

Modern Healthcare

In Supreme Court subsidies showdown, whose side is Ben Nelson on?

By Lisa Schencker

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Obamacare opponents say a former Democratic senator's comments prove Congress didn't intend to grant insurance premium subsidies to states without their own exchanges. A new brief filed in the Supreme Court uses that same senator's words to show the opposite conclusion.

It's one of a number of arguments made by congressmen, professors and healthcare organizations who submitted arguments supporting the Obama administration's position in *King v. Burwell* on Wednesday, the deadline for amicus briefs in the case. The Supreme Court is scheduled to hear the case in March, and some say the outcome could undermine the core of the Patient Protection and Affordable Care Act.

At issue is a phrase in the ACA that says tax credits are available to Americans who enrolled through an exchange “established by the state,” and the parties that brought the case argued that the Internal Revenue Service illegally extended the tax credits to consumers buying coverage in 34 states that relied on HHS to operate their insurance marketplaces.

In a brief filed in support of that argument, they point out that former Sen. Ben Nelson (D-Neb.) at the time called the idea of a national exchange a “dealbreaker.” Nelson was the last holdout for the Democrats to gather the 60 votes they needed to pass the bill.

“For Nelson and some other Senators, it was important to keep the federal government out of the process, and thus insufficient to merely allow states the *option* to establish Exchanges,” the brief's authors argue. “Rather, states had to take the lead role, which, given the constitutional bar on compulsion, required serious incentives to induce such state participation. The robust incentives provided by the ACA, and in particular, the conditioning of tax credits on state-run Exchanges, were thought sufficient to do so.”

Nelson, however, now says he expected subsidies would be available in all states. A new brief filed by 17 current and former members of Congress and more than 100 state lawmakers quote from a recent letter Nelson wrote to Sen. Robert Casey Jr. (D-Pa.) to support the administration's position. "I *always* believed that tax credits should be available in all 50 states regardless of who built the exchange, and the final law also reflects that belief as well," Nelson wrote.

Neera Tanden, president of the Center for American Progress, a progressive nonpartisan educational institute, said it's a powerful argument that could make a big difference in the case. "I think this has a devastating impact on the arguments the petitioners are making," she said.

Of course, not everyone agrees. Michael Cannon, director of health policy studies for the libertarian Cato Institute and a key influence behind the legal challenge, called Nelson's assertions "not remotely damaging" and "irrelevant." Cannon has also filed an amicus brief in the case siding with the challengers.

"It may well be that Ben Nelson always wanted there to be subsidies in state-established exchanges or federal exchanges," Cannon said. "It's irrelevant, though, because what he voted to support was a bill that offers those subsidies only through state-established exchanges. Because that's what he voted for, that's what he intended."

Attempts to reach Nelson for comment Thursday were unsuccessful.

Other groups—including the American Cancer Society, America's Health Insurance Plans, the American Academy of Pediatrics, the Catholic Health Association and former high-ranking government officials—argued in briefs that not only is the law clear in allowing subsidies in all states, but it is also clear that ending them would hurt patients and providers.

"The inevitable results will be a widespread and massive disruption, not just to the millions of Americans in the approximately three dozen states that would lose their health insurance, but also to the entire healthcare system nationwide: insurers, hospitals, physicians and other providers," said Neal Katyal, an attorney who filed an amicus brief on behalf of the American Hospital Association, the Federation of American Hospitals, the Association of American Medical Colleges and America's Essential Hospitals.

The ACA reduced government payments to hospitals for uncompensated care on the assumption that uncompensated care would decrease as more people gained coverage, Katyal said. If the challengers in *King v. Burwell* win, it will upend that assumption and mean

reduced revenue for hospitals and community health centers, he said during a call with reporters Wednesday.

An amicus brief filed by 36 healthcare policy history scholars put the stakes in more dire terms: “Because of the interrelationship between insurance coverage, healthcare access, and population health, a decision striking down the IRS rule can be expected to lead to a loss of improvements in access to care, worsening health, and more preventable deaths.”