

# ISSUE ADVISORY: Conservatives' Latest Attempt to Kill the ACA – King v. Burwell

March 2, 2015

*King v. Burwell* — the case being argued this week before the Supreme Court — marks the 175<sup>th</sup> attempt by conservatives to repeal provisions or completely overturn the Patient Protection and Affordable Care Act (ACA – P.L. 111- 148). The Republican-controlled House took its 56th vote on Feb. 3 to repeal the ACA in part or in entirety. That number joins the 118 lawsuits brought by private companies and non-profit organizations, mostly religious-related entities challenging the ACA's insurance contraceptive coverage requirement. As such, the 175th effort set a new high (or low) in mean-spirited persistence to undermine access to affordable health care for millions of persons — especially disadvantaging low- and moderate-income women.

Also waiting in the wings is a vote to repeal a 2.3 percent medical device tax, an effort – if successful– would reduce by an estimated \$30 billion designated to fund the Affordable Care Act. The highly profitable medical device industry is aggressively pushing for this and the GOP-controlled Congress is all too happy to vote for repeal since it would also weaken the Affordable Care Act.

**Case Challenges ACA Core Provision** – *King v. Burwell*, to be argued Wednesday, March 4, challenges a core provision in the ACA which authorizes the federal government to provide subsidized coverage through tax credits for qualifying individuals and families enrolled through the State Health Care Exchanges. Plaintiffs say that the law allows tax credits (subsidies) only for individuals and families in the 13 states and the District of Columbia that have established their own exchanges, not individuals and families in the 37 states that can obtain coverage through the federally-facilitated Exchanges.

The ACA says that each state “shall establish” state-based marketplaces, 42 U.S.C. 18031(b)(1). Since the federal government cannot legally compel states to adopt such measures, the Secretary of Health and Human Services (HHS) “shall establish and operate such Exchange within the State,” 42 U.S.C. 18041(c)(1). Regulations issued by the Internal Revenue Service (IRS) in 2012 made premium subsidies available to people in every state, regardless of whether or not a state created its own health insurance Exchange.

*King* petitioners claim that strict adherence to the words “each State shall establish” was intended by lawmakers and that the IRS has illegally interpreted the law. Others have asserted that this is an unintentional omission; moreover, that every other aspect of the financing mechanism of tax credits used to make health insurance affordable strongly implies that this is what Congress intended. A fair and just decision in *King v. Burwell* requires a comprehensive assessment of

the Congressional record as the Act was being debated, the law itself and the broad and beneficial impact on society.

Organizations, including the NOW Foundation, emphasize in their amicus briefs to the Court that it they believe it was the intent of Congressional lawmakers when adopting the ACA that subsidies in the form of Premium Tax Credits for individuals and families be available under both the State Health Exchanges and the federally-facilitated Exchanges. NOW Foundation's Statement of Interest for the amicus brief, added that we hoped the Court would agree.

As of mid-February, 11.4 million persons had enrolled or renewed their health insurance coverage through an ACA marketplace, a million more than had been projected for that period. That figure does not include an almost equal number who are covered through the Medicaid expansion, bringing the overall total close to 24 million.

**Devastating Impact on Women and Families** – The National Organization for Women Foundation joined the National Women's Law Center and 67 women's and health care advocacy organizations in submitting an *Amicus Curiae* brief, stating that "loss of health insurance coverage under the Patient Protection and Affordable Care Act (ACA) would have a devastating impact on millions of low- and moderate-income women and their families, both in terms of their health and well-being as well as their financial security."

Among the 37 states without state-based Health Exchanges, there are 8.96 million people who receive health care insurance through the federal Exchange and who may lose their health care insurance. Of that total, more than three million women could lose health insurance coverage because they would not be able to afford coverage without the subsidy. Some 86 percent of ACA enrollees are receiving financial help to purchase their insurance coverage, averaging \$264 per month towards their health care premium amount.

