

King v. Burwell

What's Next for Colorado After the Supreme Court Ruling?

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For the second time in three years, the Supreme Court has upheld a major foundation of the Affordable Care Act (ACA).

The 6-3 ruling for the Obama Administration in the King v. Burwell case ends a conservative challenge to the ACA that sought to do away with federal health insurance subsidies in the 34 states that use the federal exchange. Had the plaintiffs won, an estimated 6.4 million people would have lost their subsidies.

Colorado was not one of the states that would have lost its subsidies, thanks to the legislature's decision in 2011 to create a state-based health insurance marketplace.

The ruling highlights the crucial role of state-based insurance marketplaces. Legislators who backed Connect for Health Colorado argued that a state-run exchange would give Colorado leaders more control over the local insurance market and insulate the state from abrupt changes at the federal level. The King decision has proved them right.

Moving ahead, the Colorado Health Institute expects the policy conversation, both at the state and national level, to take a more targeted focus on effectively implementing the law. This will include ensuring that everyone, including the newly insured, has access to affordable and convenient health care.

The Ruling: At a Glance

Justices ruled 6-3 that the Internal Revenue Service did not break the law by offering subsidies to insurance consumers in the 34 states that rely on the federal

The Four Words

The King v. Burwell case hinged on these four words in the Affordable Care Act (ACA) – “established by the state.”

As the law is written, it says that insurance subsidies are available for health plans purchased on an exchange “established by the state.” Because 34 states did not establish an exchange, instead sending their residents to the federal exchange, the plaintiffs said people in those states should not get subsidies.

The case was brought by conservative critics of the ACA. The plaintiffs, led by David King, are four Virginia residents who qualified for subsidies on the federal exchange.

The Obama Administration and its allies argued that Congress never intended to deny subsidies to states that use the federal exchange, and that the justices should focus on the intent of the ACA as a whole, not on four words in isolation.

marketplace. Justices Anthony Kennedy and John Roberts joined the liberal justices Elena Kagan, Stephen Breyer, Sonia Sotomayor and Ruth Bader Ginsburg in the majority. Justices Antonin Scalia, Clarence Thomas and Samuel Alito dissented, saying the subsidies should not be allowed.

As a result, eligible residents of every state will continue receiving subsidies to buy insurance through an online marketplace, whether it is operated by a state or by the federal government.

Importantly, the court said that Congress intended to offer tax credits on the federal exchange, and the decision was not up to the Obama Administration. This means that a future Republican president could not halt

Key Passage from the Ruling

[The premise of the ACA] compels the Court to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid. Under petitioners' reading, the Act would not work in a State with a Federal Exchange. As they see it, one of the Act's three major reforms — the tax credits — would not apply. And a second major reform — the coverage requirement — would not apply in a meaningful way, because so many individuals would be exempt from the requirement without the tax credits. If petitioners are right, therefore, only one of the Act's three major reforms would apply in States with a Federal Exchange.

The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral. It is implausible that Congress meant the Act to operate in this manner.

the tax credits on federal exchanges without an act of Congress.

Colorado is one of 13 states, including the District of Columbia, operating their own exchanges. Four states – Oregon, Nevada, New Mexico and, most recently, Hawaii – have state exchanges that rely on the federal HealthCare.gov website to enroll their residents. Thirty-four states rely on the federal marketplace – seven of those through a "partnership exchange" with the federal government (See Map 1).

The Ruling: Why It Matters

The ruling for the plaintiffs would have knocked out one of the foundational pillars of the ACA in the majority of the states.

The ACA, signed into law in March 2010, was built on a three-legged stool. It requires health insurance companies to issue policies to anyone, even people with pre-existing conditions. It mandates that most Americans have health insurance, a provision intended to ensure that people do not wait until they become seriously ill to buy insurance. And it helps people comply with the mandate by making health insurance more affordable, offering subsidies to those with annual earnings below 400 percent of the federal poverty level.

If the Supreme Court had invalidated subsidies in most states, one of the legs of the stool would have been knocked out.

Insurance experts and actuaries predicted this would have led to a "death spiral" in individual insurance markets in the affected states.

People would tend to avoid buying insurance until they became sick, which would fill the risk pool with the most expensive customers. Insurance companies would then raise their rates, which would cause even more healthy people to drop their insurance.

RAND Corporation estimated that eight million people in the affected states who are currently insured would have lost their coverage. It also predicted that premiums would have risen an average of 47 percent in those states.¹ The court took note of this argument, using the phrase "death spiral" in the first paragraph of its summary of the case.

