Modern Healthcare

Reform law challenge may hinge on Supreme Court's interpretation doctrine

By Lisa Schencker

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How the U.S. Supreme Court rules in a major challenge to the healthcare reform law could come down to one word: Chevron.

Experts agree that the justices will have to consider the high court's oft-cited precedent in the 1984 case *Chevron USA v. Natural Resources Defense Council* in deciding whether to rule in favor of the government or the challengers in *King v. Burwell*. The pending case, to be decided next spring, centers on the question of whether the language of the Patient Protection and Affordable Care Act allows federal premium tax credits for consumers in states that have not "established" their own insurance exchanges and are relying on the federal exchange.

One part of the law says the tax credits are available only to Americans who enrolled through an "exchange established by the state." But the Obama administration argues that the law's clear intention was to offer subsidies and expand coverage to Americans in every state, and that other provisions in the law support the payment of subsidies in all the states. The IRS issued a rule interpreting the law to mean that subsidies should be allowed in all states; the plaintiffs have challenged that IRS rule.

If the tax credits are held illegal in the 34 states using the federal exchange, it's likely that millions of Americans receiving the credits in those states would no longer be able to afford their insurance, severely disrupting the law's coverage expansion and insurance reforms. The justices will be reviewing a unanimous decision by a 4th U.S. Circuit Court of Appeals panel in July upholding the legality of the subsidies.

The Supreme Court in its landmark decision in Chevron held that federal agencies must follow the letter of the law where the law is clear. But if courts using the Chevron analysis conclude that a law is ambiguous, then they must defer to an agency's reasonable interpretation of the law.

Many experts say that if the justices apply Chevron, it would mean a win for the government. "I think the justices who want to affirm the 4th Circuit will invoke the Chevron deference, and those who want to reverse the 4th Circuit will ignore it," said Erwin Chemerinsky, dean of the University of California

Irvine School of Law. “There's no doubt the Chevron deference works in favor of the IRS.”

Tim Jost, a law professor at Washington and Lee University and an expert on the ACA, said he believes the law is clear in allowing subsidies in all states. “You don't just pick four words out of it and throw the rest away,” Jost said. “The main legal doctrine that's in play is you read the statute as a whole.”

But even if the justices think the law is ambiguous, they should still rule in favor of the government under Chevron, Jost said. Indeed, the 4th Circuit panel said it found the law ambiguous in upholding the IRS rule. “If it's not clear one way or another, Chevron is clear and it says you refer to the administrative agency,” Jost said.

On the other hand, Michael Cannon, director of health policy studies for the libertarian Cato Institute and a key mover behind the legal challenge, argued that the government would lose under Chevron. “If you apply the Chevron doctrine, then the plaintiffs win because for the courts to defer to the IRS in this case the statute would have to be ambiguous, which it is not,” he said. “Congress would have had to delegate to the IRS the authority to resolve that ambiguity. Even if you assume there's ambiguity, there's no such delegation.”

Abbe Gluck, a professor at Yale Law School, argued the law is clear in allowing subsidies in all the states, regardless of whether a state launched its own exchange. She said the ACA is clear when read in context.

Gluck noted that for years, Justice Antonin Scalia and others have argued for a contextual, holistic reading of statutes. In a ruling in a separate case (PDF) earlier this year, Scalia wrote that “the fundamental canon of statutory construction (is) that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”

Gluck said the challengers in *King v. Burwell* “are asking the court to put a lot of pressure on four words in isolation from the rest of the statute. The government is asking them to read those four words in the context of a 900-page law.”

So the real issue for the justices, she argued, is how to interpret the text of the law—not whether to choose between the text and the intended purpose of the law to expand coverage as broadly as possible, as the challengers argue.

“There's a bigger question here about how the court is going to interpret statutes in the modern era,” Gluck said. “I wouldn't want to see those doctrines polluted because of the particular politics of Obamacare.” She added, “I think if this case was about anything other than Obamacare, it would be a very clear Chevron case. Or maybe the court would just say the text is clear” that subsidies are authorized in all states.

She finds it ironic that the court is weighing in, because the whole point of the Chevron doctrine is to leave interpretation of ambiguous statutes up to agencies and keep courts out of political issues.

Legal scholars say there's no way of separating the crackling politics of Obamacare from the legal questions surrounding it. Noah Feldman, a Harvard law professor, said the justices' potential decision this term on the politically explosive issue of same-sex marriage might unconsciously influence their decision in *King v. Burwell*.

If the court rules in favor of same-sex marriage, that might give Chief Justice John Roberts—who is widely expected to be the swing vote in *King v. Burwell*—the political cover he needs to vote down the premium subsidies, Feldman said. It would be difficult to accuse the court of being overtly political and overly conservative if it votes in favor of gay marriage and against the ACA in the same term.

“Consciously, the justices don't think in terms of linkage,” Feldman said. “Nevertheless, there is some hydraulic effect from one case to another. It doesn't happen every term but it happens in certain terms where there are very big cases in play.”

Chemerinsky disagreed, saying he doesn't believe that's how the justices make their decisions. “They've been there a long time now, they're going to be there a long time in the future,” he said. “They know their public approval doesn't depend on the decisions of one term.”

Feldman said the outcome of *King v. Burwell* may rest with Roberts, who was the swing vote in 2012 in the court's bitterly split decision upholding the constitutionality of the healthcare law. “Roberts “saved the ACA the last time, which was remarkable and surprising,” Feldman said. “But that was on a constitutional issue and this is on a statutory issue. So this would be a much easier vote for him. He could say the statute says what it says.”