

# FYI<sup>®</sup> Alert

## For Your Information<sup>®</sup>

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## High Court Hears Argument in ACA Subsidies Case

Yesterday, the Supreme Court heard oral argument in *King v. Burwell*, a closely watched case challenging the availability of subsidies offered in the Affordable Care Act's federally facilitated marketplaces. This case has garnered national attention because it threatens the viability of these marketplaces. Its significance for employers, in particular, centers on the shared responsibility assessments that are triggered only when a full-time employee purchases subsidized coverage through a marketplace. Debate in the courtroom divided down ideological lines. A decision is expected by early July.

### Background

The Affordable Care Act (ACA) contemplates that each state establish an American Health Benefit Exchange (aka marketplace) through which individuals can purchase affordable health coverage. In the absence of a state-run marketplace, the ACA authorizes the federal government to establish a federally facilitated marketplace (FFM) on a state's behalf. At present, there are 27 FFMs, seven partnership marketplaces, and 17 state-based marketplaces (including the District of Columbia).

Under the ACA, individuals must obtain "minimum essential coverage" or face a penalty (i.e., the individual mandate). To help facilitate that purchase, qualified individuals can receive a low-income subsidy for coverage purchased through a marketplace "established by a State." IRS regulations extended the application of the subsidy to FFMs.

In several cases nationwide, litigants have disputed the availability of the subsidy to FFMs — with challengers focused on the "established by a State" language from the statute. The Obama administration takes the position that other provisions of the ACA, as well as the ACA's overall structure and purpose, show that subsidies should be available in FFMs, too. In *King v. Burwell*, the Fourth Circuit Court of Appeals ruled that subsidies *are* available through an FFM. In *Halbig v. Burwell*, on the other hand, a three-judge panel of the DC Circuit Court of Appeals (DC Circuit) held that the subsidies *are not* available through an FFM, thus creating a circuit split. For more information on these and other circuit court decisions on this issue, please see our [November 11, 2014](#) *For Your Information* and our [July 23, 2014](#) *FYI Alert*.



In fall 2014, the Supreme Court agreed to hear the *King* case.

## Heated Debate During Oral Argument

As expected, the questioning from the justices divided down ideological lines in [yesterday's oral argument](#).

The court's four liberals — Justices Stephen G. Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor — expressed strong support for the Obama administration's view. Justice Kagan emphasized the importance of the context, rather than literal terms, of the statutory language. Justice Ginsburg described the consequences of the challengers' position as "disastrous." Justices Antonin Scalia and Samuel A. Alito, Jr., conservatives, sharply criticized the administration's stance. Justice Scalia maintained that the ACA "means what it says," Congress' intent is not relevant in this analysis, and the court cannot "twist the words as necessary" in order to accommodate the administration's goals. Justice Alito said that both Congress and the states could act to address a ruling striking down subsidies in the FFMs.

Justice Anthony M. Kennedy, often the "swing" vote between the court's liberal and conservative wings, questioned both sides. He said that the "plain words of the statute" support the challengers' view. However, he also voiced "serious" constitutional concerns about federal coercion with the challengers' reading of the ACA — namely, that either states create their own marketplace or "we'll send your insurance market into a death spiral."

Chief Justice John G. Roberts, who voted in 2012 with the court's four liberals in [National Federation of Independent Business et al. v. Sebelius](#), to uphold the ACA's constitutionality, said little and revealed no insight on his views. (See our [July 11, 2012 For Your Information](#).) In 2012, Justice Kennedy sided with the minority in voting to strike down the law.

## Relevance to Employers

The serious consequences of a ruling against the administration have, understandably, garnered significant media attention. In this scenario, millions of lower-income individuals would lose their subsidy and not be able to afford coverage in the marketplace, thus disrupting the individual insurance market. But a ruling against the administration would have important implications for employers as well. Because employer shared responsibility assessments are triggered only when a full-time employee purchases subsidized coverage through a marketplace, the employers of individuals losing their subsidy may not be exposed to these assessments.

## In Closing

As always, it is impossible to decipher anything definitive following an oral argument. The court will issue its decision in this case by early July. In the meantime, Congress has signaled that it is working on legislative responses to address a ruling striking down the FFM's low-income subsidies. (For more information on relevant legislative proposals, please see our [March 6, 2015 Legislate](#).) States using FFMs also might consider the costs and hurdles associated with establishing a marketplace, and move to do so.

**Authors**

Julia Zuckerman, JD  
Sharon Cohen, JD

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