A sharp rise in the number of uninsured could also have led to more uncompensated care at hospitals. The Urban Institute estimated that a ruling for the King plaintiffs could have led to an additional \$12 billion a year in charity care at hospitals in the affected states.²

Opponents of the ACA who supported the King plaintiffs said these predictions were overblown.

Still, the King case has focused attention on the key role states play in implementing the ACA.

The Colorado Health Institute has identified these four questions for Colorado policymakers raised by the King v. Burwell decision.



CHI's Four Questions for Colorado Policymakers

1 Can Connect for Health Colorado stand on its own feet?

The King ruling would not have directly affected Colorado residents because the legislature in 2011 established a state exchange. However, the stability of Connect for Health Colorado, which is struggling with deficits, remains a concern.

States that have tried but failed to establish their own marketplaces, such as Oregon and Hawaii, defaulted to the federal HealthCare.gov site. Seven other states have “partnership exchange” arrangements with the federal government. These options remain open for Colorado, although anxiety over the possible effects of a King ruling underscore the advantages of keeping local control over the marketplace.

2 Are there opportunities to use Connect for Health Colorado to help other states?

Despite technical glitches, Connect for Health Colorado is a resource that most states lack – a functioning health insurance exchange that does not rely on the federal HealthCare.gov site.

If the marketplaces case motivates states on the federal exchange to build their own exchanges, Connect for Health Colorado could offer help in a number of ways. It could provide consulting services, lease its technology or perhaps even sell policies to other states. These options could add a revenue stream to Connect for Health Colorado, which is striving to make itself sustainable.

The exchange's leaders would have to devote careful thought to whether the potential rewards would be worth the added burden. But the idea isn't unprecedented. Connecticut is leasing its exchange technology to Maryland and it is in contact with eight to 10 other states that might want to use its platform.³

3 How could Colorado use a 1332 waiver to improve health care for its residents?

State innovations waivers provided one response to the King case that policy experts considered in the weeks before the ruling. These 1332 waivers, named for a

Health Insurance Exchanges by the Numbers

11.7 million people

purchased insurance on an exchange in the 2015 enrollment period, including:

- **8.8 million** on HealthCare.gov
- **150,030** on Connect for Health Colorado

7.7 million people

qualified for premium tax credits on HealthCare.gov

73,438 people

received premium tax credits on Connect for Health Colorado

\$263

Average monthly tax credit on HealthCare.gov

\$101

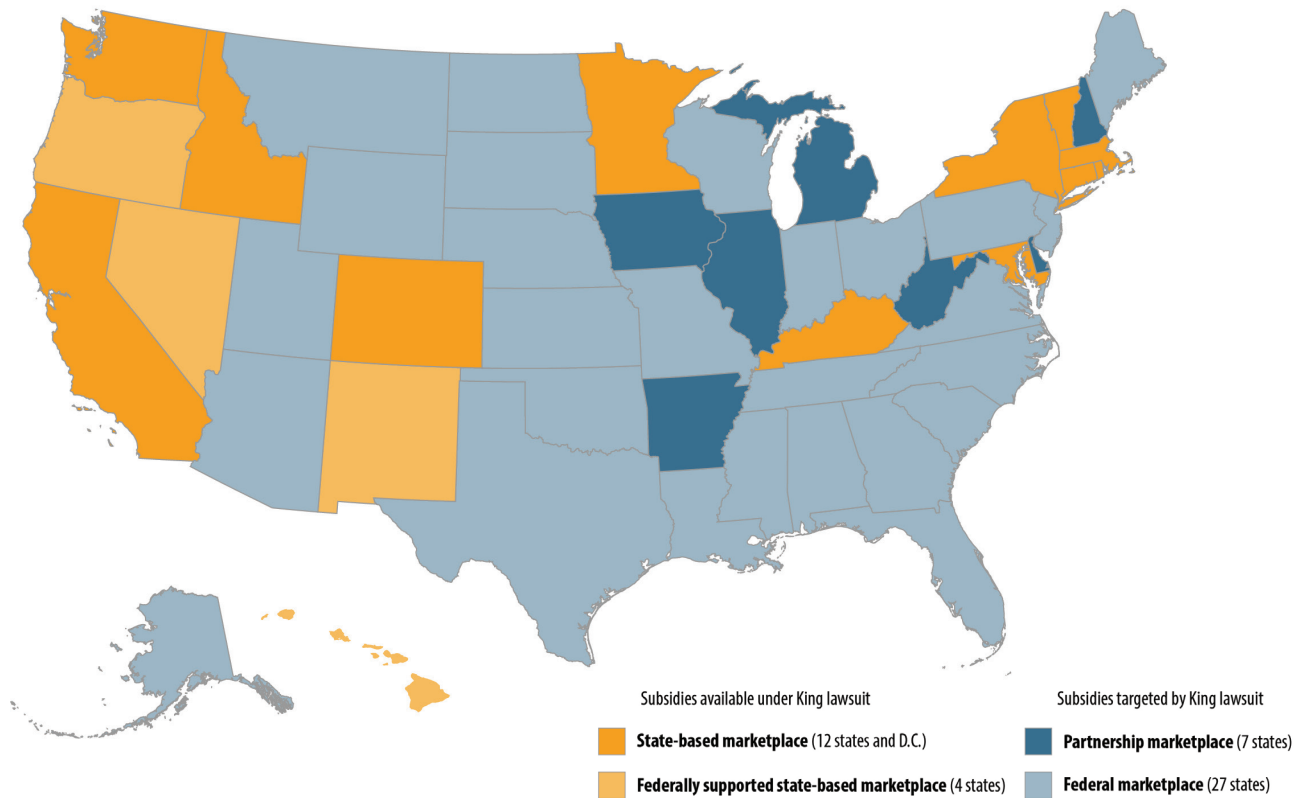
Average monthly premium on HealthCare.gov after tax credits

