No. 14-586

In the Supreme Court of the United States

STATE OF OKLAHOMA, EX REL. E. SCOTT PRUITT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF OKLAHOMA,

Petitioner,

v.

SYLVIA M. BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; AND JACOB J. LEW, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 11 OTHER STATES IN SUPPORT OF PETITIONER

PATRICK MORRISEY
ATTORNEY GENERAL

OFFICE OF THE
ATTORNEY GENERAL
STATE CAPITOL
BUILDING 1, ROOM E-26
CHARLESTON, WV 25305
EL@WVAGO.GOV
(304) 558-2021

ELBERT LIN
Solicitor General
Counsel of Record

JULIE MARIE BLAKE
Assistant Attorney General

Counsel for Amicus Curiae *State of West Virginia*

QUESTION PRESENTED

Section 36B of the Internal Revenue Code, which was enacted as part of the Patient Protection and Affordable Care Act ("ACA"), authorizes federal tax credit subsidies for health insurance coverage that is purchased through an "Exchange established by the State under section 1311" of the ACA.

The question presented is whether the Internal Revenue Service ("IRS") may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government under Section 1321 of the ACA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF *AMICI CURIAE*

Both *King v. Burwell*, No. 14-114, and this case raise the same question: whether the Affordable Care Act conditions federal tax credit subsidies and large employers' insurance mandates on a State's decision to establish a health insurance exchange.

But both cases do *not* include the same parties and interests. *King* brings to the Court two sets of parties: individual plaintiffs (private citizens subject to the ACA's individual mandate) and federal defendants (the officials responsible for administering the ACA's subsidies). Absent from *King*—but present in this case—is a *State* responsible for deciding whether to establish a state exchange and a *large employer* bearing the compliance costs triggered by a state exchange. And so, absent review in this case, the Court is set to adjudicate the States and large employers' roles under the ACA *without a single State or large employer present as a party*.

As States and large employers, *amici curiae* States of West Virginia, Alabama, Arizona, Georgia, Indiana, Kansas, Louisiana, Montana, Nebraska, South Carolina, South Dakota, and Utah thus have a direct interest in this case being heard alongside *King*.[1] *First*, granting Oklahoma's petition will ensure that a State *and* a large employer is a party

[1] Pursuant to Supreme Court Rule 37.2(a), this brief was filed more than 10 days before the date due.

when the Court determines States and large employers' rights and regulatory burdens. *Second*, including Oklahoma as a party will help reduce the possibility of encountering unforeseen procedural defects in *King* that delay or preclude reaching the merits.

REASONS FOR GRANTING THE PETITION

I. Hearing this case with *King* will ensure that this Court does not decide States and large employers' ACA roles in their absence.

In *King*, this Court granted certiorari on a question of great importance for the States and large employers: "whether the Internal Revenue Service ('IRS') may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government under section 1321 of the ACA." No. 14-114 (U.S.); *see* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified as amended at 42 U.S.C. §§ 18031 & 18041 (2010)) (collectively the "Act" or "ACA").

How this Court resolves this question will determine what consequences flow from a State's decision to establish an exchange: that is, if setting up a state exchange will cause the federal government to provide tax credit subsidies to insurance companies, which in turn will impose

expensive mandates on large employers. *See* 26 U.S.C. § 4980H(a)(2) (mandating employers to provide employee health insurance if at least one of an employer's full-time employees "enroll[s] . . . in a qualified health plan with respect to which an applicable premium tax credit . . . is allowed or paid with respect to the employee"). The question presented in *King* is thus at its heart a question about the role of the *States* and *large employers* under the ACA.

But the States and large employers are absent in *King*. The *King* petitioners are four individuals subject to the individual mandate. The respondents are the federal officials responsible for administering the ACA's tax credit subsidies. No States or large employers are parties to *King*.

Their omission as parties runs contrary to the well-established practice of not adjudicating third parties' rights in their absence. As many jurisdictional and procedural doctrines establish, federal courts are on firmest ground when they decide parties' rights and burdens when they are before the court, rather than leaving the presentation of their views to others. *See* Fed. R. Civ. P. 19 (providing for joinder of necessary parties); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014) (highlighting the traditional "limitations on third-party standing"). Absent some necessity, this Court should not decide the roles of the States and large employers under the

ACA without at least one State or large employer present.

