

Policy Priorities

FOR THE 114TH CONGRESS

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CHAPTER 1

HEALTH CARE REFORM

Congress should

- investigate (1) how the Obama administration, contrary to the clear language of the Patient Protection and Affordable Care Act (PPACA), decided to issue health-insurance subsidies (“tax credits”) and impose the related employer- and individual-mandate penalties in states with federal exchanges; (2) why the administration is not informing HealthCare.gov enrollees that their tax liabilities and premiums could increase dramatically, while those subsidies and even their coverage could disappear, by mid-2015; (3) what steps the administration is planning for the contingency that the Supreme Court rules in *King v. Burwell* that those subsidies and penalties are invalid; (4) what steps the insurers who participate in HealthCare.gov are planning for that contingency;
- end the illegal health-insurance subsidies the Office of Personnel Management is issuing to members of Congress and congressional staff;
- repeal the PPACA and offer no lesser changes to the law until *after* the Supreme Court’s ruling in *King v. Burwell*;
- replace the PPACA with expanded health savings accounts, a proven free-market reform, rather than “Obamacare-lite” proposals like health-insurance tax credits; and
- reject any attempt to ratify the Obama administration’s illegal taxes and spending in federal exchanges, which would set a dangerous precedent of *rewarding* illegal taxation.

The 114th Congress faces a grim duty. The president has repeatedly violated the law to achieve what he could not achieve through the political process: a health care law that does not rely on state cooperation and an expansion of the entitlement state over the opposition of the American people. Congress must deal with the harm the president’s actions have inflicted on millions of American families and must do so without rewarding his illegal behavior.

The Patient Protection and Affordable Care Act of 2010 is unpopular and unworkable. The PPACA gives states the power to veto its major taxing and spending provisions, and to reveal to consumers the full cost of the law’s many mandates and regulations. Two-thirds of the states have exercised those vetoes. If the American people were allowed to see the full cost of those mandates and regulations—that is, if they had to live under the law as Congress

enacted it—then Congress would have already repealed “Obamacare.” Recognizing that political reality, President Barack Obama has taken numerous steps that have exceeded his lawful powers for the purpose of blocking that democratic process.

- Notwithstanding the president’s many promises that “if you like your health plan, you can keep it,” the PPACA imposes requirements that threw millions out of their health plans. President Obama unilaterally waived many of those congressionally imposed requirements in order to ease political pressure on Democrats in Congress, who would otherwise have voted with Republicans to reopen the law.
- The PPACA stripped members of Congress and congressional staff of a \$10,000

(or so) “employer contribution” to their health benefits. President Obama has nevertheless been issuing those subsidies—which Congress itself eliminated—to members of Congress and their staffs since 2010. Again, the president unilaterally dispensed with part of the PPACA that would otherwise have impelled congressional Democrats to vote with Republicans to reopen the law.

- The PPACA imposes numerous duties on employers and health insurance companies. In a move that caused consternation even among supporters, President Obama unilaterally relieved those groups of their congressionally imposed duties—again to prevent congressional Democrats from voting to reopen the law.
- Most egregiously, the PPACA enables states to veto its health-insurance subsidies, employer mandate, and to a large extent its individual mandate, simply by not establishing a health-insurance exchange. Confounding expectations, 36 states exercised that veto power. Since the absence of those subsidies would expose consumers to the full cost of the PPACA’s hidden taxes, President Obama is ignoring the clear language of his own health care law and is illegally issuing those subsidies and imposing those taxes in the 36 states that failed to establish exchanges. Once again, the president is reaching beyond his lawful powers to change votes in Congress.

These are but a few of many examples of the president reaching beyond his lawful powers *for the purpose* of thwarting the democratic process.

KING V. BURWELL

On March 4, 2015, the Supreme Court will hear *King v. Burwell*, a case on appeal from the Fourth Circuit that could put an end to that executive overreach and finally allow the democratic process to work. Two other lower

courts have held that implementing exchange subsidies and the related taxes in federal-exchange states violates the clear and unambiguous language of the PPACA. In other words, those taxes and subsidies are, and always have been, unlawful.

