Fast Facts

King v Burwell: The Obamacare Off-Ramp?

The US Supreme Court holds the future of Obamacare in its hands as it decides King v Burwell (and the companion case Halbig v. Burwell). Not sure what the significance of those cases is? Well, you’re not alone. As Obamacare turns five, here is what you need to know about the cases that could open the door to a much-needed reassessment of the currently broken federal healthcare scheme…and the alternative plan that could begin to put South Carolina patients back in charge.

A February 2015 Elon University poll conducted right over the border in North Carolina shows that 49% of respondents think the ACA will make the healthcare situation in North Carolina worse. That’s up 2 pessimism percentage points since last October when ACA dissatisfaction pulled incumbent US Sen. Kay Hagan down. Only 35.6% of registered voters in the purple state of North Carolina think Obamacare will make healthcare better.

When the Affordable Care Act (ACA) was signed into law in early 2010, its effect on everyday Americans was hotly debated. Now, after nearly two full years of Obamacare trauma, the truth has become increasingly clear: federally-controlled healthcare is both unaffordable and handcuffing. (Based on the botched website rollout and patient privacy issues, we could also add incompetent.) Health insurance premiums are still rising, health plans that people liked are being cancelled, networks of quality doctors are being narrowed, and reliable estimates say 18 million Americans are still uninsured. It turns out that losing your plan and your doctor was just the tip of the Obamacare iceberg.

The Obamacare experience has been largely negative for many Americans. According to a new poll by the Foundation for Government Accountability:

- 37% of Americans think Obamacare has hurt their family with 17% saying it helped and 46% saying ACA made no difference.

- 49% think Obamacare has harmed the nation, 33% helped, and 18% say Obamacare has made no difference.

So, Obamacare’s failing. But are we stuck with it?

LEGAL ARGUMENTS

Not if plaintiff David King is successful. If the US Supreme Court (SCOTUS) rules on June 4, 2015 in his favor, Obamacare would be turned on its head.

King, with support from the Competitive Enterprise Institute and friend of the court (amicus) briefs from Alabama, Georgia, Indiana, Nebraska, Oklahoma, South Carolina, and West Virginia, points out that the language of the Affordable Care Act requires healthcare exchanges to be creatures of state governments, and without these state-based exchanges, federal subsidies to help citizens pay for their healthcare would be illegal under Section 1321 of the ACA.

King’s attorneys argued before SCOTUS that Section 1401 of ACA authorizes premium subsidies only to individuals who enroll in coverage “through an Exchange established by the State.”
In plain English that means Obamacare enrollees in the 34 states without state exchanges, including South Carolina, would be out of luck if the IRS were forbidden from extending tax credit subsidies for ACA insurance coverage.

According to the nonpartisan Urban Institute, if King is successful, approximately 241,000 South Carolinians would lose their tax credit subsidies which have a value of $766 million, or $3,180 per person. 192,000 more South Carolinians would remain uninsured.

A King victory in King v. Burwell may well depend on the mindset of Associate Justice Anthony Kennedy. Based on oral arguments, earlier this month, King’s lawyers and backers are optimistic.

But there is more. The real impact of a King victory is that two mandates that form the “stick” for enforcing Obamacare could go away.

- **Individuals** in those states would no longer be under the mandate to buy health insurance. That means consumers would no longer be forced to buy expensive Obamacare insurance—insurance that meets arbitrarily high minimum federal standards.
- **Employers** in federal exchange states with 50 or more employees would no longer be under the mandate because federal dollars would not be expended for subsidies, removing the mandate trigger.

This entire exercise provides a window into the heart of Obamacare’s blatantly strong arm tactics. Despite what the Administration now argues, at the time the bill was being written, now infamous ACA architect Jonathan Gruber said that the provision to rope in the states was intentional to strongly “encourage” states to set up their own exchanges. Obamacare needed warm bodies (preferably healthy ones) to jump into the insurance pool to subsidize everyone else. Now, with most states, including South Carolina, standing up against the pressure, the Administration has changed its tune and says the state vs. federal nature of the exchanges was a simple bill drafting oversight and should be treated as such.

**WHAT DOES THIS MEAN?**

So what does this mean for South Carolinians and people in other states caught in the crosshairs if the Court overturns the current subsidies?

One school of thought is that Obamacare is the lifeline for American healthcare and must be salvaged at all costs. This opinion will be trumpeted from the Administration and its media allies, and enormous pressure will be put on Congress to allow the federal exchange subsidies...or on states to cave and set up their own exchange.

Based on the example of Exchange states – which had years to prepare for their exchange rollouts and $5 billion in federal assistance for setting them up – this would be a disaster for South Carolina.

According to The Washington Post, as of May 1, 2015, half of the 17 state-run exchanges are struggling financially. Enrollment is low, call centers are expensive, and websites are crashing (four states finally pulled the plug on their websites all together). Oregon closed their exchange in March, Colorado is expecting user fees to triple. Hawaii isn't sure they will be sustainable by their goal year of 2022, needing $28 million before then. Maryland has turned to Connecticut for help.

And in the District of Columbia, in a strange twist, 89% of the exchange budget comes from user fees on products not available on the exchange.

Stepping back from the precipice a bit, a pro-King ruling does not signal the end of the world. More positively, should King be successful, the actual result could be one that would put a smile on the face of Jay, Adams and Hamilton: power for the states and freedom for patients…and businesses.
A ruling in favor of the plaintiffs would block the ACA's employer mandate, because the mandate penalties only apply when employers with more than 50 workers fail to offer ACA-compliant coverage and an employee becomes eligible for an ACA premium subsidy. Those employers would be shielded from mandate penalties totaling $2,000 per worker per year. That means more capital for businesses to hire more workers, increase hours lost due to Obamacare-driven reductions, and increased economic growth.