Low-income women would be further impacted by the loss of cost-sharing reductions for preventive care services, like mammograms, flu shots, well woman visits, contraceptives, screenings for diabetes, breastfeeding support and supplies and screening and counseling for domestic violence. In addition, the women would lose essential health benefits such as maternity and newborn care, mental health treatment, and pediatric care – several of those services were rarely covered under private market health insurance plans. In addition, ACA prohibits sex-based discrimination in insurance coverage and refusal of coverage because of pre-existing health conditions.

Coverage under the Affordable Care Act is of special importance to women of color; nearly half of ACA-eligible women in the 37 states are women of color.

**Chaos Created by Decision Against ACA** – A Supreme Court decision against the government in this case would strike an enormous blow at the heart of one of the most progressive health programs enacted in decades. A vital part of the Affordable Care Act would be dismantled: the federally-facilitated insurance Marketplaces that work in 13 states and the District of Columbia. The result would threaten the very structure of the Affordable Care Act and would cause chaos in insurance markets and health care delivery systems. Without the federal Exchanges' subsidies,

insurance premium costs in the private individual market – where many people who lose coverage would have to shop — could rise by as much as 35 – 47 percent.

Additional losers if the ACA is dealt a death blow are the 24 million individuals projected to enroll by 2017, producing a total of an estimated 36 million individuals who would have access to affordable health care insurance, including the 12 million enrolled under the expanded Medicaid program. Health policy analysts say that we can expect to see a return of much higher rates of death as a result of sick individuals not being able to pay for health insurance – perhaps as many as 10,000 persons per year. Prior to the ACA an estimated 45,000 persons died each year due to a lack of insurance coverage or having inadequate coverage.

**Unfortunate Plaintiffs Lack Standing** - Critics of the case say that this is an example of a manipulated effort that is politically-motivated and question whether petitioners have legitimate standing. The four petitioners who do not seem to know much about the ACA were recruited by a libertarian legal advocacy organization gunning for the Obamacare, the Competitive Enterprise Institute (CEI). The four are David King, Brenda Levy, Rose Luck and Doug Hurst – all residents of Virginia. None can demonstrate that they have suffered as a result of the health care law – which leads us to question whether the Supreme Court has a specific agenda by taking up this case. Two lower courts have ruled against the *King* petitioners.

In an interview by *Mother Jones*, front man David King said he doesn't care if millions of Americans lose their health coverage, because “they're probably not paying for it anyway.” The Vietnam vet and self-employed limo driver despises Obama and loathes Obamacare, referring to “the idiot in the White House” on his Facebook page. Legal filings in the case indicate that King whose projected income for 2014 was \$39,000 which would have entitled him to a premium subsidy for health insurance at \$277 a month (lower if he didn't smoke). Without the subsidy under Obamacare, the same plan would cost \$648. However, King does not have to be covered under the ACA or pay a penalty for having no insurance because he qualifies for a hardship exemption as his premium costs would exceed eight percent of his annual income. Additionally, he'll soon be eligible for another government health care plan: Medicare.

Another plaintiff, Brenda Levy, was asked how she felt about 8.6 million people losing their coverage. Her response was mind-boggling: “I don't want things to be more difficult for people ... I don't like the idea of throwing people off their health insurance.” Levy did not recall how she had been selected as a plaintiff and had yet to meet in person the lawyers handling the case. According to the article, she thought that if the petitioners won, that a fix of the insurance situation, probably at the local level, would occur.

**Less Expensive Insurance under Obamacare** – Like many other opponents of the Affordable Care Act, Levy believes that many persons have lost insurance coverage and that premiums have risen when the opposite is true. Levy faces monthly health care premiums of \$1,500 due to health conditions, including two hip replacements and two craniotomies. If Levy had checked out a plan she could qualify for under Obamacare, she could have purchased a low-cost bronze plan on the federal exchange for \$148 per month, according to the *Mother Jones* article.

On her Facebook page, Rose Luck's describes President Obama as the “anti-Christ” who was elected because “he got his Muslim people to vote for him.” Luck declined to be interviewed by

the *Mother Jones*' reporter, but public records showed that legal judgments were entered against Luck and her husband in Virginia courts in the late 1990s for almost \$5,000 in unpaid medical bills (which have since been paid). In 2012, the bank had foreclosed on the house that Luck and her husband had purchased just a year earlier. Financial blows such as this are common for many individuals and families who lack health insurance or are underinsured.

