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# Although the ACA is 1,000 pages long, its future may depend on a single phrase

By Mark Walsh

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The Affordable Care Act is some 1,000 pages long, and it survived largely intact in a 193-page 2012 U.S. Supreme Court decision that upheld President Barack Obama's signature health reform law as an exercise of Congress' taxing powers.

Now, a mere eight words in the statute—and one Internal Revenue Service regulation—may threaten the future of the act.

The justices will hear arguments March 4 in *King v. Burwell*, a challenge to the IRS rules that extend subsidies to taxpayers in the 34 states that have refused to establish their own health insurance exchanges under the ACA and instead are relying on the federal marketplace.

Because the complex law depends on three principles—tax help for participants, shared responsibility (meaning the individual coverage mandate) and reforms of the insurance market—to extend health coverage to more Americans, a decision that significantly hobbled one leg of that stool would undermine the entire law, observers believe.

The case "is the most existential threat to the viability of the Affordable Care Act in about three dozen states," says Ron Pollack, the executive director of Families USA, a Washington, D.C., group that lobbies on behalf of health care consumers and is a strong supporter of the ACA. "The stakes are very high."

Michael A. Carvin, the Jones Day lawyer who will argue on behalf of four Virginia residents behind the latest ACA challenge, says the case is "all about the rule of law."

"Do you alter the law that was enacted to achieve a policy endorsed by the executive or judicial branches?" he asks. "No, you have to interpret the law as it is written, because we are a nation of laws—not men."

The ACA authorizes federal tax-credit subsidies for health insurance that is purchased through—as the eight key words seized on by the challengers put it—an "exchange established by the state under Section 1311." That section provides carrots and sticks for the states to establish their own health care exchanges, or marketplaces. Another ACA provision, Section 1321, was a backup allowing the U.S. Department of Health and Human Services to establish a federal exchange for

those states that failed to establish their own. That exchange was offered on the HealthCare.gov site.

**PARTISAN DIVIDE**

Few people contemplated that antipathy toward the ACA would drive so many states to refuse to establish exchanges. "Congress did not expect the states to turn down federal funds and fail to create and run their own exchanges," one federal judge put it when the case was first decided Feb. 18, 2014. Amid that political landscape, the IRS in 2012 promulgated rules extending tax subsidies to income-qualified participants in states served by the federal exchange.

Some members of Congress questioned the interpretation, and two scholars, Jonathan H. Adler of Case Western Reserve University School of Law and Michael F. Cannon of the Cato Institute, published an influential law review article in 2013 that called the IRS rule illegal.

"The IRS … cited not legislative history or statutory authority for what it did," says Cannon, director of health policy studies at the libertarian D.C. think tank. "They knew the relevant language of the statute did not permit them to do what they wanted to do, but they did it anyway. They just rewrote the statute."

Several lawsuits were organized by groups opposed to the ACA. In *King*, four residents of Virginia—which does not have its own exchange—say they would be subject to the ACA's individual mandate to purchase insurance solely because of the IRS rule. Eligibility for a subsidy triggers the individual mandate for a range of low- and middle-income taxpayers who might otherwise be exempt because of their modest household incomes—and thus not subject to a tax penalty for not purchasing insurance.

Both a federal district court and the 4th U.S. Circuit Court of Appeals at Richmond, Virginia, upheld the IRS rule and the Obama administration's interpretation of the law. A panel of the appeals court ruled 3-0 on July 21 that the statute was "ambiguous and subject to multiple interpretations," and thus the agency's interpretation deserved deference.

Just hours earlier that day, a panel of the U.S. Court of Appeals for the District of Columbia Circuit had ruled 2-1 that the ACA "plainly makes subsidies available only on exchanges established by states."

A federal district court in Oklahoma, ruling in September in favor of that state's challenge to the IRS rule, criticized the Obama administration's defense of it as "lead[ing] us down a path toward Alice's Wonderland, where up is down and down is up, and words mean anything."

The high court stepped into Alice's rabbit hole and granted review of the Virginia case in November, casting off the Obama administration's plea that it should wait because the D.C. Circuit had granted en banc review of the case known as *Halbig v. Burwell*.

There was immediate speculation that the four conservative justices—Antonin Scalia, Anthony M. Kennedy, Clarence Thomas and Samuel A. Alito Jr.—who were in dissent in 2012 in *National Federation of Independent Business v. Sebelius* on the constitutionality of the individual mandate, were seeing the Virginia case as a fresh opportunity to gut the ACA. That is,

if they could persuade Chief Justice John G. Roberts Jr., who wrote the majority opinion in *NFIB*, to come back to the conservative fold.

**CONTEXT IS KEY**

The challengers' reading of the ACA rests on an out-of-context "misreading of a single phrase" and "would thwart the act's core reforms in the 34 states that exercised their statutory prerogative to allow HHS to establish exchanges for them," U.S. Solicitor General Donald B. Verrilli Jr. said in a brief. "Those states would face the very death spirals the act was structured to avoid, and insurance coverage for millions of their residents would be extinguished."

Verrilli maintained the law was designed on the idea that tax subsidies are available to participants in every state. "The act was debated, evaluated and passed under the universal understanding that tax credits would be available in every state—including states with federally facilitated exchanges," he wrote.

Jane Perkins, the legal director of the National Health Law Program, a Washington, D.C., group that backs the ACA, says the justices shouldn't focus on the key eight words of the statute cited by the challengers.

"As a lawyer who has often applied principles of statutory construction, I don't think you can isolate these words the way the plaintiffs have," she says.

Supporters of the law warn that a decision against the IRS rule would have serious repercussions for the viability of the law.

The D.C.-based Urban Institute predicted in a January report that the elimination of premium tax credits in the states without their own exchanges would increase the number of uninsured Americans by 8.2 million and deplete insurance markets not tied to group plans.

Perkins says that among the practical problems would be that federal funding for creating such exchanges has been used up, and that some states have passed laws prohibiting the establishment of their own exchanges.

"They can't turn around a barge on a dime," she says.

The Cato Institute's Cannon argues that the *King* case does not challenge the ACA itself—only what he and others view as an unlawful use of regulatory power to expand the law. And any removal of individuals from health insurance rolls would not be the fault of the lawsuit.

"It is not the job of the Supreme Court to look beyond the statute to its effects," he says. "That is the job of Congress."

But Pollack of Families USA, a former dean of Antioch School of Law (now the David A. Clarke School of Law at the University of the District of Columbia), notes that House Republicans have repeatedly tried to overturn the ACA, and that Republicans took over the Senate this year.

“If the *King* case comes down adversely [to the ACA and its supporters],” he says, “opponents in Congress will have significant leverage” over the law.

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