Questions of Context, Practical Effect Highlight Oral Arguments in King v. Burwell

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The Supreme Court of the United States today heard oral arguments in King v. Burwell, a case that could make the 2010 Affordable Care Act (ACA) unworkable in most states by eliminating premium subsidies for 7.5 million Americans; this would make coverage unaffordable and disrupt markets in those states.

The 6 simple words, "an Exchange established by the State," and their possible impact, were discussed by the justices for more than the allotted 1 hour, as the court was sharply divided; Justice Anthony Kennedy appeared, once again, to be the swing vote.

The case began when an ACA opponent combed through the law looking for potential weaknesses, and it has become the most serious threat to President Obama's signature legislation since the challenge to the individual mandate. It even involved the same attorney, Michael Carvin, who brought the constitutional challenge to the ACA in 2012. The case boils down to this: does the plain reading of the ACA mean that premium subsidies only benefit those who live in states that set up their own exchanges? Such a ruling would cancel financial help for consumers in 34 states that use HealthCare.gov, the federal exchange. Three other states have exchanges but use the federal website to calculate subsidies.

Early questioning of Carvin, the attorney for the plaintiffs, by the liberal wing of the court turned on the question of context—could the law function constitutionally if were permitted to stand as the petitioners suggest? In particular, a hypothetical instance posed by Justice Elena Kagan forced the petitioners to concede that context matters. Justice Kennedy said he appeared to see "a serious constitutional problem" if Congress were to require states to set up exchange, or risk seeing their consumer lose access to tax credits and their insurance markets damaged. Of note, Justice Kennedy compared this to the first challenge of the ACA, in which the court ruled that states could not be forced to expand Medicaid, and thus far only 29 have. Making this ruling consistent with the 2012 decision will be critical, several observers believe.

The liberal justices grilled Carvin on the practical fallout of accepting his argument, with Justice Ruth Bader Ginsburg saying that without subsidies there would be no benefit to using the exchanges; when Carvin disagreed, Justice Ginsburg asked what those benefits would be. Later on, Justice Kagan told Carvin that today's argument wasn't squaring with what he told the court during the 2012 challenge.

In the affected states, an estimated 87% of consumers who bought coverage through HealthCare.gov receive some assistance, with the average subsidy totaling $268. There are no fallback plans for what to do if the court eliminates the subsidies, although some believe the court might grant a grace period to allow states to set up exchanges or for Congress to correct the law. In her final point, Justice Kagan said that if Congress intended such dire consequences for states that did not set up their own exchanges, it would have done so more explicitly.

A recent report published by the Kaiser Family Foundation predicted widespread market disruption if the court eliminates the subsidies, with healthy consumers who no longer receive financial help opting against any coverage, which would send premiums into a "death spiral" as insurers seek to cover losses, a scenario cited early on in oral arguments by Justice Sonia Sotomayor. Some insurers would pull out of certain markets if they did not believe regulators would allow rate increases to support costs. The ability to keep rates "affordable" would be in doubt, threatening the nature of the ACA.

Solicitor General of the United States Donald Verrilli took the podium well past his scheduled time. His first argument was simple: the government interprets the statute as making subsidies available on both state and federal exchanges, and his second was that this reading is "compelled by" the ACA's overall design. Absent such an interpretation, states would lack flexibility and market disruption would result. Congress simply could not have intended the chaos that would come with the petitioners' request. But Justice Antonin Scalia argued otherwise: of course Congress could have.

Verrilli, however, noted that no one seemed to know about this possibility—not the IRS in publishing regulations, not the states who submitted comments, not the HHS. Justice Kennedy asked, however, whether that could lead to a circumstance of reading a statute in a manner of avoiding finding it unconstitutional.

But Justice Samuel Alito raised what he called the "puzzle" at the heart of the case: why does the statute say exchanges "established by the state" if the intent is to include both federal and state mechanisms? Verrilli could not answer directly.

How We Got Here

The challenge stems from language which says that subsidies are available to those consumers who are enrolled "through an Exchange established by the State under 1311," which is a separate section of the ACA that sets up state-based exchanges. Not long after the law passed, a former

US Justice Department official and attorney, Thomas Christina, seized upon this language during a presentation at the American Enterprise Institute, saying it was problematic.

Word of his discovery spread among conservative groups and opponents of the ACA, including Jonathan Adler, a law professor at Case Western Reserve University, and Michael Cannon, director of health policy at the Cato Institute. Not long after the IRS published regulations that declared consumers in all states would be eligible for subsidies, the pair wrote an op-ed in the Wall Street Journal about the problem in the ACA's language. For opponents of the law, the search was now on for plaintiffs who lived in states without exchanges who would have standing in court.

In David King, the lead plaintiff, opponents believed they had found their man. The 64-year-old Vietnam veteran, a resident of Fredericksburg, Virginia, didn't want to buy health insurance but the ACA required him to obtain coverage. A limo driver earning $39,000 a year, King qualified for a premium subsidy that reduced his monthly costs from $648 to $275. But without the subsidy, King could be exempt from the individual mandate because the cost of coverage would be unaffordable. (There are 4 plaintiffs in the case.)

Competing rulings emerged from 2 different appeals courts in July. The Supreme Court declined to take the case before the midterm election, then accepted the case shortly after on November 7, 2014.

Early reports from the courtroom indicated that Justice Ginsburg immediately questioned petitioners' attorney Carvin whether the male plaintiffs, including King, have standing; specifically, she inquired whether their status as veterans qualified them for health coverage through the Veterans' Administration. However, Verrilli accepted that there is standing and expressed a desire to decide the case on its merits.

To some, it is the subsidy itself that forces King to buy coverage; without it, he might qualify for a hardship exemption, thus escaping the tax penalties that fall on those who fail to obtain coverage under the individual mandate. If the plaintiffs win, the fact that ACA opponents caused subsidy to vanish will make for things interesting if the IRS seeks to enforce tax penalties. This year, for example, it was ACA supporters who were seen assisting consumers with hardship exemption applications in states that declined to expand Medicaid for those earning between 100% and 138% of the federal poverty level.

The Government's Argument

Obama Administration officials argue that that the federal exchanges are, in essence, the same as state exchanges. Specifically, the language of the ACA states that when a state doesn't set up its own marketplace, the federal government "shall establish and operate such exchange."

The word "such" will be critical—for the purposes of the law, the solicitor general argued that the exchanges are one and the same. More important, however, the government will assert that any reasonable person reviewing the entire law will find it obvious that Congress intended for subsidies to apply across the land, whether or not a state set up its own exchange.

A host of supporters of the law have come forward, in interviews, op-ed pieces, and amicus briefs, to assert that the plaintiffs' argument makes no sense. The wording cited may be a drafting error, but it was hardly the intent of Congress to exclude millions of Americans from premium subsidies that are a core component of the law. To exclude those consumers whose states used the federal exchange from receiving financial assistance, supporters argue, would be setting up the law to fail.

Amicus briefs have been filed by current and former Democratic members of Congress who were in control at the time the ACA passed, who state that there is no doubt they intended for all Americans to have access to subsidies. Former Rep. George Miller, D-California, current Rep. Sander Levin, D-Michigan, have filed briefs. Staffers who worked on the law have uncovered emails supporting the idea that subsidies would be available to all consumers.

Key advocacy groups that supported ACA's passage, including the American Diabetes Association, American Cancer Society, the American Heart Association, and the Multiple Sclerosis Society have also filed briefs, saying that they would not have done so if some consumers would have been ineligible for subsidies.