The Busy Reader's Guide to Amicus Briefs in *King v. Burwell*

By Jonathan Keim
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A week from Wednesday, on March 4, 2015, the Supreme Court will hear argument in *King v. Burwell* about the legality of tax subsidies for insurance plans bought somewhere other than exchanges "established by the State."

The case has certainly merited a great deal of attention from *amici*: 21 amicus briefs support petitioner/plaintiffs, and 34 briefs support the government. Bench Memos readers are likely to be too busy to read all 55 briefs, but fear not, gentle reader: I shall guide you. To paraphrase an old Scrubbing Bubbles commercial, I read the amicus briefs so you don't have to.

Briefs In Support of Petitioners/Plaintiffs

The briefs supporting the challengers are certainly more fun to read than the others. Three briefs compare the government's interpretation of "established by the State" to something in Lewis Carroll's *Through the Looking Glass*. Several cite a scholarly book by legal historian Philip Hamburger, *Is Administrative Law Unlawful?* (You can find the book publisher's page here, Adam J. White's review in the Wall Street Journal here, and a Federalist Society podcast about the book here.)

If you only have time to read three amicus briefs, start with the brief filed on behalf of law professor Jonathan Adler and Michael F. Cannon. Their brief told the story of the tax subsidy provision with reference to the policy and legislative history. After that, read the brief filed by the Judicial Education Project and the Center for Individual Rights on behalf of several U.S.

senators and representatives. This brief made a detailed textual argument in support of the petitioners, as well as noting that the IRS adopted its controversial rule without studying the issue in detail.

Third, read the scholarly Consumers' Research brief, which was filed by Hon. Ronald A. Cass and provided a normative argument for why the Court should not speculate about the consequences of its decisions. (Aside from being a sound piece of scholarly work, this brief also counters the vast number of consequentialist arguments raised by *amici* on the other side.) Consideration of practical consequences, Cass argues, should be left to Congress and the President:

The law-creating task comprehends two different sorts of judgment: (1) on analytical issues—respecting the manner in which individuals and entities will react to particular situations, the interaction among different responses, the way changes in specific factors alter those responses—and (2) on valuation issues (respecting the worth of particular outcomes). Both sorts of judgments are decidedly the province of the political branches, not the courts.

Former Supreme Court clerks Joshua Hawley and Erin Morrow Hawley were on a brief that takes a different tack on the federalism question, filed on behalf of Missouri Liberty Project and Missouri Forward Foundation. The brief argued that the IRS rule effectively nullifies the policy choice made by Missouri voters in rejecting the establishment of a state exchange. As such, the Court "should interpret the ACA to give full effect to the results of the state deliberation that the statute's plain terms invite."

The states of Oklahoma, Alabama, Georgia, Nebraska, South Carolina, and West Virginia signed a brief explaining why Congress conditioned Obamacare's tax credits on states adopting their own exchanges. Indiana's brief raised the problem of Tenth Amendment issues with the IRS rule and pointed out how the employer mandate violates the intergovernmental tax immunity doctrine.

Another important brief was filed on behalf of Jeremy Rabkin, a law professor at George Mason. The Rabkin amicus brief attacked the argument (popular in academia) that an exchange established by HHS is equivalent to an exchange "established by the State." The crux of this argument is the use of the word "such" in describing an HHS-established exchange (section 1321

of the ACA, if you want to look it up), which means that when HHS establishes its own exchanges, it is creating an exchange "equivalent" to the state-established exchange.

A brief filed by the American Civil Rights Union and the Heartland Institute gets the award for "Snarkiest Amicus Brief." Their argument focused on the plain text of the statute and paraphrased the question presented: "the real question before this Court today: 'Is this America, or is this Venezuela?'" The brief also violated Chief Justice Roberts' advice not to cite Magna Charta in briefs and asked the Court to take judicial notice that "this case is not being heard in Wonderland, and that the [government agencies] are not Alice."

The Cato Institute and law professor Josh Blackman filed their own brief outlining the dangers of executive lawmaking, documenting the Administration's numerous attempts to reshape Obamacare without the help of Congress. As they described it, *King* is about the asymmetric understandings in the Princess Bride: "To paraphrase Inigo Montoya, Congress didn't think 'expand coverage' means what the executive thinks it means."

Several briefs identified federalism problems with the IRS rule. The brief from the Galen Institute and state legislators focused on the federalism and "major question" canons of interpretation. The brief noted how Obamacare appears to displace states' traditional authority over insurance regulation and concludes that without a "clear statement" that such displacement was intended or that Congress intended to leave such a significant question to the IRS, the Court should not construe Obamacare to authorize the challenged IRS rule.

