Modern Healthcare

Reform law's fate will hinge on how justices interpret a few words

By Lisa Schencker

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After months of nervous speculation, it's finally the U.S. Supreme Court's turn this week to consider the legal case that could solidify or savage President Barack Obama's landmark healthcare reform law.

The justices on Wednesday will hear arguments in King v. Burwell, which turns on whether the language of the Affordable Care Act allows Americans in up to 37 states using the federal insurance exchange to receive premium tax credits. The Internal Revenue Service has interpreted the law to allow subsidies in all states. But the four individual plaintiffs challenging the rule say the ACA language is clear and that interpretation is wrong.

Experts say ending premium subsidies in states with federal exchanges would cause millions of Americans to lose coverage and would severely disrupt the individual insurance market, potentially forcing the White House and Congress to renegotiate the law.

Oral arguments could offer clues on how the justices might rule. Observers will be particularly watching the questions and reactions from Chief Justice John Roberts and Justice Anthony Kennedy, who are considered potential swing votes. The high court's ruling is expected in June.

Here is a rundown of some of the key legal arguments likely to play out Wednesday.

The meaning of six words

Sect. 1401 of the ACA says the premium tax credits are based on premiums for plans offered through "an Exchange established by the State." If the law's opponents have their way, the justices will focus solely on those six words.

The challengers argue that phrase means the subsidies should be available only in states that have set up their own exchanges. The government counters that the phrase is a "term of art" that includes the federally established exchange. When read in context, the government argues, the law is clear in allowing subsidies in all states.

Tim Jost, a law professor at Washington and Lee University, said the challengers will argue that those few words should be decisive in disallowing the subsidies, whereas the government will argue that the entire text of the law must be considered.

At least four of the justices, led by Antonin Scalia, are often identified as textualists. They say the proper way to interpret a statute is to examine its language in context, rather than looking at legislative intent or history. Roberts and Justices Clarence Thomas and Samuel Alito also tend to be textualists, said Todd Gaziano, a senior fellow in constitutional law with the conservative Pacific Legal Foundation, which has filed a separate lawsuit challenging the ACA.

Supporters of the ACA say a textual approach should produce a win for the Obama administration because the law as a whole supports subsidies in all the states. “Justice Scalia has been arguing for years that textualism is sophisticated and contextual, and what the challengers are arguing here is the opposite,” said Abbe Gluck, a Yale Law School professor. The challengers in the case argue that even when those six words are read in context, the law is still on their side.

ACA objectives and structure

ACA opponents claim Congress intended to limit subsidies to state-established exchanges to persuade all states to establish their own exchanges. But the government argues that the law's “text, structure, design and history” refutes that. The law's objective, the government says, was to ensure affordable coverage for all Americans and that the premium subsidies available in all states are part of a three-part structure to achieve that.

But the challengers say Congress' intent doesn't matter. “Congressional intent is not the law,” said Michael Cannon, director of health policy studies for the libertarian Cato Institute and a key strategist behind the legal challenge.

The meaning of “such”

The government makes its own textual argument relying not on six words, but on two—“such exchange.”

Sect. 1321 of the ACA says that if a state does not establish its own exchange, HHS' secretary shall “establish and operate such Exchange within the State…” The government argues that the “such exchange” language shows that state and federal exchanges are equivalent, and therefore premium subsidies should be available through both. The dictionary definition of the word “such” is “of the type previously mentioned.” Scalia has cited dictionary definitions in his opinions.

“The reason 'such' is important is because it makes clear that what the federal government is doing is operating the state exchange,” Gluck said. “The Affordable Care Act does not mention

or define anywhere the concept of a federal exchange. The only kind of exchanges that exist are state exchanges."

Nicholas Bagley, an assistant law professor at the University of Michigan who supports the law, said the words "such exchange" provide "a pretty good signal that Congress meant the federal government to step into the shoes of the state." But Cannon said other parts of the law show that interpretation of "such exchange" is incorrect.