The Supreme Court will rule on this issue by June 2015. If it agrees with the two other lower courts and overturns the Fourth Circuit’s ruling, then more than 57 million taxpayers and employers will be freed from those illegal taxes and some 4 million Americans will lose the illegal health-insurance subsidies that have been shielding them from the full cost of the PPACA.

The Obama administration’s decision to ignore the clear language of the PPACA has imposed substantial burdens on those 57 million taxpayers and created serious risks for those 4 million low-to-moderate income HealthCare.gov enrollees. Those risks include:

1. *A tax increase of up to \$5,000.* The PPACA requires households who receive subsidies that “exceed the credit allowed” to repay the IRS as much as \$2,500 per year. If the Supreme Court agrees with those two lower courts, HealthCare.gov enrollees who received subsidies of \$2,500 or more each year would thus be required by law to repay the IRS \$5,000. The Obama administration’s defenders claim that the IRS would seek to waive that requirement, but the agency has announced no intention to do so.
2. *An enormous increase in their premium payments.* Exchange subsidies cover 76 percent of the premium for the average recipient. When they disappear, recipients will have to pay not 24 percent of the premium themselves, but 100 percent. Four million enrollees will thus see their premium payments increase by an *average* of 300 percent—a four-fold increase. Households near the poverty level will face larger increases.
3. *Potential cancellation of health plans, replacement plans uncertain.* According to

one trade publication, “The agreements to participate in the federally-facilitated marketplace (FFM) that [the Centers for Medicare & Medicaid Services, or CMS] sent to issuers [for 2015] include a new clause assuring issuers that they may pull out of the contracts, subject to state laws, should federal subsidies cease to flow.” HealthCare.gov enrollees could thus lose their coverage entirely and be unable to find a replacement plan.

The Obama administration is knowingly exposing millions of HealthCare.gov enrollees to these risks without their knowledge. More than 1 million of those enrollees were lured out of jobs that provide relatively secure health coverage and into HealthCare.gov by the promise of Exchange subsidies, according to estimates by the Urban Institute (see Figure 1).

One of those HealthCare.gov enrollees is Rebecca Murray, a Chicago resident and mother of two young children. Murray’s husband, Tim Williams, suffers from chronic spinal arthritis. Murray left a secure job with good health benefits because the Obama administration promised her that she qualifies for subsidies through Illinois’ federally established exchange. If the Supreme Court agrees with those two lower courts that such subsidies are illegal, Murray could see her tax liability and her premiums rise dramatically, and her family could lose its health coverage. *None of that would happen if the Obama administration had informed Murray of the risks of HealthCare.gov coverage.* Like a million other Americans, Murray would have stayed at the job where her family’s coverage would have been protected from the Obama administration’s false promises.

The false promise of subsidies led Chicago’s mayor, Rahm Emanuel, to move tens of thousands of retired city workers off the city’s health plan and onto HealthCare.gov despite protests from employee unions about the “uncertainty” of PPACA exchanges. Those retirees’ coverage is now in jeopardy because the Obama administration did not follow the law and is not apprising them of the risks of

HealthCare.gov coverage.

