



Health Law Arguments Offer Few Clues About Supreme Court Decision

By Julie Rovner
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For the second time in three years, the federal Affordable Care Act went before the Supreme Court Wednesday. And before a packed courtroom, a divided group of justices mostly picked up right where they left off the last time.

Once again, commentators and experts were left to wonder where Chief Justice John Roberts and Justice Anthony Kennedy, considered swing votes in the case, stand. A decision is expected by the end of June.

Unlike in 2012, the current case, *King v. Burwell*, doesn't challenge the constitutionality of the law's centerpiece that requires most Americans to have health insurance or pay a penalty. In a 5-4 ruling, the court that year decided the law could continue, albeit with a twist: states could elect not to expand Medicaid. But the latest case does challenge another piece that's pivotal to making the law work: Whether tax credits to help moderate-income Americans afford coverage can be provided in the three dozen states where the marketplace is being run by the federal government.

The court's most conservative justices seemed to side with the challengers, who say that a sentence in the law stipulating that tax credits are available only on health insurance exchanges "established by the state" means just that. In other words, credits would not be available in the three dozen states that are using healthcare.gov, the federal exchange.

“If Congress did not mean ‘established by the state’ to mean what it normally means, why did they use that language?” asked Justice Samuel Alito.

Liberal justices, however, seemed much more comfortable with the Obama administration’s argument that the phrase encompasses both federal and state-run exchanges — and that reading the text to allow tax help only on state exchanges runs counter to the rest of the law.

If they were to read the law the way the challengers argue, said Justice Elena Kagan, “there will be no customers and no products” on the federal exchange, because no one would be eligible. “When you’re interpreting a statute generally, you try to make it make sense as a whole,” she said.

But almost nothing could be gleaned from the questioning and comments of Roberts and Kennedy.

Kennedy had hard questions for both sides. He suggested at one point that withholding tax credits from states that failed to set up their own insurance exchanges could pose “a serious constitutional problem,” because it could disrupt insurance markets in states that do not set up their own exchanges. Giving states such an unpalatable choice would be unfair coercion by the federal government, Kennedy said.

But Kennedy also questioned whether, in the absence of more specific language, Congress intended to let the Internal Revenue Service decide how to distribute billions of federal tax dollars. “That’s a lot of responsibility,” he said. The question specifically before the court is whether the IRS overstepped its authority in interpreting the law to allow tax credits in both state-run and the federal exchange.

Roberts, meanwhile, was uncharacteristically quiet during the nearly hour and a half argument. In 2012, it was the chief justice who surprised many observers by joining the liberals to find the law constitutional because Congress was using its taxing power.

Outside the court, standing in a light rain, those on both sides predicted victory.

“It looks good for the plaintiffs,” said Michael Cannon of the libertarian Cato Institute. Cannon, who helped push the court case – and travelled the country working to persuade states not to set up their own exchanges – said he was pleased by questions about the IRS’ interpretation. “It’s absurd to give the IRS that kind of authority,” he said.

But Elizabeth Wydra of the Constitutional Accountability Center, which supported the administration’s position, said she thought the arguments leaned her side’s way. “If the court follows the plain text of the law and prior precedents, then it’s clear tax credits are available to all Americans no matter what entity runs the exchange,” she said.