Center for American Progress

King v. Burwell

The Prohibitive Cost of Any Congressional Response to a Ruling Against the Affordable Care Act

By Topher Spiro January 29, 2015

In March, the U.S. Supreme Court will hear oral arguments in *King v. Burwell*, the latest court challenge to the Affordable Care Act. This time, opponents of the law claim that tax credits should not be available for health plans sold through a marketplace—or "exchange"—run by the federal government via the HealthCare.gov website. If the Supreme Court rules against the Affordable Care Act, more than 8 million Americans would become uninsured, and premiums would increase by more than 35 percent in the market for individuals—even for those who do not receive tax credits or buy insurance through the marketplace.[1]

The media, health care industry stakeholders, state officials, members of Congress, and the Supreme Court justices themselves should understand that Congress would not be able to take legislative action to prevent these severe consequences from occurring. Due to budget scorekeeping rules, any congressional response to a Supreme Court decision against the Affordable Care Act—whether it be a targeted response or one that makes additional revisions to the law—would cost as much as $340 billion over 10 years.[2] To state the obvious, the challenge of paying for this cost would be insurmountable.

Budget scorekeeping

The nonpartisan Congressional Budget Office, or CBO, regularly updates its budget projection for current policies. This projection is the baseline of spending against which the budgetary impact of any legislation is measured. The baseline is important because it is used for official scorekeeping that enforces rules requiring the cost of any new legislation to be paid for through revenue increases or spending cuts.[3]

When CBO updates its baseline, it takes into account a variety of factors, including:[4]

- Legislative changes
- Economic changes
- Executive branch decisions
- Changes in CBO's estimating methodologies
- Court decisions

With respect to court decisions, CBO has provided the following guidance to Congress:

> *If new information indicates that an action or event that would affect CBO's baseline has happened or definitely will happen … such as a Supreme Court decision … CBO immediately takes that information into account in assessing what will happen under current law when it analyzes the effects of legislation being considered by the Congress.*[5]

In fact, CBO has already adjusted its baseline for the Affordable Care Act to account for a Supreme Court decision.[6] The Supreme Court ruled on June 28, 2012, that states must be able to choose whether or not to expand their Medicaid programs. In July 2012, CBO promptly updated its baseline for the Affordable Care Act accordingly. Whereas CBO had previously assumed that all states would expand their Medicaid programs, it could no longer make this assumption.

Because CBO assumed that fewer states would expand their Medicaid programs, it lowered its projection of spending under the Affordable Care Act by $84 billion from 2012 to 2022.[7] In doing so, CBO took into account the many factors that state officials would likely consider in deciding whether to expand their Medicaid programs.

Effect of *King v. Burwell* on CBO's baseline

If the Supreme Court rules against the Affordable Care Act in June—eliminating tax credits in states that do not run their own marketplaces—the Congressional Budget Office would immediately adjust its baseline for the Affordable Care Act downward. Currently, CBO assumes that tax credits are available in all 50 states—an assumption that the office maintained even after it became clear that some states would not set up their own marketplace.[8] Because CBO would no longer make this assumption, it would lower its projection of spending under the law.

Using the same modeling techniques as CBO, the Urban Institute estimates that a Supreme Court decision against the Affordable Care Act would reduce federal spending by about $340 billion over 10 years.[9] This estimate assumes that no additional states would set up their own marketplaces to qualify for tax credits. In determining how many states would lose tax credits and over what time period, CBO would take into account many factors, which would most likely include the following:

- A ruling in June would be only months before open enrollment for 2016 begins in October, leaving little time for states to act.

- Of the states that would lose tax credits, only eight have legislative sessions that extend beyond June.[10] Because states need to have the legal authority to set up a marketplace—and because most governors do not have the statutory authority to act on their own—state legislatures would need to act.

- Of the states that would lose tax credits, only Delaware is led by a Democratic governor and legislature.[11] Due to entrenched Republican resistance to the Affordable Care Act, it would be unrealistic to expect many other states to act.

- Nearly two dozen states chose not to expand their Medicaid programs. It would be unrealistic to expect a significantly different result with respect to the Affordable Care Act's other main coverage program.

- According to the consulting firm Leavitt Partners, it would cost a state $40 million to $60 million to build a marketplace, which would take as long as 18 months.[12]

- Federal funding for states to set up marketplaces has already expired. States that are already strapped for cash would have to provide their own funding to start up a marketplace.

Moreover, states that continue to refuse to set up their own marketplaces would not be able to rely on "state innovation waivers," which would allow states to experiment with alternative ways to expand coverage. The Affordable Care Act does not authorize state innovation waivers until 2017.[13] More importantly, state innovation waivers only provide states with federal funding equal to the amount of tax credits that they would otherwise receive.[14] Because a Supreme Court decision against the Affordable Care Act would eliminate tax credits in states that do not run their own marketplace, such states would not be entitled to any federal funding under a state innovation waiver.

