HOBBS STRAUS DEAN & WALKER

2120 L Street, NW, Suite 700
Washington, DC 20037

T 202.822.8282
F 202.296.8834

HOBBSSTRAUS.COM

MEMORANDUM

November 7, 2014

To: Tribal Health Clients

From: Hobbs, Straus, Dean & Walker, LLP

Re: *Supreme Court grants cert in* King v. Burwell *and will determine availability of the ACA's premium tax credits on federal exchanges.*

On November 7, 2014, the Supreme Court granted certiorari in *King v. Burwell*, in which the U.S. Court of Appeals for the Fourth Circuit held that the Affordable Care Act (ACA) permits the Internal Revenue Service (IRS) to make premium tax credits available on federally facilitated health insurance exchanges.

To ensure that low-income individuals can afford to comply with the ACA's individual mandate, the ACA provides for premium assistance in the form of tax credits. The ACA allows states to implement their own health insurance exchanges, but if they choose not to, the federal government steps in and operates a federally facilitated exchange. To date, 26 states have chosen not to implement their own exchanges and are operating a federally facilitated exchange. The IRS makes premium tax credits available to individuals that purchase health insurance through either state-run or federally facilitated exchanges.

In *King v. Burwell*, 2014 U.S. App. LEXIS 13902 (4th Cir. 2014), the Fourth Circuit held that the IRS may lawfully make premium tax credits available on federal exchanges. The court rejected the argument that the ACA restricts premium tax credits to state-run exchanges because the provision of the Act that provides for premium tax credits is found under Section 1311, governing state exchanges, rather than Section 1321, which establishes federally facilitated exchanges. The Fourth Circuit found the text of the ACA ambiguous on this matter and deferred to what it found to be a reasonable interpretation of the Act by the IRS.

A panel of the D.C. Circuit, however, came to the opposite conclusion in *Halbig v. Burwell*, 2014 U.S. App. LEXIS 13880 (D.C. Cir. 2014). In a 2-1 vote, the panel held that the text of the ACA unambiguously restricts premium tax credits to insurance purchased on state-run exchanges. On September 4, 2014, the D.C. Circuit vacated the decision in *Halbig* and granted a petition for a rehearing *en banc.*

If the Supreme Court overturns *King*, it could lead to significant legislative efforts to reform the ACA. Millions of individuals have already received advance payment of

premium tax credits to purchase insurance on federal exchanges in 2014, and these tax credits are critical to ensuring the affordability of health insurance for low-income individuals. If the Supreme Court were to overturn the Fourth Circuit's decision in King v. Burwell, it is unclear whether those individuals would have to pay the IRS back in the form of a tax penalty for the premium tax credits they were found not to be eligible for. This uncertainty could open the door to significant legislative efforts to reform this provision, as well as other aspects of the ACA. We will be closely monitoring this case as it moves forward.

For more information, please contact Elliott Milhollin at (202)822-8282 or emilhollin@hobbsstraus.com; or Geoff Strommer at (503)242-1745 or gstrommer@hobbsstraus.com.