PROTECTING PATIENTS: NEXT STEPS
If the Supreme Court decides against the Obama administration in *King v. Burwell*, while it doesn't mean the automatic end of Obamacare, it does mean that Congress must make significant reforms—or else coverage will be prohibitively expensive for millions of Americans.

Whatever Congress settles on as the stop gap measure, an off ramp or “bridge” that stops the bleeding and protects innocent consumers affected by this federal policy debacle would allow us as a nation to transition to a conversation about what real, effective healthcare reform looks like.

It is expected that should King prevail, the Court would provide a timetable for the decision to take effect.

A vision for a state-driven, post-exchange healthcare system was presented recently by leaders in the US Senate and US House of Representatives in at least five (5) plans.

1. **Senator Ben Sasse (R-NE)** introduced a plan that would allow those losing coverage to keep it for 18 months with tax credits shrinking to zero.

2. **Rep. Ben Flores (R-TX)** and his colleagues in the conservative Republican Study Committee have been discussing a plan that would repeal Obamacare entirely, create individual and business tax deductions, and expand Health Savings Accounts (HSAs).

3. **Sen. Ron Johnson (R-WI)** has introduced a plan with 31 Senate co-sponsors, including **Majority Leader Mitch McConnell**. The Johnson plan would allow people to keep their current coverage until August 2017 and eliminate both the individual and business mandate.

4. **Senators Orrin Hatch (R-UT), Richard Burr (R-NC) and Lamar Alexander (R-TN)** have discussed general principles of a plan.

5. **Rep. Paul Ryan (R-WI)** Plan has also developed a plan (see table below). Ryan, along and Republican colleagues **John Kline (R-PA)** and **Fred Upton (R-MI)** presented their plan in the pages of *The Wall Street Journal*. According to the Ryan plan, healthcare freedom can be achieved in the wake of a positive King decision, but it will not come to the states automatically.

Congress will need to clean up its mess and empower the states. States will then need to seize the opportunity presented by a King victory. Instead of signing off on an end-run Administration plan to comply with King that would involve the state setting up a rump exchange run by Washington, state legislatures must implement bold policies that lower costs and increase access to quality health care. States must also protect the most vulnerable, guarantee access for patients with pre-existing conditions, make insurance rules that result in more affordable and customizable health insurance choices, and provide new options for businesses looking to provide value-based, wellness-focused healthcare to their employees.

As the table indicates, South Carolina, if freed from the shackles of the federal exchange, could chart a new course for patients, offering an advanceable tax credit to help South Carolinians purchase insurance.

### Which Way For South Carolina?

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<thead>
<tr>
<th>Plan, Doctor</th>
<th>Price</th>
<th>Expectation</th>
<th>Tax Credit</th>
<th>Empowers</th>
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<tr>
<td><strong>Obamacare State</strong></td>
<td>Mandates</td>
<td>Inflated</td>
<td>Confusion</td>
<td>IRS Whim</td>
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<td><strong>Freedom State</strong></td>
<td>Choice Freedom Access</td>
<td>Affordable Fair Adjustable</td>
<td>Simple Clear Competitive</td>
<td>Advanceable Refundable Renewable</td>
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This credit could:

- affirmatively opt out of ACA mandates that restrict choice and ban affordable plans South Carolinians want;
- replace confusion and red tape with simplicity by allowing insurers to compete across state lines and small businesses to band together as a group;
- make the credit “advanceable” so that consumers can get their full credit each quarter (not just at tax season);
- make the tax credit “refundable” so that consumers can get the full amount of the credit whether they pay taxes or not;
- make the tax credit “renewable” so that consumers would be guaranteed a renewal for the next year;
- assist the gap population of up to 192,000 able-bodied adults who are not covered by Medicaid.

According the Foundation for Government Accountability, these types of reforms are popular with the public. In a recent FGA survey:

- **78%** of voters polled want the ability to buy plans available before Obamacare took effect and Washington dictated they weren’t good enough.
- **77%** of voters want to buy health insurance coverage at any time during the year, not just during 3-month windows of open enrollment.
- **68%** of voters want subsidies to be available for all types of health plans, not just plans available on Obamacare exchanges.

Stuart Butler of The Brookings Institution, who spent 35 years at The Heritage Foundation, points out that Section 1332 of the ACA allows states to apply for waivers beginning in 2017 that would allow them to follow the goals of ACA without some of its mandates. If that is the case, wouldn’t allowing the waivers immediately fix Obamacare? Well, no. If Medicaid is an example of the flexibility of federal waivers, and we think it is, bold new legislation of the type Congressman Ryan outlines will be needed to prevent the federal HHS from blocking real market-based healthcare reforms proposed by the states. Stay tuned.

**SUMMARY**

What should be the response of states if the U.S. Supreme Court in *King v. Burwell* overturns federal exchange subsidies?

1. **Do No Harm.** Don’t set up a state exchange.

2. **Put Pressure on Washington.** ACA is a problem that started in Washington and it’s up to Washington to fix the problem it created. States must demand more flexibility for themselves and more control for the patients in their borders.

3. **Lead Boldly.** Now is the time for states to be looking at state-based innovations similar to the Ryan Plan that lower costs, increase access and put patients in charge of their health care decisions.