

The Stage is Set: Predicting State and Federal Reactions to King v. Burwell

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The significance of the Supreme Court’s decision to hear the King v. Burwell case cannot be understated. The case will have preeminent implications for consumers and industry stakeholders residing in the 34 states utilizing the Federally Facilitated Marketplace (FFM). A cornerstone of the law is in question and there is a very real possibility that nearly five million citizens enrolled through the federal marketplace may lose access to subsidized coverage. The intention of this document is to share potential contingency options that Leavitt Partners believes are likely to be considered under two scenarios characterizing a Supreme Court ruling in favor of King.

The King case has taken a rather unusual course to be heard by the Supreme Court. Unlike most cases heard by the Supreme Court, King v. Burwell does not involve split circuit decisions (Halbig’s original ruling was docketed for en banc review) nor does it involve a state court decision. Rather, a circuit court decided that this was an important question of federal law that should be settled by the Supreme Court. Leavitt Partners contends that the Supreme Court likely voted to hear the case at this juncture in order to prevent the Affordable Care Act (ACA) from being implemented too fully before the Court had a chance to settle this question of federal law. The Supreme Court has scheduled oral arguments for March 4, 2015 and is expected to issue a final ruling by the end of June 2015. If the Supreme Court rules in favor of King, there will likely be some transitional period between the date of the ruling and when subsidies stop. Such a transition period could be established by the Court’s own design or by directing lower courts to effectuate the ruling through the issuance of a court order.

Both the plaintiff’s and defendant’s arguments hinge upon statutory interpretation versus legislative intent. The plaintiff argues that an IRS rule establishing subsidies is an invalid interpretation of the ACA’s literal text, which mentions subsidies only in reference to “exchanges established by the State.” Conversely, the

administration argues that the statute needs to be read in context of Congressional intent and that subsidies offered through the FFM are a necessary and key component of the law. The general rule in cases of statutory interpretation is that if the Justices find that the statute is “unambiguous” on its face and does not lead to an “absurd” result, the Court will not consider legislative intent. While Leavitt Partners is not in a position to predict how the Court will rule in this case, there is reason for the government to be nervous, as the conservative justices emphasized that the courts should not rewrite legislation. If Congress is perceived as having made a mistake in drafting the ACA, these justices may defer to Congress to fix it rather than the Supreme Court.

SCENARIO 1: CONGRESSIONAL FIX

Congress will be a key player in the type of response the government will make to a Supreme Court ruling in favor of King. This section will discuss political attitudes and possibilities that Republicans in Congress will take in reaction to a ruling in favor of King.

The political will for Congress to amend the ACA statute ahead of the King v. Burwell ruling may exist, but Republicans in the Senate and House of Representatives find themselves in a precarious situation in the scenario of a victory for King. On one hand, the ACA is stripped of a powerful provision to extend health care to millions of Americans who enrolled in the federal marketplaces, not to mention the attendant effect on Medicaid expansion in some states. On the other, Republicans have tied their own hands by their outspoken antagonism against the law and could be seen as taking health care away from millions by not providing an amendment that continues the insurance subsidies increasingly viewed as an entitlement.

Republicans in this situation will have several legislative options in a ruling in favor of King.

The first and least complex option is for Republicans to amend the law to firmly establish that the original intent of Congress was to extend subsidies to all Americans, regardless of who operates a state’s insurance marketplace. However, the optics of this “rescue” approach are poor for a political party that has voted over 30 times to repeal the law, essentially eliminating this as a policy prerogative.

A second, slightly more plausible scenario is that Congress will pair a long- or short-term fix to the ACA statute with material concessions from Democrats on other components of the ACA. Such concessions may consist of the employer shared accountability payment (e.g. employer mandate), advance premium tax credit thresholds and amounts, risk corridors, medical device tax repeal, Independent Payment Advisory Board repeal, more stringent security and income verification or more flexibility for states on marketplace infrastructure. Seeking concessions and changes in policy at the national level and punting marketplace decisions to the states would grant Republicans the ability to eliminate

unpopular provisions, chair state’s rights and afford states a chance to adopt ideal solutions for their respective markets.

A third scenario is that Republicans will do nothing and allow the legislation to flounder. Republicans run a significant risk with this option as 2016 proves to be an important race for the party. This scenario could be perceived as political “brinksmanship” similar to the 2011 Debt Ceiling Crisis that was largely blamed on Republicans (and Republicans walked away with very little in gains).

