

U.S. Senate Committee on Small Business and Entrepreneurship hearing on *King v. Burwell* and Congressional Action to Protect Small Businesses and Their Employees, testimony of Michael F. Cannon, Director of Health Policy Studies, Cato Institute¹

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Chairman Vitter, Ranking Member Shaheen, and members of the Committee, thank you for your invitation to discuss *King v. Burwell*, a case concerning the Patient Protection and Affordable Care Act (ACA) currently before the Supreme Court. *King v. Burwell* challenges as unauthorized by any Congress both the premium subsidies the Internal Revenue Service is issuing in 38 states with federally established Exchanges, and the tax penalties those subsidies trigger.² The Court heard oral arguments on March 4, 2015. Court watchers expect a ruling by the end of June.

If the Court sides with the challengers, its ruling will free more than 57 million employers and individuals in those federal-Exchange states from the ACA's employer and individual mandates.³ Those 57 million Americans include Kevin Pace, a jazz musician and Virginia resident whose income fell by \$8,000 when his employer cut his hours to avoid the IRS's illegal taxes.⁴ They include small business owners who would expand and hire more workers, but are prohibited from doing so by threat of illegal taxes. A ruling for the challengers would protect small businesses and their employees from an out-of-control IRS. Such a ruling would cause a smaller number of Americans—an estimated 6.7 million⁵—to lose access to subsidies that no Congress ever authorized.

A ruling for the government, on the other hand, would for the first time allow the IRS to usurp Congress' exclusive powers to tax and spend. Few things could be more destructive to small businesses, liberty, or our constitutional order.

Even if the Court makes the right decision and frees 57 million Americans from the IRS's illegal taxes, the ACA would continue to harm tens if not hundreds of millions of employers and individuals, and an additional 6.7 million Americans would see their health-insurance bills soar as the loss of those illegal subsidies brings them face-to-face with the full cost of the ACA's very expensive coverage.

By far, the most important way this Committee and other congressional committees can prepare for a *King* ruling, and ensure Congress provides appropriate assistance to those affected by the ruling, is to investigate how the IRS came to tax, borrow, and spend tens of billions of dollars in violation of the clear limits the ACA places on the IRS's authority.

Oversight hearings would showcase that those limits are clear and unambiguous. Even the IRS's defenders sometimes admit as much. Harvard law professor Noah Feldman, a former clerk for U.S. Supreme Court Justice David Souter, confesses the weakness of the IRS's case:

The uncomfortable truth (for liberals, at least) is that [*King v. Burwell*] arises from a piece of statutory language that on its face explicitly says that tax subsidies are only available for health insurance purchased on an exchange "established by the state."

Liberals have tried to explain why, correctly interpreted, this language really means "established by the state or the federal government on the state's behalf." But their theories seem forced.⁶

Investigative hearings would reveal how the IRS initially included in its implementing regulations the statutory requirement that subsidy recipients purchase coverage “through an Exchange established by the State,” but reversed itself and dropped that requirement after a political appointee at the Treasury Department objected.⁷

Investigative hearings would reveal the IRS officials made no serious effort to research the statute or its legislative history before expanding their agency’s powers, and the reach of the ACA’s taxes and subsidies, beyond the clear limits imposed by Congress.⁸

Oversight hearings would reveal that this decision by IRS officials to expand their agency’s powers unilaterally is not an isolated incident but part of a pattern at the IRS. University of Iowa law professor Andy Grewal found the IRS is also issuing subsidies to two other ineligible groups: certain undocumented aliens and lawful residents below the poverty line who over-estimate their income. Indeed, Grewal found the IRS “effectively provides the *largest* [subsidies] to persons who do *not* satisfy the statutory criteria.”⁹ Those illegal subsidies likewise trigger illegal taxes against employers.

Oversight hearings would reveal the IRS’s actions contradict what the government told the Supreme Court. The government told the Court that the phrase “an Exchange established by the State” is a statutory “term of art” that means *an Exchange established by either the State or the federal government*.¹⁰ But if the government believed that, there would have been no reason for the IRS to drop that “term of art” from its regulations.

Investigative hearings would reveal the IRS has been stonewalling Congress on this issue for nearly four years. As Ranking Member of the Senate Finance Committee, Sen. Orrin Hatch (R-UT) first asked the IRS in December 2011 for documents related to the agency’s creation of these illegal taxes and subsidies.¹¹ More than three years later, Sen. Hatch has risen to the chairmanship of the Finance Committee, yet the IRS still has not honored to his request. For the better part of one year, the IRS has been ignoring a subpoena for those documents from the House Committee on Oversight and Government Reform.¹²

Oversight hearings would allow Congress to ask important questions of other administration officials.

Since late 2013, the Department of Health and Human Services (HHS) and the Centers for Medicare and Medicare Services (CMS) have enrolled millions of Americans in HealthCare.gov. From the beginning, HHS and CMS officials knew the subsidies that prop up HealthCare.gov could disappear with one court ruling. Yet they never informed enrollees of this inherent risk of the coverage they were selling. Even after the Supreme Court granted cert in *King v. Burwell* in November 2014, defendant HHS Secretary Sylvia Burwell¹³ and CMS administrator Marilyn Tavenner¹⁴ publicly proclaimed, “Nothing has changed.” Each knew it was not true. The risks that those subsidies would disappear had become so significant that HealthCare.gov-participating insurers demanded protection from an adverse court ruling. Burwell and Tavenner obliged. They granted insurers the right to terminate their relationship with HealthCare.gov if the subsidies disappeared.¹⁵ Oversight hearings would give Burwell and Tavenner a chance to explain why they told consumers “nothing has changed,” and whether Tavenner believes that was fair to say while testifying before Congress under oath.

