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Court to rule on health care subsidies

The Supreme Court, moving back into the abiding controversy over the Affordable Care Act, agreed early Friday afternoon to decide how far the federal government can extend its program of subsidies to buyers of health insurance. At issue is whether the program of tax credits applies only in the consumer marketplaces set up by sixteen states, and not at federally operated sites in thirty-four states.

Rather than waiting until Monday to announce its action, which would be the usual mode at this time in the Court year, the Justices released the order granting review of *King v. Burwell* not long after finishing their closed-door private Conference.

By adding the case to its decision docket at this point, without waiting for further action in lower federal courts, as the Obama administration had asked, the Court ensured that it would rule on the case during the current Term. If it decides to limit the subsidies to the state-run “exchanges,” it is widely understood that that outcome would crash the ACA’s carefully balanced economic arrangements.

The Court’s Friday orders are [here](#); it also granted review of a case on deadlines for serving papers in federal civil cases. The two cases probably will be heard by the Court in the first week of March. The argument calendar was full up to that point.

Since the health care exchanges have been in operation, nearly five million individuals have received federal subsidies to help them afford health insurance on an exchange run by the federal government. The average subsidy has been about \$4,700 per person. The fate of those subsidies apparently will now depend upon how the Court interprets four words in the Affordable Care Act. In setting up the subsidy scheme, Congress said it would apply to exchanges “established by the State.”

The challengers to subsidies for those who shop for insurance on a federal exchange have argued that those words limit the availability to the tax benefits solely to state-run exchanges. That argument failed in

the U.S. Court of Appeals for the Fourth Circuit, in the ruling now under review. It was accepted in the U.S. Court of Appeals for the District of Columbia Circuit, but that ruling has now been set aside while the full D.C. Circuit reconsiders the issue.

Thus, as of now, there is no split in the federal appeals courts on the challengers' argument and thus on the scope of the ACA language regarding subsidies. The lack of such a split, however, did not prevent the Court from going ahead to grant review of the *King* case, as the challengers had asked it to do. They had argued, among other points, that the longer the subsidies continue to consumers who had gone to federal exchanges, the harder it would be to undo the program if the Court were to accept the challengers' interpretation.

It would have taken the votes of four Justices to grant review. The Court, as usual, did not indicate the way the Justices had voted on that question. It will take a majority, of course, to decide the case in the end. A ruling is not expected to emerge until near the end of the current Term, in late June or early July.

The new case appears to be as important to the functioning of the ACA, as it emerged from Congress in 2010, as was the mandate that every individual in the nation (with few exceptions) had to obtain health insurance by this year, or pay a financial penalty. The Supreme Court in June 2012 rejected a challenge to the individual mandate, finding that the arrangement Congress had made was a valid tax scheme. No one absolutely had to buy insurance, but those who did not would face a penalty as part of their filing of federal tax returns, as the Court viewed the mandate.

That was a decision based on the Constitution. The question presented by the case that the Court granted Friday is how to interpret legislative language chosen by Congress. Underlying that issue, however, is the broader question whether the words Congress chooses are to be the sole guide to what a law does, or whether the larger purposes that Congress seems to have in mind should determine how to read the words.

The challengers take the "literal interpretation" approach, although they also have policy reasons for reading the ACA as they do. The Obama administration takes the "broader purpose" approach, contending that Congress would not have set up the insurance program on a basis that is as limited as the challengers contend. There are Justices on the Court on both sides of that debate over interpreting federal laws.

The four words primarily in dispute have been interpreted by the Internal Revenue Service, which is in charge of the tax subsidy program, to apply to every exchange across the nation, whether set up by a state or, if a state declined to do so, by the federal government in place of the state.

Here is the question that the petition put before the Court: “Whether the Internal Revenue Service may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through exchanges established by the federal government under section 1321 of the ACA.”

That is essentially the same issue that the D.C. Circuit has agreed to examine en banc. It is scheduled to hold oral arguments on December 17. Whether it would go ahead with that review, knowing now that the Supreme Court is going to decide the issue, is unclear at this point. The challengers would be free, it appears, to ask the D.C. Circuit to hold its case in abeyance during Supreme Court review.