



## Analysis: King v. Burwell Arguments

On Wednesday, March 4, the Supreme Court heard oral arguments in *King v. Burwell*, the latest legal challenge involving the Patient Protection and Affordable Care Act (ACA). Petitioners in the case are challenging an Internal Revenue Service (IRS) regulation that makes federal tax subsidies available to middle- and lower-income individuals who purchase health insurance through Healthcare.gov, the federal health insurance exchange or “marketplace” established under the ACA.

The petitioners contend that the IRS regulation violates the ACA, which says that the subsidies are available for insurance plans purchased on “an Exchange established by the State.” Sixteen states, including Colorado, set up their own exchanges under the ACA and petitioners argue that subsidies are only available for insurance plans purchased on those exchanges. The petitioners contend that Congress gave states the choice of setting up an exchange and intended to use the subsidy system as an incentive to encourage the states to do so.

The petitioners are appealing a unanimous decision by the Fourth Circuit to uphold the subsidies in this case. The Circuit Court found that, while the dispute of the text’s literal interpretation was a close call, the ACA read in its totality makes it clear that despite the plaintiffs’ literal reading of the provision in question, the intent of Congress was to provide subsidies to purchasers in both state-created and federally-created exchanges

The government’s position is that the federal exchange is an “Exchange established by the State.” The government argues that its reading flows directly from the text of the ACA, which defines “Exchange” as a governmental agency or nonprofit entity that is established by a State. The contention is that an exchange is, by definition, established by the State whether the exchange is facilitated by a state agency, a nonprofit entity or the Secretary of the federal Department of Health and Human Services (HHS), which steps into the state’s shoes when setting up and running its exchange. The government argues that its reading is the only way to make sense of the section that contains the provision.

The government further argues that its interpretation is compelled by the ACA’s structure and design. The government’s position is that Congress created a system that relies on a nationwide subsidy program to make affordable health insurance available to Americans in every state. According to the government, its interpretation of the disputed provision is necessary to fulfill that intention and reporting around the case, at the very least, supports the contention that millions of Americans would lose access to affordable coverage if petitioners win their case. For example, the New York Times has reported that

about 7.5 million people could lose their subsidies in the 34 states that use the federal health exchange if the Supreme Court invalidates subsidies for the federal exchange.<sup>1</sup>

The government argues that petitioners' reading produces an incoherent statute that doesn't work and that requires the HHS to establish Exchanges that are doomed to fail. The government argues that the petitioners' interpretation makes a mockery of the statute's express textual promise of state flexibility because it forces the states to create their own exchange or forgo hundreds of millions of federal dollars in health insurance subsidies for their citizens, that it precipitates the insurance market death spirals that the statutory findings specifically say the statute was designed to avoid, and that it revokes the promise of affordable care for millions of Americans.

The government also contends that the system is not like one in which the government hands out money to states with conditions attached, but rather is a system of federal benefits extended to federal taxpayers.

Plaintiffs' counsel, Michael Carvin, started the day on Wednesday and was subjected to heavy questioning from the bench. Justice Ginsberg jumped in right away with questions about the petitioners' stake in the lawsuit – a concept known as standing. Petitioners must establish standing or the Court will dismiss the case on lack of standing without addressing the merits. Petitioners in this case have standing if at least one of the four plaintiffs in the case is liable to pay the ACA's individual mandate penalty for failing to have health insurance. Petitioners' counsel addressed Ginsberg's questioning asserting that two of the plaintiffs clearly had standing and that "it's black-letter law that only one plaintiff needs standing."

Questions regarding the King petitioners' standing arose earlier this year when the Wall Street Journal investigated and reported on the personal circumstances of all four plaintiffs and found reasons to question the legal standing of each. That reporting, summarized in a helpful article published by The ACA Times,<sup>2</sup> uncovered that two of the plaintiffs may qualify for free medical coverage through the Veterans Administration and that the other two may qualify for the ACA's hardship exemption which would exempt them from having to pay the penalty.

Interestingly, the government did not contest the petitioners' standing, indicating, perhaps, that the government wants the Court to consider the case on the merits. It's possible that the government wants the Court to address the subsidy issue now as a dismissal on standing will not put the issue to rest but will most likely only delay the Court's review until next year when *Halbig v. Burwell*, a similar case now in the D.C. Circuit, comes up on appeal.