Congress has little will to provide a fix to legislation that Republicans in both chambers have been so antagonistic towards. However, Republicans, if they were to act, would undoubtedly seek concessions for other key parts of the ACA.

SCENARIO 2: STATE SOLUTIONS

If Congress chooses not to take corrective action following a SCOTUS ruling in favor of King, contingency plans for maintaining access to insurance subsidies will fall to the states. However, this will necessitate that states seek compliance under the provisions of a “state exchange.” In such an instance, there are a variety of contingency plans that will be available to states in order to seek statutory compliance and keep the subsidies flowing. Still, each contingency option will vary on the time necessary for implementation, costs necessary to reach compliance and state political obstacles to overcome. Not all of these options tenably ensure continuous subsidy distribution without some disruption. The Obama Administration has yet to announce contingency planning or flexibility in the criteria used to define a state exchange. Although the administration publicly maintains the expectation that the Supreme Court will side with them, the consequences of eliminating subsidies through the Federally Facilitated Marketplace are so significant that CMS will be relied upon to have contingency options available. Some of the contingency options that we expect to be considered may include:

HHS as the Technology Administrator

The administration may endorse a “hybrid” state-based marketplace, where CMS would allow the FFM and partnership states to use the Healthcare.gov technology platform to enroll consumers, but would require states to assume or retain ownership and control of all other marketplace functions such as plan management, consumer assistance, etc.

There are a number of obstacles to consider with this type of model. The first would be a clearer definition of the term used in statute, “state exchange,” and what criterion constitutes a state-based marketplace. CMS has some discretion in defining the amount of ownership and control a state must retain to be considered a state-based marketplace. In an effort to maximize participation in state-based marketplaces, we believe that CMS would be willing to re-evaluate the anatomy of what has been considered a state-based

chance to develop their own insurance distribution channel. However, any plans to implement 1332 waiver alternatives must be approved by CMS and the 1332 waivers cannot take effect until 2017. Furthermore this is prescribed in statute that would take an act of Congress to change, meaning that the 1332 waiver is unlikely to be considered as a rapid solution.

In any contingency plan considered by a state, capital and operational costs will be a major determinant for states that comply. CMS could open up additional grant funding opportunities that allow new states and regional partners to build state-based marketplaces. It is extremely unlikely that a Republican-controlled Congress would be willing to provide any additional appropriations for such funding opportunities. Although states would have the ability to establish their own fee for supporting marketplace-related activities, it would certainly not be popular provision. Comments from executive staff at CMS have suggested that the federal marketplace is barely sustaining itself under the current 3.5% carrier assessment—and even under reduced involvement, we should not expect CMS to lower the cost of providing this technology. As such, the ongoing costs to leverage federally administered technology may ultimately incentivize states to adopt their own, state-based systems.

STATE WILLINGNESS TO SEEK COMPLIANCE

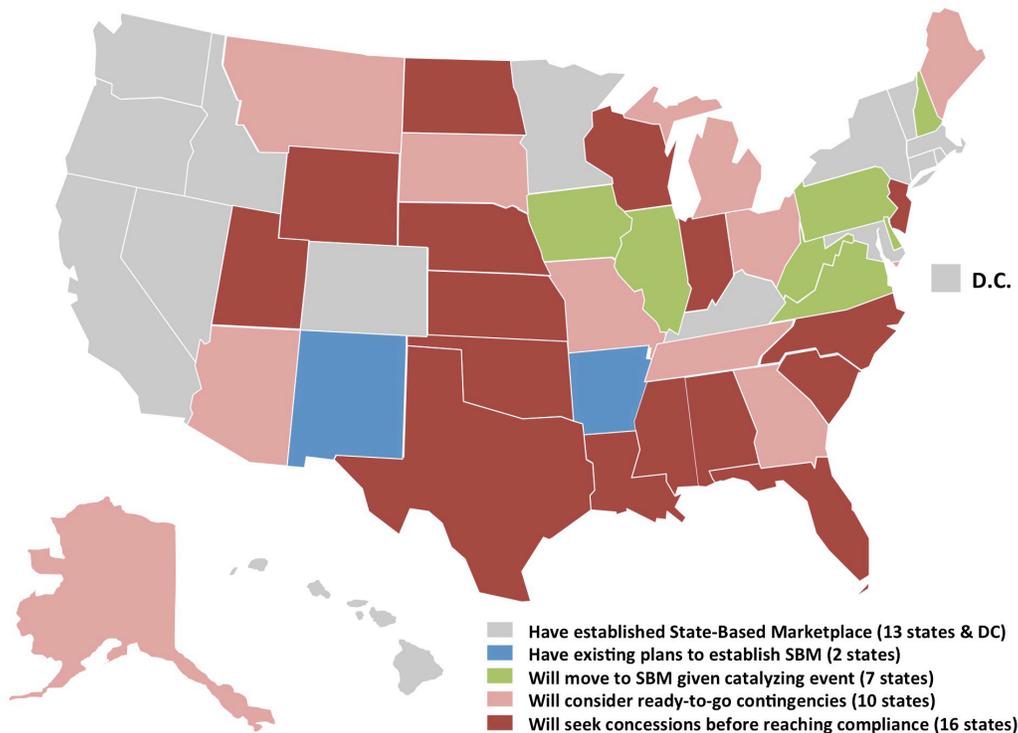
In 2015, 34 states will be operating in a federal marketplace arrangement (e.g. Partnership, Bifurcated exchange, Marketplace Plan Management or Federally Facilitated Marketplace). It should be noted that we have exempted all fourteen of the state-based marketplaces from this federal marketplace designation—as well as three states (Nevada, New Mexico and Oregon) that will be utilizing Supported State-Based Marketplace arrangements in 2015. Provided a scenario where Congress has been unwilling to act and it is now up to the states to decide whether to seek compliance as a state exchange, Leavitt Partners believe that states will fall into one of four camps in their propensity to establish a state-based marketplace:

States with existing plans to move towards an SBM. At this point, Arkansas and New Mexico are the only states operating on the federal marketplace that have well-paved in-roads to establish state-based marketplaces. These states have enabling legislation in place and have drawn down the establishment funds necessary to carry the marketplace through its first year of operation.

States: AR, NM

States that will take proactive steps towards an SBM. Leavitt Partners believes that there are states that would readily move to a state-based marketplace given a catalyzing event such as a Supreme

Figure 2 | Potential State Reactions to King v. Burwell Ruling in Favor of Plaintiff



Court ruling in favor of King. These states may have desired a state-based marketplace from the outset but for one reason or another have so far been unable to advance efforts. However, under threat of losing access to subsidies, they may seek to identify ways they can realistically transition to a state-based marketplace.

States: DE, IL, IA, NH, PA, VA, WV

States that will research the necessary steps to establish an SBM.

For these states, the threat of losing access to premium subsidies will be the impetus to proactively develop ready-to-go contingency plans capable of shielding consumers in an adverse case ruling. These states have proven to be politically charged but are moderate enough, or have populations large enough, that elimination of the premium subsidies could be very detrimental to their respective insurance markets.

States: AK, AZ, GA, ME, MI, MO, MT, OH, SD, TN

States that will dig in their heels and seek extractions from the administration. These are the states that have been staunchly opposed to the Affordable Care Act since its inception. A ruling in favor of the plaintiff in King v. Burwell may give these states a bargaining chip to seek concessions from the federal government, perhaps on specific constructs of marketplace operation or on Medicaid expansion.

States: AL, FL, IN, KS, LA, MS, NE, NJ, NC, ND, OK, SC, TX, UT, WI, WY

CONCLUSION

The impact that the King v. Burwell case could have on ACA implementation is not lost on anyone. Elimination of consumer subsidies through the marketplace in 34 states will deliver a crippling blow to the health care law and tarnish much of the implementation progress that has been made to date. The Obama Administration has undoubtedly started planning for potential contingencies under possible King outcomes. However, with a new Republican majority and months to go before a King ruling, we do not expect to learn about these contingency plans until well into 2015. The intention will be to balance the time necessary for states to prepare and minimize the time available for Republicans to defame these contingencies.

Simultaneously, the ability for Congress to come together on a bipartisan solution is not a forgone conclusion. The long-term stability of President Obama's signature piece of legislation is on trial, and he has expressed² a willingness to work with Congress to make pragmatic refinements to "make the law work even better." Despite their vehement opposition to the health care law, Republicans will not want to be "caught holding the bag" for removal of insurance subsidies and diminished revenue for the health care industry. Still, Republicans will not have as much at

stake in these transactions, so conversations are unlikely to hold up if the administration is not willing to discuss major structural changes to the ACA.

The possibility of losing ACA-subsidized coverage across more than half the country is now a very real prospect to all parties involved. Expect to see increased political posturing and reference to the King v. Burwell in the coming months. If a patchwork solution to the statutory language is not proctored by Congress and the Administration, expect to see CMS announce guidance on potential contingency plans in late spring.

