

United States Senate

WASHINGTON, DC 20510

December 17, 2014

The Honorable Jacob J. Lew
Secretary
Department of Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

The Honorable Sylvia M. Burwell
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue SW
Washington, D.C. 20201

Dear Secretary Lew and Secretary Burwell:

On November 7th, the Supreme Court agreed to hear the case of *King v. Burwell*. The issue before the Court is whether the Internal Revenue Service (IRS) rule extending tax credits under the Patient Protection and Affordable Care Act (PPACA) to people purchasing coverage in states that do not establish and operate their own exchange is legal.¹ While PPACA, commonly referred to as Obamacare, instructs the Secretary of Health and Human Services to establish exchanges in states that opted not to create their own, the law only allows the tax credits for people purchasing coverage in an “Exchange established by the State.”² We write to ask about the Administration’s preparations in the event the Court agrees with the plaintiffs that the IRS rule at question is improper and inconsistent with the statute.

Obamacare’s tax credits were important for the administration since they obscure the true cost of the law’s many mandates and regulations by passing these expenses to taxpayers. Although the tax credits in federal exchanges may therefore be the Administration’s preferred policy, they are unambiguously inconsistent with the law. Already, two lower courts have concluded that the IRS rule is “not in accordance with the law.”³ Based on a plain reading of the law, IRS’s decision to extend the tax credits to federal exchanges increases taxes and spending by hundreds of billions of dollars beyond what Congress authorized.

The Supreme Court ruling could eliminate the tax credits in states that participate in the federal exchanges. Moreover, the tax credits could end immediately after the ruling. Obamacare would then require many credit recipients to repay some or all of the credit amount already received.

¹ Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377 (May 23, 2012).

² Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1311(b)(1), 124 Stat. 119, 173 (2010)

³ Jacqueline Halbig, Et Al., Appellants v. Sylvia Mathews Burwell, in her official capacity as U.S. Secretary of Health and Human Services, Et Al., Appellees; State of Oklahoma, ex rel. Scott Pruitt, in his official capacity as Attorney General of Oklahoma v. Sylvia Mathews Burwell, in her official capacity as U.S. Secretary of Health and Human Services, and Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury.

Without the tax credits, millions of people will be confronted with Obamacare's true cost and will face much higher premiums. Some could see their coverage cancelled. It is imperative that people understand this risk as they contemplate signing up for coverage.

On December 9, 2014, Centers for Medicare and Medicaid Services (CMS) Administrator Marilyn Tavenner testified that the administration does not plan to inform federal exchange enrollees that they could face much higher tax bills and higher premiums next year should the Court find that the IRS was improperly providing the tax credits.⁴ Without this information, many families could turn down more-secure coverage options (e.g., through a different employer) in favor of less-secure Obamacare coverage. We urge you to reconsider this position and to ensure that these Americans have all available information as they make decisions about health insurance coverage next year.

We also are concerned that the IRS's interpretation of the law may be inappropriately subjecting individuals and businesses to excessive taxes and mandates. Since the tax credits trigger the tax penalties under the law's employer mandate and individual mandate, the IRS's rule extends those penalties to people and employers in states that opted not to create a state exchange. One expert estimated that 57 million people residing in states participating in the federal exchanges would otherwise be exempt from these mandates.⁵

Furthermore, while the Administration has decided not to inform people about the potential ramifications of *King*, the administration has protected insurers, at their request, from a ruling that strikes down the IRS rule.⁶ According to an October report, at the request of insurers, the contracts between CMS and insurers "include a new clause assuring issuers that they may pull out of the contracts, subject to state laws, should federal subsidies cease to flow. ... The language in the clause says that CMS acknowledges that the issuer has developed its products for the FFM 'based on the assumption that (advanced payment tax credits) and (cost-sharing reduction payments) will be available to qualifying (e)rollees.'"⁷ In the House hearing, Administrator Tavenner testified that CMS negotiated these contracts with insurers over the summer and that every contract has the same clause.⁸ It is troubling that the administration decided to protect insurers from a *King* ruling that restricts the law's tax credits to state exchanges while at the same time failed to inform people enrolled or considering enrolling in federal exchanges of the potential consequences of such a decision.

⁴ Marilyn Tavenner testimony, House Oversight and Government Reform hearing entitled "Examining Obamacare Transparency Failures," (December 9, 2014).

⁵ Michael Cannon, *Halbig v. Burwell Would Free More Than 57 Million Americans From the ACA's Individual and Employer Mandates*, Forbes, (July 21, 2014).

⁶ Amy Lotven, *CMS Assures Issuers They May Terminate Plans if FFM Subsidies End*, <http://insidehealthpolicy.com/login-redirect-no-cookie?n=79559&destination=node/79559>

⁷ *Id.*

⁸ Marilyn Tavenner testimony, House Oversight and Government Reform hearing entitled "Examining Obamacare Transparency Failures," (December 9, 2014).

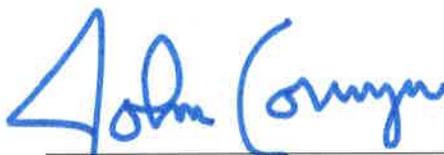
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Given the enormity of the financial stakes involved, we request that you use your department's fiscal year (FY) 2016 budget submission to inform Congress of how the Administration plans to respond to a possible ruling in *King* that recognizes that the IRS's rule is at odds with the law. We also urge you to inform all current federal exchange enrollees and all visitors to HealthCare.gov about the *King* suit and how a ruling against the administration could affect them. Finally, please provide information on any actions that the Administration is preparing to ensure that people inappropriately subjected to Obamacare's individual and employer mandates and associated tax penalties are not punished further.

Sincerely,



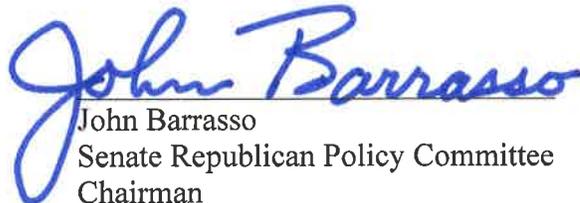
Mitch McConnell
Senate Republican Leader



John Cornyn
Senate Republican Whip



John Thune
Senate Republican Conference
Chairman



John Barrasso
Senate Republican Policy Committee
Chairman



Roy Blunt
Senate Republican Conference
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