Justice Breyer chimed in shortly after Mr. Carvin began arguing the merits. In response to Mr. Carvin assertion that subsidies are only available through an exchange established by the state under 1311, Breyer pointed out that the health law has clearly defined terms. He said; "this statute is like the tax code more than it's like the Constitution. There are defined terms, and the words [exchange established by the state under section 1311] concern a defined term." It seemed to Justice Breyer that an exchange under the health law is, by definition, established by the state whether the state or the federal government on the state's behalf actually set up and operates the exchange. "So what's the problem?" Breyer asked petitioners' counsel.

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<sup>1</sup> Mathew Bloch, *The Health Care Supreme Court Case: Who Would Be Affected*, The New York Time Online. Available at: [http://www.nytimes.com/interactive/2015/03/03/us/potential-impact-of-the-supreme-courts-decision-on-health-care-subsidies.html?\\_r=0](http://www.nytimes.com/interactive/2015/03/03/us/potential-impact-of-the-supreme-courts-decision-on-health-care-subsidies.html?_r=0).

<sup>2</sup> Robert S. Sheen, *Questions Raised About Standing of 'King' Plaintiffs*, The ACA Times: News and Information about the Affordable Care Act. Available online at: <http://www.acatimes.com/king-plaintiffs/>.

Justice Kagan followed Breyer. She presented a hypothetical involving her law clerks that pushed Mr. Carvin to acknowledge that the context of the ACA matters. Her point was that “it’s not the simple four or five words in my example ... [i]t’s the whole structure and context of the provision that suggests whether those instructions carry over to the substitute.”

The justices that questioned Mr. Carvin seemed most concerned with the constitutional implications of the petitioners’ reading of the provision. “If we read it the way [the petitioners’ are] saying,” said Justice Sotomayor, “then we’re going to read a statute as intruding on the Federal-State relationship, because then the States are going to be coerced into establishing their own Exchanges.” Justice Sotomayor characterized the states’ choice, under the petitioners’ interpretation of the provision, as either setting up their own exchange or sending their state’s insurance market into a “death spiral.” “Tell me how this is not coercive in an unconstitutional way,” said Sotomayor.

Notably, Justice Kennedy, who is expected to be one of the swing votes in the case, expressed the same concerns. “[I]t does seem to me,” Kennedy said “that if your argument is accepted, the States are being told either create your own Exchange, or we’ll send your insurance market into a death spiral.” “It seems to me that ... there is a serious constitutional problem if we adopt your argument.”

The justices’ federalism concerns are most likely to work in the government’s favor because the Court will avoid interpreting a provision in a way that makes it unconstitutional if there is another plausible interpretation. Justice Sotomayor made that point by saying it “is a primary statutory command; that we read a statute in a way where we don’t impinge on the basic Federal-State relationship.” Similarly Justice Kagan said, “there’s at least a presumption, as we interpret statutes, that Congress does not mean to impose heavy burdens and Draconian choices on States unless it says so awfully clearly.”

But Justice Scalia didn’t miss his opportunity to push back. “But do we have any case which says that when there is a clear provision, if it is unconstitutional, we can rewrite it?” Of course the answer was no. Justice Kennedy also acknowledged, “it may well be that [petitioners’ interpretation is] correct, and there’s nothing we [the Court] can do. I understand that.”

Overall, and as expected, the Court’s liberals seemed much more comfortable with the government’s argument and the Court’s most conservative justices seemed to side with the challengers. “If Congress did not mean ‘established by the state’ to mean what it normally means, why did they use the language?” asked Justice Samuel Alito.

But it was much harder to glean what Chief Justice Roberts and Justice Kennedy, who are expected to be swing votes in the case were thinking. As mentioned, Kennedy suggested that withholding tax credits from states that failed to set up their own insurance exchanges could pose “a serious constitutional problem.” But Kennedy asked hard questions of both sides. On the other side, he questioned whether, in the absence of more specific language, Congress intended to let the IRS decide how to distribute billions of federal tax dollars. “That’s a lot of responsibility,” he said.

Roberts, meanwhile, was uncharacteristically quiet during the nearly hour and a half argument. In 2012, it was the chief justice who surprised many observers by joining the liberals to find the law constitutional because Congress was using its taxing power.

