From international law firm Arnold & Porter LLP comes a timely column that provides views on current regulatory and legislative topics that weigh on the minds of today’s physicians and health care executives.

How the Supreme Court's Affordable Care Act decision could affect your practice
--By Lauren L. Haertlein, Kristin Hicks, and Jennifer Madsen, Arnold & Porter LLP

On June 25, the U.S. Supreme Court issued a long-anticipated decision (previously previewed) in the latest legal challenge to the Affordable Care Act (ACA). The case, King v. Burwell, concerns the lawfulness of an IRS regulation allowing low-income enrollees in health plans offered on federally-facilitated health insurance exchanges (called Federal Exchanges) to receive tax credits to subsidize the cost of their health insurance premiums. The Court’s decision upholding the IRS rule is a major victory for proponents of the ACA. According to the nonpartisan Urban Institute in Washington, D.C., an estimated 8.2 million people in 34 states risked losing their health insurance coverage if the Court ruled to invalidate the IRS regulation. What does this decision mean for health care providers? In short, it depends on where you live, where you work and on the local politics in your state. Here’s a guide to help you break it down.

The issue

The ACA includes three key provisions that were designed to work together to enable the ACA’s expansion of health insurance coverage.

1. **Insurance market reforms.** The ACA established a number of health insurance reforms, such as prohibiting insurers from refusing to cover individuals based on their preexisting medical conditions. For these reforms to work, the ACA had to expand the number of people covered by health insurance to spread the risks and costs associated with sicker people who would now be guaranteed coverage across a larger pool of insured individuals.

2. **Individual mandate.** To expand the risk pool, the ACA mandated that everyone obtain health insurance. The ACA also required the establishment of marketplaces, called ”Exchanges,” in each state, where individuals could purchase health insurance. The ACA envisioned state-run Exchanges but provided that if a state decided not to establish an Exchange, the federal government must establish and operate the Exchange in that state (ie, a Federal Exchange). In practice, fewer states were willing or able to run Exchanges. Moreover, it’s estimated that roughly 5.4 million people thus far have obtained health insurance through Federal Exchanges.

3. **Low-income premium assistance.** Recognizing that a mandate to purchase insurance is effective only if the prospective purchasers can afford it, Congress included in the ACA tax credits (also described as premium subsidies) to low-income purchasers. The ACA specifies that the amount of tax credit an enrollee receives is based on the cost of the insurance an enrollee purchases through “an Exchange established by the State.”
In May 2012, the IRS issued a regulation implementing the tax credit provision, which permitted financially eligible individuals who enrolled in health insurance through either a State or a Federal Exchange to receive them. In 2014, approximately 86% of Federal Exchange enrollees met the income qualification for tax credits.

The plaintiffs in King v. Burwell challenged the legitimacy of the IRS regulation allowing tax credits for enrollees in Federal Exchanges. As residents of Virginia (which has a Federal Exchange), the plaintiffs did not want to be eligible for the premium subsidies, because without them, they would satisfy an exemption to the individual mandate for individuals “who cannot afford coverage” or who would suffer hardship if forced to buy it. Plaintiffs argument was simple: The phrase “an Exchange established by the State” does not include an Exchange established by the federal government.

The district court ruled that the ACA unambiguously foreclosed the plaintiffs’ claim. On appeal, a three judge panel on the Fourth Circuit unanimously affirmed, upholding the IRS regulation. On the same day that the Fourth Circuit issued its decision upholding the regulation, a three judge panel of the D.C. Circuit ruled (2-1) the opposite — that the ACA only allows premium subsidies for health insurance purchased on state-run Exchanges. The entire D.C. Circuit (sitting en banc), however, reversed the panel opinion.

On Nov. 7, 2014, the Supreme Court unexpectedly agreed to review the Fourth Circuit’s decision in King. As the Fourth Circuit acknowledged, both sides had strong arguments for their positions, which were supported by (different) sections of the ACA’s text. The plaintiffs argued that “Congress meant exactly what it said”: The ACA “plainly limits premium subsidies to coverage purchased on state-established Exchanges.” The government, however, argued that the Court must consider the context of the phrase at issue, including the interrelationships of different sections of the law and the impact of plaintiffs’ reading of the law on those other provisions.

The Supreme Court decision

On June 25, the Supreme Court affirmed the Fourth Circuit’s ruling that premium subsidies are available to individuals in states that have Federal Exchanges. As an initial matter, the Court found that whether premium subsidies are available on Federal Exchanges was a question of deep “economic and political significance.” Because Congress did not expressly give the IRS the authority to decide this question, the Supreme Court held that it must determine the correct reading of the statute itself without deference to the IRS’ interpretation.

Next, the Court determined that when read in context, the phrase “an Exchange established by the State” is ambiguous as to whether it applies only to State Exchanges or both State and Federal Exchanges (at least for purposes of the tax credits). The Court acknowledged that “[a]t the outset it might seem that a Federal Exchange cannot fulfill this requirement” to be established by the State. However, the Court went on to say that “when read in context, with a view to its place in the overall statutory scheme, the meaning of the phrase ‘established by the State’ is not so clear.” The Court cited a number of provisions in the ACA where it would make no sense to distinguish between State and Federal Exchanges when interpreting this phrase, along with several ACA provisions that assume that premium subsidies would be available on both State and Federal Exchanges. The Court also dismissed the argument that the words “established by the State” would be unnecessary if Congress meant to extend premium subsidies to both Federal and State
Exchanges, on the grounds that the ACA was passed as part of a rushed legislative process and “contains more than a few examples of inartful drafting.”