All of this to say: the first half of 2015 will be very interesting.

Appendix: Federal Marketplace States—Supporting Logic

Alabama: In 2012, when the state was considering state-based marketplace legislation, Governor Robert Bentley threatened to veto any bill implementing a marketplace. Gov. Bentley and the conservative legislature have since been staunchly opposed to nearly all aspects of the Affordable Care Act.

Alaska: Previous Governor Sean Parnell was opposed to a state marketplace in Alaska for concerns of cost and membership. However, we are slightly encouraged that the state may be willing to consider a state marketplace because of new, Independent Governor Bill Walker and recent considerations for Medicaid expansion.

Arizona: Newly elected Republican Governor, Doug Ducey, is yet to express a preference for type of marketplaces wants operating in Arizona. But the legislature's active involvement in the state's Medicaid expansion could be demonstrative of how they perceive their roll in marketplace-related decisions.

Arkansas: At a September 10, 2014, Arkansas marketplace board meeting, the board approved plans to set up a state-run marketplace for small businesses in 2015 and a state-run marketplace for individuals in 2016. If provided with a ruling in favor of King, the marketplace would likely need to call an audible to establish whatever functionality would be required to maintain delivery of the subsidies.

Delaware: In recent weeks, the state of Delaware has made statements that they believe their “Partnership” marketplace should qualify as a state marketplace. Whether this is true or not, we believe their intentions would support working with CMS to quickly become compliant as a state marketplace if need be.

Florida: Governor Rick Scott has never had intentions to build a state marketplace for the state of Florida, but they do have a state-established small group private marketplace called Florida Health Choices. If provided special allowances to be capable of funneling premium subsidies through this marketplace, we believe they could seek compliance with the health care law for individual enrollment.

Georgia: The state of Georgia has enacted legislation that will require legislative approval to establish a marketplace. Despite having a significant enrollment population that's heavily subsidized, any show of ACA implementation would be politically toxic in the state of Georgia. As such, it is not expected they will seek compliance without major structural changes to the law.

Illinois: The state's conservative legislature has blocked every attempt to pass enabling legislation to establish a state-based marketplace. As Republican Governor Bruce Rauner takes over, we expect there to be little momentum for a state transition unless the subsidies are disallowed from the federal marketplace.

Indiana: Governor Mike Pence has been a staunch opponent of the health care law and refused to establish a state marketplace due to costs to taxpayers. Despite moving forward with an alternative-style Medicaid expansion plan, it is highly unlikely that the state will be interested in planning for a state marketplace.

Iowa: Early in 2014, Iowa Governor Terry Branstad remarked that he was open to the idea of building a marketplace with the governors of Kansas, Nebraska, and South Dakota. The state has also drawn down federal grants that would allow them to research this alternative.

Kansas: The state of Kansas has been a major opponent of the health care law. Now that Insurance Commissioner Sandy Praeger has retired, the state has very few ACA-supporters to advocate for a state-based marketplace.

Louisiana: The state of Louisiana has never displayed interest in adopting a state marketplace or expanding Medicaid. It's unlikely the state would be willing to seek compliance with these unless major concessions were extracted from the administration.

Maine: Governor Paul LePage has not displayed any interest in establishing a state marketplace nor expanding Medicaid for the state of Maine. If pressed, the state is likely to seek reasonable alternatives—but willing compliance with a state marketplace is doubtful.

Michigan: Governor Rick Snyder was an early advocate for a state marketplace, and we suspect there may still be an appetite to adopt a Michigan-specific marketplace. However, the conservative legislature, which has so far prevented a state marketplace or even a consumer assistance partnership arrangement, will not allow this to occur without a fight.

Mississippi: Despite Governor Phil Bryant being a devout opponent of the Affordable Care Act, Insurance Commissioner Mike Chaney is an elected official and has proved to be more pragmatic on these issues. Mississippi is unlikely to establish a state marketplace without major concessions, but Commissioner Chaney could be an advocate for those conversations.

Missouri: The state of Missouri has enacted legislation that will require legislative approval to establish a marketplace. This may prove challenging for the state, but Democratic Governor Jay Nixon and a large subsidy-eligible market could build enough support to establish a state-based marketplace.

Montana: The state of Montana also has legislation on the books that would require legislative approval to establish a marketplace. But with a Democratic Governor and an active, elected insurance commissioner to lobby for support, Montana could potentially swing to a state marketplace if needed.

