ROLL CALL

Fate of Obamacare Hinges on Six Words

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Could a simple six-word sentence fragment, buried deep within hundreds of pages of legislative text, end up destroying Obamacare?

It might sound far-fetched at first, but determined opponents think they've found a way to unravel the entire health care law.

So now the fate of President Barack Obama's signature legislative achievement rests on a single, seemingly picayune legal question: Does the phrase "an exchange established by the state" make it impossible for the federal government to help pay for individual health insurance in the 34 states that didn't set up their own health care exchanges?

The six words, found in the middle of 906 pages of law, will be the focus of intense scrutiny on March 4 as the Supreme Court hears oral arguments on the matter.

The stakes are nearly as enormous as they were in 2012, when the justices upheld the law's constitutionality. A ruling against the Obama administration this time around, in King v. Burwell, would mean millions of Americans could lose their health insurance. The president could see his main legislative accomplishment rendered unworkable without a fix from the administration or Congress — and neither option seems feasible.

The story of the health care law's second major legal rumpus starts with a band of libertarian lawyers in Washington who plotted it out like doctors targeting a tumor. They seized on an idea presented at a 2010 policy forum, and developed a theory to render the law virtually moot. They found plaintiffs, and recruited a star Supreme Court litigator to get the issue before the nation's highest court.

The practical consequences of a victory are not of interest to them. Democrats in Congress who wrote the law and pushed it through are the ones ultimately to blame if the justices throw the nation's health care system into chaos, says Tom Miller of the American Enterprise Institute, which hosted the 2010 forum.

"If you write a bad law in a sloppy manner under extraordinary procedures and methods, it will ultimately catch up with you," Miller says. "That's what created this situation."
Looking to save the federal insurance exchange, in addition to the Obama administration, are major health companies, the American Cancer Society, AARP, and 22 states and the District of Columbia.

The justices are likely to also hear about a growing constellation of "gotcha" moments and past statements from former Sen. Ben Nelson and other lawmakers — maybe even a pizza metaphor — that arose as the case wound through the courts.

A Challenge Formed

Justices will be told about how the health care law calls for a one-stop shopping spot for health insurance, called an exchange, to be set up by states. In states that decline to participate, the law says the federal government must establish and operate a fallback exchange.

This time, the justices won't be determining the constitutionality of the law, as they did when they upheld it in a landmark 5-4 decision in June 2012. Instead, they will perform one of their most common tasks — deciding what Congress intended when writing the law.

Thomas Christina, an employment lawyer from South Carolina, first realized the potential of the six-word phrase tucked in section 36(B) of the law. That is the section that authorizes subsidies for low- and middle-income residents enrolled in "an exchange established by the state."

That seemed to him to exclude residents in states that did not set up exchanges, "which is really quite extraordinary," Christina said at the 2010 AEI forum. At that time, the Internal Revenue Service had not yet written regulations about who could get the subsidies.

Other panelists were more direct. "This bastard has to be killed as a matter of political hygiene," American Enterprise Institute visiting scholar Michael Greve told the crowd. "There are all sorts of contradictions and incongruities in this statute, and that is something to be exploited."

By the time the IRS announced its rules in June 2012 and declared that residents on federal exchanges also qualified for the subsidies, two libertarian lawyers already had scoured the statute's text, structure and congressional history.

Jonathan Adler of the Case Western Reserve University School of Law and Michael Cannon of the Cato Institute published a paper that month in Health Matrix that identified the pillars of a legal challenge. They wrote that the IRS rule — which said residents in states that did not set up state-run exchanges were eligible for subsidies — runs contrary to the plain language of those six words in the statute.

The IRS rule therefore is contrary to congressional intent, Adler and Cannon wrote. And, they concluded, individuals could get standing to challenge it in court.

Adler and Cannon made the rounds as the most public advocates for the challenge, fleshing out the arguments in legal circles, lectures and media outlets.

"The statute limits tax credits to state-established exchanges in a manner that is plain and unambiguous," Adler and Cannon wrote in an amicus brief filed in December on the King case. The IRS rule "tries to achieve through regulatory fiat what [the health care law] supporters could

not achieve through the political process: a health care bill that does not rely on state cooperation."

The libertarian Competitive Enterprise Institute, where Greve is a board member, decided to fund lawsuits based on the argument. Their aim from the beginning was the Supreme Court, and they wanted to be in front of the justices as soon as possible. Michael Carvin of Jones Day, who argued for challengers in the first health care law case before the Supreme Court, agreed to handle the litigation and filed it in federal court in Virginia.

The Competitive Enterprise Institute found plaintiffs: four residents of Virginia, which did not set up its own exchange, who did not want to purchase health insurance. Media reports have questioned the backgrounds of those plaintiffs — one lists a hotel as a home address but no longer resides there, for example — but the intention of the litigation has been clear. The residents can sue, courts have ruled, because the IRS rule poses a direct financial burden when someone is forced either to purchase insurance or pay the penalty.

Carvin filed the King case when a separate CEI-backed case in the D.C. Circuit, Halbig v. Burwell, didn't move quickly enough. Carvin "has always pushed the gas pedal as fast as possible," Miller says.

Text and Context

The justices will look at the case through a familiar legal framework, which weighs the plain language of the statute with the intentions of the law.

