

**INTRODUCTION:** *On March 4, 2015, the Supreme Court heard oral arguments in King v. Burwell, a case that could have a significant impact on our healthcare system and on millions of Americans. A decision is expected in June 2015. To start this conversation, take the quiz to see what you know about what's at stake in the King v. Burwell case.*

*To start the discussion, [take the quiz below](#) to see what you know about King v. Burwell.*

## 1: What is the key issue being considered in this case?

- A. The constitutionality of ObamaCare's individual mandate
- B. The constitutionality of the mandate that insurers must provide first-dollar coverage for contraception
- C. The IRS rule for providing subsidies to and imposing mandates and penalties on people buying health insurance through the federal government exchanges created under ObamaCare

**ANSWER: C** – The key issue in this case is whether the Affordable Care Act allows the government to provide subsidies to insurance companies on behalf of individuals to help pay for their insurance, and to impose penalties on people and businesses in states that did not choose to establish a State exchange. There are effectively two categories of health insurance exchanges established by ObamaCare: Those “Established by the State” (described in Section 1311 of the law’s text) and the Federally-Facilitated Exchanges (described in Section 1321). The statute authorizes the federal government to provide subsidies to insurance companies on behalf of enrollees in the state-established exchanges, but not in the federal exchanges. In 2012, the IRS issued a rule allowing insurance companies in federal exchange states to also get subsidies. That means that those who purchase insurance through a federal exchange would receive the same subsidies as people in states that had established their own exchanges. These subsidies also trigger the individual and employer mandates, which the plaintiffs say their states were trying to avoid by not setting up their own exchanges. Plaintiffs in King v. Burwell allege that the IRS acted illegally and that the federal government did not have authority to overrule the states in their decisions not to establish exchanges.

## 2: Why did Congress write the law so that only those in states with their own, state-based exchanges would receive subsidies?

- A. There is no reason why they would, which is why the provision must be a drafting error.
- B. To encourage states to create their own exchanges.

**ANSWER: B** – The record of Congress’ debate over this provision strongly suggests that the subsidies were intended by the law’s drafters as a conditional “carrot” to encourage states to create their own exchanges. If states set up their own exchanges, then their citizens would get the subsidies. If they didn’t, there would be no subsidies but citizens in these states would be protected from the employer mandate and, in many cases, from the individual mandate. Such carrots are a common practice in federal law. In many ways, ObamaCare put states between a rock and a hard place. Different states understood the law differently, and different states had different political concerns. Questions about subsidies and mandates aside, states had many other variables to consider when deciding whether or not to establish exchanges, like administrative costs and political pressures. It was only after a majority of states opted not to create their own exchanges, and that the constitutionality of the differential treatment had been raised as a question that the Obama Administration moved to refashion the law to allow subsidies to flow to states that had not established their own exchanges.<sup>1</sup>

**3: What would happen if the Supreme Court ruled in favor of the plaintiff and agreed that the IRS acted inappropriately in providing subsidies to those in non-establishing states?**

- A. Insurance companies will lose their subsidies, meaning that approximately 6 million people will be charged the full price for their insurance rather than the discounted (taxpayer-subsidized) price. People could still keep their coverage, but it would be much more expensive without the subsidies and many people would either drop coverage or be dropped from coverage.
- B. Millions of individuals and businesses would be freed from ObamaCare’s harmful mandates and taxes.
- C. The IRS – and by extension other agencies – will have been reminded that they are not our legislators, and regulatory fiat is not how we decide laws.
- D. All of the above

**ANSWER: D** – If the Supreme Court rules in favor of the plaintiffs and Congress does not take action to either change the law as written or provide alternative forms of assistance, then millions of Americans could lose insurance subsidies and may suffer real hardship as a result of this poorly designed law. However, tens of millions of Americans will also benefit because they would no longer face the mandates created by ObamaCare, which are triggered by the illegal subsidies. Finally, Americans will also benefit because the Supreme Court will have once again ruled that regulators cannot rewrite laws enacted by Congress, only reasonably interpret and enforce them.

**4: Could Congress take action to help those who are hurt by this ruling, while protecting those who benefit?**

- A. No, Congress can’t do anything other than “fix” the law so that all of ObamaCare’s benefits and penalties are in force in non-establishing states.

