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Halbig and King and The Struggle of Two Federal Appeals Courts to Find Meaning in Words That May or May Not Be in the ACA: Of Mice and Elephants

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At issue in ***Halbig v. Burwell*** and ***King v. Burwell*** is whether or not subsidies to buy insurance on an exchange are available in both state and federal exchanges. On its face the **Affordable Care Act ("ACA")** provides for subsidies only in *state exchanges*. The Treasury Department wrote regulations in 2012, however, confirming that subsidies are available in both state and federal exchanges. Not so fast, said plaintiffs like those in *Halbig* and *King:* Treasury's clarification looked a lot like legislating, which Treasury cannot do.

In ***Halbig***, as has been widely reported, a three-judge panel of the **D.C. Circuit Appeals Court** determined that the absence of plain language in the ACA authorizing subsidies to individuals covered on federal exchanges meant no subsidies were available. In ***King****, t*he **Fourth Circuit Court of Appeals**, while recognizing that there is no ACA language that explicitly authorizes the subsidies, found that that the "context" of the statute permitted subsidies in federal exchanges.

Who's right and who's wrong? I'll leave that for a future court to decide. What's interesting to me is how both courts allude to the same judicial doctrine to identify a weakness in the losing side's case.

In *Halbig,* the majority notes that relying on a contextual reading of a defintional provision in an ancillary subsection of a major "operational" provision of the ACA would essentially transform the ancillary subsection into the "proverbial elephant in the mousehole." In other words, it would be strange for Congress to hide an elephant (a key provision of the law) in a mousehole (an important but nonetheless ancillary provision of the law).

In *King,* a concurring judge wrote that the absence of a reference to the federal exchanges in the very same ancillary provision on which the *Halbig* court relied "bespeaks a deeply flawed effort to squeeze the proverbial elephant into the proverbial mousehole." In other words it would be strange for Congress to override the intent of the statute by hiding a key provision (the elephant) in an ancillary subsection (the mousehole).

At the end of the day the use of the doctrine by both judges for different purposes bespeaks nothing

more than the creative linguistics lawyers, judges and regulators use to justify different positions. The real elephant here is the elephant in the room: the fate of subsidies in over 30 states across the country. For employers, it's an important elephant, since it is the subsidies (the mice?) that trip the penalties (the elephants?) under the ACA. Without subsidies there are no penalties. Should employers doing business in the states (including Washington, D.C.) operating state exchanges move to a federal exchange state? Of course not. In fact, the best course of action is to simply wait and see what develops and remember: with a resolute heart, a mouse can lift an elephant. I have no idea what that means in this context so I'll leave it to each of you to apply it any way you see fit.

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