

# The Washington Post

## Supreme Court hears Obamacare challenge: Highlights from oral arguments

By Sandhya Somashekhar and Robert Barnes

March 4, 2015

*The Supreme Court on Wednesday heard oral arguments in a major challenge to the Affordable Care Act. Justices appear split along ideological lines in their questioning. Read the highlights of the oral arguments; a [full transcript can be found here](#).*

### **The chamber is packed, the stage is set**

**9:55 a.m.:** The house is packed to hear arguments in *King v. Burwell*, the case challenging the legality of health insurance subsidies provided in at least 34 states.

Among the notables spotted inside and outside the courtroom are Health and Human Services Secretary Sylvia Mathews Burwell; Cato Institute Director of Health Policy Studies Michael Cannon (who was instrumental in pushing this legal strategy); and several members of Congress, including House Minority Leader Nancy Pelosi (D-Calif.); Sens. Patty Murray (D-Wash.), Orrin Hatch (R-Utah), Lamar Alexander (R-Tenn.), Richard Durbin (D-Ill.) and Ron Wyden (D-Ore.); and Reps. Paul Ryan (R-Wis.) and Fred Upton (R-Mich.). Also present was former HHS secretary Kathleen Sebelius.

### **Ginsburg starts with a question about standing**

**10:08:** As arguments began, Michael Carvin, the attorney for the plaintiffs, hardly got a few words in before Justice Ruth Bader Ginsburg jumped in with a question about standing.

Carvin represents four Virginians who claim they were harmed by the IRS' interpretation of the part of the health-care law pertaining to subsidies. They do not want to buy health insurance, and say that if it weren't for the subsidies, they would be able to qualify for a hardship exemption from the penalty for failing to carry health insurance.

[Here's a report](#) from my colleague Robert Barnes on the issue. (The legal term "standing" separates those who simply don't like a law from those who are hurt by it.)

But questions have come in the past about whether all these plaintiffs really have standing here. One of the plaintiffs served in the military, raising the question of whether he could get coverage through the VA. One is a woman nearing 65, the age at which Medicare kicks in. Another earns a low enough income that she could potentially get a hardship exemption.

No one disputes that the fourth plaintiff would likely be affected, and among his retorts, Carvin notes that it only takes one plaintiff with standing to bring a case.

### **Kagan offers a hypothetical regarding Congress' intent**

**10:15:** Justice Elena Kagan suggests a hypothetical might be useful in thinking through whether Congress meant for the subsidies to go to everyone or just the states that proactively set up health insurance exchanges.

She has three clerks, she says: Will, Elizabeth and Amanda. She asks Will to write a memo and Elizabeth to edit it. If Will is too busy, Amanda is to write it. If Will is too busy to write it, should Elizabeth edit it? she asks, eliciting a round of laughter from the audience.

“It’s obvious that Elizabeth should edit the memo,” she says.

### **Sotomayor: ‘Tell me how that is not coercive’**

**10:22:** “I’m a little concerned with how you envision this provision working,” Justice Sonia Sotomayor told Carvin.

The federal government cannot force states to set up exchanges because it violates state sovereignty under the Constitution. Without the subsidies, she says, the insurance markets in states relying on the federal exchange will likely collapse, which is referred to as a “death spiral” – a disastrous and untenable consequence.

“Tell me how that is not coercive in an unconstitutional way,” Sotomayor said.

### **Kennedy echoes Sotomayor’s concerns**

**10:25:** Aside from one or two quick interjections, the first 20 minutes of this hearing have been largely the court’s liberals absolutely grilling Carvin. But Justice Anthony M. Kennedy, the court’s traditional swing vote, finally chimed in, echoing Sotomayor’s concerns about the constitutional implications of Carvin’s reading of the act’s subsidy provision.

“It does seem to me that there is something very powerful to the point 15 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,” Kennedy told Carvin. He added: “It seems to me that under your argument — perhaps you will prevail in the plain words of the statute — there’s a serious constitutional problem if we adopt your argument.”

Carvin responded that, by that logic, many government programs where federal funding to states is contingent on a level of participation by the state are unconstitutional – like No Child Left Behind, for example.