Having found that that the language at issue was ambiguous, the Court looked to the broader structure of the ACA to determine whether there is a “permissible meaning [of the language that] produces a substantive effect that is compatible with the rest of the law.” The Court noted that under the plaintiffs’ reading, one of the ACA’s three major reforms — the premium subsidies — would not apply. Additionally, 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 premium subsidies. According to the Court, this “combination of no tax credits and an ineffective coverage requirement could well push a State’s individual insurance market into a death spiral.” The Court reasoned it was implausible that Congress intended for the ACA to operate in this manner.

The Court concluded, “Congress passed the Affordable Care Act to improve health insurance markets, not destroy them.” According to the Court, although the plaintiffs’ “arguments about the plain meaning of [the phrase ‘an Exchange established by the State’] are strong … the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.”

Prior to the Court’s decision, economists projected that a judgment striking down the premium subsidies would lead to adverse selection in the individual and small-group insurance markets because only those individuals with the highest health care costs would buy coverage without the premium subsidies. A leading health insurance industry group, America’s Health Insurance Plans, wrote in its amicus brief in King v. Burwell that striking down the premium subsidies “would lead to unstable markets with fewer affordable options … than what was available before enactment” of the ACA.

The entire health care sector has been living with steep Medicare payment cuts (used to finance the coverage expansion) since 2011, and Congress essentially eliminated payments to Disproportionate Share Hospitals (DSH) for uncompensated care under the ACA on the theory that those costs would decrease with the coverage expansion. As a result, a decision striking down the IRS’ regulation could have caused uncompensated care costs to spike. The Urban Institute projected that in 2016, individuals who lost insurance coverage as a result of the ruling stood to receive 36% less health care services, with their health spending falling from $27.1 billion (with premium subsidies) to $17.3 billion (without premium subsidies) — including $12 billion of uncompensated care. The Supreme Court’s decision may, therefore, result in less uncompensated care for physicians in states with Federal Exchanges.

The health care industry’s investment in implementing the ACA during the past 5 years appears to be paying off. The Court’s decision was released at 10 a.m. ET on June 25, and in less than an hour, The Wall Street Journal reported an increase of more than 8% in the prices of shares of hospital chains HCA Holdings, Tenet Healthcare Corp., Universal Health Services and Community Health Systems. Health insurer stocks rose also, with Medicaid insurance plans Centene Corp, Molina Healthcare and WellCare Health Plans increasing by 2% to 4%, and more modest gains for national players such as UnitedHealth Group, Humana, Anthem and Cigna.
In the days since the ruling, those players have announced a wave of consolidations buoyed by more certainty in their regulatory environment, including a $37 billion purchase of Humana by Aetna, a $6.8 billion purchase of Health Net by Centene and a rejected $54 billion bid for Anthem to buy Cigna.

What happens next?

The King vs. Burwell ruling has made the path forward on ACA implementation much clearer. The federal funding states received to set up their exchanges has ended, and some states have had more success than others in setting up websites, customer call centers and networks of consumer navigators. With the Supreme Court upholding the Federal Exchanges, states are looking at collaborative solutions to their implementation struggles, such as contracting to use the HealthCare.gov technology platform (already in use in Nevada, New Mexico and Oregon; in transition in Hawaii; and under consideration in Vermont and Minnesota) or forming regional exchanges that would merge several states’ exchanges.

Democrats likely will advocate for state legislatures to expand Medicaid and accept federal financing to cover their states’ uninsured in the 19 states that have not already done so. But don’t expect this to be an easy win — state Attorneys General in Oklahoma, Alabama, Georgia, Nebraska, South Carolina and West Virginia all submitted briefs to the Supreme Court supporting the elimination of premium subsidies. One issue to watch in the future is whether, and if so, how, those states will use an authority in the ACA that gives states more flexibility in designing their insurance programs using federal funding starting in 2017.

The focus of the national debate over health policy appears to be shifting to issues other than the ACA, such as medical innovation and alternative payment models. But with 15 candidates for the GOP nomination, the drumbeat to repeal and replace the ACA will likely continue through the 2016 election.

Lauren L. Haertlein is an associate at Arnold & Porter LLP. She can be reached at Lauren.Haertlein@aporter.com.

Kristin M. Hicks is an associate at Arnold & Porter LLP. She can be reached at Kristin.Hicks@aporter.com.

Jennifer B. Madsen, MPH, is Health Policy Advisor for Arnold & Porter LLP’s FDA and Healthcare practice group. She can be reached at Jen.Madsen@aporter.com.

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Brief for the Respondents in Opposition, King v. Burwell, no. 14-114, at 8.

Internal Revenue Code (IRC) § 36B(b)(2)(A).

26 C.F.R. § 1.36B-2(a)(1).

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King v. Burwell, 759 F.3d 358 (4th Cir. 2014).


Order (Granting Petition for Rehearing En Banc), Halbig v. Burwell (No. 14-5018) (Sept. 4, 2014).

King v. Burwell, 759 F.3d at 369 (stating “the court is of the opinion that the defendants have the stronger position, although only slightly”).

Brief for the Petitioners, King v. Burwell (no. 14-114), at 18; see also Petition for Certiorari, King v. Burwell (No. 14-411), at 24-25.

King v. Burwell, no. 14-114, slip op. at 8 (June 25, 2015).

King, slip op. at 8 (internal brackets and quotation marks omitted).

King, slip op. at 14.


King, slip op. at 17.

King, slip op. at 19, 20.