencies' reasonable interpretations of statutes if the plain meaning of the statutory language is ambiguous. In its briefs and during oral argument, the government asserted first that the statutory language clearly permitted tax credits for people who purchased insurance through federally established exchanges. But, in the alternative, even if the statute was found to be ambiguous, the government argued that the application of Chevron meant deferring to the IRS' reasonable interpretation of the statute.

As described above, the majority reached its decision without resorting to the doctrine of Chevron deference at all. Of interest, Chief Justice Roberts explained that it was the task of the court, not the IRS, to interpret the relevant provision of the statute. And in the court's view, a thorough consideration of not

only the text but also the purpose and structure of the act led it to agree with the government's interpretation:

When analyzing an agency's interpretation of a statute, this Court often applies the two-step framework announced in Chevron, 467 U. S. 837. But Chevron does not provide the appropriate framework here.

The tax credits are one of the Act's key reforms and whether they are available on Federal Exchanges is a question of deep "economic and political significance"; had Congress wished to assign that question to an agency, it surely would have done so expressly.

And it is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. It is instead the Court's task to determine the correct reading of Section 36B.

While this "path not taken" may seem of interest only to lawyers, it has far more broad importance. If the court had found the language of the ACA to be ambiguous and then opted to defer to the IRS' interpretation under Chevron, a subsequent presidential administration (perhaps a Republican one) could have been placed in the position of reinterpreting the statute through the passage of a new regulation that precluded the availability of subsidies for insurance purchased on federal exchanges. Thus, the choice of the majority to avoid the Chevron pathway to finding for the government translates the *King* decision into some measure of long-term stability when it comes to tax credits and subsidies.

The Path Ahead

Will the *King* decision mean the end of state-run exchanges? Some are predicting that there might be a bit of "buyer's remorse" in state capitals around the country. On one hand,

state exchanges provide the opportunity for state insurance regulators to oversee their markets, a long-familiar role. In addition, state-run exchange systems allow for a greater amount of policy flexibility and control.

On the other hand, states may have underestimated the difficulty and expense of building from scratch, and running, state marketplaces with all of the technical complexity of a multifaceted website, customer service demands that mean maintaining call centers and marketing efforts to encourage the uninsured to sign up. Nearly one-half of the states are running into money difficulties while federal start-up funds are now at an end. The future may see more states turning their marketplaces over to *HealthCare.gov*.

Other big changes the future may bring may depend on the next presidential election. All of the frenzied thinking that went into how to respond if the *King* decision had turned out differently could foreshadow future legislation, including the possibility of turning health care insurance over to the states to adopt alternative approaches, or provisions that could water down parts of the ACA such as the sections that cover employers.

Closing Thoughts

Chief Justice Robert's discussion of the "death spiral" contains perhaps one of the favorite lines of the opinion for many of my health law colleagues: "It is implausible that Congress meant the Act to operate in this manner." The chief justice's support for this proposition? A quote from *NFIB*: "Without federal subsidies ... the exchanges would not operate as Congress intended and may not operate at all."

The irony? The quote did come from *NFIB* — but from the *joint dissent*.

One lesson of *King* for everyone? Words matter — and may come back to haunt you.



About the author: Katharine Van Tassel recently joined Creighton School of Law as professor and director of Health Law Programs. She began her teaching career in 1997 and has taught health law, law and science and bioethics courses. She is editor of the *Health Law Prof Blog*, and a regular blogger on *Bill of Health* (a blog of the Harvard School of Law) and *Bio Law: Law and the Life Sciences*.

She currently serves as chair of the executive board of the Law and Mental Disability Section of the American Association of Law Schools and as co-chair of the Food and Drug Law Committee of the Administrative Law Section of the American Bar Association. She also has served on the executive board of the Law, Medicine and Healthcare Section of the American Association of Law Schools.

Van Tassel's scholarship has appeared in such journals as the *University of Chicago Legal Forum*, the *Pepperdine Law Review*, the *Cardozo Law Review*, the *Connecticut Law Review*, the *Brooklyn Law Review*, the *University of Cincinnati Law Review* and the *Seton Hall Law Review*.

Her work has been cited by the Nevada Supreme Court, the New Mexico Supreme Court and the New Jersey Tax Court, all on issues of first impression. She is the author of *International Encyclopaedia of Laws: Medical Law, United States of America* (Kluwer, forthcoming, 2016). She is the co-author of the two-volume encyclopedia *Food and Drug Administration* (4th ed., 2015), which is cited as an authoritative FDA source by the U.S. Supreme Court and numerous circuit and district courts. She is also the co-author on the book *Litigating the Nursing Home Case* (2nd ed., 2014).

Recently, Van Tassel testified as an expert witness before the U.S. Commission on Civil Rights in Washington, D.C., on how to improve the enforcement of the Emergency Medical Treatment and Labor Act (EMTALA) (Washington, D.C., March 2014).