Much of the public discourse surrounding this case has focused on how a ruling in Petitioners’ favor will impact the insurance markets in those 34 states that use Healthcare.gov. The concern, which

came up during oral arguments, is that, unable to afford health insurance without a subsidy, millions of healthy people will lose their policies. The fear then is that the shrinking of the healthy consumer pool will lead insurance companies to escalate premium prices to the point that only the very rich and very unhealthy individuals will remain insured.

Regardless of exactly how the post-King v. Burwell world looks, the case will have serious implications for the millions of people who receive a subsidy in one of the 34 Healthcare.gov states. As reported by Aljazeera America, “[a] recent report published by the Rand Corporation estimates that in 2015, 13.7 million Americans will have purchased insurance on [Healthcare.gov] using subsidies and that if the Supreme Court rules in favor of the Petitioners, the resulting financial hardship will cause 9.6 million to lose their coverage.”<sup>3</sup> Furthermore, as the New York Times reported, “[t]he effect of a [ ] decision [for the petitioners] would not be limited to the people currently receiving subsidies in the federal marketplaces. People who buy their own health insurance in those states, even without subsidies, could be affected, because rates would increase if insurance pools become older and less healthy.”<sup>4</sup>

Also, in December 2014, the Committee on Energy and Commerce put out an analysis that estimates the total loss of tax-credits in each congressional district in the states that will be affected if the Supreme Court rules against tax subsidies for the federal exchange.<sup>5</sup> The analysis use zip-code level data on 2014 plan selection as well as Kaiser Family Foundation and CBO estimates of 2016 ACA enrollment by state and ACA subsidies. The Urban Institute also put out a report in January 2015 that estimates that a victory for the petitioners in King v. Burwell would increase the number of uninsured in 34 states by 8.2 million people and eliminate \$28.2 billion in tax credits and cost-sharing reductions in 2016 for 9.3 million people.<sup>6</sup>

Colorado is one of the 16 states that established and runs its own state-based exchange. As a result, the fate of the subsidy program in Colorado is not directly at stake in the case before the Supreme Court. But the collapse of the ACA in 34 states is sure to have ripple effects that will eventually be felt in Colorado. The collapsing markets in other states will affect the national insurance companies that operate in our state and we will also lack a viable federal alternative to our state exchange will no longer be available.

Finally, the concern expressed by several justices that the petitioners’ interpretation makes the subsidy program designed by the ACA unconstitutionally coercive may signal future constitutional challenges to the ACA if the Court adopts petitioners’ interpretation. Furthermore, those legal battles would likely impact all states, including states like Colorado that have their own exchange because, if the system is coercive for states that declined to establish their own exchange, it would be equally coercive

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<sup>3</sup> Elijah Wolfson, ‘Obamacare’ on trial: SCOTUS takes up case on tax credits, Aljazeera America, March 2, 2015. Available online at: <http://america.aljazeera.com/articles/2015/3/2/case-on-obamacares-tax-credits-could-unravel-health-law.html>.

<sup>4</sup> Mathew Bloch, *The Health Care Supreme Court Case: Who Would Be Affected*, The New York Time Online. Available at: [http://www.nytimes.com/interactive/2015/03/03/us/potential-impact-of-the-supreme-courts-decision-on-health-care-subsidies.html?\\_r=0](http://www.nytimes.com/interactive/2015/03/03/us/potential-impact-of-the-supreme-courts-decision-on-health-care-subsidies.html?_r=0).

<sup>5</sup> Minority staff, Committee on Energy and Commerce, *District-by-District Impact of a Potential Supreme Court Ruling Against Affordable Care Act Federal Exchange Tax Credits* (December 2014). Available online at: <http://democrats.energycommerce.house.gov/sites/default/files/documents/Fact-Sheet-District-By-District-King-vs-BurwellImpacts-2014-December.pdf>.

<sup>6</sup> Linda J. Blumberg, Mathew Buettgens, and John Holahan, *The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums*, The Urban Institute (January 2015). Available online at: <http://www.urban.org/UploadedPDF/2000062-The-Implications-King-vs-Burwell.pdf>.

for the states that opted to establish an exchange. Bottom line is that the potential implications of this lawsuit are complicated, far reaching, and largely unknown. We will be watching this case closely.