- B. No, Congress is unlikely to do anything at all in response to the ruling.
- C. Yes, Congress can create a better system that will provide for transitional assistance to help those who lose subsidies while preserving more freedom and options for others in those states.

**ANSWER: C** – Congress is discussing several plans that would protect those in jeopardy of losing subsidies by preserving that financial support, but without imposing the other ObamaCare mandates and penalties. All the plans would allow these states to transition to a better health care system that allows for greater choice while protecting those who need help.<sup>2</sup>  
and 3 and 4

**5: What is the Supreme Court supposed to consider in making the determination about whether the IRS acted inappropriately by taking it upon itself to radically rewrite the law?**

- A. What actions Congress will take in response to the ruling
- B. How many people will be impacted, both harmed and helped, by the ruling
- C. The letter of the law that was passed by Congress and signed by the President

**ANSWER: C** – The Supreme Court is charged with interpreting the law as it was written. Congress is in charge of writing the laws and the executive branch, with enforcing those laws. The Supreme Court should not rewrite the law to create a certain policy outcome any more than a regulatory agency should. That’s why ultimately this case is about far more than healthcare penalties and subsidies. It’s about the rule of law and separation of powers.

*How Did You Do?*

Check your answers and give yourself one point for each question you got right.

**Did you get fewer than 3 points?** That’s okay! This information isn’t well known, and in fact, most of the discussion you hear about this topic ignores this kind of analysis. Take a look at our suggested readings to learn more.

**Did you get 3 points or more?** If so, congratulations! You know your stuff about the King v. Burwell case and its potential impact on our healthcare system. You should speak up when you hear discussion about this topic since so many people haven’t heard this information!

**Real World Examples**

Here are a few examples of people who will be affected if the Supreme Court rules in favor of the plaintiff.

### ***Kathy Greeley***

*Kathy owns a small business, an “Etsy” shop where she sells personalized stationery. In the past she was employed at a bigger company where she had employer-provided health insurance, but this year she has to obtain coverage on her own or face a tax penalty under ObamaCare’s individual mandate. Kathy lives in a state that did not establish a state-based health insurance exchange so she went to HealthCare.gov to buy a plan. When asked what her annual income would be for the upcoming year, Kathy had to take a guess. She was confident in her small business, but she expected her annual income would be pretty low. After all, her “Etsy” shop had always been a hobby of hers, something she expected would be a more fun job but not very lucrative. When she estimated her income, the federal health insurance exchange offered her subsidized health insurance plans. This was so exciting, Kathy thought. ObamaCare was working well to provide entrepreneurs like her a way to buy affordable insurance. Kathy’s first year working for herself full time turned out better than she ever imagined. Her paper products really took off, and her annual income ended up being much higher than she expected. But when it was time to file her taxes, Kathy was devastated to find out that she would have to pay back several thousand dollars in subsidies for her health insurance. These subsidies went to her health insurance company so why did Kathy have to pay them back? Kathy felt like she was being punished for her success. In the end, Kathy concluded that it would have been better if the exchange had been transparent with her about the costs of her insurance. Her unsubsidized premium was much higher, not lower, than her insurance costs had been before ObamaCare. Kathy hopes the Supreme Court will rule against the IRS in King v. Burwell because then lawmakers will have to reexamine how to make individual-market insurance less expensive, both for subsidized and unsubsidized customers.*

### ***Sarah and John Miller***

*Sarah works at a small business that couldn’t afford to pay her health insurance. John is a stay-at-home dad. Before ObamaCare took effect, their family had a low-cost, high deductible plan that worked well for them. Sadly, that plan was cancelled once ObamaCare’s regulations took effect. And when the Millers went to buy insurance on the federal exchange, they couldn’t afford the more expensive plans, which were all they were offered. The Millers qualified for a government subsidy, however, so they have been able to shoulder ObamaCare’s higher costs. Still, the portion of their ObamaCare premiums that they have to pay is a higher dollar amount than they had been paying for their pre-ObamaCare plan (without any subsidy!). They worry though, that after the Supreme Court ruling, they’ll lose those subsidies and won’t be able to afford the expensive insurance plans that are all that are available under ObamaCare. The Millers are hopeful that Congress and their state government will work to restore the lower-cost options*

they had before ObamaCare was passed in the first place. They understand that greater freedom, not subsidies, is ultimately the key.