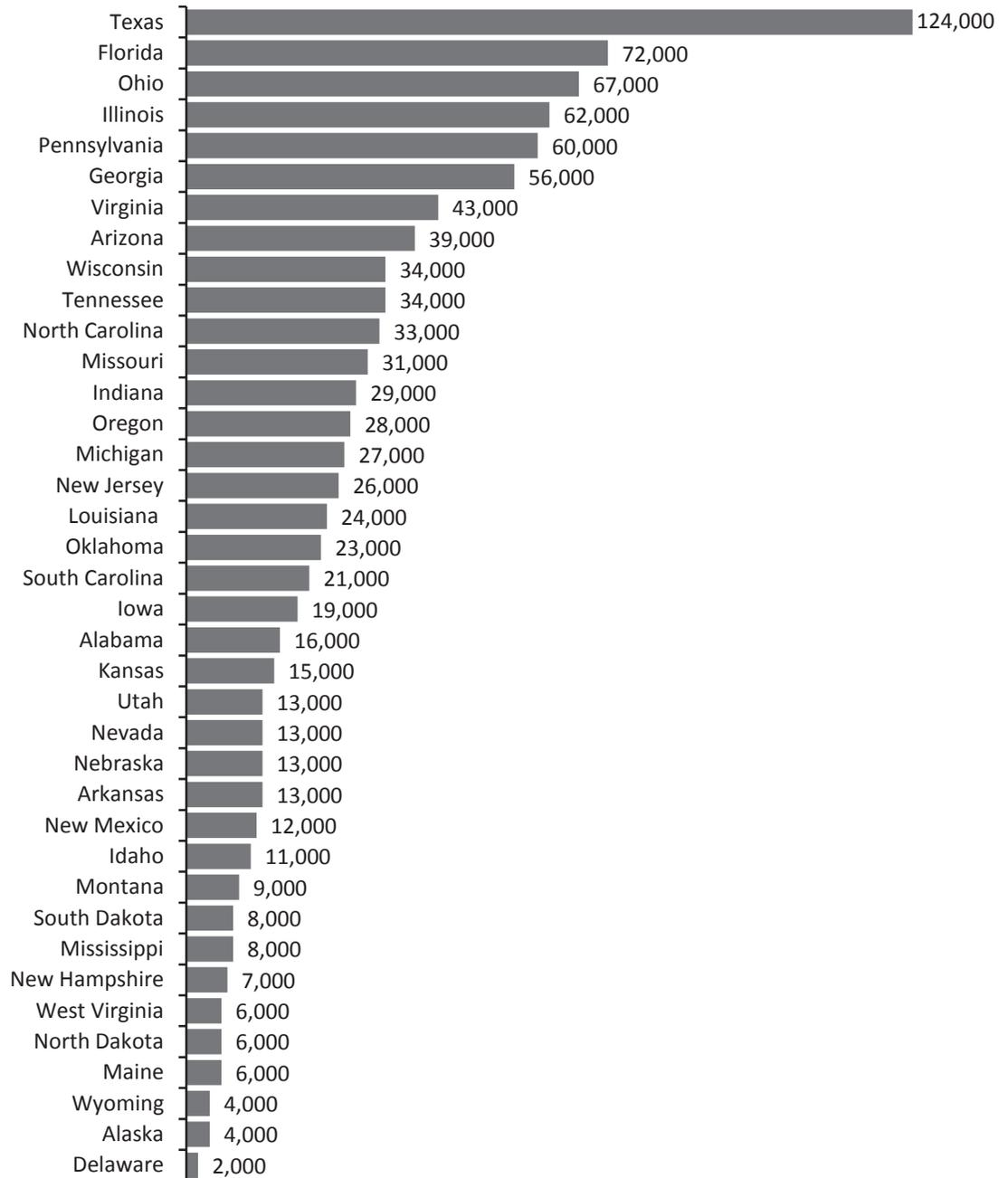
HealthCare.gov enrollees have a right to know about these risks. Indeed, the administration sold the PPACA as a way to increase transparency in health care:

The Affordable Care Act is about letting people actually see what is happening in the health insurance market. Until now, too many Americans have lacked reliable information about coverage and faced confusing fine print and hidden limits when trying to sign up for or simply use their health insurance. [The PPACA] will shine some sunlight on the details of how these insurance options actually work. It’s a huge step toward making the health care system more transparent.

The Obama administration has known that these risks are inherent in HealthCare.gov coverage since before it began selling plans for calendar year 2015. Yet the administration has adamantly refused to inform HealthCare.gov shoppers and enrollees about these risks. In press releases and congressional testimony, administration officials are telling millions of HealthCare.gov enrollees “nothing has changed.” The administration *knows* that is not true, because it changed the agreements with insurers to allow them to terminate their relationship with HealthCare.gov if a court ruling puts an end to subsidies in federal exchanges. The administration is *protecting insurers* from these risks. It is not even *informing* consumers about them.

