Subsidies and the Survival of the ACA — Divided Decisions on Premium Tax Credits

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In rapid succession on July 22, two federal courts of appeal reached opposite conclusions on the single most important outstanding legal issue affecting the Affordable Care Act (ACA): whether the federally facilitated insurance exchanges that serve two thirds of the states can grant premium tax credits to individuals purchasing health insurance plans. Shortly after 10 a.m., two members of a panel of the District of Columbia Circuit held, over a vigorous dissent, in *Halbig v. Burwell*[1] that the Internal Revenue Service (IRS) rule allowing federally facilitated exchanges to issue tax credits was invalid. Around noon, a three-judge panel of the Fourth Circuit in Richmond, Virginia, unanimously upheld that same rule in *King v. Burwell*.[2]

Both courts agreed that the primary purpose of Title I of the ACA is to "increase the number of Americans covered by health insurance." To that end, Congress adopted several interlocking measures. First, uninsured Americans who can afford health insurance must purchase health insurance or pay a tax. Second, insurers must accept all applicants, regardless of preexisting conditions, and charge premiums that disregard health status. Third, premium tax credits are available to Americans with household incomes between 100% and 400% of the federal poverty level, in order to make health insurance affordable. Finally, large employers must offer their employees health insurance or must pay a tax if one or more of their employees receives premium tax credits.

The ACA permits the purchase of health insurance with premium tax credits through virtual marketplaces called exchanges. Section 1311 of the ACA provides that states "shall" establish exchanges, but since Congress cannot literally require states to do so, section 1321 provides that if a state "elects" not to establish the "required" exchange, the Department of Health and Human Services shall establish "such" exchange for the state. This much is common ground to all the judges.

But buried in the ACA section authorizing premium tax credits are two subsections, addressing the calculation of credits and defining months for which credits are available, that say that tax credits are available for individuals enrolled in a plan "through an exchange established by the state under 1311." The IRS concluded that, when the statute as a whole was taken into account, this phrase did not preclude federal exchanges from issuing credits. The Halbig and King lawsuits, sponsored by the antigovernment Competitive Enterprise Institute, challenged this conclusion. Both lawsuits lost at the district court level, where the judges held that the statute clearly authorizes federal exchanges to grant premium tax credits. Both decisions were appealed.

Judge Thomas Griffith of the D.C. Circuit, writing for himself and Judge A. Raymond Randolph, decided that the phrase "plainly distinguishes" state-operated from federally facilitated exchanges and allows only the former to issue premium tax credits. Griffith brushed aside other language in the statute that points the other way — a section that defines all exchanges as 1311 exchanges, another that seems to say all exchanges are state established, and another that would seem to limit individuals who can enroll through the exchanges to those who reside in a state "that established the exchange." The government had argued that these provisions show that all exchanges, whether federal or state operated, are "established by the state," by definition. Otherwise, federal exchanges could not enroll individuals in health plans and would be pointless. Griffith also rationalized away another provision requiring federal exchanges to report the premium tax credits they award. Finally, he concluded that, although it might not be necessary to consider the purpose or history of the statute, the legislative history "sheds little light on the precise question" at issue.

Judge Harry Edwards dissented vigorously. It is obvious, he contended, that premium tax credits are an essential element of the congressional scheme to make health insurance affordable to all Americans. If the "established by the state" phrase is read in the context of the other provisions of the statute that Griffith trivialized, it is quite

clear that Congress meant for the federal exchanges established on behalf of states to issue tax credits. At most, the statute is ambiguous, and thus, under established law, the courts must defer to the IRS interpretation.

Judge Roger Gregory, writing for the Fourth Circuit, similarly reviewed the wording of the premium-tax-credit provision and its context and history and concluded that neither side had clearly prevailed — although the government's arguments were better than the plaintiffs'. The courts must, he concluded, defer to the IRS interpretation of the statute and uphold the rule. Judge Andre Davis, concurring, went further, concluding that the IRS interpretation of the statute was "required as a matter of law."

Two courts, equal in stature, are thus divided. The Obama administration will request that the entire 11-judge D.C. Circuit rehear the case. Although the D.C. Circuit rarely rehears cases en banc, they do so for cases of "exceptional importance," and this is clearly such a case. If they decide to rehear the case, they may vacate and then reverse Griffith's judgment. There would then no longer be a disagreement between the circuits, which would make Supreme Court review unlikely. The same issue is pending in district courts in Oklahoma and Indiana, but appeals on those cases will not be decided for some time. In the meantime, the IRS rule remains in place, and Americans in states with federally facilitated exchanges continue to qualify for tax credits.

But what if the Supreme Court ultimately strikes the rule? First, nearly 5 million Americans who chose an insurance plan through the federal exchange using a premium tax credit would lose that credit — and probably their health insurance.[3] Since the enforceability of the ACA mandates that large employers provide and individuals obtain health insurance depends on the availability of tax credits, those mandates could also disappear or be seriously undermined in two thirds of the states. Insurers, however, would still be required to offer coverage regardless of applicants' preexisting conditions. Absent the premium tax credits and the mandates, the risk pool for insurers in states with federally facilitated exchanges would deteriorate rapidly, causing premiums to rise precipitously.[4] The individual insurance market could indeed collapse entirely in these states, leaving millions of Americans uninsured. The states could set up their own exchanges, but the political climate in many states might make that impossible.

Such a situation would have serious consequences for physicians and their patients. Without health insurance, patients are less likely to seek — and pay for — the services of physicians. Patients might defer seeing their doctors, undergoing recommended tests, or taking prescribed medicines until their conditions deteriorated considerably, necessitating even more costly care. Bad debt would become an even more serious issue than it is now.

It is obvious that the premium-tax-credit provision is awkwardly worded. The purpose of the statute is clear, however, and there is no evidence, other than the four words on which these cases turn, that Congress meant to deny millions of Americans health insurance simply because their states elected not to operate exchanges. Ultimately, the courts are likely to attend to the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"[5] and defer to the IRS interpretation of the law. But it may take time before that endgame is reached. And in the interim, continuing uncertainty may discourage lower- and moderate-income Americans from getting covered and getting care.

Editor's note: Since this article was published, the Obama administration has requested en banc review of *Halbig*, and the plaintiffs in *King* have requested Supreme Court review.

Disclosure forms provided by the author are available with the full text of this article at NEJM.org.

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1. Halbig v. Burwell (D.C. Circuit, July 22, 2014) (http://www.cadc.uscourts.gov/internet/opinions.nsf/10125254D91F8BAC85257D1D004E6176/$file/14-5018-1503850.pdf).
2. King v. Burwell (4th Circuit, July 22, 2014) (http://www.ca4.uscourts.gov/opinions/published/141158.p.pdf).
3. Avalere Health. Upcoming federal court decision could mean premium increases for nearly 5 million Americans. July 17, 2014 (http://avalere.com/expertise/managed-care/insights/upcoming-federal-court-decision-could-mean-premium-increases-for-nearly-5-m).
4. Blumberg LJ, Holahan J, Buettgens M. *Halbig v. Burwell*: potential implications for ACA coverage and subsidies. Robert Wood Johnson Foundation/Urban Institute, July 17, 2014 (http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2014/rwjf414644).
5. Utility Air Regulation Group v. EPA, 573 U.S. (2014) (Scalia J) (http://www.supremecourt.gov/opinions/13pdf/12-1146_4g18.pdf).

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