‘Obamacare’ on trial: SCOTUS takes up case on tax credits

A victory for the plaintiffs in King v. Burwell could unravel the president’s signature health care overhaul

By Elijah Wolfson

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On Wednesday, the Supreme Court will begin to hear arguments in King v. Burwell, the latest legal challenge to the Patient Protection and Affordable Care Act, or ACA. The case boils down to an argument over how to interpret seven words in the legislation, also known as “Obamacare,” that define who can receive a government subsidy to help pay for health insurance.

Here’s how it works: As soon as the ACA went into effect (plus a few days’ grace period), most U.S. citizens who didn’t already have health insurance were required to purchase coverage, either through their employer and the private market, or through the new public exchanges created by the law. If you didn’t, you would be hit with a tax penalty. That’s the stick. But there was also a carrot: If you (and your family) fell within a certain range of income relative to the federal poverty level, the government would cover a significant chunk of your insurance costs.

The argument in King v. Burwell is over what the ACA means when it says, in section 36B, that these subsidies may be given to qualifying citizens who bought their insurance “through an Exchange established by the state.” Every state, of course, has an exchange. But of the 51 exchanges that have been set up (in all the states plus Washington, D.C.), only 14 were established by their individual jurisdictions. The remaining 37 were established by the federal government or are a state-federal partnership.

The Department of Health and Human Services, along with the Internal Revenue Service, has interpreted the wording in 36B to mean that the state exchanges set up by the federal government are, for all intents and purposes, state exchanges. But the plaintiffs argue that this is wrong and that all subsidies provided to individuals who purchased insurance through exchanges set up by the federal government should, therefore, be considered unauthorized under the law.

Michael Cannon of the Cato Institute, generally considered one of the architects of the King attack on the ACA, says the entire defense is based on "a misreading of one part of the statute that turns the reading completely on its head." Cannon and others argue that we just need to look at the plain text and that "the problem" for the defense is that "the government did nothing in that statute that achieves what the government wants … they are just going on a fishing expedition."

On the other hand, says Charles Fried, an expert in constitutional and contract law at Harvard, "It's very simple. You have one phrase, seven words. If that phrase was all there was, the petitioner's argument would hold. But that's not all there is. There is a whole elaborate statute that provides context." Fried's point is that while this particular section of the ACA does not define every possibility of what could be considered an "exchange established by the state," other parts of the massive document do. And in those cases, as Fried writes in an amicus brief filed on behalf of the defense, "all exchanges established 'under section 1311' are 'Exchange[s] established by the State' for purposes of the Act."

The key, says Allison Hoffman, an expert in health care law and policy at the UCLA School of Law, is that "if you just look at this language in the context of the statute as a whole, it seems obvious that Congress knew that in some states it was the federal exchanges that would be doing the work." Hoffman and many others argue that claiming Congress meant to make subsidies available only to states that set up exchanges makes no sense: If that were the case, then Congress would have been setting the ACA up to fail. And why would Congress want its own legislation to fall apart?

Cannon argues that this was precisely the point of the contentious seven words: to give the states the option of exercising a veto against "Obamacare" by choosing to not set up their own exchange. Cannon says he visited many states in the years the ACA was up for congressional debate and that the leadership in these states understood their options in setting up an exchange in this context.

But many of the policy advisers and analysts who were there during the drafting of the ACA disagree. "[What counted as a state-established exchange] was not an issue that was ever discussed openly," says Hoffman. "Of course, there are always backroom discussions, but this is a pretty major design piece to have never been publicly debated." Mary Rouvelas, senior counsel for the American Cancer Society Cancer Action Network, argues that the subsidies for people who purchased coverage through the federal exchanges "advance the true purpose and means of the act" because "we were involved in the [ACA] from the very beginning. … In the course of our many conversations with members of Congress during the legislative process, none of them ever mentioned creating a distinction between state and federal exchanges for the purpose of receiving tax credits."

This debate over what the drafters of the ACA meant has heated up in recent weeks. One video first published on thewebsite of the Competitive Enterprise Institute (the libertarian think tank that is behind the King case) and since reposted widely across online media outlets, shows Jonathan Gruber, one of the law's architects, making statements in 2012 that seem to suggest that the intention was for states that did not create their own exchanges to risk relinquishing the subsidies. By contrast, Brian Beutler of The New Republic noted last month, nearly every Republican in Congress in 2011 voted for a subsidy overpayment reimbursement bill that only makes sense if everyone knew and agreed that subsidies were not limited to states that set up their own exchanges.