A president who once promised to “protect every American from the worst insurance company abuses” is instead exposing Americans to abuses greater than any insurance company ever has. The president complained that before the PPACA, “the average increase on premiums in this individual market . . . was double digits.” Now, he is exposing HealthCare.gov enrollees to potentially triple-digit increases. The president once promised that under the PPACA, “insurance companies can no longer drop your coverage . . . due to a mistake you

Figure 1
HealthCare.gov Enrollees Who Left Job-Based Health Coverage



Source: Urban Institute, Georgetown University, Robert Wood Johnson Foundation.

made on your application.” Now, millions may lose coverage due to the president’s mistakes.

CONGRESS MUST PROTECT AMERICANS FROM THE WORST EXECUTIVE ABUSES

To protect Americans from these execu-

tive-branch abuses, Congress must immediately investigate the following questions.

1. How did the IRS come to issue subsidies in federal Exchanges contrary to the clear language of the PPACA?

Since 2011 the IRS has stonewalled attempts by Congress to ascertain how the

agency decided to depart from the text of the statute on the question of subsidies in federal Exchanges.

Despite the administration's lack of transparency, a congressional investigation found cause for concern about how the IRS reached this decision. As detailed in a joint report by staff for the House Committee on Oversight and Government Reform and the House Committee on Ways and Means, congressional investigators learned that

- The IRS's draft regulations initially included the statutory requirement that subsidy recipients must be enrolled in qualified health plans "through an Exchange established by the State."
- In March 2011 IRS officials learned PPACA opponents were considering legal challenges based on this provision.
- When IRS officials realized the language restricting tax credits to state-established exchanges might present a problem, they brought their concerns to the Treasury Department, which ultimately led to discussions with the White House and the Department of Health and Human Services.
- Around that time, IRS officials dropped the "through an Exchange established by the State" requirement from their draft regulations.
- Treasury and IRS officials who were involved in writing the tax-credit rule admitted to congressional investigators they knew the PPACA did not explicitly authorize subsidies in federal exchanges. The officials generally believed it was Congress's intent to offer tax credits in all exchanges, yet they failed to conduct a serious review of the PPACA or its legislative history to determine whether the law actually does authorize tax credits in federal exchanges, or to determine if their understanding of Congress's intent was correct.
- The IRS ultimately issued proposed and final rules offering tax credits in

federal as well as state-established exchanges.

The joint committees' report is incomplete, because Treasury and IRS officials have repeatedly refused to release documents related to the development of the IRS's tax-credit rule. The agencies have gone so far as to ignore a congressional subpoena issued on September 23, 2014, by the House Committee on Oversight and Government Reform. The agencies' lack of transparency suggests they may be trying to hide information that would undercut its case before the Supreme Court.

2. Why isn't CMS informing consumers of the inherent risks of HealthCare.gov coverage?

Rebecca Murray and millions of other HealthCare.gov enrollees have an absolute right to know about the risks to which the Obama administration has exposed them. It is reckless and unethical for the Obama administration not to inform the public of those risks.

Congress should demand that CMS inform HealthCare.gov shoppers and enrollees of those risks, so they can prepare for any possible disruption.

3. What contingency plans has the administration developed?

The public further has a right to know what, if any, contingency plans the Obama administration is considering in the event the Supreme Court, in *King v. Burwell*, agrees with lower courts that have found the challenged subsidies and taxes to be illegal. If the administration has not developed any plans, that would be even more reckless and unethical. If it has, Congress and the public have a right to know what the administration has in mind. If the administration plans to vitiate other requirements of the law to keep those taxes and subsidies flowing, Congress has a right to know and a duty to stop such efforts.

Congress also has a right to know if the administration is planning to make one last massive transfer of taxpayer dollars to insurance

companies participating in HealthCare.gov before the Supreme Court rules such transfers illegal. The PPACA authorizes the Treasury to change the periodic basis on which the IRS makes “advance payments of tax credits” to insurers from monthly to annually. If Treasury does so, then sometime after oral arguments in *King* but prior to a ruling, the IRS could issue those subsidies to insurance carriers for the remainder of 2015. The *only* reason for the administration to even contemplate such a step is if it believes there is a reasonable chance the Supreme Court will find such transfers to be illegal, which would make such a move by the administration highly unethical.

