



What the Ruling in *Mayhew v. Burwell*'s cert. Petition May Tell Us About *King v. Burwell*

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Introduction

Court watching is something of a sport among lawyers and policy wonks. Much like placing bets on the outcomes of horse racing or football games, we speculate about what the justices of the Supreme Court will decide in various cases based on subtle indicators such as previous opinions, questions asked during oral arguments, and even the outcome of seemingly unrelated cases.

King v. Burwell is an important case of statutory interpretation currently before the Court. Justices will decide whether the language of the Affordable Care Act (ACA) should be applied literally to only allow for premium subsidies to be available to individuals purchasing their health insurance through “exchanges established by the State.” The Obama Administration argues instead that Congress’ rather vague intent should be applied, and therefore subsidies should also be available to individuals purchasing insurance through an exchange established by the Secretary of the Department of Health and Human Services (HHS).

Speculation about the case is at an all-time high since the ruling will have such a large impact on state and federal politics for years to come. While we may not be able to say for sure if the plaintiffs in *King* will win, we may be able to deduce whether they are going to lose.

Mayhew v. Burwell

Mayhew v. Burwell is a challenge to the validity of the Maintenance of Effort (MOE) provisions imposed on the states by the ACA. These provisions require the states to continue providing Medicaid eligibility to all individuals who were eligible before passage of the ACA, even if their eligibility was not previously federally mandated. The plaintiffs in this case are basing their claim, in part, on the Supreme Court’s ruling in *NFIB v. Sebelius* wherein the Court held that mandatory Medicaid expansion is unconstitutionally coercive, and, *Mayhew* argues, the MOE is part of that Medicaid expansion. This spring the plaintiffs in *Mayhew* filed a petition for a writ of certiorari, or cert., asking the Supreme Court to agree to hear the case.

While the result of *Mayhew v. Burwell* isn’t of immediate importance, an overlooked connection makes this case important to those who will be impacted by *King*: the MOE requirements are automatically lifted in states that have established their own exchanges. In her arguments in *King*, the Secretary of HHS claims that Federally Facilitated Exchanges (FFE) and State Based Exchanges (SBE) are operationally equivalent and so subsidies should be available in both. However, in *Mayhew*, *Burwell* will put forth the position that the MOE will remain in effect in states with FFEs until they establish SBEs, therefore differentiating the two.

Because the two cases are tied by their dependence on the Secretary’s treatment of SBEs, even if her treatment in the two cases is completely different, the way in which the Supreme Court treats *Mayhew* may indicate their

intentions regarding King.

What We May Deduce

If the Supreme Court grants cert. in Mayhew, there is little to be learned from their decision. If the King plaintiffs win, the interrelated exchange issues will be shortly settled by the Court upon deciding Mayhew. Likewise, if the King plaintiffs lose, the interplay between MOE and the establishment of exchanges will become irrelevant, and therefore unlikely to influence the Justices' decision to grant cert.

On the other hand...

If the Court denies cert. in Mayhew, this may indicate plaintiffs in King will lose. The reasoning for this depends first on how and why they deny Mayhew's writ for certiorari.

The first possibility is that the Court will not take up Mayhew based on the merits, meaning that at least six Justices do not see a reason to hear the case and are willing to allow the lower court decision to stand. If the King plaintiffs win, states will be faced with a choice of whether or not to establish state based exchanges. They will be told by HHS that the MOE provisions will only be lifted if a state based exchange is established, and this will almost certainly influence lawmakers' establishment decisions. This is, however, a very unlikely scenario. The plaintiffs in Mayhew base their claim on the language provided in the majority opinion in *NFIB v. Sebelius*. Though Justices are not required to ultimately find in favor of the plaintiffs based only on Mayhew's claims, it is unlikely that six or more Justices will refuse to hear a case disputing the meaning of language that three of them (Roberts, Breyer, and Kagan) signed onto, and which lead to a result that four Justices (Scalia, Kennedy, Thomas, and Alito) also support.

Another possibility is that the Justices will refuse to hear the case because there is currently no circuit split. As in the previous scenario, after a ruling for King, state lawmakers would make decisions about whether to establish an exchange based on HHS' current self-contradictory definition of exchanges, and the fiscal impact of the MOE provision may well influence the decision.

Under either scenario, based either on passive acquiescence or lack of a circuit split, any state that does not establish an SBE will still be held to the MOE requirements of the ACA. However, a circuit court split would almost certainly require resolution by the Supreme Court. If, as a result of that resolution, the Court sides with Mayhew, states without SBEs will be released from the very MOE requirements other states established exchanges to escape. It is possible this issue will be brought to a head if Congress passes yet another MOE extension, similar to those passed in the American Recovery and Reinvestment Act (ARRA) and most recently in the ACA. The resulting disparate treatment of states and the missed opportunity for states to escape both the MOE and SBE requirements would be an unjust result.

Because the Supreme Court is ostensibly primarily concerned with the provision of justice, it is difficult to imagine a reason the Justices would allow for an inequitable result that is within their power to avoid. If we assume that the Justices will not willingly create or allow injustice, and that a denial of cert. in Mayhew preceding a win for the plaintiffs in King would lead to an unjust result, we may deduce that either the Court will grant cert in Mayhew, or else King will lose. Therefore, if the Court does not grant cert, the plaintiffs in King will lose.