The brief filed by the Pacific Research Institute, Individual Rights Foundation, and Reason Foundation highlighted the clear statutory text and argued that the IRS's broad purposive reading of the statute is at odds with the separation of powers. It's also impractical:

[A] unified legislative purpose is almost always a myth. Legislation is the product of negotiation and compromise in which lawmakers may sacrifice one interest to achieve another. In the main, a bill successfully runs the legislative gauntlet not because Congress has a unity of purpose—but because it reconciles a multiplicity of purposes, some of which may be incompatible. The notion that *every* Representative and *every* Senator voting in favor of a bill did so for the *same* reason paints an unrealistic picture of the legislative process. The process leading to the ACA's passage illustrates the point. This behemoth of a law—over 2,400 pages in all—resulted from ad hoc

procedures, convenient alliances, special deals to secure holdout votes, admissions by key legislators that they never read it, and a chaotic race to the finish line prompted by the surprising outcome of a special election in Massachusetts. If there were ever a case in which a court should refrain from divining a unified congressional purpose, this is it.

A group of law professors filed an amicus brief highlighting separation of powers concerns with allowing the executive branch to rewrite such a massive benefits program. The Mountain States Legal Foundation's brief made a similar argument while highlighting the plain text application of the Obamacare statute.

The Washington Legal Foundation's brief took a textual approach, focusing on the application of *Chevron* doctrine to *King* and directing the Court to the "legislative grace" canon of interpretation.

Briefs in Support of the Government

Having slogged through as many of the 34 briefs supporting the government as I could find (31, to be exact), it's pretty clear that the government's defenders largely doubled down on the purposivist/consequentialist defense of the IRS rule. As Professor Adler pointed out today at a Heritage Foundation panel, the Solicitor General's argument that "established by the State" is a "term of art" would require the Court to interpret nearly every word in the supposed "term of art" to mean the opposite of its ordinary meaning.

For that reason, I suspect, the vast majority of the amicus briefs filed in support of the government's position made roughly the same consequentialist argument: Congress was trying to do good stuff with Obamacare; striking down the subsidies means less good stuff; therefore the Court shouldn't strike down the subsidies. But that isn't really *legal* argument at all; it's policy. Wrong branch of government, folks.

When most of the pro-government briefs did include legal argument, they began not with a statement of legal principle, but by describing the supposedly disastrous consequences of a ruling for the petitioners. Only after reciting sky-will-fall predictions did they proceed to the legal arguments. The brief filed by several states and the District of Columbia, for instance, delayed its argument that Obamacare failed to give states clear notice of the consequences of relying on a

federally-facilitated exchange under the *Pennhurst doctrine* until after it proclaims the surpassing importance of the tax subsidies.

Anyway, the pro-government amicus briefs clearly reflected the interest-group politics that created the Frankenstatute — er, complex legislation — now known as Obamacare. One brief focused on the benefits that the IRS rule provides to children. Other briefs explained how hospitals would lose money, the impact on elder care, another cancer, this or that demographic group, etc. Some briefs provided policy analysis devoid of substantive legal argument, including even the brief submitted for Harvard Law's Center for Health Law and Policy Innovation. It's no wonder the Wall Street Journal's editorial page subtitled a piece on *King* "ObamaCare's industry allies shake the tin cup at the Supreme Court."

If you can read two amicus briefs supporting the government, I recommend starting with the one submitted on behalf of Yale law professor William N. Eskridge, Jr. and four other law professors. Their brief tried to leverage textualism against the petitioners. As the brief describes it, "this is not, as Petitioners suggest, a case about textualism vs. purposivism. It is a case about good textual analysis vs. bad textual analysis." Although the Eskridge brief at least tried to take seriously textualism and its basis in the separation of powers, it's too bad that most of the other *amici* on the government's side didn't get that memo.

The other recommended brief is the one submitted on behalf of Former Government Officials that tries to bolster the government's argument that statute is ambiguous under *Chevron*. They turn the Galen Institute's "major question" argument around and claim that Treasury was obliged to make a decision with "major economic and political significance *whatever* the agency decided."

Similarly, two briefs tried to turn the federalism problems with the IRS rule into arguments in favor of the rule, one by claiming that state decisionmaking on exchanges would lead to "disparate geographical coverage", and the other by claiming that conditioning subsidies on creation of exchanges would create other federalism problems. Other noteworthy items include a brief describing the history of Obamacare and the AFL-CIO arguing that freeing workers from Obamacare's employer mandate is a bad thing.

Finally, one pro-government amicus who is a member of the SCOTUS frequent filer club threw in a few pages comparing Justice Scalia and Frodo Baggins. (This may be the first time anyone has mentioned the Nazgûl in a Supreme Court brief.) You can read it for yourself.