



Written by [Jack Kenny](#) on November 10, 2014

## New Appeal Offers More Controversy Over ObamaCare

The new challenge the Supreme Court will hear to ObamaCare is likely to be as controversial and divisive as the high court's 5-4 decision in 2012, holding as constitutional the healthcare law and its mandate that uninsured persons purchase health insurance or pay a penalty.

The Court announced on Friday it will hear an appeal that has come from Virginia in the case *King v. Burwell*, challenging the legality of providing subsidies for those who can't afford health insurance through exchanges established by the federal government.



The law, enacted in 2010, authorizes the creation of both state exchanges for the purchase of health insurance and federal exchanges in states that have not established exchanges of their own. Only 14 states have established exchanges, and the point in controversy is over the language authorizing subsidies to "an exchange established by the state." Those challenging the law argue that the act contains no authorization for subsidies through the federal exchanges. The IRS has issued a regulation saying subsidies are allowed through either state or federal exchanges, a finding the challengers say contradicts (and thereby violates) the legislative power granted to Congress by the Constitution.

The state of Oklahoma, also challenging the ruling, welcomes the Supreme Court's decision to hear the challenge, said Scott Pruitt, the state's attorney general.

The administration "cannot ignore the plain language in a statute and rewrite laws with which they disagree," Pruitt told the *New York Times*, "This Supreme Court review will provide Oklahoma and the 35 other states that did not establish state-based exchanges with immediate and conclusive clarity as to their rights and obligations under the A.C.A. [Affordable Care Act] so that the states may make appropriate health care policy decisions."

The Obama administration promised to make a vigorous defense of funneling subsidies through the federal exchanges, something Press Secretary Josh Earnest said Friday "was the intent of the law, and it is working as Congress designed." U.S. Solicitor General Donald Verrilli argued in his brief that the challenges are "contrary to the act's text and structure and would render the act unrecognizable to the Congress that passed it."

A July 2014 analysis by the Robert Wood Johnson Foundation, *Time* magazine reported, found that about seven million Americans in the 36 states that have not established state exchanges could be eligible for subsidies through the federal exchange by 2016, meaning the elimination of the federal part of the system could significantly increase the number of the nation's uninsured. Without access to the subsidies, and with the individual mandate still in place, would people who could not afford health insurance face fines for being uninsured? Petitioners from Virginia, who object to the mandate, claim that without the subsidies, they would be eligible for the law's hardship exemption.

The decision to hear the case was unsigned, but the approval of at least four of the nine justices is



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required to hear a case. That has given rise to speculation that the four dissenters in the 2012 case — Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito — have welcomed another chance to consider a challenge to the ObamaCare law. That would leave Chief Justice John Roberts with the critical “swing” vote again. Roberts joined the Court’s liberal bloc — Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan — in finding the individual mandate constitutionally permissible. Plaintiffs’ lawyers had argued in that case that the constitutional authority of Congress to regulate interstate commerce could not be used to penalize people for their non-purchase of a product, namely health insurance.

But Roberts, writing the opinion of the Court, claimed the fine imposed for non-compliance is in fact a tax and falls within Congress’ taxing power, despite the fact that the law itself refers to the charge as a “penalty” 18 times. At the same time, the Court struck down a part of the law that made all federal Medicaid funding for a state dependent on the state’s expansion of its Medicaid program. That provision was coercive and “would threaten the political accountability key to our federal system,” the Court ruled.

The current controversy has come to the Supreme Court as the result of conflicting U.S. appeals court decisions, with the Fourth Circuit Court in Richmond ruling against the challenge, while a divided three-judge panel of the appeals court in the District of Columbia ruled in its favor. “We reach this conclusion, frankly, with reluctance,” Judge Thomas Griffith wrote for the 2-1 majority. “Our ruling will likely have significant consequences both for the millions of individuals receiving tax credits through federal exchanges and for health insurance markets more broadly. But, high as those stakes are, the principle of legislative supremacy that guides us is higher still.” Dissenting Judge Harry Edwards said the case was about a “not-so-veiled attempt to gut” the healthcare law.

Case Western University’s Jonathan Adler, one of the architects of the new challenge, said the Supreme Court “has the opportunity to reaffirm the principle that the law is what Congress enacts, not what the administration or others wish Congress had enacted with the benefit of hindsight.” Granting tax credits to those who need help purchasing health insurance “may be a good idea, and may have bipartisan support,” Adler told the *Times*, “but the I.R.S. lacks the authority to authorize such tax credits where Congress failed to do so.”

Evidence for the “bipartisan support” might be hard to find since ObamaCare was passed on a straight party line vote at a time when Democrats were in the majority in both houses of Congress. A group of Republican lawmakers filed a brief to the Supreme Court in support of the challenge, arguing that subsidies through the federal exchanges would result in “tens of billions of dollars of unlawful spending in the next year, and hundreds of billions over the next decade.”

What appears missing from the debate is the question of what constitutional grant of power authorizes the federal government to even establish exchanges for the sale of insurance products, with or without subsidies. Still unanswered in any meaningful way are two key questions from the oral arguments in the 2012 case. When Solicitor General Verrilli argued that the individual mandate comes under Congress’ power to regulate interstate commerce, Justice Kennedy asked: “Can you create commerce in order to regulate it?”

“That’s not what’s going on here, Justice Kennedy,” Verrilli insisted, “and we’re not seeking to defend the law on that basis.” The question also arose as to where such a grant of federal power might end.

“What — what is left?” asked Justice Scalia. “If the government can do this, what — what else can it *not*



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