4. What contingency plans have insurers who participate in HealthCare.gov developed?

HealthCare.gov enrollees have a right to know how their insurance company will respond to a ruling invalidating subsidies in federal Exchanges.

Insurers who participate in HealthCare.gov demanded (and CMS granted) a provision in their participation agreements that would allow them to withdraw from federal Exchanges if the subsidies disappear. Would they merely stop selling coverage through HealthCare.gov? Would they cancel all HealthCare.gov plans? If so, how much time would enrollees have before their coverage is cancelled? Even if they do not cancel those plans, would they participate in federal exchanges in 2016?

CONGRESS MUST REPEAL THE PPACA

Congress can head off the risks the Obama administration created by repealing the PPACA. Repealing the law would make coverage more affordable for the vast majority of those who would lose subsidies.

With the PPACA no longer on the books, all exchange subsidies—legal and illegal—would disappear. But so would the myriad price controls, regulations, and mandates that make exchange coverage so expensive in the first place.

A “clean” repeal bill is likely to secure a majority in both the House and Senate. That will be an important milestone, even if the bill does not clear a Senate filibuster. Majority support for a full-repeal bill will also enable members of Congress to remind the public they have tried repeatedly to head off the risks to which the administration is exposing HealthCare.gov enrollees and would signal to the Supreme Court that the PPACA’s future is still a matter of legislative debate. This will create space for the Court to do the right thing and encourage the Court to leave the legislating to Congress.

Having held a full-repeal vote prior to oral arguments in *King v. Burwell*, Congress should shelve any lesser changes to the PPACA until after the Supreme Court rules on that case. It would make little sense for members of Congress to spend scarce time and effort amending the employer or individual mandates, for example, when a *King* ruling would free 57 million individuals and employers from those mandates and increase Congress’s leverage to repeal those measures entirely. Whatever changes Congress wishes to make to the PPACA, it will have no less leverage—and possibly much more leverage—after a *King* ruling.

CONGRESS MUST REPLACE THE PPACA

Once the PPACA has been repealed, Congress must replace it with reforms that continuously make health care of ever-increasing quality available to an ever-increasing number of people.

Developing a “replace” plan in advance of oral arguments in *King v. Burwell* would signal to the Supreme Court that Congress is ready to address the PPACA’s flaws and would create space for the Court to do the right thing.

Unfortunately, many current “replace” plans would preserve a variant of the PPACA’s health-insurance tax credits, and would thereby reproduce many of the worst features of the PPACA: redistribution and government control of health care.

A far better approach would be to build on a proven free-market idea that is already part of the free-market lexicon: health savings accounts, or HSAs. Congress should

1. Convert the current tax exclusion for employer-sponsored health insurance (ESI) into an exclusion for HSA contributions, regardless of whether contributions come from an employer or the account holder.
2. Double or triple current HSA contribution limits to enable the vast majority of workers with ESI to exclude the same (or a greater) amount of their compensation from payroll and income taxes.
3. Remove the requirement that HSA holders enroll in a qualified high-deductible health plan, or any health plan.
4. Allow HSA holders to purchase health insurance tax-free with HSA funds.

Expanding health savings accounts to create such “Large HSAs” would make health care better, more affordable, and more secure, by giving workers greater freedom and choice. Large HSAs would

1. Make health *coverage* more affordable for the uninsured by giving Americans without access to ESI the same tax break available to those with job-based coverage.
2. Make health care more affordable for people with pre-existing conditions by giving them the same tax break on their out-of-pocket medical expenses that is available for the purchase of health insurance.
3. Make coverage more secure for people who develop expensive medical conditions.
4. Make health care and coverage even more affordable by creating incentives for 200 million Americans to demand lower prices and cost-reducing innovations.
5. Allow Americans to keep their existing

coverage, if they and their insurers desire, without being thrown out of those health plans by government dictate.

6. Allow insured workers to control some \$5,000 or \$11,000 of their earnings that their employers now control, resulting in an *effective* tax cut of trillions of dollars for insured workers.
7. Allow workers to choose their own health plan, rather than have their employer (or the government) choose it for them.
8. Treat every health care dollar the same, whether it is spent on health coverage, medical care, or saved for future medical expenses
9. Cap the currently unlimited tax exclusion for health insurance.
10. Have zero effect on the deficit.