**Did Not Have to Buy Insurance or Face Penalty** – Legal filings indicate that Rose Luck's estimated household income was \$45,000 and the least expensive plan available to her via the federal exchange was \$332 per month, (less if she didn't smoke) and like David King she is exempt from having to buy a plan or pay a fine as the cost of subsidized insurance is more than eight percent of her income.

Doug Hurst and his wife, Pam, owned a remodeling company that went bankrupt during the financial crisis and their 2009 tax returns list more than \$8,500 out-of-pocket medical expenses. Hurst is eligible for the most savings for health insurance under the ACA: just \$62.49 a month compared to the \$655 per month amount Hurst was paying for in 2010. The family experienced the loss of a daughter who suffered from a serious mental health problem and died in 2009. Ms. Hurst declined to talk about the case. Her Facebook entries were complimentary of Sen. Ted Cruz (R-Tex.), a Tea Party favorite.

It is sad to know that persons such as the four petitioners in the case are so poisoned by right-wing hate-mongering that they are not able to see the value of a program in helping them attain affordable health insurance and, at the same, time improve their financial security. Such is the talent of the Tea Party, the Fox news/talk channels and all the crazy, right-wing websites opposing Obama to cause people adopt views that, in reality, are against their own self-interest.

Lawyers representing the petitioners are Sam Kazman, the General Counsel for the Competitive Enterprise Institute and Michael Carvin, who represented George W. Bush during his 2000 Election Florida recount controversy. Predictably enough, the Competitive Enterprise Institute is funded by the Koch brothers, major oil corporations, tobacco companies and big pharma.

**Large Health Care Organizations Support ACA** – Yet organizations like the U.S. Chamber of Commerce which aggressively lobbied Congress against passage of the Affordable Care Act have declined to join forces in this lawsuit. America's Health Insurance Plans, an important health care lobby group, and the Hospital Corporation of America (HCA), the largest health care provider in the U.S., have filed amicus briefs with the Supreme Court defending Obamacare. *Mother Jones* notes that the HCA described the legal rationale offered by the CEI lawyers in this case as "absurd."

We think it "absurd" as well. An adverse decision – potentially coming from the conservative majority (Roberts, Scalia, Thomas, Alito and Kennedy) – would be a giant step backwards towards a fundamentally unfair society where a broken system of health care meant that an estimated 45,000 people a year died for lack of insurance. The Affordable Care Act is building a healthier and more just society and millions of women and their families are benefitting from its provisions. Let's keep it.

**More Information**

Supreme Court of the United States, Docket 14-114, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14-114.htm>

*King v. Burwell Amicus Brief*, <http://www.nwlc.org/resource/king-v-burwell-amicus-brief>

More *King v. Burwell* analysis, <http://www.nwlc.org/tags/king-v-burwell>

*King v. Burwell* Places Women's Health at Risk, <http://www.nwlc.org/resource/king-v-burwell-places-womens-health-risk>

Updated Estimates of the Insurance Coverage Provisions of the Affordable Care Act, Congressional Budget Office, <http://www.cbo.gov/publication/45159>

Raw Data: By 2017 Obamacare Will Be Covering 36 Million People, <http://www.motherjones.com/kevin-drum/2014/03/raw-data-2017-obamacare-will-be-covering-36-million-people>

The Court is About to Hear a Case that Will Destroy Obamacare, <http://www.motherjones.com/politics/2015/02/king-burwell-supreme-court-obamacare>

Why is Big Pharma Financing A Conservative Group Trying to Destroy Obamacare?, <http://www.motherjones.com/politics/2015/02/competitive-enterprise-institute-king-burwell-obamacare-pharma>

Tracking Enrollments for the Affordable Care Act (aka, Obamacare), <http://acasignups.net/>

Patient Protection and Affordable Care Act, [http://en.wikipedia.org/wiki/Patient\\_Protection\\_and\\_Affordable\\_Care\\_Act](http://en.wikipedia.org/wiki/Patient_Protection_and_Affordable_Care_Act)