

THE PLAIN DEALER

Supreme Court hears Obamacare case

By Stephen Koff

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WASHINGTON, D.C. -- The U.S. Supreme Court this morning heard two starkly different interpretations of the words defining Obamacare, the nickname for a groundbreaking health-care law whose future now depends on which legal interpretation the court's majority believes is valid.

The outcome will determine if millions of Americans, including nearly 200,000 in Ohio, can still get federal tax credits, or subsidies, to help them pay for health insurance premiums. Without the financial help, many will find insurance unaffordable and may drop coverage.

An interpretation of the law that way -- that people in 34 states are not eligible for the subsidies - - could lead to "disastrous consequences," Justice Ruth Bader Ginsburg said.

Justice Samuel Alito suggested that any such ruling could be made with a condition of a six-month stay, or delay, to let states address and fix the problem. If that were to happen, "there's no harm," Alito said.

But U.S. Solicitor General Donald Verrilli Jr., arguing the case for President Barack Obama's administration, said it would take 34 states much longer. He called six months "completely unrealistic."

A ruling against the Obama's administration could knock out a key principle behind the law: the creation of a vast pool of people with health insurance, with premiums from the healthy helping keep premiums relatively low for those needing medical care. Without the subsidies, the foundation of Patient Protection and Affordable Care Act of 2010, or ACA, crumbles, according to a number of health economists.

The court's justices touched on that possibility repeatedly. Justice Sonia Sotomayor suggested that if the court accepts the position of those challenging the law, "we're going to have the death spiral" that the ACA was designed to prevent.

Other justices, however, suggested a political fix could remedy that.

At its core, the case comes down to different interpretations of the ACA. The parties bringing the case said in legal briefs that the ACA's wording specifically limited the ACA subsidies to

individuals buying policies through a computerized health insurance marketplace or exchange "established by the state."

Verrilli told the court repeatedly, however, that the wording can only be understood in the bill's broader context. The law was intended to provide "quality, affordable health care for all Americans," the administration said in its brief.

Attorney Michael A. Carvin, from the Washington, D.C. offices of Jones Day, represented those challenging the law in the case, *King v. Burwell*. He said Congress worded the provision in question "in plain English," and that lawmakers knew what they were doing.

After the law passed, only 16 states created exchanges. Governors and legislatures in the 34 other states, including Ohio, balked at the law itself or its requirements. Instead, they tapped into a federal marketplace, allowing insurers in their states to sell their products on the federal HealthCare.gov website.

Since those policies were not sold on an exchange "established by the state," that means the Internal Revenue Service had no right to authorize tax subsidies for those buyers, the ACA challengers say. Carvin said the wording is clear and that the Obama administration cannot just bend the law -- and give subsidies in every state -- to suit its desires.

Justice Anthony Kennedy, a possible swing vote, appeared to give this argument at least some credence, saying that with billions of dollars in tax subsidies at stake, the IRS should not make such decisions based on an ambiguous reading of the law.

But Verrilli said that the court's precedent in a case involving *Chevron* allows for interpreting a statute in its full context if a specific passage is under debate. "*Chevron* applies to the tax code as well as everything else," Verrilli said.

During another portion of the arguments, Verrilli told the court, "You don't read statutes in isolation. You read them as a whole."

Justices on the liberal end of the spectrum, including Ginsburg, Sotomayor and Elena Kagan, appeared skeptical of Carvin's counter-argument. Kagan said such a narrow right to premium subsidies "makes no sense" from Congress's point of view.

But she allowed that there's little that is clear in the language, noting that "it took a year and a half for anybody to notice this language" that could restrict the right to subsidies in 34 states.

Why would Congress pass a law that withheld a federal financial benefit to citizens based solely on the inaction of their state governments? Supporters of the challengers said that in an early ACA draft, some lawmakers envisioned using the subsidies as incentives for states taking action to establish their own exchanges. The law as passed, however, did not contain such carrot-and-

stick language. Still, since the final law referred to subsidies going to buyers on exchanges "established by the state," the challengers say such a limit must be imposed.

The Obama administration says that's preposterous. It says the law, when viewed in its entirety, clearly intended for citizens in every state to get tax credits that would help them pay their premiums.

The challengers in the case are four people from Virginia -- David King, Brenda Levy, Rose Luck and Doug Hurst -- who have shied from publicity and have appeared to be incidental to the case's legal underpinnings. A conservative organization opposed to the ACA, the Competitive Enterprise Institute, provided the financial and legal muscle behind their challenge. The group, promoting "limited government, free enterprise and individual liberty," said King and the other plaintiffs dislike the ACA's individual mandate, which requires them to enroll in certain types of health insurance that they do not want, or else pay a penalty.

Several of the plaintiffs appear to be eligible for other forms of health coverage such as veterans' care or Medicare, which covers seniors. And several justices raised the the question of whether those plaintiffs therefore have standing, or the legal right to bring a case if they are not directly affected by its consequences. Verrilli did not press that issue, however, saying that "it is our understanding that at least one of the four would be liable for the tax penalty" assessed under the ACA for failure to get insurance, and therefore would have standing.

Eighty-seven percent of ACA buyers using HealthCare.gov have been deemed eligible for subsidies at some level, depending on their incomes, according to the U.S. Department of Health and Human Services, whose secretary, Sylvia Mathews Burwell, is the defendant in the case. In Ohio, the share came to 84 percent as of Jan. 30, providing an average savings on premiums of \$247 a month, HHS says. Many of those buyers would be find premiums unaffordable without the subsidies and might drop their policies if the court rules against Burwell, health economists say.

Although the health law calls for fines if people fail to buy insurance, it allows for hardship exemptions if personal premium costs exceed 8 percent of income after accounting for subsidies. Costs would almost certainly rise beyond that level for many if they lost subsidies, and hardship exemptions would soar, economists say. The result would be millions of people dropping coverage, with a range from 5.5 million, a figure from the conservative Heritage Foundation, to 9.6 million, a figure from the RAND Corporation, a California-based research institute.

Those who nevertheless kept their policies would face steep premium hikes, setting up what the health insurance industry calls a "death spiral." Insurers would still be bound by the ACA's requirement to cover everyone without price differences for health conditions. Age and smoking status can be factored in, but not to the extent of the pre-ACA universe.

So older sicker and older people would probably keep their insurance while younger and healthier ones dropped it, ACA supporters and even critics say. This would deprive insurers of the premium pool needed to balance out costs and risk. As soon as 2015 policies expired, some insurers would flee the market, health insurers and hospitals say.

The Competitive Enterprise Institute, the libertarian Cato Institute and others who support the ACA's challenge say that any such problems are the fault of Democrats in Congress for passing the law -- without any Republican support -- as it was written, and of the Obama administration for writing rules in conflict with the law's wording.

They also say a victory for King would free millions more people and businesses from the ACA's mandates to buy insurance, cover employees or face penalties -- mandates that they consider unfair and expensive.

The court is expected to rule by the end of June. Members of Congress and governors meantime are discussing ways to avert a crisis -- or at least of cushioning the blow to people who could lose coverage -- if the court's majority rules for King.