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Supreme Court Hearing on ACA Subsidies Will Be 'Such' Drama

By Robert Lowes
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In the minds of many legal experts, no great constitutional issues will take center stage when the Supreme Court hears oral arguments on March 4 in a case challenging the validity of insurance premium subsidies in at least 34 states under the Affordable Care Act (ACA).

Instead, lawyers for both sides will parse the meaning of words in the law such as "such," marshalling dictionary definitions, context, and logic in an effort to sway the nine judges. It will be showtime for statutory construction, the nit-picking art of interpreting and applying legislation.

The eventual outcome of the case, which won't be known until this summer, will be anything but pedantic. At stake is health insurance coverage for millions of Americans, and perhaps the survival of the 5-year-old ACA, which narrowly escaped a Supreme Court smackdown in 2012.

Back then, the big issues were the individual mandate to obtain insurance coverage (upheld) and Medicaid expansion (made optional on a state-by-state basis). This time around, the high court will decide whether the Internal Revenue Service (IRS) correctly interpreted the ACA to make premium subsidies — in the form of tax credits — available to Americans enrolled in any health insurance marketplace, or exchange, in any state.

One provision in the ACA stipulates that the subsidies go to qualified individuals enrolled in a federally approved health plan through an exchange "established by the state." However, when the IRS issued regulations in 2012 to implement the law, it decided that the ACA, read as a whole, intended to make subsidies also available to residents of states served by federally established exchanges.

As it turned out, 34 states, mostly "red" politically, declined to create exchanges. That left the Department of Health and Human Services (HHS) with the task of creating and operating "such exchange(s)" there, as the law required. They are served by the federal website healthcare.gov.

Sixteen other states, mostly "blue," as well as Washington, DC, created their own exchanges. Three of them — Nevada, New Mexico, and Oregon — fall in the category of "federally supported state-based" because they rely on healthcare.gov (bringing the total number of website users to 37 states). The remaining 13 states operate exchanges completely on their own —

California, Colorado, Connecticut, Hawaii, Idaho, Kentucky, Maryland, Massachusetts, Minnesota, New York, Rhode Island, Vermont, and Washington — as does DC.

In the Supreme Court case against the Obama administration, the plaintiffs contend that the IRS ran roughshod over the explicit will of Congress to limit subsidies to individuals who bought insurance on an exchange "established by the state," the four embattled words of the Supreme Court case. This violated the constitution's separation of powers — only Congress has the power to tax and spend — and even the rule of law, according to a friend-of-the-court brief filed by the conservative Cato Institute.

The high-court debate over a handful of words points to a new era of strict statutory construction for the Supreme Court, said Robert Schapiro, dean of the Emory University School of Law, in Atlanta, Georgia, in an interview with *Medscape Medical News.* Before 1980 or so, said Schapiro, the subsidy case would have been a slam-dunk win for the government because the courts, like the IRS, would have considered the overarching purpose of the law — affordable healthcare for everyone.

"More recently, though, the court has been driven by (Associate Justice Antonin) Scalia and others to look more narrowly at the language of a statute, to focus on individual phrases," said Schapiro. "However, even that kind of textualism does requires looking not just at one phrase in isolation but looking at that phrase in the context in the overall statute."

Schapiro calls the challenger's case weak, but ACA supporters, such as Lawrence Gostin, a professor of global health law at Georgetown University, are nevertheless worried.

"I predict the Supreme Court will strike down the subsidies (in states with federally established exchanges)," Gostin told*Medscape Medical News.* "It's a very conservative court, and it's not shown a great deal of support for the ACA.

"I am very discouraged."

How the Case Arrived at the High Court's Doorstep

Conflicting decisions in lower courts on the IRS subsidy regulations set the stage for the Supreme Court battle.

A federal district court in Richmond, Virginia, ruled for the Obama administration in a subsidy suit brought by David King and three other residents of Virginia, which had defaulted to a federally established exchange. The King plaintiffs, whose case is funded and coordinated by a group called the Competitive Enterprise Institute, said they didn't want to buy comprehensive health insurance, but the availability of premium subsidies would force them to do so — or else pay a penalty — under the ACA's individual mandate.

Without the subsidies, they would be exempt from the mandate because they otherwise would have to spend more than 8% of their income on a health plan. With the subsidies bringing them under this income threshold, the mandate would apply. And in their view, the subsidies should not be in the equation because Virginia lacked an exchange "established by the state."

The district judge agreed with the government in *King v. Burwell* that the law in its entirety envisioned subsidies to Americans in all states, regardless of who established their exchanges. The King plaintiffs also lost at the appellate level, but for a different reason. The United States Court of Appeals for the Fourth Circuit found the law ambiguous when it came to Congress' intentions on subsidies.