“Large” HSAs are more politically feasible than tax credits and would do more to bring health care within reach of those who cannot afford it.

A free-market “replace” plan would take several other steps to make health care better, more affordable, and more secure. It would allow individuals and employers to avoid unwanted regulatory costs by freeing them to purchase health insurance regulated by states other than their own. It would subsidize Medicare enrollees the way Social Security does: by giving them a cash subsidy and trusting them to spend it wisely. Medicare checks would be risk- and income-adjusted to ensure all enrollees could afford a standard package of health benefits should they choose to purchase one. It would freeze “old” Medicaid and State Children’s Health Insurance Program spending at 2014 levels, to be distributed to states as flexible “block grants” with no strings attached. It would reform veterans’ benefits by (1) making the costs of caring for wounded veterans more transparent to Congress and the public, (2) giving veterans a choice of health care plans and providers, and (3) making active-duty personnel and veterans stockholders in a privatized Veterans Health Administration.

STOP ILLEGAL SUBSIDIES TO MEMBERS OF CONGRESS

One way Congress can productively legislate without short-circuiting the Supreme Court's consideration of *King v. Burwell* is by eliminating the unlawful health-insurance subsidies the administration has been issuing to members of Congress since 2010.

It is inexcusable that millions of Americans should be made to suffer under the taxes imposed by the PPACA, yet members of Congress get a presidential dispensation from the provisions that harm them personally.

Members of Congress and congressional staff have little reason to fear ending those subsidies. The pay cut they suffer will last mere weeks if not days. That's because even if the legislation only passes with Republican votes, *all* members of Congress will work together to ensure the resulting PPACA-imposed pay cut is only temporary. Democrats will support legislation that makes even greater changes to the PPACA in order to reinstate their lost compensation.

Ending those illegal subsidies would also be consonant with *King v. Burwell*: it would stop the Obama administration from using illegal subsidies to thwart Congress's deliberations.

WHAT CONGRESS CANNOT DO FOLLOWING A KING RULING

A favorable ruling in *King v. Burwell* will give Congress more leverage than it has ever had to repeal the PPACA, because it would expose millions of voters to the full cost of the law's hidden taxes. What Congress must not and cannot do after a *King* ruling is ratify in any way the illegal subsidies the Obama administration created to hide those costs.

After a ruling for the *King* plaintiffs, the president would no doubt send Congress a one-page bill reinstating those taxes and subsidies that the Court held to be illegal. But because that ruling would require the Congressional Budget Office to adjust its revenue, spending, and deficit baselines downward, the

impact of the president's one-page "amnesty" bill would be to

1. Expand the PPACA.
2. Expand the reach of the individual and employer mandates, by imposing them on an additional 57 million individuals and employers.
3. Increase federal spending by hundreds of billions of dollars over the 10-year window.
4. Increase federal taxes by more than a hundred billion dollars.
5. Increase federal deficits by hundreds of billions of dollars (because the additional spending would far exceed the additional tax revenue).

Worst of all, such a bill would

6. Establish a precedent under which the president can impose new taxes and entitlement programs on his own—breaking the law (and Congress will ratify his actions).

Approving any such effort to give permanent legal status to the president's illegal taxes and spending would mark a greater shift of constitutional power away from Congress and toward the executive than anything that has occurred in this or recent administrations.

The fact that the illegal taxes and spending in this case are so massive, and the disruption that could result from withdrawing them is so great, makes it *more* important that Congress not ratify them. To do otherwise would encourage executive-branch agencies to commit sweeping violations of federal law, because it would create a precedent where the greater the illegality, the more likely the executive branch will get away with it. Even providing transitional relief without first repealing the PPACA would reward the president's illegal behavior.

To prevent the creation of such a dangerous precedent, members of Congress and congressional staff must immediately begin edu-

cating themselves and the public about this abuse of executive power. They must immediately begin developing and promoting proposals that—once repeal becomes possible—can replace the PPACA with free-market reforms that effectively (and lawfully) address the need for better, more affordable, and more secure health insurance and health care.

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