First, the justices will see if the intent of Congress is clear based on the text of the law. This is where Carvin and the challengers may have the better of the argument, because the plain meaning of the six-word phrase would seem to only give subsidies to state-run exchanges.

"Certain members of the court are likely to say, 'Look at the language Congress wrote,'" says Kannon Shanmugam, a Supreme Court litigator at Williams & Connolly. "It may be six words in the key provision, but it's still the key provision — the one that determines who gets subsidies."

If that is clear, then the Supreme Court can decide the case based just on that. The D.C. Circuit, in the Halbig case with the same arguments, agreed that the language was straightforward. (The Halbig case is stalled pending the outcome of the King case.)

So the Obama administration will try to create enough doubt about that sentence fragment to make the justices find the law ambiguous, at the least, about whether subsidies should go to insurance policies purchased on the federal exchange.

If the court finds the law as a whole is ambiguous, then it gives deference to the IRS rule as the correct interpretation of the law. It's in this policy area where the Obama administration may have the better of the arguments.

The government will argue that the law demands that when a state fails to set up an exchange, the federal government set up "such exchange" in its place. And the whole point of the law is to

provide health care to every American, which is an integral part of the economics that make the law work, the administration says.

If Congress was trying to do what the challengers say and bully states into creating exchanges, "it's not at all clear why you would create the federal exchanges at all," says Tejinder Singh, an appellate litigator at Goldstein & Russell. "I think that is the hardest argument for the challengers to explain."

In the 4th Circuit Court of Appeals, the three-judge panel that heard the King case unanimously found the law's language ambiguous, siding with the Obama administration. In his separate opinion, Senior Judge Andre Davis called the challengers' reading of the law "cramped." The law says no reading should take place in a vacuum, Davis wrote.

"So does common sense: If I ask for pizza from Pizza Hut for lunch but clarify that I would be fine with a pizza from Domino's, and I then specify that I want ham and pepperoni on my pizza from Pizza Hut, my friend who returns from Domino's with a ham and pepperoni pizza has still complied with a literal construction of my lunch order," Davis wrote.

"That is this case: Congress specified that exchanges should be established and run by the states, but the contingency provision permits federal officials to act in place of the state when it fails to establish an exchange."

The Cornhusker Vote

Despite the importance of the six-word phrase now, it appears there wasn't much said about it back when the law was under debate in Congress. While many lawmakers now have weighed in on the merits of the case, no lawmaker's words are likely to be more central to the case than those of former Nebraska Democratic Sen. Ben Nelson.

The challengers say that section 36(B) makes subsidies available only for individual coverage purchased through state-established exchanges because it is the product of legislative compromise for "Nelson and some other senators."

Nelson was a crucial 60th vote to avoid a filibuster, Carvin has said during court arguments. Nelson wanted to keep the federal government out of the process, and states had to take the lead role. That required serious incentives to induce such state participation.

"They couldn't get to 60 unless Ben Nelson said we're not going to have a federally run exchange, we're going to implement basic principles of federalism and the states are going to run those exchanges or I don't vote for it and it doesn't get passed," Carvin said during arguments in the Halbig case.

But an amicus brief filed by lawmakers including Sen. Harry Reid, D-Nev., and Rep. Nancy Pelosi, D-Calif., says that argument has no basis in fact and "the pertinent text was not part of any 'compromise.'"

“The provision was not amended after [health care law] supporters lost their filibuster-proof majority because, as previously discussed, no one then interpreted the provision in the way petitioners now do,” the brief states.

Nelson said as much in a letter to Sen. Bob Casey, D-Pa., now filed at the Supreme Court.

“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 in the letter.

Roberts and Kennedy, Once Again

Those watching the case are focused on Chief Justice John G. Roberts Jr. and Justice Anthony M. Kennedy. It is widely assumed that other justices will vote as they did for the initial 5-4 decision. The three conservative justices, Clarence Thomas, Samuel A. Alito Jr. and Antonin Scalia, will side with challengers. Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan are expected to side with the administration.

Roberts and Kennedy, however, might see this case differently from the last challenge. The 2012 case posed a constitutional challenge, which would have struck down the law. This time, if it is just a wording problem, the Supreme Court could rule for the challengers with the idea that it is up to Congress to fix the language.

“I could easily see both the chief justice and Justice Kennedy say, ‘Look this is Congress’ problem.’” And even though it’s unlikely to get fixed, “It is what it is,” Shanmugam says.

Republican lawmakers have talked vaguely about a possible fix for the health care law if the Supreme Court rules for the challengers. But few expect a workable solution from the party that has voted 57 times in the House to eliminate the law.

The Supreme Court in Holder v. Shelby County in 2013 struck down a key enforcement provision of the Voting Rights Act, in part because it said Congress could simply fix the formula for which states must comply.

Such a ruling would be “something more than a fig leaf, maybe not a lot more,” says Jeff Wall, head of the Supreme Court practice at Sullivan & Cromwell. “It gives this case a different feel, because there is that cover there, and they have taken it before. So I don’t think the federal government can be confident they won’t do it again.”

Back in 2010, the libertarian thinkers knew that Kennedy would be important to any challenge, and so would Scalia.

“The reality is you cannot win this without him,” Greve said at the policy forum. “You need to think through the Constitution the way he does.”