But that was a boon for the government. When a law is ambiguous, the courts defer to the executive branch's interpretation as long as it is reasonable under a Supreme Court case called *Chevron USA v. Natural Resources Defense Council* (giving rise to the principle of "Chevron deference"). The appellate court did just that.

Another federal lawsuit that challenged subsidies in states like Virginia, however, triumphed at the appellate level, setting up the kind of judicial split that pulls in the Supreme Court to settle the matter. In *Halbig v. Burwell*, the United States Court of Appeals for the District of Columbia Circuit said that "the ACA unambiguously restricts the...subsidy to insurance purchased on 'exchanges established by the state.'... Within constitutional limits, Congress is supreme in matters of policy." The decision, reached by two members of a three-judge panel, was vacated when the entire appellate court agreed to rehear the case, later put on hold after the subsidy issue made the Supreme Court docket.

A federal district court in Muskogee, Oklahoma, also read "established by the states" literally and ruled against the Obama administration. The government's appeal of that decision is on ice until the Supreme Court decides *King v. Burwell.*

The Jonathan Gruber Factor

The Supreme Court on March 4 is likely to hear attorneys for the government and the plaintiffs spar over the ACA provision that, in the event of state inaction on an exchange, requires the HHS to establish "such exchange." The government maintains that "such exchange" represents a legal surrogate for an exchange "established by the state." The plaintiffs counter that although exchanges may function the same way regardless of their creator, "such" still does not touch on who created them. Besides, exchanges created by US territories such as Guam are "such" exchanges, yet their enrollees aren't eligible for premium subsidies. So where's the equivalence?

Mere semantics? "Believe it or not, it matters when you talk about lawyering," said Ilya Shapiro, a constitutional-law expert at the Cato Institute.

At the same time, both sides in the case will look at the context of contested phrases. The individual mandate is meaningless without the subsidies, the Obama administration will contend. The government can't require Americans to buy insurance when it's unaffordable. Furthermore, the lack of subsidies would exempt millions of Americans from the mandate in states with HHS-established exchanges, draining the individual-insurance risk pools there of healthy young adults, even as insurers continue to accept all applicants, sick or not, as required by law. The result would be a "death spiral" of higher premiums and declining enrollment. To think that Congress engineered such exchanges to fail is unreasonable and absurd, according to the government.

Not so absurd, counter the challengers. The King plaintiffs claim that Congress made subsidies contingent on state-established exchanges to pressure states to get with the program. Lawmakers

took the same approach with Medicaid expansion, they assert, threatening to withhold all federal contributions to state Medicaid programs if they refused to loosen their eligibility requirements (the Supreme Court in 2012 cancelled that threat in the name of states' rights). And back in 2009, conditional subsidies were on the menu of healthcare reforms that lawmakers could choose from.

The government denies that Congress hid such a "poison pill" in the ACA, and a number of constitutional experts agree, pointing to a dearth of evidence about what lawmakers were thinking about behind closed doors. A "sheer, cynical fabrication," said Simon Lazarus, senior counsel at the Constitutional Accountability Center, in an email interview with *Medscape Medical News.*

For its part, the plaintiffs hope to get a lot of mileage from some evidence that has embarrassed the Obama administration. Jonathan Gruber, an economics professor at the Massachusetts Institute of Technology, advised the White House as a paid consultant on crafting the ACA in the likeness of RomneyCare in Massachusetts, which he helped design.

Gruber went on to write a comic book explaining healthcare reform ("...I've got a little experience in this area," his character quipped on page 7). On January 10, 2012, he was captured on video explaining to an audience that "if your governor doesn't set up an exchange, you're losing hundreds of millions of dollars in tax credits to be delivered to your citizens." Eight days later he repeated this point in another talk. "I hope that's a blatant enough political reality that states will get their act together and realize there are billions of dollars at stake here in setting up these exchanges," Gruber said, apparently confirming the position of the King plaintiffs.

Confronted with the videos, Gruber initially said he misspoke and that Congress had made a clerical mistake in drafting the law (a point made by others). He later said that he was addressing the possibility that the federal government may fail to set up exchanges in lieu of the states. Gruber declined to grant an interview to *Medscape Medical News.*

Like some other legal scholars, Lazarus said that Gruber's "after-the-fact, off-the-cuff remarks" should not factor in the court's decision because they were not part of the actual legislative history of the ACA. "There is a massive amount of other evidence that this is not what Congress intended," added Emory's Robert Schapiro.

There remains the question of how much the high court will consider any outside evidence that illuminates "established by the state," whether it is a staff-written memo or a lawmaker's speech about who would receive subsidies (every American who qualified on the basis of income, according to Democrats and Republicans alike at the law's debut). The notion of interpreting a tricky legal text in light of its legislative history is repugnant to the influential Associate Justice Scalia, who once remarked, "It is the law that governs, not the intent of the lawgiver."

