

# *King v. Burwell, the Supreme Court's Recent Decision Upholding the Affordable Care Act*

By Doug L. Anderson and Tal A. Schapira

The Affordable Care Act<sup>1</sup> was enacted into law five years ago and took full effect on Jan. 1, 2014. Designed to expand coverage in the individual health insurance market, the ACA established a series of reforms including:

- A requirement that insurers “guarantee issue” coverage to all individuals regardless of health conditions and without pre-existing condition exclusions,
- Low-income subsidies to people with incomes up to 400 percent of the federal poverty level (FPL) to help pay for coverage,
- Health insurance exchanges for people to shop for, compare and buy coverage and
- An individual mandate requiring people to buy insurance if it is affordable or otherwise pay a tax penalty.<sup>2</sup>

In June, the United States Supreme Court decided *King v. Burwell*, rejecting a challenge to the authority of the federal government to provide subsidies to people living in states – including Ohio – where the federal government, not the state, operates the exchange.<sup>3</sup>

The plaintiffs in *King v. Burwell* were residents of Virginia, which is a state with a federal exchange. The plaintiffs wanted to exclude themselves from the individual mandate, which requires individuals to buy insurance if it is affordable. The plaintiffs had incomes less than 400 percent of the FPL and, thus, were eligible for subsidies. Without the subsidies, insurance would not have been affordable to the plaintiffs and, consequently, they would not have been required to buy insurance. Thus, the alleged harm to the plaintiffs resulting from the subsidies was the fact that the subsidies caused the plaintiffs to be required to buy insurance under the individual mandate.

Like the plaintiffs, many people buying insurance through exchanges are eligible for subsidies. In February 2015, 8.8 million people had enrolled in individual coverage in federal exchanges. Of that amount, 7.7 million people – or 87 percent – received subsidies. The subsidies significantly reduce the cost of coverage. Average premium rates before subsidies were \$364 per member per month. After subsidies, average premium rates were reduced by 72 percent to \$101 per member per month. Subsidies therefore impact most people buying coverage through exchanges and are a significant motivating factor for buying coverage.

Because of this situation, many people feared that a decision by the Supreme Court to strike down subsidies in states with federal exchanges would cause major problems in the individual market. People losing subsidies would have seen premium rates rise by an average of 300 percent. In terms of the effect of this increase, estimates were that healthier people would be more likely to drop coverage than sick people. With healthier people dropping coverage and sicker people remaining insured, the average cost of insurance in the individual market would have risen even higher, making the cost of coverage prohibitive for most people.

Plaintiffs in *King v. Burwell* argued that the subsidies in Virginia were illegal because the ACA authorized subsidies only in states with state-operated exchanges, not in states with federal exchanges. This argument was based on an ACA provision that subsidies were only available “through an Exchange established by the State.”<sup>4</sup> The plaintiffs argued that the plain language of this provision meant that subsidies were not available in the 34 states with federal exchanges, including Virginia and Ohio.

The federal government countered that subsidies were intended for people in all states and the ACA treated state exchanges the same as the federal exchange in all material respects. Consistent with this position, in 2012 the IRS issued a regulation authorizing subsidies for individuals enrolled through any exchange “regardless of whether the Exchange is established and operated by a State...or by HHS.”<sup>5</sup> Thus, the issue in *King v. Burwell* was whether the IRS had authority to adopt a rule extending subsidies to coverage obtained through federal exchanges.

In a majority decision supported by six justices, the Supreme Court saw its task as determining a correct reading of the statute authorizing subsidies, recognizing that words or phrases may only be evident when placed in context. In reviewing the ACA, the Supreme Court observed that all states were required to establish exchanges but, if a state decided not to do so, the federal government was required to establish “such Exchange” in the state.<sup>6</sup> Based on this language, and other provisions in the ACA which accorded the same treatment to state and federal exchanges, the Court held that “State Exchanges and Federal Exchanges are equivalent and must meet the same requirements, perform the same functions and serve the same purposes.”<sup>7</sup>

Turning to the purpose of the ACA and its major reforms, the Supreme Court found that the reforms in the ACA were designed to work together to minimize adverse selection, broaden the health insurance risk pool and lower health insurance premiums. The Court found that if low income subsidies were not available, a state’s individual health insurance market would not function as intended. Reviewing the ACA in its entirety, the Court found that Congress intended all aspects of the ACA to apply in every state regardless of the type of exchange, upholding the IRS rule and foreclosing the possibility that the IRS or any other federal agency could take a contrary view in the future.