### **The ‘never-ending saga’ of Obamacare challenges**

**10:29:** Justice Elena Kagan made a wry reference to the health law’s repeated court challenges, at least three of which have come before the court. With a weary voice, she called it a “never-ending saga,” coaxing another round of laughter from the audience.

### **Carvin pushes back**

**10:32:** In response to justices who asked how the broader law makes sense under his interpretation of the subsidies section, Carvin countered that his interpretation is the only one that would make sense to “a rational, English-speaking person.”

Why, he asks, would someone use “established by the State” when the person actually means established by the state or federal government?

### **Carvin gets a tiny assist from Alito**

**10:38:** The conservatives have been largely quiet, but Justice Samuel A. Alito Jr. piped up briefly in a way that Carvin interpreted as support.

Justice Elena Kagan, who has dominated this hearing thus far, noted that the section of the law that is in question is a relatively obscure and technical one, an odd place to put something so important as the fact that states must set up their own exchanges to get subsidies for their citizens. Carvin responded that the subsidies are actually granted in the form of tax credits, and “where else would you expect a tax credit except in the tax code?”

“If I were a state official ... and I wanted to know whether individuals ... would get a credit, where would I look?” Alito asked.

“Exactly,” Carvin responded.

But Kagan was unpersuaded. “I think the place I would look to find out about my choices is in the provision of the statute that talks about my choices.”

Carvin, however, said states would have been crystal-clear on the issue had the IRS “done its job” and told states that they were giving up subsidies by failing to set up exchanges.

### **Carvin’s time extended**

**10:38:** The justices apparently have a lot more questions for Carvin. They are giving him more than the initial 30 minutes allotted to make his case.

## **Breyer and Kagan raise ‘anomalies’**

**10:42:** Justice Stephen G. Breyer asked Carvin about the effect of the law broadly if the language “established by the State” is interpreted only to mean state-based exchanges and not the federal exchange, HealthCare.gov.

Based on that reading, for example, no one in a federal exchange state would be considered “qualified” to buy coverage on the exchange. As Kagan said in bolstering Breyer’s line of questioning, “There will be no customers and, in fact, there will be no products” on the exchange.

But Carvin countered that people would not drop out en masse from the exchanges, suggesting that “there are numerous defenses” that the federal government could turn to.

## **It’s the Obama administration’s turn**

**10:50:** The justices spent 40 minutes questioning Carvin before turning to Donald Verrilli, the solicitor general, to argue the Obama administration’s case.

Verrilli began by addressing the question of the plaintiffs’ standing, which Ginsburg had raised with Carvin. He said there is no way for the government to know whether the plaintiffs have standing to challenge the IRS rule, because it depends on how the math worked out on their taxes this year, something only the plaintiffs know. But he conceded that at least one of the plaintiffs probably has standing.

## **Scalia is skeptical**

**10:55:** Verrilli said that the government had the better reading of the statute, because Carvin’s restricted view of who should receive subsidies would render the ACA “an incoherent statute that doesn’t work.”

“That cannot be the statute that Congress intended,” Verrilli said.

“Of course it could be,” Justice Antonin Scalia responded. “The question is whether it’s the statute that they wrote,”

## **Verrilli pushes back against Alito**

**10:59:** Justice Samuel A. Alito Jr. asked Verrilli whether he agreed with Justice Anthony M. Kennedy that the act might be unconstitutionally coercive if it forced states to either set up exchanges or deny benefits to its citizens.

Verrilli resisted, saying that the government was not making that assertion. But he said it provides “another very powerful reason to read the statutory text our way.”

## **Alito says individuals may not lose subsidies immediately**

**11:05:** One of the concerns raised by the administration is that an adverse decision by the Supreme Court could immediately deny benefits to as many as 7.5 million people and cause a crisis for insurance companies.

But Justice Samuel A. Alito Jr. raised the possibility that the court could find for the challengers and delay the impact of its ruling until the first of the year. That would give the states and Congress time to fix any problems, he said.

