

---

The Patient Protection and Affordable Care Act (ACA) created state-wide health insurance exchanges. Individuals are now generally required to obtain qualifying health insurance coverage or to pay a tax penalty. Low-income individuals who do not qualify for Medicaid are entitled to tax credits to subsidize the purchase of health insurance when they acquire that insurance through the exchange “established by the State” under 42 U.S.C. § 18031. 26 U.S.C. § 36B(c)(2)(A)(i). Today, the Supreme Court granted certiorari in *King v. Burwell*, No. 14-114, to decide whether that provision can permissibly be construed by the Internal Revenue Service to permit tax credits for individuals who acquire insurance through exchanges operated by the federal government in states that do not administer their own exchange. The Court’s resolution of this issue will be of substantial importance to health insurance plans and health care providers as well as to employers, whose responsibility to provide health insurance coverage for their employees depends on the availability of tax credits to their employees.

As background, the ACA called for “[e]ach state” to establish an exchange (42 U.S.C. § 18031(b)(1)), but did not compel them to do so (42 U.S.C. § 18041(b)). In cases where a state either elected not to create an exchange or failed to create an exchange that complied with other statutory requirements, the federal government was empowered to “establish and operate such Exchange within the State.” 42 U.S.C. § 18041(c). Because only sixteen states (plus the District of Columbia) set up their own exchanges, federally-facilitated exchanges have been established in thirty-four states.

Based on the interplay between §§ 18031 and 18041, the IRS promulgated regulations specifying that when the federal government steps in to operate a state’s exchange, that federally-facilitated exchange is the exchange “established by the State” within the meaning of § 18031. Accordingly, premium tax credits are available to qualifying individuals who purchase health insurance either from state-run or federally-facilitated exchanges. 26 C.F.R. § 1.36B-1(k). Although the IRS rule expands the number of people eligible for premium tax credits, it also expands the number of people potentially liable under the ACA for tax penalties for not purchasing insurance that is otherwise “affordable” to them.

Each of the four plaintiffs in *King* is a resident of Virginia, a state that has a federally-facilitated exchange. The plaintiffs filed suit under the Administrative Procedure Act, claiming that the IRS rule—which has the effect of requiring them to buy insurance or to face a tax penalty—exceeds the agency’s statutory authority, is arbitrary and capricious, and is contrary to law. The U.S. District Court for the Eastern District of Virginia granted the government’s motion to dismiss, ruling that the IRS’s rule is based on a reasonable interpretation of the ACA. The Fourth Circuit affirmed the district court. After examining the language of the statute, its structure, and its legislative history, the Fourth Circuit concluded that the ACA is ambiguous as to whether individuals purchasing plans through the federally funded exchanges qualify for tax credits. The court thus looked to the ACA’s “broad policy goals” of increasing the number of insured Americans and reducing the cost of health care. As the court explained, the IRS’s rule is essential to achieving these goals because it helps prevent adverse selection and premium inflation. Consequently, the IRS’s rule is a reasonable one warranting deference from the courts.

The petition for certiorari urged the Supreme Court to hear this case because the Fourth and D.C. Circuits were split on the validity of the IRS’s rule. A divided panel of the D.C. Circuit had invalidated the IRS’s rule, but the *en banc* D.C. Circuit subsequently vacated the panel opinion and set the case for rehearing.

In the proceedings before the Fourth and D.C. Circuits, Mayer Brown filed amicus curiae briefs for America’s Health Insurance Plans in support of the Government.

Absent extensions, amicus briefs in support of the petitioners will be due on December 29, 2014, and amicus briefs in support of the respondent will be due on January 28, 2015. Any questions about this case should be directed to Andrew J. Pincus (+1 202 263-3220) or Brian D. Netter (+1 202 263-3339) in our Washington office.