It is widely assumed that Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan will side with the defense. Justices Antonin Scalia, Clarence Thomas and Samuel Alito are expected to vote in favor of the plaintiffs. That leaves Justices John Roberts and Anthony Kennedy as the swing votes. Most pundits believe Kennedy's vote in the 2012 case challenging the ACA's individual mandate (he voted against its constitutionality) suggests he'll side with the plaintiffs. That means the outcome likely rests in the ink in Roberts' pen.

Then again, the entire case could end up shifting toward a procedural debate over whether or not the plaintiffs have standing to actually sue. Last month, Mother Jones published an investigation of the four plaintiffs in the case: Brenda Levy, David King, Rose Luck and Douglas Hurst. After the ACA passed, the four all received a tax subsidy to help them buy health insurance. At that point, they could either make the purchase or pay the penalty. Their legal team

(organized and paid for by the Competitive Enterprise Institute) argues that because the four are residents of Virginia, a state that did not establish its own exchange, this was an unlawful chain of events and that, if not for the subsidies, they would have qualified for a hardship exemption from the tax penalty. The problem with this argument, as Mother Jones points out, is that three of the four are on the verge of Medicare eligibility — meaning they will no longer have to buy their own insurance and that any hardships they might have suffered under "Obamacare" are about to end. And Luck, the one plaintiff young enough that she won't be eligible for Medicare anytime soon, comes with her own set of red flags. In her declaration she says her 2014 household income is projected to be $45,000, but because she listed her residence as a motel with a 28-day stay limit, and it is unclear where she is now, there is no way to know the price of the cheapest plan available to her — and therefore no way to know for certain whether she qualifies for a hardship exemption.

Showing that the plaintiffs suffered some sort of damages as a result of Health and Human Services and IRS' interpretation of the ACA is a prerequisite for the petitioners' case. Hoffman says it's possible that the defense will attempt to show that the plaintiffs have not been harmed. "Cases are won either on procedure or substance. If you can win a case on procedure and don't even need to battle on substance, why wouldn't you?"

Cannon says that bringing hardship into this case would be a disingenuous tactic by the defense to purposefully prolong the case in order to increase states' reliance on the subsidies. "They want to drag this out to prejudice the courts against the plaintiffs," he says. Cannon believes that if the case is thrown out, another similar case will eventually make it to the Supreme Court. But by then, even more Americans will be entangled in "Obamacare" and the Supreme Court will be less likely to rule in favor of the petitioners if it thinks such a decision would harm millions of Americans. "It's callous and reckless," he says, "and uses millions of people as political pawns. But it makes plenty of sense."

However, says Hoffman, "We are already past the point of no return. The day that people started buying insurance on the federal exchanges is when we passed that threshold of being in too deep to unravel it easily."

The outcome of the case will inevitably have a dramatic effect on the landscape of the U.S. health care system. If the Supreme Court rules in favor of the plaintiffs, insurance credits would

go away almost immediately in two-thirds of the states. Some states would scramble to replace the federal exchanges with their own. But despite the likely pressure from taxpayers and health care providers, others might not. As a recent article in "The New England Journal of Medicine" points out, in the majority of these states, "the political climate is hostile to the ACA." Those states may therefore opt to just let their public-insurance option fall to pieces. Consider, the authors write, the "refusal of nearly two dozen states to expand Medicaid even though the federal government would cover almost all the costs."

"Messy is an understatement," says Nicholas Bagley, a law professor at the University of Michigan and one of the authors of the NEJM study. A recent report published by the Rand Corp. estimates that in 2015, 13.7 million Americans will have purchased health insurance on federally facilitated exchanges using subsidies and that if the Supreme Court rules in favor of the plaintiffs, the resulting financial hardships will cause 9.6 million of them to lose their coverage.

That is exactly what those supporting the plaintiffs want. They argue that a ruling in their favor would set the stage for the implementation of a better health care law. "'Obamacare' will have to be legislatively reopened," says Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute. "Who knows, maybe we'll actually end up with something that the American people actually support."

To the ACA's defenders, this position proves that the lawsuit is politically motivated. As Sahil Kapur reported for Talking Points Memo, House Ways and Means Chairman Paul Ryan, R-Wis., recently told reporters that Republicans are not interested in fixing the legislation. "The idea is not to make 'Obamacare' work better," he said, but to give states an easier way "to get out of 'Obamacare.'" In January, a handful or Republican lawmakers presented an alternative plan that would, among other things, eliminate mandatory coverage of contraception and maternity care. It would also revoke the individual mandate for coverage, and this, says Rouvelas, provides "no assurance that a ban on pre-existing conditions could be sustained when the market begins to collapse because only sick people are in it."

On its face, says Fried, "the argument is over whether the IRS is allowed to allow a tax credit for persons purchasing insurance." But "it's really about trying to destroy the Affordable [Care] Act … I dislike the way in which the legal process is being contorted to achieve this political result."