section of the ACA, allow states to waive major parts of the ACA, as long as they cover as many people as the ACA at no additional cost.

Stuart Butler, a senior fellow in economic studies at the Brookings Institution, argues that 1332 waivers offer Republican critics of the ACA a responsible way to exit Obamacare, while Democratic supporters could modify the law in states they control.⁴ Awareness of 1332 waivers has grown, partly because of attention to the King v. Burwell case, and some Colorado legislators are actively examining how the waivers might be used.

First, however, state policymakers will have to decide what they want to achieve with a waiver. Possibilities include allowing low-cost, high-deductible insurance plans to be sold on Connect for Health Colorado and making it easier for people to move from Medicaid to private insurance.

Map 1. The State of Exchanges



4 What is the future of the ACA?

The ACA won a major victory at the Supreme Court, but its future still is not certain. It could face political and judicial challenges in the near future.

The 2016 presidential election is gearing up. In a year and a half, the country will have a new president – one whose name is not synonymous with the ACA. Next year's elections also could tip the balance of power in the U.S. Senate. The result could be significant changes to the ACA.

In the courts, the King case was the last major legal challenge to the ACA. But that doesn't mean there won't be others.

At a March forum hosted by the Colorado Health

Institute, University of Colorado law professor Melissa Hart noted that Medicare and Medicaid are 50 years old, and they are still the subject of lawsuits from committed opponents.

"There will always be a next challenge to the Affordable Care Act, because there is a financed industry challenging the Affordable Care Act," Hart said.

Conclusion

The Supreme Court ruling in the King vs. Burwell case settles the last major legal challenge to the ACA on the horizon. But it does not settle the debate over the ACA. The act will remain vulnerable to judicial and political challenges. Colorado's state-based insurance exchange, Connect for Health Colorado, provides the state with a measure of protection against these national challenges.

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End Notes

¹ Eibner, Christine, and Evan Saltzman. (2015) "How Do ACA Tax Subsidies Affect Premiums and Enrollment?" Rand Corporation. Available at: http://www.rand.org/pubs/research_briefs/RB9812z1.html

² Buettgens, Matthew, et. al. (2015) "Health Care Spending by Those Becoming Uninsured if the Supreme Court Finds for the Plaintiff in King v. Burwell Would Fall by at Least 35 Percent." Urban Institute. Available at: <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000106-Health-Care-Spending-by-Those-Becoming-Uninsured-if-the-Supreme-Court-Finds-for-the-Plaintiff-in-King-v-Burwell-Would-Fall-by-at-Least-35-Percent.pdf>

³ Ferris, Sarah. (2015). "States zero in on ObamaCare rescue plan." The Hill. Available at: <http://thehill.com/policy/healthcare/244186-for-states-an-obamacare-backup-plan-comes-into-focus>

⁴ Butler, Stuart. (2015) "JAMA Forum: Why Section 1332 Could Solve the Obamacare Impasse" The JAMA Forum. Available at: <http://newsatjama.jama.com/2015/04/28/jama-forum-why-section-1332-could-solve-the-obamacare-impasse/>