

# ISSUE BRIEF

No. 4360 | FEBRUARY 27, 2015

## *King v. Burwell*: An Opportunity for Congress and the States to Clear Away Obamacare's Failed Policies

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On March 4, the Supreme Court will hear oral arguments in *King v. Burwell*—a case challenging the Obama Administration's IRS ruling granting premium support subsidies to those enrolled in federal exchanges under the Affordable Care Act (ACA). While a ruling against the Administration would preclude paying those subsidies to individuals who obtain coverage through the federally run exchange, that would merely add one more effect to the ongoing complexity and cascade of adverse effects produced by the law's complex and flawed design.<sup>1</sup>

Congress and the states should therefore seize the opportunity and clear the way for patient-centered, market-based reforms to take root in the states. To start, Congress should devolve the regulatory authority over insurance back to the states. In anticipation of such an exemption, states should use their authority now to put in place their own policies governing insurance.

### **What Congress and the States Should *Not* Do**

It is critical that any response at the federal or state level not prop up or strengthen the ACA's troubled framework. Therefore:

- **Congress should not preserve the flawed ACA subsidy scheme.** Congress should not perpetuate the complex and costly subsidies in the ACA. The design of the subsidies creates major financial incentive for millions of Americans to shift to plans that qualify for the new subsidies; it involves additional rules, restrictions, and penalties; and is administratively complicated.<sup>2</sup>
- **States should not adopt state exchanges.** States should not pursue efforts to adopt a state exchange. States gain no meaningful flexibility from administering the exchanges,<sup>3</sup> while their long-term costs fall squarely on the states—as any state implementing a state exchange must develop its own revenue source to fund the exchange's annual operations.<sup>4</sup>

### **What Congress and the States *Should* Do**

**Federal Action:** Congress should exempt individuals, employers, and insurance plans in states that have no state exchange from the ACA's costly rules, regulations, and mandates. The exemption should include items such as the ACA's rating rules and benefits mandates, as well as formally exempting residents of the affected states from the individual and employer mandates, among others.<sup>5</sup> As is evident from basic premium analysis, in many of the potentially affected states, the cost of coverage was less before the ACA.<sup>6</sup>

**State Action:** States should pass pre-emptive legislation that would ensure a smooth transition from ACA-compliant plans to state-regulated coverage. States should take the opportunity to review and assess their pre-ACA rules and regulations

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This paper, in its entirety, can be found at <http://report.heritage.org/ib4360>

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TABLE 1

## Effects of Obamacare Regulations on Health Insurance Premiums in the 34 Federal Exchange States

This table shows the difference in average monthly premiums between 2014 exchange plans—the first year for which premiums reflect the imposition of the ACA’s benefit mandates and rating rules—and 2013 non-group market plans.

