



Policy Brief
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New Mexico and *King v. Burwell* **What Kind of Exchange Are We?** **What Does that Mean for Citizens and Policymakers?**

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Introduction

In response to the Affordable Care Act (ACA), commonly known as “Obamacare,” New Mexico created a “hybrid” healthcare exchange. Unlike the states that chose to either embrace the ACA by enacting a state-based exchange or simply accept a federal exchange as imposed under the law, New Mexico created a state-based marketplace using the HealthCare.gov platform.¹ Nevada and Oregon originally set up state-based exchanges, but have now created plans similar to that of New Mexico.²

King v. Burwell was heard by the U.S. Supreme Court on March 4, 2015.³ The matter before justices was whether the ACA extends tax-credit subsidies to coverage purchased through exchanges established by the federal government under Obamacare.⁴ High Court watchers believe the justices’ decision, expected to be handed down this summer, could go either way. The Court might rule that Obamacare should be implemented as written, without subsidies, in states that left creation of an exchange to the federal government.

According to Avik Roy, a senior fellow at the Manhattan Institute and the opinion editor at *Forbes*, the slapdash way in which Obamacare was passed in 2010 led to a discrepancy in the way the law’s exchanges were established.⁵ Each state was expected to set up its own exchange in order to receive premium-assistance subsidies. For states that didn’t set up their own exchanges, Obamacare authorizes the creation of a federally run exchange as a backstop. But the law never formally authorizes the flow of premium-assistance subsidies through the federal exchange; only exchanges “established by a State” are eligible for federal subsidies.

The Obama administration simply ignored the text of the ACA, and authorized the flow of hundreds of billions of dollars in Obamacare subsidies through the federal exchange. *King v. Burwell* could put an end to that, leaving large numbers of recipients without subsidies.

To the Cato Institute's Michael Cannon, the loss of those subsidies is not a bad thing. Cannon, called the "architect" of *King v. Burwell* by *The New Republic*, notes that "under [Obamacare], states that have not embraced state-run exchanges could be exempted from some costly mandates under the law."⁶

"If the subsidies the IRS is issuing in those 36 states are illegal," wrote Cannon, "then the IRS is also illegally subjecting more than 57 million individuals and employers to illegal taxes."⁷ If the subsidies go away, so does a swath of regulations on businesses in the states that have not created Obamacare exchanges. This could make doing business far more attractive in states that have stuck with the federal exchange, rather than embracing a state exchange.

New Mexico's Exchange

There is some debate over how New Mexico's hybrid exchange will be treated, should the High Court rule in favor of *King's* plaintiff, and limit subsidies to state-created exchanges. In a recent *Albuquerque Journal* story, Amy Dowd, the director of the New Mexico Health Insurance Exchange, claimed that "the case isn't likely to have a bearing on New Mexico because the court is looking at the federal, as opposed to state, exchanges."⁸

Of course, the head of the New Mexico exchange has a great deal of interest in keeping her program going and is likely inclined to believe that it would be unaffected by the pending Supreme Court decision. When asked, members of New Mexico's exchange board have been unable to provide evidence that New Mexico's exchange is safe regardless of the Supreme Court's decision.

Others health care experts believe New Mexico will be affected by *King v. Burwell*. As Cannon commented in a recent email:

New Mexico passed legislation to establish an exchange, but failed to get its exchange up and running on time as it is required to do by the [ACA] in order to avoid a designation as a federal exchange. Moreover, New Mexico is contracting with HealthCare.gov to operate its exchange, which violates a bright-line requirement that New Mexico must meet if its exchange is to be established "under Section 1311." (Namely: States can only contract with an "eligible entity" to perform Exchange functions, and HealthCare.gov is not an eligible entity.)

Cannon is likely right. The map below from the Kaiser Family Foundation is instructive. The states, including New Mexico, in light-blue, are states that the foundation says are "at risk" of losing subsidies under the health care law.

Contractual medical malpractice reform, on the other hand, allows patients and providers to agree in advance of treatment on how the patient will be compensated in the event of simple negligence on the part of providers.¹² Supporters believe that such a model offers potential improvements in the areas of costs, patient preferences, the pursuit of more efficient liability rules, and quality of care.

Other reformers, including Haislmaier, argue that states should lead the way by demonstrating that they are better-equipped to ensure access to affordable coverage. They can do that by ensuring that their insurance law is set to default automatically to a less restrictive age rating ratio for premiums in their individual and group health insurance markets, effective as soon as Congress lifts Obamacare's ill-considered federal imposition of a narrower three-to-one ratio.¹³ The natural variation in health costs between 64-year-olds and 21-year-olds is about five-to-one.

Haislmaier says states should revert to their prior standard or another more appropriate variation.