This petition offers an ideal opportunity to ensure that a State and a large employer are present. Oklahoma is both a State and a large employer. Its petition presents the identical question as *King*. And, if this Court grants the petition, there is enough time to brief and decide both cases this Term. Pet. at 2 n.2, 12–13.

II. Hearing this case with *King* will ensure that unforeseen procedural problems do not delay a merits decision.

As this Court is well aware, procedural problems can unexpectedly prevent the Court from reaching the merits of an otherwise important question on which certiorari has been granted. Such problems range from jurisdictional defects to settlement by the parties. *E.g.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661–63 (2013) (lack of jurisdiction to examine the constitutionality of state marriage laws due to lack of standing); *Madigan v. Levin*, 134 S. Ct. 2 (2013) (mem.) (lack of interlocutory jurisdiction to resolve the meaning of the Age Discrimination in Employment Act); *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 134 S. Ct. 636 (2013) (mem.) (lack of jurisdiction to interpret the Fair Housing Act because the parties settled the case); *Magner v. Gallagher*, 132 S. Ct. 1306 (2011) (mem.) (same). They often do not arise until after briefing and oral argument. *See, e.g.*, *Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594, 595 (2013)

(Breyer, J., dissenting); *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959). And they frequently result in the dismissal of a case as improvidently granted. *See* Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 Wis. L. Rev. 1421, 1434 (finding that the Supreme Court dismissed as improvidently granted an average of about three cases per Term between 1954 and 2005); Michael E. Solimine & Rafael Gely, *The Supreme Court and the Sophisticated Use of Digs*, 18 Sup. Ct. Econ. Rev. 155, 175 (2010) ("Almost all of the DIGs occur after oral argument has taken place.").

The risk of unanticipated procedural problems—especially those that arise after briefing and oral argument—is a strong reason to consider, when possible, granting and consolidating multiple petitions that raise the same question. This is hardly an unusual practice. *See, e.g.*, *Conestoga Wood Specialties Corp. v. Sebelius*, 134 S. Ct. 678 (2013) (granting and consolidating similar cases raising identical questions about the legality of HHS's contraceptive mandate under the ACA); *Gould v. United States*, 559 U.S. 903 (2010) (granting and consolidating petitions from different circuits to review the meaning of a federal firearms law). And it could ensure that a late-arising or late-discovered defect as to one party or petition would not entirely preclude this Court from reaching the common merits question.

Here, granting the State of Oklahoma's petition will help ensure that standing does not unexpectedly impede this Court from deciding the important merits question in *King*. Although *amici* agree that the *King* petitioners have standing, Oklahoma offers two additional bases for standing: Oklahoma is a large employer "subject to the ACA's employer mandate" and a "sovereign State vested with the statutory right under the ACA to decide whether to establish a health insurance exchange and subject itself to the various burdens and benefits associated with that decision." Pet. at 4–5. Prudence, if nothing else, warrants a grant of certiorari.

CONCLUSION

The petition for certiorari before judgment should be granted.

Respectfully submitted,

Patrick Morrisey
Attorney General

Elbert Lin
Solicitor General
Counsel of Record

Julie Marie Blake
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
State Capitol
Building 1, Room E-26
Charleston, WV 25305
EL@wvago.gov
(304) 558-2021

Counsel for Amicus Curiae
State of West Virginia

DECEMBER 2, 2014

Luther Strange
Attorney General
State of Alabama

Thomas C. Horne
Attorney General
State of Arizona

Samuel S. Olens
Attorney General
State of Georgia

Gregory F. Zoeller
Attorney General
State of Indiana

Derek Schmidt
Attorney General
State of Kansas

James D. "Buddy" Caldwell
Attorney General
State of Louisiana

Timothy C. Fox
Attorney General
State of Montana

Jon Bruning
Attorney General
State of Nebraska

Alan Wilson
Attorney General
State of South Carolina

Marty J. Jackley
Attorney General
State of South Dakota

Sean D. Reyes
Attorney General
State of Utah