Context Matters: The Supreme Court Rules in Favor of ACA Subsidies

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The "what will Congress do" news leads can now stop. The Supreme Court issued its decision in King v. Burwell and Congress does not need to fix anything because, by a vote of 6-3 in an opinion written by Chief Justice John Roberts, the Supreme Court held that the subsidy provisions of the ACA are not broken, and that individuals who purchase insurance through the Federal Exchange are eligible for ACA subsidies. In a nutshell, the Court held that the most reasonable reading of the ACA provision making credits available to individuals who purchased insurance on an exchange "established by the State" makes tax credits available to individuals who purchased insurance through the Federal Exchange. The decision delves deeply into health insurance policy concepts as well as the dark-art of statutory interpretation and the underlying chaotic legislative process to find, ultimately, that it was "implausible" that Congress intended to limit tax credits to individuals who purchased insurance through a State Exchange. See King, 576 U.S. __ (2015), slip op. at 17.

At the policy level, the Court clearly understood that the three main pieces of the ACA are "interlocking." Id. at 1. Community rating and guaranteed issuance by insurers, and mandated purchase by individuals, are underpinned by subsidies for individuals who cannot afford what they have been told they must purchase. The Court discussed the health reform precedents in states like Massachusetts and New York at length, and even used the term "death spiral," to make clear that it understood the carrot and stick approach embodied in the ACA. Id. at 15. Taking away the "carrot" – tax credits – that makes insurance affordable for large swathes of the population will make the scheme completely untenable in states that have not created an exchange, because too many people will fall out of the mandated purchase category by qualifying for an exemption where premiums would constitute too high a percentage of their income. This, in fact, was the premise of the lawsuit brought by challengers, who reside in Virginia, a state that has not created a State Exchange. Without access to the ACA's tax credits, their income would be low enough that they would no longer be subject to the ACA's mandated purchase provisions, which is what they sought.

The decision showed that the Court fully understood the ramifications for insurance markets of the challengers' argument: People with lower incomes have markedly less incentive to purchase insurance until they are sick, at which point the ACA's guaranteed issuance provisions will allow them to purchase coverage – thus creating an insurance market that is beset with adverse selection by consumers with above average health risks.

The Court simply did not accept that in making functioning individual health insurance markets the centerpiece of reform, Congress would intentionally leave such an obvious threat to the success of reform up to the vicissitudes of state by state selection. In an obvious rejoinder to the challengers' assertion that limiting subsidies to the State Exchanges would encourage states to participate, the opinion noted that Congress clearly understood that states might elect not to participate – that is why it created a parallel Federal Exchange in the first place, to assure that there would in fact be an exchange in every state.

Moreover, the Court noted that the "State Exchanges and Federal Exchanges are equivalent—they must meet the same requirements, perform the same functions, and serve the same purposes." Id. at 10. Again, the Court found it to be implausible that Congress would make the Federal Exchange different in this single but fundamental way, and even more implausible that it
would have done so by burying such a material difference in a collateral provision in the tax code, where the four magic words – "established by the State" – are found.

The Court also noted that the reconciliation process that was used to pass the ACA resulted in many ambiguities that might have been avoided if the ACA had been passed under the regular legislative process with more of an opportunity for amendments and corrections. The decision noted several examples, but one stood out as being significant for purposes of the challengers' contention that Congress did not intend to provide subsidies to purchasers utilizing the Federal Exchange. The law contains provisions that require the Federal Exchange to report to the Secretary of the Treasury information about each health plan they sell, including the "aggregate amount of any advance payment of such credit," "[a]ny information . . . necessary to determine eligibility for, and the amount of, such credit," and any "[i]nformation necessary to determine whether a taxpayer has received excess advance payments." 26 U.S.C. § 36B(f)(3). The Court concluded that if tax credits were not available on Federal Exchanges, these provisions would make little sense.

Finally, important for purposes of divining the future of the ACA tax credits, the Court also held that so-called Chevron deference did not apply. Thus, although the statutory language was ambiguous when viewed in the context of the statute as a whole, the Court stated that it was not appropriate to defer to the interpretation of the IRS that made subsidies available to Federal Exchange purchasers. Rather, the Court stated that this is one of those "extraordinary cases" where it is unreasonable to conclude that Congress intended to delegate interpretation to the agency. Id. at 8. The availability of tax credits is of such political and economic significance and so central to the statutory scheme, that if Congress intended to delegate this question to the IRS, the Court stated that it would have done so expressly. This element of the decision effectively eliminates the discretion of any future Internal Revenue Commissioner to "re-interpret" the legislative language on the availability of subsidies. Only Congress can change the law on this point.

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