

What New Hampshire Needs to Know about the *King v. Burwell* Decision

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Introduction

Americans see health care costs and low wages as their top financial concerns (Gallup Poll January 2015), yet few Americans are paying attention to what David King and three other citizens from Virginia are seeking in *King v. Burwell*. The case will be decided this month by the Supreme Court of the United States, and a win for Mr. King could signal the end of New Hampshire's federally operated health insurance Marketplace.

It's no wonder people aren't paying attention - this case represents one of over 637 legal challenges to the Affordable Care Act (ACA) and the sixteenth case that has made it all the way to the United States Supreme Court. Yet if the four plaintiffs from Virginia succeed, millions of low income Americans who have relied on subsidies in order to purchase insurance on the health care 'Marketplace' (often referred to as the 'Exchange') will be ineligible to receive such subsidies, including an expected 44,000 New Hampshire residents in 2016.

In 2012, the U.S. Supreme Court decided *National Federation of Independent Business v. Sebelius* and upheld 'the individual mandate' – the provision in the ACA that requires everyone to have qualifying health insurance coverage. States then moved forward with establishing health care insurance Marketplaces where individuals and small businesses can shop, compare options and apply online for affordable coverage. When using the Marketplace to buy coverage, low income individuals can qualify for subsidies in the form of premium tax credits or, if very low income, even an exemption from the mandate.

The ACA does not require states to set up their own health care Marketplace infrastructure, but instead permits states to rely on *healthcare.gov*, the federally operated Marketplace. According to the Centers for Medicare and Medicaid, as of March 2015, approximately 10.2 million consumers had ACA Marketplace coverage; approximately 85% or 8.7 million relied on premium tax credits in order to afford such coverage.

The four Virginia plaintiffs argue the ACA prohibits premium tax subsidies in at least thirty-four states. If the Supreme Court agrees, an estimated 6.4 million consumers who received premium tax credits through federally operated Marketplaces could lose their insurance, increasing the number of uninsured by an estimated 8.2 million people. ([http://www. Urban.org/UploadedPDF/2000062-The-Implications-King-vs-Burwell.pdf](http://www.Urban.org/UploadedPDF/2000062-The-Implications-King-vs-Burwell.pdf) and cms.gov).

What Could the Impact Be on New Hampshire?

The *King v. Burwell* decision will impact many more than four Virginian plaintiffs. New Hampshire's federally operated health care Marketplace will be directly impacted by the Court's decision, as well as the Marketplace in our neighboring state of Maine. Currently, approximately 30,000 of New Hampshire's 46,000 Marketplace enrollees receive premium tax subsidies, averaging \$264 a month.

State-based Marketplaces, including those in Vermont, Rhode Island, Connecticut and Massachusetts, would not be impacted. In fact, Massachusetts began operating the Mass Health Connector even before the ACA was passed in 2010. New Hampshire law specifically prohibits a state-based exchange, thus, New Hampshire's Marketplace is actually operated as a "partnership" – relying on the federal government to set up a federal electronic portal where New Hampshire citizens shop for coverage through *healthcare.gov*.

Consumers have seen a growth in the competitive choices on New Hampshire's Marketplace and premium prices have remained relatively stable. In 2014, only Anthem offered Marketplace plans; however, in 2015, New Hampshire's Marketplace expanded to include five insurers offering over fifty plans. This type of increased choice and price stability has persisted even with insurance reforms. For example, the plans can no longer deny coverage or charge more based on pre-existing conditions; plans now cover dependents up to age 26; plans are prohibited from imposing annual or lifetime limits; plans no longer charge co-pays for preventive services like shots and screenings; and plans must provide mental health and substance use disorder treatment at the same levels as other health care treatments.

According to the American Academy of Actuaries (Issue Brief, May 2015), "[a]n immediate or near-term elimination of federal premium subsidies would cause massive disruption in the individual market. Potentially millions of people would drop coverage, and the average costs of those remaining insured would soar." The AAA further notes that insurers could face solvency concerns, especially those for whom exchange business is a relatively large share of their books of business, which is true for several carriers on New Hampshire's Marketplace.

New Hampshire's Marketplace is also an important part of New Hampshire's unique and bi-partisan "private option" plan for the New Hampshire Health Protection Program, which currently covers over 40,000 citizens with expanded Medicaid. Beginning in January 2016, under the premium assistance program required by law, the Health Protection Program participants will enroll in plans available on the federally operated health insurance Marketplace. If the Marketplace falls apart as a result of *King v. Burwell*, the unique "private option" for the New Hampshire Health Protection Program may also be jeopardized.

What are the Legal Issues in the Case?

The plaintiffs first make a 'statutory construction' argument, claiming the plain words of the ACA only authorize federal tax credit subsidies for health insurance coverage that is purchased through an exchange "established by the State" under section 1311. The legal question focuses on the meaning of four words in a lengthy law of over 900 pages. Second, they argue the Internal Revenue Service impermissibly extended tax credits to citizens purchasing coverage through exchanges established by the federal government, basically claiming the IRS overstepped its administrative authority.

When the case was argued, many questioned whether or not the plaintiffs had "standing" to challenge the ACA. "Standing" is a legal rule that requires a plaintiff to be *injured* by the law before challenging it. The plaintiffs argue they don't want to be subject to the "mandate." Because access to subsidies makes insurance affordable for them through Virginia's Marketplace, and thus mandatory, they claim they are injured. Mr. King, a 64 year old Vietnam Veteran, Doug Hurst, a 63 year old veteran, and Brenda Levy, 65 years old in June 2015, arguably have other insurance options for coverage in the form of veterans benefits and Medicare. Rose Luck, 56, the youngest plaintiff, was living at a motel, but reportedly has no known address at this time. Reports go on to note that at least two of the plaintiffs have had significant difficulties with high medical bills, and many have questioned whether or not all the plaintiffs might actually qualify for an exemption from the insurance mandate altogether because even subsidized insurance costs more for them than what's considered "affordable" under the ACA.

New Hampshire, along with many of the states with federally operated health care Marketplaces, including, ironically, Virginia, signed onto a 'friend of the court' brief arguing against the plaintiffs and in support of access to subsidies on their federally operated Marketplaces. New Hampshire contends that the federal government promised through other sections of the statute, through regulations, through guidance and approvals, that New Hampshire citizens would have access to subsidies if New Hampshire set up precisely the type of efficient and workable Marketplace it did.

Are there Solutions?

During the week of June 8, Health and Human Services Secretary Burwell told the House Ways and Means Committee in Washington D.C., that "the critical decisions will sit with the Congress and states and governors to determine if those subsidies are available," adding that the administration does not have the authority to undo the damage that could result from the decision.

Proposals that offer a temporary premium tax credit "fix" while eliminating other key provisions of the ACA are being debated already in Washington.

The Court may agree New Hampshire made the right choice with its Marketplace model and New Hampshire is able to move forward debating how best to increase affordable options for health coverage. Or the court could disagree and New Hampshire will be faced with destabilizing uncertainty, along with the complex, expensive and delicate task of undoing the resulting damage. Either way, hard work lies ahead requiring commitment, tough decisions and a lot of cooperation.

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