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Health reform law clear on allowing subsidies, Obama administration says

By Lisa Schencker
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The nation's health care reform law is clear in allowing Americans in all states to get insurance premium tax credits as Congress intended, the Obama administration argues in its main brief filed with the Supreme Court in the widely watched *King v. Burwell* case.

"I think it's a very powerful brief," said Tim Jost, a law professor at Washington and Lee University and supporter of the law. "I think what the government's brief does is to say this case is about the text of the statute, but the entire text of the statute, not just four words."

But Michael Cannon, director of health policy studies for the libertarian Cato Institute and a key influence behind the legal challenge, said the brief "very helpfully shows just how silly the government's case is." Mr. Cannon has filed an amicus brief in the case siding with the law's challengers.

The brief, filed last week, lays out the administration's arguments in the closely watched case, which many say has the potential to sink the law itself. The case centers on the question of whether the IRS is correct to interpret the Patient Protection and Affordable Care Act to allow premium tax credits for consumers in states that have not established their own insurance exchanges and are instead relying on the federal HealthCare.gov exchange.

Petitioners in the case argue that a sentence in the law that says the credits are available to Americans who enrolled through an exchange "established by the state" means the credits should not be available everywhere. They argue it's implausible that Congress would have wanted to leave the law's interpretation up to the IRS.

The administration, however, in its new brief, makes a number of arguments, including that the law is clear, when read fully, in allowing tax credits in all states. The brief cites a number of other places in the law that the administration says prove that the credits were meant to be available to individuals in all states.

“If you look at the entire text of the 1,000-page statute there are many provisions in the statute, and frankly the administration could have cited many more … that just don't make sense unless you read the statute the way it's written, which is that the federally facilitated exchanges are a fallback that Congress created because it realized that not all states would establish exchanges,” Mr. Jost said.

The administration also calls the phrase “established by the state” a “term of art” that includes the federally established exchange.

It's a valid argument, said Nicholas Bagley, an assistant professor of law at the University of Michigan and supporter of the law. There's a great deal of evidence within the text of the law that Congress simply used that phrase as a “convenient reference for exchanges of whatever kind,” Bagley said.

'The giggle test'

But Mr. Cannon said the argument that the words are a term of art “does not pass the giggle test.”

“I would not be surprised if one or more of the justices took the government to task for making such a silly argument,” Mr. Cannon said.

The administration also argues in its brief that wide availability of tax credits is essential to the law's insurance market reforms.

If tax credits were to disappear in states without their own exchanges, most of the people now relying on those credits would be exempt from the requirement to purchase coverage because they would no longer be able to afford it, according to the government. That, in turn, would lead to too few people in the insurance market, which would lead to so-called “death spirals” of premium increases and enrollment decreases, according to the government.

“Petitioners' contrary rendering of the act — which rests on a contextual misreading of a single phrase in two subclauses of Section 36B and an implausible account of the act's design and history — would thwart the act's core reforms in the 34 states that exercised their statutory prerogative to allow HHS to establish exchanges for them,” according to the government's 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.”

When an interpretation of a law would overthrow that same law's structure and design “it must be rejected,” the government argues.

The brief also argues that the legislative record shows Congress understood the tax credits would be available in all states.

“During the time the act was under consideration, no member of Congress ever suggested that tax credits would be available only in states that established their own exchanges — even though the language on which petitioners rely was in draft bills for months before the act was enacted,” according to the brief. “Any such suggestion would have produced a firestorm of controversy, but there was none.”

That's contrary to the petitioners' brief, filed Dec. 22, which argues that Congress intended to limit the tax credits to those states that established their own exchanges. The law's challengers argue in their brief that Congress wanted tax credits nationwide but also wanted state-established exchanges, and limiting credits to states with their own exchanges was perhaps the only way to get both.

The administration also argues in its new brief that though the law is clear, if the court believes it to be ambiguous it should apply the Chevron doctrine upholding the IRS' interpretation. The Chevron doctrine says that federal agencies must follow the letter of the law where the law is clear. But if courts using the Chevron analysis determine a law to be ambiguous, they must defer to an agency's reasonable interpretation.

Mr. Cannon, however, said the government's argument masks its true purpose. The administration is arguing the law is clear to “create the appearance of an ambiguity,” so the court uses Chevron and defers to the IRS' interpretation, Mr. Cannon said.

But Mr. Bagley called the government's brief “terrific” in laying out the administration's main arguments.

“What the government says is, 'We think the statute is clear. Congress didn't mean to withdraw tax credits, but if you don't agree with us, even if you think the statute is ambiguous about whether tax credits are available in states that decline to establish exchanges, the IRS is owed deference,'” Mr. Bagley said.

So far, more than 20 so-called friend-of-the-court briefs have been filed in the case siding with the law's challengers, including by a number of conservative groups and the state of Oklahoma. Wednesday is the deadline for amicus briefs in support of the government, Mr. Jost said. He expects a host of briefs from states, members of Congress, health insurers, hospitals and academics.

Lisa Schencker writes for Modern Healthcare, a sister publication of Business Insurance.