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Supreme Court to Hear Challenge to ACA Subsidies

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The Supreme Court decided on November 7, 2014 to hear the appeal in *King v. Burwell*, the 4th Circuit Court of Appeals decision that held that Federal subsidies could be paid under the 36 public Marketplaces run by the Federal government under the Affordable Care Act (ACA).

The Court's decision in this case could have a significant impact on the viability of the ACA, since the payment of such a subsidy triggers the employer penalty provisions. Without the availability of subsidies in the affected Marketplaces, large numbers of employers might avoid the penalty impact. Thus, it could thwart the objectives of the ACA in encouraging employers to provide meaningful coverage and to generate revenue to support the infrastructure of the law.

The issue here is one of statutory construction versus regulatory interpretation. Opponents of the subsidies hold the view that the statutory language only authorizes subsidies in the Marketplaces actually established by the States, not those established or run by the Federal government. The Internal Revenue Service, on the other hand, has issued regulations authorizing the subsidies in all of the Marketplaces.

Typically, the Supreme Court does not review cases where there is no split of authority at the Federal appellate level. It is interesting to note that the Court decided to hear this appeal before the Circuit Court of Appeals in the District of Columbia undertook a full panel review of the decision in *Halbig v. Burwell*. In that case, a three-judge panel held against the subsidies, but observers expected the full DC Circuit to change that ruling in favor of the ACA. If the Supreme Court waited for the DC Circuit to rule, it might have avoided the need to hear the issue on the grounds that there was no conflict in the holdings. Some observers are speculating as to what the Court's intentions were in deciding to hear the issue on an expedited basis.

We will be monitoring the progress of the appeal and will be providing you with more details and expected timing shortly.