10 Things to Know about the Latest Challenge to the Affordable Care Act—a/k/a “Obamacare”—that is now pending in the Supreme Court
(King v. Burwell, No. 14-114)

Whether the Supreme Court will construe the statute in a manner that will lead to a “death spiral” of the health care exchanges in 34 states appears to depend on whether either Chief Justice Roberts or Justice Kennedy votes with the four Democratic appointees to uphold the Obama Administration’s position.

The Affordable Care Act requires the creation of an “American Health Benefit Exchange” in every state. The Act allows each state to choose whether to establish the exchange itself or rely on the Department of Health and Human Services (“HHS”) to do so. The question presented to the Supreme Court in this case is whether subsidies are available in the 34 states that decided to rely on an HHS exchange.

1. **The “three legs” of the statute.** The complex Act stands or falls on three legs: (1) insurance companies must provide insurance to everyone and cannot increase premiums on account of preexisting conditions; (2) everyone must buy health insurance (this is the “individual mandate” that was upheld in 2012); and (3) subsidies must be available for the many people who cannot afford insurance. HHS and the Internal Revenue Service (“IRS“), which have authority to issue rules interpreting the Act, concluded that subsidies are available on all exchanges established under the Act.

2. **The “death spiral.”** Almost nine million people have purchased insurance on an exchange run by HHS and the vast majority of them received a subsidy. If the Court determines that subsidies are not available on exchanges run by HHS, many of those people will not be able to afford insurance. It is likely that those who keep their insurance will predominantly be people with serious medical conditions. For that reason, insurers will have to raise their premiums, causing more people to be unable to afford insurance and additional increases in premiums. Ultimately, this “death spiral” will lead to the collapse of the federal exchanges.

3. **The challengers argue that an “Exchange established by the State” does not include an exchange established by HHS.** The statutory provision governing how to calculate the subsidy speaks of “an Exchange established by the State”—and the challengers advance the simple argument that the statute therefore means that subsidies are not available on exchanges run by HHS.

4. **The Obama Administration argues that HHS exchanges are indirectly established by states.** The Obama Administration’s position is more complicated and boils down to the argument that, under the statute, an exchange established by a state includes an
exchange indirectly established by a state’s choice to rely on HHS to run an exchange in
the state.

5. **The Obama Administration’s primary textual argument.** The statute says that “each
state shall ... establish an American Health Benefit Exchange” and adds that, if the state
does not do so, HHS “shall ... establish such Exchange within the State.” The Obama
Administration argues that only way to harmonize these provisions is to conclude that a
state indirectly establishes an exchange by choosing to make HHS do so. That
interpretation is supported by the language referring to an HHS exchange as “such
exchange,” which in turn refers back to the phrase “required Exchange.”

6. **The Obama Administration’s argument that the challengers’ position would lead to
absurd results.** The Obama Administration points out that only a “qualified individual”
may purchase insurance, and such an individual is defined in part as a person who
“resides in the state that established the Exchange.” If that means that individuals may
purchase insurance only on exchanges that were directly established by a state, then no
one could purchase insurance on HHS exchanges. A rule of statutory construction
provides that they should be interpreted so as not to lead to such absurd results.

7. **The Obama Administration’s structural argument.** The Obama Administration also
argues that if Congress meant not to authorize subsidies on federal exchanges, it would
have made that clear in the provision stating that, if a state does not establish an exchange,
HHS would do so. Otherwise, states would not appreciate the consequences of a choice
not to establish an exchange directly. Instead, the phrase “established by the State” on
which the challengers rely is buried in the middle of a 142-word sentence in a tax code
provision setting out how to calculate the amount of the subsidy. And it is clear that states
did not know that, by choosing not to establish an exchange directly, they were
renouncing subsidies for their citizens.

8. **The partisan split.** At oral argument, the four Justices appointed by Democratic
Presidents all seemed persuaded by the Obama Administration’s arguments. Three
Justices appointed by Republican Presidents seemed persuaded by the challengers’
arguments.

9. **The Chief Justice’s comment at oral argument.** Chief Justice Roberts made only one
comment on the merits at oral argument, directed to the Obama Administration’s
“deference” argument. The deference argument is that when a statute gives rulemaking
authority to federal agencies (as the ACA does), then the courts must defer to the agencies’
interpretation of the statute unless the statute is clear. Chief Justice Roberts pointed out
that, if the Court upheld the Obama Administration’s position on the ground that the
statute is ambiguous and the Administration’s position was one of two permissible
interpretations, then a subsequent administration could change course and decide that
subsidies should not be permitted on exchanges run by HHS.

10. **Justice Kennedy’s comment at oral argument.** Justice Kennedy told counsel for the
challengers that there is a serious constitutional problem with their argument. Under the
Tenth Amendment, the federal government may not “coerce” states to run a federal
program. Here, Justice Kennedy argued, the states would be unconstitutionally coerced
into setting up exchanges if there is no realistic alternative—and if the “death spiral”
analysis is accurate, then the alternative of a federal exchange is a mirage. A rule of statutory construction provides that federal statutes should be construed to avoid constitutional problems. Under that rule of construction, Justice Kennedy stated, the statute ought to be construed so that subsidies are available on federal exchanges.

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<th>The Bottom Line: The fate of Obamacare in the 34 states that did not directly set up an exchange appears to rest in the hands of the Chief Justice and/or Justice Kennedy. If Justice Kennedy provides a fifth vote to uphold the rule authorizing subsidies in those states under the “constitutional avoidance” theory, that will settle the matter. If Chief Justice Roberts provides the fifth vote under the “deference” theory, in contrast, the issue would be unsettled because a Republican Administration might decide that subsidies are not available on HHS exchanges. If neither provides a fifth vote to uphold the rule, then a death spiral is likely unless a state that had decided not to establish its own exchange changes its mind.</th>
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<td><strong>About the Author:</strong> Christopher Wright is the Head of the Appellate Practice at Harris, Wiltshire &amp; Grannis LLP. He served as a law clerk to Chief Justice Burger and has argued 28 cases in the Supreme Court and about 40 in the federal courts of appeals. He filed an amicus brief on behalf of the Catholic Health Association and Catholic Charities supporting the Obama Administration in this case.</td>
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