Verrilli said it would be “completely unrealistic” to think that states could adjust in six months.

Justice Antonin Scalia said Congress could fix the problem, and would not sit by idly if there were a crisis.

“Well, this Congress, your honor, I ... I ...” Verrilli said.

His remark drew laughter in the chamber, and a smile from House Democratic Leader Nancy Pelosi, who was sitting in the front row.

### **Verrilli says states did not know residents wouldn't receive subsidies**

**11:08:** Verrilli said that if Congress was intending to send a messages to states that their residents would not receive benefits unless the state itself set up an exchange, it would have made that clear “in neon lights.” Instead, the four words “established by the State” were buried in a subclause of the bill.

Justice Antonin Scalia said that might simply be a feature of what he said was not the “most elegantly” written law. “Among its other imperfections,” Scalia said, this one “doesn't strike me as inconceivable.”

### **Alito asks toughest question**

**11:12:** Justice Samuel A. Alito Jr. asked Verrilli what seemed to be the toughest question for him to answer: Why does the law use those four words, “established by the State,” if it meant federal exchanges could substitute? Why not say exchanges established “in the state?” Alito asked.

Verrilli said the context of the law made it clear that the words “worked perfectly well this way.” He noted that the law directs federal authorities to establish “such” exchanges if the states decline.

Justice Antonin Scalia said Verrilli was putting a lot of weight on the word “such.”

“That is gobbledygook,” Scalia said.

### **If it's ambiguous, does government win? Roberts finally speaks.**

**11:26:** When a law is ambiguous, the court often defers to the agency in charge of administering it. The U.S. Court of Appeals for the 4<sup>th</sup> Circuit said just that, and that the IRS' interpretation that subsidies were available to all was a reasonable one.

Verrilli resisted questions about ambiguity, saying it was clear. But if not, he said, the agency does deserve deference.

But Justice Anthony M. Kennedy said he was concerned about giving the power to allocate billions of dollars in subsidies to an agency.

It was then that Chief Justice John G. Roberts Jr. asked his only substantial question. If it was up to the agency to decide, he asked Verrilli, could a new administration change the decision?

Verrilli said its action would have to be consistent with an accurate reading of the law

### **So what happens next?**

The court will meet on Friday and vote on the case. This will probably determine the outcome, though the public may not know the result for several months.

### **Well, when will we know?**

A case as important as this one tends to take some time. The ruling will be issued once the majority has agreed upon an opinion and, if there are dissenters, when those opinions are ready as well. The court's only deadline is that it tries to finish its work by the end of June.

### **Some more background on the case**

In November, the justices [announced that they would hear](#) the case, the most serious challenge to the Affordable Care Act since finding it constitutional in 2012.

The ACA — that's Obamacare to you — created marketplaces that let people shop for health insurance. If states didn't build their own exchanges, the federal government did it for them. The challengers say the language of the law provides subsidies for only those exchanges that are set up by states.

Millions of people are at risk of losing their subsidized insurance if the justices rule against the administration. [Lena Sun and Niraj Chokshi found who they are](#): Many of the people who get the subsidies through the federal exchange are white and live in the South. Half have full-time jobs. To qualify for subsidies, they must earn between \$11,500 and \$46,680 a year as individuals, or between \$25,850 and \$95,400 for a family of four.

Sun and Chokshi [told the stories of some of those people](#), including Erin Meredith of Austin, who wasn't a fan of Obamacare but signed up for a health plan when she felt she had no other choice.

Now that she has coverage, she doesn't want to lose it. "I can still feed my kids and put gas in my car," she said. "I'm not trying to go to Cancun or carry a Michael Kors bag. I drive a 2009 Mazda, and I'm just trying to make it in my little apartment and not be on government assistance."

At issue in the case are six words: "an Exchange established by the state." Lisa Rein looked into why the Obama administration rule-writing officials in the Internal Revenue Service and its parent agency, the Treasury Department, ultimately interpreted the language the way they did. Fundamentally, those officials decided that the more expansive reading of the law had to be correct for it to succeed — and that Congress wouldn't have passed a law that it wanted to fail.