Putting together all of these legal, practical, and political constraints, CBO would likely assume that not many—if any—additional states would set up their own marketplace to qualify for tax credits or otherwise be able to access equivalent funding. As a result, the Urban Institute's estimate of a $340 billion reduction in federal spending is a reasonable approximation of how CBO would update its baseline.

The implications are enormous. As discussed above, any legislation that seeks to restore the tax credits would be measured against this lower baseline. CBO would therefore score any legislation that fully restores the tax credits as increasing the federal budget deficit by roughly $340 billion over 10 years. Yet because the provisions of the Affordable Care Act that financed the coverage expansion would remain current law and endure as part of CBO's baseline, these financing sources would no longer be available to Congress.

Clearly, it would be nearly impossible for Congress to pay for any legislation that provides the same extent of coverage as the Affordable Care Act currently provides. For example, Congress has long been unable to pay for a permanent reform of Medicare payments to physicians—which would cost $144 billion over 10 years—despite strong bipartisan support.[15] If Congress cannot come up with even that amount of money for a bipartisan reform, it would be a miracle for it to find more than two times that amount for a contentious reform. This is just one illustration of the extreme difficulty Congress would face if the Supreme Court rules against the Affordable Care Act.

Conclusion

The Supreme Court cannot rely on congressional Republicans who have voted many times to repeal the Affordable Care Act's coverage to save it from the consequences of a ruling that would unravel that expansion. As Leavitt Partners has judged, "Congress has little will to provide a fix to legislation that Republicans in both chambers have been so antagonistic towards."[16] But as this issue brief demonstrates, the major obstacles to any legislative response would not be just political; there would also be the practical reality that the cost of any such legislation would be too high for Congress to bear.

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Endnotes

1 Linda J. Blumberg, Matthew Buettgens, and John Holahan, "The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums" (Washington: Urban Institute, 2015), available at http://www.urban.org/UploadedPDF/2000062-The-Implications-King-vs-Burwell.pdf; Evan Saltzman and Christine Eibner, "The Effect of Eliminating the Affordable Care Act's Tax Credits in Federally Facilitated Marketplaces" (Santa Monica, CA: RAND Corporation, 2015), available at http://www.rand.org/pubs/research_reports/RR980.html.

2 Blumberg, Buettgens, and Holahan, "The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell."

3 For a description of these "PAYGO" rules, see Office of Management and Budget, "The Statutory Pay-As-You-Go Act of 2010: A Description," available at http://www.whitehouse.gov/omb/paygo_description/ (last accessed January 2015).

4 Letter from Douglas W. Elmendorf to Rep. Paul Ryan, July 30, 2013, available at http://www.cbo.gov/sites/default/files/44465-ACA.pdf.

5 Ibid.

6 Congressional Budget Office, "Estimates for the Insurance Coverage Provisions of the Affordable Care Act Updated for the Recent Supreme Court Decision" (2012), available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/43472-07-24-2012-CoverageEstimates.pdf.

7 Ibid.

8 Letter from Douglas W. Elmendorf to Rep. Darrell Issa, December 6, 2012, available at http://www.cbo.gov/publication/43752. Prior to the date of this letter, several states—including Arkansas, Idaho, Louisiana, New Hampshire, Ohio, Texas, and Wisconsin—announced that they would not set up their own marketplaces. For individual state information, see Kaiser Family Foundation, "State Health Insurance Marketplace Profiles," available at http://kff.org/state-health-marketplace-profiles/ (last accessed January 2015).

9 Blumberg, Buettgens, and Holahan, "The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell."

10 Nicholas Bagley, David K. Jones, and Timothy Stoltzfus Jost, "Predicting the Fallout from *King v. Burwell*—Exchanges and the ACA," *The New England Journal of Medicine* 372 (2) (2015): 101–104, available at http://www.nejm.org/doi/pdf/10.1056/NEJMp1414191.

11 Ibid.

12 Margot Sanger-Katz, "Many States Will Be Unprepared if Court Weakens Health Law," The Upshot, December 11, 2014, available at http://www.nytimes.com/2014/12/12/upshot/many-states-will-be-unprepared-if-court-weakens-health-law.html?_r=0.

13 *The Patient Protection and Affordable Care Act*, H. Rept. 3590, Section 1332, 111 Cong. 2 sess. (Government Printing Office, 2010).

14 Ibid.

15 Congressional Budget Office, "Medicare's Payment to Physicians" (2014), available at http://www.cbo.gov/publication/49770.

16 Leavitt Partners, "The Stage is Set: State and Federal Planning Ahead of King v. Burwell" (2015), available at http://leavittpartners.com/payer-publications/.