

Modern Healthcare

Key justices hard to read in *King v. Burwell* arguments

By Lisa Schencker

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Justice Anthony Kennedy raised the hopes of the Affordable Care Act's supporters Wednesday by expressing doubts about the premise of the latest legal broadside against the law to reach the U.S. Supreme Court. But plenty of other signals suggested the court could rule either way.

Kennedy is widely seen as a possible swing vote in the case, as is Chief Justice John Roberts, who remained mostly silent during Wednesday's arguments in *King v. Burwell*. The plaintiffs in the case are challenging the legality of the Internal Revenue Service rule allowing premium subsidies in as many as 37 states.

Some observers noted that two of the court's most conservative justices seemed to offer Kennedy and Roberts a way to reduce their concerns that ruling against the Obama administration would make insurance unaffordable for millions of Americans.

'A serious constitutional problem'

The central question of the case is whether the language of the Affordable Care Act allows premium subsidies for Americans in states relying on the federal government for enrollment in exchange plans.

Kennedy questioned the implications for states' rights and federalism posed by the plaintiffs' argument because their reading would coerce states to establish exchanges by imposing onerous consequences for states that declined.

"There's a serious constitutional problem if we adopt your argument," Kennedy said.

The Supreme Court generally assumes that Congress doesn't intentionally violate the Constitution, a doctrine known as "constitutional avoidance," which U.S. Solicitor General Donald Verrilli seized on as "another very powerful reason to read the statutory text our way."

The justices are likely to hold a conference at the end of this week and possibly take a preliminary vote. Chief Justice John Roberts will assign the writing of the opinion if he is in the majority. If he is not, then the senior justice in the majority will assign the opinion. A decision in the case is expected in June.

"If Justice Kennedy believes that the challengers' interpretation of the statute would lead to an unconstitutional federal coercion of states, then the law's challengers will lose," said Jesse Witten, healthcare partner with Drinker Biddle & Reath. "There is no way they can prevail unless Justice Kennedy is on their side."

Later in the arguments, however, conservative justices Antonin Scalia and Samuel Alito suggested that lawmakers could mitigate the fallout from a negative decision in the case.

The case has raised considerable concern that a decision siding with the challengers could abruptly end subsidies for 7.5 million people in states relying on HHS to run their exchanges, as well as wreak havoc on insurance markets and cause ripple effects across the healthcare industry.

Republican lawmakers have said in recent days that they would pursue a legislative fix, but it's unclear whether they can unite around a particular approach.

Scalia, though, asserted that Congress would act to prevent a doomsday scenario, allowing Verrilli to get a laugh with the quip, "This Congress, your honor?"

Alito hinted that the justices might consider staying a negative ruling until the end of 2015 so that subsidies wouldn't immediately disappear and Congress and states would have time to act. Verrilli said that still would leave states too little time to establish their own exchanges and maintain access to subsidies for their residents.

Scalia and Alito's comments may be arguments they'll make behind the scenes in coming days and months to persuade other justices to side against the administration, said Ankur Goel, a health partner with McDermott Will & Emery who co-authored an amicus brief in the case for the American Public Health Association siding with the government.

"I think what you can anticipate is the possibility that those who are on that side of the case will be making a pitch to say the idea that this death spiral has to be caused, it's not the case," Goel said.

Joel Ario, a managing director at Manatt Health Solutions and the former exchange director with HHS, said he hopes that Roberts' relative silence means he might side with the government. "I would like to think he's trying to be very judicious here, be very careful, and I think, in general, the more judicious and careful he is, the more that favors the government," Ario said.

A number of notables filled the courtroom as arguments were heard, including Sen. Orrin Hatch (R-Utah), HHS Secretary Sylvia Mathews Burwell, former HHS Secretary Kathleen Sebelius, Rep. Paul Ryan (R-Wis.), and U.S. House Minority Leader Nancy Pelosi (D-Calif.).

Throughout the nearly 90-minute arguments, the court's four liberal-leaning justices largely aimed their questions at the challengers' attorney, Michael Carvin of the firm Jones Day, while Scalia and Alito probed Verrilli with questions.

'An exchange established by the state'

A hotly contested phrase in the law gave rise to this latest legal threat: that subsidies are available to Americans who enrolled through “an exchange established by the state.” The justices appeared split on how to interpret that language.

Carvin called it a “straightforward case of statutory construction.” Even if one were to go beyond the language of law and look at congressional intent, he argued, Congress meant to differentiate between exchanges established by the state versus those created by the federal government.

Justice Elena Kagan, however, said it's important to consider the law's structure and context. Verrilli argued that the law's structure and context clearly suggest that subsidies should be available in all states.

Scalia countered that congressional intent doesn't matter. “The question is not whether this is the statute they intended, the question is whether this is the statute they wrote,” Scalia said.

The justices also spent a significant amount of time discussing how much weight to give to the word “such.” The text of the law says that if a state does not establish its own exchange, the HHS secretary shall “establish and operate such exchange within the state.” The Obama administration argues that the line shows that state and federal exchanges are equivalent in the eyes of the law, meaning subsidies should be available through both.

Scalia said he thought the government was both misinterpreting and putting “a lot of weight” on the word “such.” To say that it indicates the federal government can establish a state exchange is “gobbledygook,” Scalia said.

But Justice Stephen Breyer said that section paired with another section seems to indicate that only one type of exchange exists in the eyes of the law. “So what's the problem?” Breyer asked Carvin.

Observers were also watching for clues about whether the justices would apply the Chevron doctrine. The often-cited precedent says courts should defer to a federal agency's reasonable interpretation of the law where the statute is ambiguous.

Kennedy said that it seemed like “a drastic step” to give the IRS that discretion given the large amounts of money involved.

Roberts, meanwhile, suggested if the justices say the law is ambiguous and apply Chevron, that might allow a future administration to interpret the law differently.

That could be a problem for the government and the court, said Larry Vernaglia, chair of the healthcare practice at Foley & Lardner, which filed an amicus brief on behalf of Trinity Health siding with the government.

Deciding that the law is ambiguous would be “a way to resolve the case, but also would be an unfortunate outcome if the court wants finality, which it appears they do,” Vernaglia said.

Observers split on takeaways

Neal Katyal, a former acting solicitor general who represents the American Hospital Association, called Wednesday “a pretty extraordinary day for the government.”

But Michael Cannon, director of health policy studies for the libertarian Cato Institute and a key strategist behind the legal challenge, said after the arguments that he was optimistic about the challengers' chances. He noted Kennedy's skepticism about the idea that the court should defer to the IRS' interpretation of the law. “To do so would give the IRS a breathtaking amount of power,” Cannon said.

Tim Jost, a professor at Washington and Lee University and prominent advocate of the law, praised Verrilli's performance, saying he seemed in control of the case and familiar with little-discussed provisions of the law.

Verrilli's performance was widely panned immediately after his arguments in the 2012 case challenging the Affordable Care Act's requirement that all Americans be insured. The government ultimately prevailed in that case.

Jost said he felt the arguments went well for the government and there's a real chance Kennedy or Roberts will side with the government. Kennedy's comments convinced Jost that he's “very concerned” with the constitutional problems raised by the idea that “a clause buried deep in the tax code puts the states at risk of having millions of their residents lose health insurance and the destruction of their nongroup insurance markets.”

Paul Demko contributed to this story.