

MEMORANDUM

To: ASTS

From: Peggy Tighe, Joel Hamme, Caitlyn Yana and Steve Postal

Date: June 25, 2015

Re: Supreme Court Decision in *King v. Burwell* on Eligibility for Tax Credits in the Health Insurance Exchanges

A. Background

In a 6-3 decision issued today, the Supreme Court of the United States held that Section 36B of the Internal Revenue Code authorizes tax credits for all financially eligible individuals who enroll in insurance plans through the health insurance exchanges created by the Affordable Care Act (ACA). This eligibility applies regardless of whether those exchanges are established and operated by the states, the federal government, or federal-state partnerships.¹ This means that federal subsidies will continue to flow to roughly eight million individuals in the 34 states with federal exchanges.

This memorandum reviews the majority opinion, the dissenting opinion, and the implications of the decision.

B. The Majority Opinion

The majority opinion consists of four major parts.² The first part furnishes background concerning the ACA. The opinion describes the ACA and its efficacy as a function of three intertwined reforms: guaranteed issue and community rating requirements, the individual mandate to have health insurance (or pay a tax penalty), and sliding scale tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty level.

The second part of the majority opinion focuses on Section 36B's reference to "an Exchange established by the State." The opinion recognizes that, when analyzing an agency's

¹ *King v. Burwell*, No. 14-114 (U.S. June 25, 2015).

² The majority opinion was written by Chief Justice Roberts. Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan concurred in the entire opinion.

interpretation of a statute, the Court often applies the two-step *Chevron* framework.³ However, the opinion declines to apply *Chevron*. The opinion emphasizes that tax credits are a key component of the Act with “deep economic and political significance” central to the ACA. The opinion concludes that *Chevron* analysis is inappropriate because it is unlikely Congress would have delegated expansive interpretive authority to the IRS on such an essential component of the ACA. Instead, the opinion determines that the issue must be resolved through judicial statutory interpretation.

The third part of the majority opinion examines the language of the ACA’s various provisions to determine the meaning of Section 36B. In doing so, the opinion reviews both the language and structure of Section 36B and the statute as a whole. The opinion concludes that Section 36B is ambiguous when read along with other related provisions in the Act. However, based upon an analysis of the entire statutory structure, including congressional design, the Court rejects a narrow interpretation of “an Exchange established by the State” because it would lead to results that are plainly contrary to legislative intent, including undermining the individual insurance market in states with federally-facilitated exchanges and likely collapse of the individual mandate in the absence of tax credits. The opinion declines to accept the notion that Congress intended results that could ultimately dismantle the ACA and disrupt the insurance markets that it sought to stabilize.

The fourth part of the majority opinion reasons that the context and structure of the ACA compels the conclusion that Section 36B allows tax credits for insurance purchased through federally-facilitated exchanges as well as state-exchanges.

C. The Dissent

The dissent forcefully asserts that the majority’s holding distorts the plain language of the statute.⁴ In its view, the majority has engaged in linguistic gymnastics simply to preserve the ACA, ignoring the import of that language, rewriting the law, and ignoring fundamental principles of statutory interpretation. In doing so, the majority has also given preferential treatment to the ACA over other statutory enactments which are subject to different and more stringent tenets of judicial review.

D. Implications

Only 14 jurisdictions originally established and operated their own exchanges. An additional three states have recently gained federal approval to do so. As such, a contrary ruling by the Supreme Court would have resulted – as previously noted – in eliminating tax credits in 34 states, causing the loss of health insurance by about eight million people as well as destabilizing the insurance markets in those states and triggering massive premium hikes for health insurance. The Supreme Court’s decision avoids this market “death spiral” and allows implementation of the ACA to continue in a more stable environment. This includes key provisions such as: the

³ *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (the two-step analysis examines whether the statutory provision at issue is ambiguous and, if so, whether the administrative interpretation of it is reasonable).

⁴ Justice Scalia authored the dissent which was joined by Justices Thomas and Alito.

individual mandate, employer mandate, health insurance reforms (guaranteed issue, community rating, ban on denials due to pre-existing medical condition, and anti-discrimination based on health status), and now, under this decision, the continued operation of both state and federally-facilitated exchanges.

It is important to note that the majority's refusal to employ the *Chevron* framework is highly significant. Under *Chevron*, the Court asks whether a statute is ambiguous, and, if so, whether the agency's interpretation of that statute is reasonable.⁵ Had the majority relied upon *Chevron*, a determination of reasonableness would not insulate the agency's interpretation from later revision. Thus, in a new Administration -- for example, the successor to the Obama Administration -- the IRS could alter its interpretation to reach a different outcome. This would not require an act of Congress. However, since the majority opinion did not employ *Chevron*, the majority's interpretation that state-exchanges and federally-facilitated exchanges are functional equivalents cannot be changed as easily but would have to be modified legislatively. In effect, this means that ACA opponents will need to control both chambers of Congress and the White House to repeal or substantially modify the ACA.

The ACA has been controversial since its inception, but the Supreme Court has now rejected major challenges to its constitutionality (*National Federation of Independent Business v. Sebelius*, 567 U.S. ___ (2012)) and statutory efficacy (*King v. Burwell*). Although litigation over various aspects of the ACA will undoubtedly continue, major efforts to repeal or replace it will now have to be addressed to -- and agreed upon by -- federal legislative and executive branches. Of course, major skirmishes about other facets of the ACA (e.g., Medicaid eligibility expansion which is a voluntary state decision) will continue in the states.

If you have questions on this memorandum, please do not hesitate to contact us.⁶

⁵ See n.1.

⁶ Caitlyn Yana, a summer associate at Powers Pyles, contributed significantly to our work on this memorandum.