n Up 100%+  
n Up 51%-100%  
n Up 26%-50%  
n Up 0%-25%      n Down

	ADULT AGE 27			ADULT AGE 50			FAMILY OF FOUR		
	BEFORE	EXCHANGE	% change	BEFORE	EXCHANGE	% change	BEFORE	EXCHANGE	% change
Alabama	\$165.00	\$216.12	31.0%	\$285.00	\$368.31	29.2%	\$676.66	\$730.01	7.9%
Alaska	\$198.00	\$341.58	72.5%	\$398.00	\$582.05	46.2%	\$1,020.45	\$1,153.84	13.1%
Arizona	\$102.00	\$261.87	156.7%	\$315.00	\$446.24	41.7%	\$792.38	\$884.51	11.6%
Arkansas	\$105.00	\$285.00	171.4%	\$215.00	\$385.00	79.1%	\$761.26	\$948.82	24.6%
Delaware	\$129.35	\$258.60	99.9%	\$267.00	\$440.71	65.1%	\$731.44	\$873.52	19.4%
Florida	\$151.40	\$264.45	74.7%	\$257.00	\$450.67	75.4%	\$724.98	\$893.27	23.2%
Georgia	\$98.12	\$263.28	168.3%	\$263.00	\$448.69	70.6%	\$732.34	\$889.32	21.4%
Illinois	\$116.45	\$249.72	114.4%	\$298.00	\$425.56	42.8%	\$753.23	\$843.50	12.0%
Indiana	\$197.45	\$264.77	34.1%	\$249.00	\$451.21	81.2%	\$712.80	\$894.38	25.5%
Iowa	\$205.00	\$230.21	12.3%	\$347.00	\$392.32	13.1%	\$729.00	\$777.61	6.7%
Kansas	\$87.40	\$200.14	129.0%	\$198.00	\$341.08	72.3%	\$553.92	\$676.05	22.0%
Louisiana	\$129.20	\$266.38	106.2%	\$315.00	\$453.96	44.1%	\$800.56	\$899.79	12.4%
Maine	\$225.00	\$282.59	25.6%	\$329.00	\$341.00	3.6%	\$945.86	\$954.57	0.9%
Michigan	\$117.30	\$255.85	118.1%	\$305.00	\$436.01	43.0%	\$771.41	\$864.22	12.0%
Mississippi	\$163.00	\$213.00	30.7%	\$364.00	\$500.00	37.4%	\$854.92	\$943.00	10.3%
Missouri	\$159.00	\$244.06	53.5%	\$299.00	\$415.92	39.1%	\$743.80	\$824.39	10.8%
Montana	\$150.00	\$213.80	42.5%	\$278.00	\$364.35	31.1%	\$666.11	\$722.19	8.4%
Nebraska	\$125.00	\$213.34	70.7%	\$298.00	\$363.57	22.0%	\$680.98	\$720.62	5.8%
New Hampshire	\$220.00	\$221.71	0.8%	\$359.00	\$377.84	5.2%	\$739.09	\$748.91	1.3%
New Jersey	\$329.00	\$319.33	-2.9%	\$550.00	\$544.20	-1.1%	\$1,081.50	\$1,078.66	-0.3%
North Carolina	\$135.00	\$257.39	90.7%	\$364.00	\$438.64	20.5%	\$824.85	\$869.41	5.4%
North Dakota	\$116.00	\$247.30	113.2%	\$215.00	\$421.44	96.0%	\$634.81	\$835.33	31.6%
Ohio	\$247.00	\$243.12	-1.6%	\$421.00	\$414.32	-1.6%	\$824.47	\$821.21	-0.4%
Oklahoma	\$135.00	\$213.02	57.8%	\$298.00	\$363.02	21.8%	\$680.29	\$719.53	5.8%
Pennsylvania	\$167.00	\$220.36	32.0%	\$289.00	\$374.05	29.4%	\$689.38	\$744.13	7.9%
South Carolina	\$205.00	\$246.19	20.1%	\$315.00	\$419.56	33.2%	\$762.59	\$831.60	9.0%
South Dakota	\$159.00	\$308.64	94.1%	\$305.00	\$525.99	72.5%	\$853.71	\$1,042.56	22.1%
Tennessee	\$135.00	\$214.70	59.0%	\$278.00	\$365.90	31.6%	\$667.91	\$725.24	8.6%
Texas	\$115.00	\$229.95	100.0%	\$205.00	\$391.88	91.2%	\$599.72	\$776.74	29.5%
Utah	\$126.00	\$220.91	75.3%	\$268.00	\$338.04	26.1%	\$648.54	\$693.88	7.0%
Virginia	\$165.00	\$193.07	17.0%	\$278.00	\$335.27	20.6%	\$704.76	\$774.34	9.9%
West Virginia	\$215.00	\$229.48	6.7%	\$359.00	\$391.07	8.9%	\$757.83	\$775.14	2.3%
Wisconsin	\$140.00	\$277.91	98.5%	\$289.00	\$473.61	63.9%	\$788.82	\$938.72	19.0%
Wyoming	\$289.00	\$364.95	26.3%	\$540.00	\$621.96	15.2%	\$1,186.00	\$1,232.78	3.9%