With respect to those risks, Secretary Burwell could at any time announce that she would issue hardship exemptions to any HealthCare.gov enrollee who loses a subsidy, a step that would allow enrollees to switch to lower-cost catastrophic plans. She could, at any time, announce that she would create a “special enrollment period” to allow everyone in HealthCare.gov states to switch to lower-cost plans.

She could, at any time, announce she will hold HealthCare.gov enrollees harmless through the end of the year by immediately issuing to insurers the subsidies they would otherwise receive on a monthly basis for the remainder of 2015. Oversight hearings would allow Secretary Burwell to explain whether she is considering these steps to protect HealthCare.gov enrollees, or at least to explain why she refuses to discuss contingency plans that would protect consumers when she has already taken steps to protect insurance companies.

Oversight hearings would reveal that *King v. Burwell* is actually not about health care at all, but rather an example of political corruption and abuse of power at the IRS that goes beyond what any of us have seen in our lifetimes. Lacking any statutory basis for its actions, the IRS first pledged and ultimately spent taxpayer dollars on a multi-year, multi-billion-dollar contribution to the re-election campaigns of members of Congress who enacted, and a president who signed, a law that voters and Congress otherwise would have scrapped as unworkable. Instead, the law remains on the books.

Investigative hearings can thus point Congress toward appropriate responses to a *King* ruling, and away from proposals that expand the ACA and authorize even more government spending than ACA supporters could have enacted at the height of their power. Oversight would point the way to full repeal of the ACA as the only way to provide relief for HealthCare.gov enrollees without rewarding the IRS for breaking the law. And hearings might suggest that, given the insurance industry's complicity in the IRS's illegal taxing and spending, an appropriate way to hold HealthCare.gov enrollees harmless through 2015 would be to require participating insurers to keep covering those enrollees at the same premium enrollees were paying before the subsidies were invalidated.

I look forward to your questions.

(Attachments)

¹ Michael F. Cannon is the director of health policy studies at the Cato Institute (www.cato.org), a non-partisan, non-profit, educational foundation dedicated to advancing the ideas of individual liberty, limited government, free markets, and peace. To preserve its independence, the Cato Institute accepts no government funding. Cannon has been described as “[the intellectual father](#)” of *King v. Burwell* (by *Modern Healthcare*), “[ObamaCare’s single most relentless antagonist](#)” (*The New Republic*) and “[the man who could bring down ObamaCare](#)” (*Vox*). His work on *King v. Burwell* is extensive. From 2010 through 2013, he counseled state officials not to implement the Patient Protection and Affordable Care Act’s (ACA) health-insurance “Exchanges.” He was the first to criticize the Internal Revenue Service (IRS) when it announced in August 2011 it would issue premium subsidies and impose the ACA’s employer mandate in states with federal Exchanges. With Jonathan H. Adler, a professor of administrative and constitutional law at Case Western Reserve University, Cannon conducted the legal and legislative research, and wrote the leading scholarly treatment, that laid foundation for *King v. Burwell* and three similar challenges to the IRS’s overreach. He has participated in numerous debates, advised congressional investigators, and filed several amicus briefs related to these cases. He blogs about *King v. Burwell*, the ACA, and health care reform at DarwinsFool.com.

² See generally Jonathan H. Adler and Michael F. Cannon, [The Halbig Cases: Desperately Seeking Ambiguity in Clear Statutory Text](#), *Journal of Health Politics, Policy and Law* (Nov. 25, 2014); and [Brief of Amici Curiae Jonathan H. Adler and Michael F. Cannon, King v. Burwell](#), No. 14-114 (U.S. Dec. 29, 2014).

³ Michael F. Cannon, [King v. Burwell Would Free More Than 57 Million Americans From The ACA’s Individual & Employer Mandates](#), DarwinsFool.com (Jul. 21, 2014).

⁴ Sandhya Somashekhar, "[Health-Care Law Is Tied To New Caps on Work Hours for Part-Timers](#)," *Washington Post*, July 23, 2013.

⁵ Charles Gaba, "[Mazel Tov, GOP: Winning King v. Burwell Will Screw Your Base While Helping Those You Hate!](#)", ACASignups.net, April 16, 2015.

⁶ Noah Feldman, "[Justices Drop Another Clue About Obamacare's Future](#)," Bloomberg View, April 22, 2015.

⁷ Staff of H. Comm. on Oversight and Gov't Reform, 113th Cong., [Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies](#) (Comm. Print 2014).

⁸ Staff of H. Comm. on Oversight and Gov't Reform, 113th Cong., [Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies](#) (Comm. Print 2014).

⁹ Andy Grewal, "[Lurking Challenges to the ACA Tax Credit Regulations](#)," SSRN.com, April 23, 2015. Emphases added.

¹⁰ Brief for the Respondents, *King v. Burwell*, No. 14-114 (U.S. Jan. 21, 2015).

¹¹ Sen. Orrin G. Hatch, U.S. Senate, [Letter to Timothy Geithner, Sec'y, Dep't of the Treasury and Douglas Shulman, Comm'r, Internal Revenue Serv.](#) (Dec. 1, 2011).

¹² Rep. Darrell Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, [Subpoena Letter to Treasury Secretary Jacob Lew](#) (Sept. 23, 2014).

¹³ [Secretary Burwell on Health Insurance Enrollment](#), C-SPAN.org, November 10, 2014.

¹⁴ [U.S. House of Representatives, Committee on House Oversight and Government Reform, hearing on Health Care Law Enrollment](#), C-SPAN.org, December 9, 2014.

¹⁵ Michael F. Cannon, "[Insurers' Demand For A 'Halbig' Contingency Plan Demonstrates Need For Immediate SCOTUS Review](#)," DarwinsFool.com, October 21, 2014.