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## Prompt on the *King v. Burwell* case

By David Gamage<sup>1</sup>

Once again, the U.S. Supreme Court will be deciding the fate of Obamacare—in the case of *King v. Burwell*. Also, once again, the future of American healthcare reform will turn on how the Supreme Court reviews a provision of Obamacare that was enacted through the tax code.

Whereas the earlier Supreme Court challenge was based on review of the individual mandate provision of I.R.C. Sec. 5000A, this new challenge is based on review of the premium tax credit provision of I.R.C. Sec. 36B. This premium tax credit provision was designed to make health insurance affordable for low and moderate income Americans who do not receive health insurance from their employers or from other government programs.<sup>2</sup>

The question to be decided in *King v. Burwell* is whether Obamacare’s premium tax credits will be available within the majority of U.S. states that allowed the Department of Health and Human Services (HHS) to establish a marketplace for purchasing health insurance policies (an “Exchange”) on behalf of those states. The plaintiffs in *King v. Burwell* argue that Obamacare’s premium tax credits are only to be made available within states that acted to establish their own Exchanges.

The plaintiffs’ arguments are based on language in I.R.C. Sec. 36B referring to Exchanges “established by the State”.<sup>3</sup> Examined in isolation, this language certainly does appear to authorize premium tax credits only within states that have affirmatively acted to establish Exchanges on their own. However, in an earlier co-authored essay, I argued that the definition sections of the Affordable Care Act define the word “Exchange” as a *statutory term of art* so as to specifically include Exchanges that HHS establishes on behalf of the states.<sup>4</sup> Moreover, numerous other commentators have argued that the overall structure and purpose of the Affordable Care Act supports that premium tax credits were intended to be available within all states.<sup>5</sup>

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<sup>2</sup> For a more in-depth discussion of I.R.C. Sec. 36B, you might refer to a prior Article of mine: David Gamage, *Perverse Incentives Arising from the Tax Provisions of Healthcare Reform: Why Further Reforms are Needed to Prevent Avoidable Costs to Low- and Moderate-Income Workers*, 65 TAX L. REV. 669 (2012). Available at SSRN: <http://ssrn.com/abstract=2067138>.

<sup>3</sup> See, e.g., Adler and Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119 (2013).

<sup>4</sup> David Gamage & Darien Shanske, *Why the Affordable Care Act Authorizes Tax Credits on the Federal Exchanges*, 71 STATE TAX NOTES 229 (2014). Available at SSRN: <http://ssrn.com/abstract=2389446>.

<sup>5</sup> See, e.g., Timothy Jost, *Tax Credits in Federally Facilitated Exchanges Are Consistent With the Affordable Care Act’s Language and History*, HEALTH AFFAIRS BLOG, July 18, 2012, available at <http://healthaffairs.org/blog/2012/07/18/tax-credits-in-federally-facilitatedexchanges-are-consistent-with-the-affordable-care-acts-language-andhistory/print>; Judith Solomon, *Health Reform Law Makes Clear That Subsidies Will Be Available in States With Federally Operated Exchanges*, CENTER

Although this dispute turns on technical questions of statutory interpretation, the real-world stakes are incredibly high. If successful, most commentators agree that the *King v. Burwell* challenge would seriously threaten the continued viability of Obamacare's reforms, at least within the majority of states that have not acted to establish their own Exchanges. Indeed, some commentators argue that the Supreme Court siding with the plaintiffs would likely signal the "death knell" of Obamacare.<sup>6</sup>

So far, the debates over *King v. Burwell* have largely focused on Constitutional law, Administrative law, and other non-tax-law considerations. Might there be unique tax law perspectives that could be brought in to better illuminate these debates? Does it matter that the provision being reviewed (I.R.C. Sec. 36B) was enacted through the tax code? More generally, how should tax lawyers or state or federal government officials respond if the *King v. Burwell* challenge is ultimately successful? Finally, how should the Supreme Court decide this dispute, and what implications might follow from the Supreme Court's decision?

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ON BUDGET AND POLICY PRIORITIES, July 16, 2012; Amy E. Sanders, *A Gap in the Affordable Care Act: Will Tax Credits Be Available for Insurance Purchased Through Federal Exchanges?*, 66 VAND. L. REV. 1259 (2013).

<sup>6</sup> <http://www.forbes.com/sites/anthonymitti/2014/12/29/the-top-ten-tax-cases-and-rulings-of-2014-1-obamacare-endures-additional-attacks/>