Nebraska: Newly elected Republican Governor, Pete Ricketts, is a strong opponent of the ACA. Furthermore, the Nebraska Attorney General, Jon Bruning, signed an amicus with a number of other attorney generals opposing the ability of the FFM to administer subsidies.

New Hampshire: In 2012, legislation was passed that will require legislative approval before setting up a state-based marketplace. This may prove to be an obstacle for the state, but recently re-elected Democratic Governor Maggie Hassan may prove capable of lobbying for legislative support.

New Jersey: As a leading member of the Republican Party, Governor Chris Christie is unlikely to allow the establishment of a state marketplace without seeking major extractions from the administration.

North Carolina: Under Governor Pat McCrory, the state signed legislation rejecting a Medicaid expansion and preventing the state from operating a state-based marketplace. Despite the Governor's interest in Medicaid expansion, a very conservative legislature will make it difficult to get around this bill.

North Dakota: The state of North Dakota has not shown interest in developing a state-based marketplace since 2012 when Insurance Commissioner Adam Hamm was involved with the Health Care Reform Review Committee. Governor Jack Dalrymple and Commissioner Hamm are opponents of the health care law.

Ohio: Governor John Kasich has shown willingness to seek compliance under ACA provisions like Medicaid Expansion. If the SCOTUS decision removes subsidies from the federal marketplace, powerful health care stakeholders and a sizeable enrollment population could be enough incentive to move Ohio toward a state-based marketplace if need be.

Oklahoma: Governor Mary Fallin has not shown any interest in the establishment of a state-based marketplace. If the Supreme Court rules in favor of King, the state of Oklahoma may seek extractions from the administration before seeking compliance.

Pennsylvania: Under newly-elected Democratic Governor Tom Wolf, the state will embrace the ACA under a more traditional Medicaid expansion. Owing to new state leadership and a highly-significant eligible market size, Pennsylvania would be willing to transition to a state marketplace under a Supreme Court ruling in favor of King.

South Carolina: As home to two of the ACA's most vehement opponents, Governor Nikki Haley and Senator Lindsey Graham, the state of South Carolina is highly unlikely to seek compliance under a state-based marketplace unless there are considerable changes made to the structure of the law.

South Dakota: The state of South Dakota has had concerns over the feasibility of a state-based marketplace for reasons of cost and eligible market size. However, with highly subsidized enrollment

population in 2014 and a legislature that has not spurned the ACA to the extent that others have, the state may be willing to consider new market alternatives such as a regional marketplace.

Tennessee: Despite his opposition to the ACA, Governor Bill Haslam initially considered a state marketplace after establishing the Insurance Exchange Planning Initiative. Their planning efforts were ultimately disbanded in favor of a fully federally facilitated marketplace. The conservative legislature has also shown devout opposition to other ACA-related measures and would not look favorable on a bill establishing a state-based marketplace.

Texas: Perhaps the Affordable Care Act's most ardent opponent, the state of Texas has expressed little willingness to comply with any of the law's major provisions. If provided with a SCOTUS ruling in favor of King, the state is unlikely to seek compliance without seeking major concessions from the administration.

Utah: At one point, Governor Gary Herbert considered the establishment of a state-based marketplace for Utah but expressed concerns of ACA requirements around reporting and organizational structure. The state ultimately received a waiver to allow their already established small business marketplace (Avenue H) to be considered the state's SHOP.

Virginia: Democratic Governor Terry McCaulliffe campaigned on the establishment of a state-based marketplace for the state of Virginia but has so far dedicated most of his attention to the expansion for Medicaid. If pressed by a ruling in favor of King, Governor McCaulliffe and the numerous insurance carriers participating in the state could lobby for a state marketplace.

West Virginia: Existing as a partnership state with a Democratic Governor, we believe West Virginia could be well-positioned to seek compliance as a state-based marketplace. Furthermore, the state's 2014 marketplace enrollment was both significant and highly subsidized and could prove very disruptive to the insurance market if not protected.

Wisconsin: Governor Scott Walker's stature within the Republican Party makes Wisconsin an unlikely candidate to seek compliance under a state marketplace without first seeking major concessions from the administration.

Wyoming: In 2012, the state passed laws preventing the establishment of a state-based marketplace until further review produced by select committee and voted on by legislature. Despite the committee's support for establishment of a Wyoming-operated marketplace, the legislature never approved it and still holds decision-making authority.

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