Questions the Judges Might Pose

By the time a Supreme Court case makes it to oral arguments, litigants will have already spelled out their positions in written briefs. The focus of the oral arguments, rather, is on the questions that the nine justices will ask the attorneys and how well they defend their positions.

The lead attorney for the Obama administration is Solicitor General Robert Verrilli, Jr, reprising his role from the 2012 Supreme Court case. Both Ilya Shapiro and Robert Schapiro expect the justices to test Verrilli with this question: "If Congress intended subsidies to Americans enrolling in any exchange, including federally established ones, why didn't it say so in clear language?"

If Verrilli were to concede that the wording of the law amounted to a typo, the government's case would weaken because "it's not the court's job to correct errors of Congress," noted Schapiro.

Facing off against Verrilli is Michael Carvin, his Supreme Court nemesis from 2012. Ilya Shapiro said that the justices may challenge Carvin on the distinction that he draws between state- fashioned exchanges and those of HHS parentage. "Is there really a difference in who set them up?" Carvin also will be pressed to prove that Congress knowingly would have put HHS exchanges at grave risk by withholding subsidies from their enrollees, said Robert Schapiro. "Could Congress have intended this result?"

Supreme Court watchers are tempted to analyze the justices' questions in hopes of deciphering how they're leaning in the case. However, don't get carried away with this diagnostic exercise, cautions Robert Doherty, senior vice president of governmental affairs and public policy at the American College of Physicians (ACP). Justices who appear hostile toward one position during the oral arguments often end up supporting it. "The questions are not always indicative of the outcome," Doherty told *Medscape Medical News*.

Will the Court Consider the Fallout of a King Victory?

In its written brief in *King v. Burwell*, the Obama administration stated that the plaintiffs "seek to upend the (ACA) and extinguish the coverage of millions of Americans."

"This is no abstract case about principles of statutory construction," the administration said. "Petitioners' position, if accepted, means many more people will get sick, go bankrupt, or die."

Recent research bears out the administration's fears. A study from the Urban Institute predicts that if the Supreme Court rules in favor of the King plaintiffs, 9.3 million individuals would lose subsidies in the 34 states that declined to set up exchanges, and 8.2 million would become uninsured (some say subsidies in the remaining three states served by healthcare.gov also may be at risk).

The Rand Corporation, a nonprofit research organization focused on public policy, also put the number of potential uninsured in the 34 states at about 8 million. In addition, insurance premiums would climb as adverse selection kicks in, leading to a cycle of enrollment declines and further premium hikes that would devastate the individual insurance markets in those states, according to Rand.

These prophecies of healthcare apocalypse loom large in friend-of-the-court briefs filed by a broad swathe of the healthcare industry in favor of the Obama administration. Supporters include America's Health Insurance Plans, the American Hospital Association, the American Nurses Association, and medical societies such as the American Academy of Pediatrics, the American Academy of Family Physicians, and the ACP.

"It's a life-and-death situation," said the ACP's Robert Doherty. "There's plenty of evidence that having health insurance is associated with better outcomes, and lack of health insurance is associated with preventable mortality and morbidity."

It's anybody's guess how much the justices will heed the possibly dire fallout from a King victory described by the Obama administration and others. "Should those appeals matter when everyone knows there are winners and losers with every decision?" asked the Cato Institute's Ilya Schapiro.

"Outcomes aren't strictly relevant, legally," said Lawrence Gostin, at Georgetown University. "But justices are humans beings. They're aware of the effects of their rulings."

The justices also know that if they do invalidate premium subsidies in states with federally established exchanges, other branches of government have ways to undo the damage, at least in theory. Congress could amend the ACA to make subsidies available in every state. But Congress is controlled by Republicans who have vowed to repeal the ACA. The GOP conceivably might agree to save the subsidies, though, if it can wring concessions from Democrats, such as the elimination of the employer mandate or the medical device tax.

Another remedy is for states with federally established exchanges to take them over so their residents can keep their subsidies. But that assumes a willingness to do so on the part of Republican governors and Republican-dominated legislatures that heretofore have tried to roadblock the ACA. "There may be political pressure to move in the direction of state-operated exchanges," said Gostin, "but governors have been prepared to stab their own citizens in the heart before, by refusing to expand Medicaid."

Gostin expects the Supreme Court's conservative majority to read "established by the state" literally and invalidate subsidies in states with federally established exchanges. Other legal scholars aren't so sure what will happen.

"I do believe that the four more liberal justices (Elena Kagan, Stephen Breyer, Ruth Bader Ginsburg, and Sonia Sotomayor) will vote with the government," said Robert Schapiro. "With the other five, I don't have a prediction."

As with the 2012 decision that saved the ACA, a victory for the Obama administration in *King v. Burwell* will require a swing vote coming from one of the five conservative justices. If someone does swing, who will it be?

That judge may be keeping a poker face at next week's oral arguments.