The dissent in *King v. Burwell*,<sup>8</sup> comprised of Justices Scalia, Alito and Thomas, took a starkly different view, focusing on the plain language of the provision limiting subsidies to coverage obtained through a state exchange. Justice Scalia found the majority decision “absurd,” with the majority crossing out the words “by the State” in the ACA not once, but seven times through interpretive “jiggery pokery” and with reasoning that was “pure applesauce,” such that “[w]ords no longer have meaning.”<sup>9</sup> The other dissenters had similar views which focused on the specific

provision limiting subsidies to “State Exchanges,” with equally persistent but somewhat less expressive language.

*King v. Burwell* is the second ACA case to reach the Supreme Court and the second time the Supreme Court has rejected a major challenge to the ACA. Although there are other cases in the lower courts challenging aspects of the ACA, none of those cases rise to the level of *King v. Burwell* in terms of the impact that an adverse decision could have on the major components of the law. With the Supreme Court’s decision in *King v. Burwell*, the ACA remains effective in all states and it is likely to remain that way for the foreseeable future.

1. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 11-152 (2010).
2. In *Nat’l Fed’n of Indep. Bus. v. Sebelius*, the Supreme Court upheld the ACA’s individual mandate, holding that the ACA’s “requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax.” 132 S. Ct. 2566, 2600, 183 L. Ed. 2d 450, 490 (2012).
3. *King v. Burwell*, 135 S. Ct. 2480, 192 L. Ed. 2d 483 (2015).
4. 26 U.S.C. § 36B.
5. 45 C.F.R. §155.20.
6. 42 U.S.C. §18041.
7. *King*, 135 L.Ed. 2d at 495.
8. *King*, 135 L.Ed. 2d at 501, et seq.
9. *Id.*



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## WHEN SHOULD AN ATTORNEY HIRE A CART PROVIDER?

*By Angie R. Starbuck*

If you’ve ever worked with a client or witness who is deaf or hard of hearing, you both may have struggled with communication. One of the many methods of assisting people who are deaf or hard of hearing with communication utilizes the same process, equipment and software that court reporters use. It is called Communication Access Realtime Translation or CART.

While many of you reading this are familiar with court reporters and how they help you in a deposition or court setting, you may not be aware that there is another specialty that some court reporters have that allows them to provide services to individuals who are deaf or hard of hearing.

Court reporters who specialize in providing CART services write what is being said in a deposition, hearing, trial or meeting, and the words are instantly translated to a laptop screen for the end consumer to read, thereby allowing them to participate equally in whatever proceeding is taking place.

Here are four tips on when and why it would be helpful to hire or request a CART provider in a legal setting:

1. If your client is deaf or hard of hearing and they are being deposed, a CART provider could help facilitate communication for your client. Keep in mind that CART is a one-way communication service, so if your client uses American Sign Language to communicate, CART may not be the best option.

2. If your client is deaf or hard of hearing and their case is going to trial, utilizing a CART provider during the trial could be very beneficial for your client. This service would ensure they are provided the same access as hearing individuals to all that is said during the proceedings.

3. If you have a witness who is deaf or hard of hearing who will be testifying in court, you should bring this to the attention of the judge or other judicial personnel so that appropriate accommodations can be made to have a CART provider there for the witness.

4. If you, yourself, are deaf or hard of hearing, consider requesting a CART provider to assist you in court.

While there are many similarities between an official court reporter and a CART provider, there are some important differences:

1. The role of the CART provider is to assist with communication whereas the official reporter’s role is to provide a verbatim record of the proceedings. The official court reporter should not provide CART services in the same proceedings unless there are extenuating circumstances and there is no other option available.

2. In a legal setting, a CART provider is not to provide a transcript or electronic file of any kind. The court reporter’s transcript is the official record.

3. A CART provider may include environmental sounds, like sirens wailing or books slamming, so the consumer gets a sense of what’s being heard by others around them, where the official court reporter will only write the spoken word.

While not every court reporter is able to provide CART services, there are many that work in both settings. CART providers also work in high school, university, corporate and medical settings. Like court reporting, there are also certifications for CART providers by the National Court Reporters Association. Look for a Certified CART Provider or Certified Realtime Reporter when hiring a CART provider. You can locate a qualified CART provider by searching the NCRA Sourcebook or asking your favorite court reporter for a referral.



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