### **Fred Alvarez**

*Fred runs an auto-shop with 55 full-time employees. Lately, business has been a real challenge. Because of ObamaCare's employer mandate, Fred now faces a tough choice. He has always wanted to provide health insurance benefits to his workers, but in a small business his margins are very thin, and the expensive health insurance ObamaCare requires is out of reach for his business. Now, on top of his other business costs, Fred faces a penalty next year for not providing this type of benefit to his employees. Sadly, Fred has had to consider laying off a few of his workers or moving several of them to part-time in order to maintain a workforce of fewer than 50 workers and avoid the additional cost of ObamaCare's penalties. He knows one thing for sure: With this mandate in place, he can't dare hire anyone new or grow his business because the cost of hiring new workers could now include not just their compensation and employment taxes, but more penalties. Fred lives in a state that didn't establish an ObamaCare exchange, so the federal government operates the exchange in his state. He is hopeful that the Supreme Court will rule with the plaintiff and against the government because if they do, the employer mandate and the associated penalty will no longer be applied to him. He can go on creating jobs and paying his workers more wages in cash compensation because he won't be forced to provide a health insurance benefit or pay a fine. Maybe one day his business will grow so much that he can afford to offer more competitive benefits. But he can't grow under ObamaCare's current rules.*

### **Tim Rogers**

*Tim is a single guy in his early 30s. Before ObamaCare, he didn't have any health insurance. He makes too much money to qualify for Medicaid, but his income is still pretty low. You might think ObamaCare would be helpful to him. When his state decided not to establish an exchange, he was instructed to go to HealthCare.gov to find an insurance plan or else face a fine for not buying insurance. Tim qualified for a small subsidy, but he still didn't really want to buy health insurance. He wanted to keep his money to try to pay off his debts and pay his rent. Because of the IRS rule that subsidies apply to Tim, he has to choose between buying an expensive ObamaCare plan or paying a penalty for going uninsured. If the Supreme Court rules that the IRS acted illegally, Tim will no longer be subject to the individual mandate penalty because he will qualify for a hardship exemption and will be allowed to purchase a catastrophic insurance plan with a very low premium, which is really all he needs. Or, he might still choose to forego health insurance, but he will no longer face a fine for his decision.*

## *Discussion Questions*

- Does your state have its own exchange? Are you worried about losing subsidies or do you know anyone who is?
- Do you think that the Administration and IRS should follow the law? What are the dangers of allowing agencies and the White House to ignore the law as written by Congress and rewrite the laws themselves? What else might happen if this becomes business-as-usual in Washington?
- Do you trust Congress to fix the law after a Supreme Court ruling? Do you want them just to put a Band-Aid on ObamaCare or would you rather them work to create a better healthcare system?

## *Articles to Read*

- 1 - Michael Cannon “[Seven Things You Should Know about the IRS Rule](#)”
- 2 - Sen. Ron Johnson “[A Make-or-Break ObamaCare Moment](#)”
- 3 – Rep. Paul Ryan “[An Off-Ramp for ObamaCare](#)”
- 4 – Sen. Ben Sasse “[A First Step on the Way Out of ObamaCare](#)”
- 5 - Hadley Heath Manning “[King v. Burwell Policy Focus](#)”
- 6 - Hadley Heath Manning “[Five Myths about King v. Burwell](#)”
- 7 - Grace-Marie Turner and Tom Miller “[What Happens To The ACA If The Petitioners In King v Burwell Win At The Supreme Court?](#)”

## *Action Items*

- Ask your friends and family how they feel about the upcoming Supreme Court ruling. Make sure they know the facts about the letter of the law. Ask if they are comfortable with the precedent of the Supreme Court allowing the executive branch to rewrite the laws passed by Congress. Inform them about the steps that Congress could take to prevent anyone from losing insurance—and to create a better healthcare system—after a ruling in favor of the plaintiff.
- Write a letter to the editor of your local paper the next time you read about the King v. Burwell case. Explain how it’s the Supreme Court’s job to rule based on the letter of the law and that Congress, as the people’s representatives, needs to create the laws and reform laws that need adjustment.
- Call or write a letter to your Congressman and Senators in Washington telling them you want them to make sure the 6 million people in federal exchange states will not lose their coverage if the Supreme Court votes that the IRS violated the law. Tell them this case could be a big opportunity to transition our health policies toward greater freedom.