The Chevron doctrine

The justices are likely to consider applying an often-cited precedent for interpreting statutes that was established in the 1984 Supreme Court ruling in Chevron USA v. Natural Resources Defense Council. In that case, the court held that federal agencies must follow the letter of the law where the law is clear. But if a law is ambiguous, courts must defer to a government agency's reasonable interpretation of it.

Both sides in the King case argue that the law is clear and not ambiguous, but they disagree about what its "clear" language says. A 4th U.S. Circuit of Appeals panel found that the ACA's language was ambiguous, applied the Chevron doctrine, and unanimously upheld the IRS' interpretation of the ACA.

The legal standing issue

In recent weeks, the Wall Street Journal and Mother Jones magazine have published reports questioning whether the four Virginia plaintiffs in the case have legal standing to bring their case before the federal courts.

To have standing, the plaintiffs must show that they were injured by the law. They claim that because of the premium subsidies, they are being forced to buy health insurance. But the media reports have suggested that none of the four may fall under the law's mandate to buy coverage, either because their incomes are too low or because they may qualify for other coverage.

Roberts and Scalia have emphasized the importance of standing in determining whether the federal courts have jurisdiction over a matter. Bagley predicted that the justices will ask questions about the plaintiffs' standing. But Jost doubted it will become an issue.

It is possible the justices could ask for supplemental briefings about the standing issue after oral arguments, said Lisa McElroy, an associate professor of law at Drexel University. If the justices find that none of the plaintiffs have standing, she said, they could dismiss the King case without addressing its merits.

Highlights from friend-of-the-court briefs

Opposing the government's position

Republican Sens. John Cornyn, Ted Cruz, Orrin Hatch, Rob Portman and Marco Rubio, and Republican congressmen Dave Camp and Darrell Issa: “The plain text of the ACA reflects a specific choice by Congress to make health insurance premium subsidies available only through 'an Exchange established by the State.' … The executive should not be able to accomplish through grasping agency rulemaking, and friendly judicial review, what it could not accomplish in legislative negotiations.”

Alabama, Georgia, Indiana, Nebraska, Oklahoma, South Carolina and West Virginia: “… the federal government's payment of a subsidy … triggers costly obligations for employers within that State (including the States themselves), placing such States at a competitive disadvantage in employment.”

Supporting the government's position

HCA Inc.: “… The consequences of Petitioners' interpretation are so absurd that Congress could not possibly have intended them.”

American Hospital Association, Federation of American Hospitals, Association of American Medical Colleges and America's Essential Hospitals: “Petitioners' position, if accepted, would be a disaster for millions of lower- and middle-income Americans … That—emphatically—is not what Congress intended when it enacted a statute to create 'near universal coverage.' More importantly, it is not what Congress wrote.”

California, Kentucky, Massachusetts, Pennsylvania, Virginia and 17 other states: “Congress did not give States clear notice that their citizens would be punished and their insurance markets ruined if the States chose (a federal exchange).”

America's Health Insurance Plans: “… The lack of tax credits in the (federal exchanges) would alter the fundamental dynamics of those markets in a manner that would make insurance significantly less affordable even to those who would not rely on subsidies.”

The opposing lawyers who will argue King v. Burwell

U.S. Solicitor General Donald Verrilli Jr.

Verrilli, who became solicitor general in 2011, previously served as deputy counsel to President Barack Obama and as an associate deputy attorney general in the Justice Department. In 2012, he argued the case for the government in National Federation of Independent Business v. Sebelius. Even though his delivery was widely criticized, the Supreme Court upheld the constitutionality of the Affordable Care Act's individual mandate by a 5-4 vote while allowing states to opt out of the law's Medicaid expansion.

Michael Carvin

Carvin, a partner at Jones Day in Washington, will argue for the four individual plaintiffs challenging the ACA. He was one of the lawyers who argued for ACA opponents in the 2012 NFIB v. Sebelius case before the Supreme Court. In addition, he was one of the lead lawyers who argued the presidential election recount case before the Florida Supreme Court in 2000 on behalf of George W. Bush.