Sources: Drew Gonshorowski, “How Will You Fare in the Obamacare Exchanges?” Heritage Foundation *Issue Brief* No. 4086, October 16, 2013, <http://www.heritage.org/research/reports/2013/10/enrollment-in-obamacare-exchanges-how-will-your-health-insurance-fare>.

with attention to making coverage more affordable and available. Action taken in 2011 by the state of Maine provides a template for such pre-emptive legislation.<sup>7</sup> States should consider more flexible rating rules, more affordable benefit packages, more competition through state reciprocity agreements, and other changes that help to facilitate more choice and competition while retaining or restoring pre-ACA portability rules and consumer protections.

### **The ACA and Its Flawed Policies: Still the Problem**

It is important to remember that it is the ACA's flawed policies that are responsible for the adverse effects that have characterized this law since its inception. Many of the law's key components—the exchanges, the premium and cost-sharing subsidies, the rating rules, benefit requirements, as well as the individual and employer mandates—are complicated, confusing, and disruptive. A ruling against

the Administration creates a unique opportunity to provide individuals who live in states that do not operate an exchange with immediate relief from the costly ACA rules and mandates.

Clearing away the ACA's flawed policies is the first step toward a patient-centered, market-based health care alternative. That will require a new approach to the tax treatment of health insurance and health care entitlement programs that empowers individuals—not the government or employers—by giving them direct choice and control that allows them to make their own health care decisions.<sup>8</sup>

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1. Edmund F. Haislmaier, "King v. Burwell: Assessing the Claimed Effects of a Decision for the Plaintiffs," *Heritage Foundation Issue Brief* No. 4349, February 20, 2015, <http://www.heritage.org/research/reports/2015/02/king-v-burwell-assessing-the-claimed-effects-of-a-decision-for-the-plaintiffs>.
  2. Edmund F. Haislmaier, "Impact of King v. Burwell: The ACA's Key Design Flaws," *Heritage Foundation Issue Brief* No. 4350, February 20, 2015, <http://www.heritage.org/research/reports/2015/02/impact-of-king-v-burwell-the-acas-key-design-flaws>.
  3. Edmund F. Haislmaier, "Less Than Meets the Eye: The Obamacare Exchange Regulations," *The Daily Signal*, July 12, 2011, <http://dailysignal.com/2011/07/12/less-than-meets-the-eye-the-obamacare-exchange-regulations/>.
  4. Nina Owcharenko and Edmund F. Haislmaier, "Medicaid Expansion and State Health Exchanges: A Risky Proposition for the States," *Heritage Foundation Issue Brief* No. 3802, December 12, 2012, <http://www.heritage.org/research/reports/2012/12/obamacares-medicaid-expansion-and-state-exchanges-risky-for-states>.
  5. A ruling against the Administration would render the employer mandate effectively unenforceable and would increase the number of people who would qualify for an affordability exemption from the individual mandate. See Tom Miller and Grace-Marie Turner, "What Happens to the ACA if the Petitioners in King v. Burwell Win at the Supreme Court?" *Forbes*, February 12, 2015, <http://www.forbes.com/sites/gracemarieturner/2015/02/12/what-happens-to-the-aca-if-the-petitioners-in-king-v-burwell-win-at-the-supreme-court/> (accessed February 26, 2015).
  6. Drew Gonshorowski, "How Will You Fare in the Obamacare Exchanges?" *Heritage Foundation Issue Brief* No. 4068, October 16, 2013, <http://www.heritage.org/research/reports/2013/10/enrollment-in-obamacare-exchanges-how-will-your-health-insurance-fare>.
  7. Maine offers an example of such pre-emptive legislation. See Tarren Bragdon and Joel Allumbaugh, "Health Care Reform in Maine: Reversing 'Obamacare Lite,'" *Heritage Foundation Backgrounder* No. 2582, July 19, 2011, <http://www.heritage.org/research/reports/2011/07/health-care-reform-in-maine-reversing-obamacare-lite>.
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