Other market-based ideas include several basic health care reforms that the Rio Grande Foundation has previously proposed. These include removing gross receipts taxes from deductibles and co-pays, allowing the purchase of health insurance across state lines, and eliminating costly insurance mandates.¹⁴

Congressional Response

Cannon argues that the best thing congressional Republicans can do in the wake of a favorable Supreme Court decision is to repeal Obamacare. He cites polling data from the Foundation for Government Accountability which had several significant findings based on polling done in the 34 states with federal exchanges.¹⁵

- Washington, not the states, would be the target of voters' blame if the High Court rules against subsidies for federal exchanges, with 46 percent blaming Congress for poorly writing the Obamacare law and 22 percent blaming the IRS for giving out the subsidies illegally;
- Only a fifth of voters say states are to blame for refusing to establish their own exchange;
- Half of all voters, and 76 percent of Republicans, would be less likely to re-elect their state legislator if he or she voted to establish and fund a state-run Obamacare exchange.

According to Roy, Republicans in Congress should not sit idly in the wake of a favorable decision in *King*. In fact, such a response would likely drive state leaders to simply adopt state-based exchanges in order to obtain the subsidies the Obama administration had been allowing them to access in violation of the law.

Roy suggests that Republicans in Congress capitalize on a favorable decision and improve America's healthcare system by offering states the option of either going forward with

Obamacare's exchanges, or setting up an alternative, more market-oriented system. Under Roy's proposed model, states would be free to choose from a broad array of health insurance plans, instead of being forced to choose from a narrow set of federally-certified options.¹⁶

Roy's plan repeals the Obamacare individual mandate, which requires most Americans to purchase government-certified health coverage. It also restores the primacy of state-based exchanges and state-based insurance regulation. It expands the flexibility of insurers to design exchange-based policies that are more attractive to consumers, because they are of higher quality at a lower cost. The plan expands access to health savings accounts. Because these reforms lower the cost of insurance for younger and healthier individuals, they have the potential to expand coverage, without an individual mandate.

States also have the further option of abandoning exchanges entirely, and simply offering means-tested tax credits to their lower-income residents.

Conclusion

No one knows how the U.S. Supreme Court will rule in *King v. Burwell*, but New Mexico and other states must be prepared for the very real possibility that they do. This paper is not meant to have been an exhaustive analysis of the various options available to state and congressional policymakers, but a primer to better understand how to respond. Hopefully this paper illustrates the need for policymakers to be prepared to act and offers some paths forward that will actually accomplish the stated, but un-achieved goals of Obamacare: reducing the cost of American health care while also improving its quality.

Footnotes

1. U.S. Department of Health and Human Services, "Health Insurance Marketplaces 2015 Open Enrollment Period: March Enrollment Report," March 10, 2015.
2. *Ibid.*
3. "*King v. Burwell*," ScotusBlog.
4. *Ibid.*
5. Avik Roy, "Transcending *King v. Burwell*: With the Supreme Court's Blessing, the GOP can replace Obamacare's Exchanges," *Forbes*, January 15, 2015.
6. Brian Beutler, "The Architect of the ObamaCare Court Challenge Just Undermined Republicans' Victory Strategy," *The New Republic*, February 13, 2015.
7. Michael Cannon, "A Reference Guide To *King v. Burwell* and Related Cases: Can The IRS Issue ACA Subsidies Through Federal Exchanges?" *Forbes*, December 31, 2013.
8. Michael Coleman, "Head of NM Health Exchange Likes Current Trends," *Albuquerque Journal*, March 8, 2015.
9. Kaiser Family Foundation, "How Many Americans Could Lose Subsidies If the Supreme Court Rules for the Plaintiffs in *King vs. Burwell*?"
10. Edmund Haislmaier, "*King v. Burwell*: What State Lawmakers Should Do," Heritage Foundation, March 5, 2015.
11. Eboni Morris, "Liability Under 'Good Samaritan' Laws," American Association of Orthopaedic Surgeons.
12. Michael Cannon, "Reforming Medical Malpractice Liability Through Contract," Cato Institute, November 12, 2010.
13. Edmund Haislmaier, "*King v. Burwell*: What state lawmakers should do," Heritage Foundation, March 5, 2015.
14. Paul Gessing, "Cutting Costs and Improving Health Care in New Mexico," Rio Grande Foundation, January 7, 2008.
15. Charles Siler, "34 State Poll Confirms Voters Don't Want State-Run ObamaCare Exchanges," The Foundation for Government Accountability, March 26, 2015.

16. Avik Roy, "Transcending King v. Burwell: With the Supreme Court's Blessing, the GOP can replace ObamaCare's Exchanges," *Forbes*, January 15, 2015.

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