Op-Ed

Once More Into the Breach: The Future of Subsidies in the Federal Health Insurance Exchange

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THE IMPLEMENTATION OF THE AFFORDABLE CARE ACT (ACA) serves as a reminder of the degree to which the judiciary shapes US health policy. Literally within minutes of the ACA's enactment, opponents sued to halt its implementation. In upholding the constitutionality of the ACA's personal responsibility provision in 2012, the US Supreme Court permitted the law to move forward. But damaging rulings have piled up. In the same decision affirming the legality of the personal responsibility requirement, the Court ruled that the law's mandatory Medicaid expansion for the poorest adults amounted to unconstitutional state coercion.¹ In 2014, in *Hobby Lobby v Burwell*, the Court limited the reach of the ACA's contraceptive coverage guarantee in cases in which employers object to covering contraceptives on religious grounds.

Now the Court has decided to hear an especially potent challenge, one of a collection of four cases² that focus on the question of whether the ACA permits eligible people who buy health insurance through the federal Exchange to receive premium tax credits. Should the Court side with the challengers and decide that subsidies are available only to residents of states that establish their own Exchange, the results would be catastrophic. Thirty-four states have elected to use the federal Exchange; according to the Commonwealth Fund, a decision for the plaintiffs would result in the loss of premium subsidies by nearly 5 million people, the great majority of Americans who receive subsidies.³ The Urban Institute has calculated that by 2016, such a decision would affect more than 7 million people, costing the states that use the federal Exchange \$36 billion in lost financing.⁴ A decision against the federal government also would cause a collapse of the individual insurance market in states using the federal Exchange, since the loss of subsidies would deter enrollment by healthy people, even though the ACA's

nationwide market reforms—including the requirement that insurers sell to all people regardless of health status— would remain in effect.⁵ Moreover, the ACA's employer responsibility provision also would disappear in the federal Exchange states, since employer payments are triggered only if employees without affordable workplace coverage use premium credits to buy Exchange coverage.

These 34 states could, of course, protect their residents—and their insurance markets—by establishing a state Exchange; opponents readily concede that this would cure the problem. But these states have not done so, either for ideological or practical reasons, a choice that the ACA expressly affords them (PPACA §1321).

This is not the first time, of course, that the courts have become a political battleground over a seminal advance in social welfare policy. Opponents of both the Social Security Act and Medicare challenged these laws. The Supreme Court's decision to intervene early in the federal subsidy cases, even as they still make their way through the appeals process, can be read either as an overt political act aimed at destabilizing the law on the eve of its second open enrollment or as a decision to settle the cases quickly because of their profound implications. Whatever the Court's motives, its decision skyrockets the litigation to front-and-center status, just as a new, Republican-dominated Congress assumes power in winter 2015.

The premium subsidy cases focus on 5 words in a nearly 1,000-page statute: "Exchange established by the State" (PPACA §1401). These words appear in the part of the ACA that defines how the size of the subsidy is calculated (ie, based on the price of insurance in the Exchange) rather than on the subsidy entitlement itself. Under normal conventions of statutory interpretation, these 5 words would be read in the fuller context of the Act as a whole, not in isolation as the challengers insist. This fuller examination means reconciling the sentence fragment with the law's two most crucial provisions: the personal responsibility requirement, which applies to nearly all US residents; and nationwide market reforms requiring insurers to sell plans to any person regardless of health status (guaranteed issue). The Internal Revenue Service (IRS), reading this fragment as part of the law as a whole, takes the sensible position that the subsidies apply everywhere. But were the Court to side with the Act's opponents, the IRS position would fail. In this situation, responsibility would fall to Congress to clarify the meaning and reach of the subsidy provision.

Thus, the case boils down to how courts respond to statutory text that may be less than clear. The correct approach to statutory interpretation—offered by Justice Antonin Scalia, the Court's leading authority on understanding statutory text—is to read the statute as a whole, rather than focusing on isolated fragments. Furthermore, under normal principles of judicial interpretation, were the statute judged ambiguous, the Court would defer to the federal agency empowered by Congress to implement the law (in this case, the IRS).

In July 2014, in *Halbig v Burwell*, a 3-judge panel in the DC Circuit adopted the opponents' fractured approach to the law. That same day, a 3-judge panel in the 4th Circuit, in *King v Burwell*, ruled in favor of the government. In August 2014, the full DC Circuit set aside its own 3-judge ruling and decided to rehear the case *en banc* (ie, before all of Circuit court judges) in December. In the meantime, the losing *King* plaintiffs appealed directly to the Supreme Court, bypassing *en banc* review in the 4th Circuit (which is the challengers' prerogative).

At this point, the Court's normal custom would have been to put the 4th Circuit appeal on hold and permit the other circuit court cases to percolate. But in a shocking move, on November 7, the Supreme Court granted *certiorari* in the 4th Circuit case, effectively pushing the lower courts aside.

Now, for the third time in 4 years, the nation once again finds itself awaiting a major Supreme Court decision involving the ACA. The Court likely will schedule oral arguments in late winter or early spring, after the second open enrollment period, with a decision expected at the end of June 2015. Such timing inevitably will coincide with a Republican-led Congressional budget blueprint that could call for radical changes in the ACA. Were the Court to strike down the IRS rule, this could immeasurably strengthen Congress' bargaining power; by contrast, a decision upholding the Administration would allow the subsidies to stand even as the FY 2016 federal legislative process proceeds.

In the meantime, of course, the choices made by the 34 federal Exchange states loom large. Any state could avoid the case's threat to its residents' access to insurance subsidies by establishing a state Exchange. This does not mean that the state could not use the federal Exchange platform; indeed, at least two states with state Exchanges do so (Idaho and Nevada). By establishing an Exchange, a state would protect its residents not only against the loss of premium subsidies but against the collapse of its individual insurance market. But how many federal

Exchange states—in a nation whose state legislatures tilt even more Republican than before the 2014 mid-terms—will elect to do so is anyone's guess.

References

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