THE
NATIONAL LAW REVIEW

ACA Battle Lines Are Drawn

Health reform arguments are now on the record.

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February 9, 2015

Like armies mustering their best weapons, supporters and opponents of the Affordable Care Act once again have turned out at the U.S. Supreme Court to battle over a critical element of that health insurance law.

Fifty-two amicus briefs — 21 supporting the challengers and 31 backing the Obama administration — are on record in King v. Burwell, which the justices will hear on March 4. The political, economic and social stakes are huge. If the challengers prevail, the law itself, enacted in 2010, could collapse.

At issue are IRS regulations extending federal tax credits intended to -subsidize purchases of health insurance policies through exchanges, or marketplaces. The challengers, a group of Virginia residents represented by Jones Day's Michael Carvin and backed by the conservative Competitive Enterprise Institute, contend the statute's plain-language limits these subsidies to exchanges "established by the State." They argue the IRS rule, which extends subsidies to the federal exchange, is invalid.

To win ACA votes from members who did not want the federal government running exchanges, they assert, Congress restricted subsidies to state exchanges as a serious inducement to state participation. More than 5 million low- and moderate-income Americans have purchased health insurance on federal exchanges now operating in 34 states.

"The Act's text, structure, design and history refute petitioners' argument," counters U.S. Solicitor General Donald Verrilli Jr. Focusing on isolated phrases, "divorced from cross-references, definitions and context," he wrote, "subverts the rule of law."

On the challengers' side, conservative-libertarian legal and political organizations dominate. Also supporting that side are six states, a number of legal scholars and 15 Republican members of Congress. On the other side are national health, insurance, hospital, education and labor

organizations; Nobel economists; 22 states; nearly 100 state legislators; and U.S. House and Senate Democratic leaders.

"This court, in particular the conservatives led by Justice [Antonin] Scalia, have adopted a whole text canon of statutory interpretation which looks to the words of the statute and their place in the overall scheme," said Hogan Lovell's Neal Katyal, who filed a brief supporting the government. If the court stands by those precedents, he said, "it is very hard for the challengers to win."

But Ilya Shapiro of the Cato Institute, supporting the challengers, said he is "more optimistic" about winning the King challenge than he was about an unsuccessful 2012 bid to persuade the justices to wipe out the ACA mandate that individual citizens purchase health insurance. This time, he sees a possible 7-2 victory.

Whatever the outcome, Shapiro's colleague Jonathan Adler of Case Western Reserve University School of Law predicted that ACA litigation would continue. "It's the perfect storm for litigation. I foresee almost permanent litigation."

Below is a quick look at key amicus briefs:

Affordable Care Act opponents

Jonathan Adler and Michael Cannon

Case Western's Jonathan Adler (left) and Michael Cannon, director of health policy studies at the Cato Institute, were "among the first to question the federal government's authority to issue subsidies for coverage purchased through federally established exchanges," according to this brief. Their brief, written by Eric Grant of Hicks Thomas in Sacramento, recites the theory in all its parts, focusing especially on the government's interpretation of words and phrases in the law — the word "such," for example. "The IRS has no authority to provide tax credits in federal exchanges," the brief asserts. "The IRS simply rewrote the statute."

The state of Oklahoma

An early participant in litigation against the Affordable Care Act, Oklahoma argues in King that the federal government's position interferes with "traditional state control" over health insurance regulation. States know and understand that federal legislation often conditions benefits on whether states participate. "There is nothing absurd or even unusual about the plain text" of the law as written, wrote Oklahoma solicitor general Patrick Wyrick, the counsel of record. As a result, he said, the IRS rule cannot be justified as a way to "prevent unfair surprise" to states. Alabama, Georgia, Nebraska, South Carolina and West Virginia support this brief.

Washington Legal Foundation and Steven Willis

This brief, by Washington Legal Foundation litigator Cory Andrews, offers the court yet another reason to strike down federal tax credits. Steven Willis, a professor at University of Florida Levin College of Law, is an expert on a little-known principle in interpreting statutes:

"legislative grace." It is the notion that, because Congress has undisputed power over "the public fisc," it does not extend tax credits lightly. Therefore, the theory goes, they are a matter of "legislative grace" and must be construed -narrowly by the executive branch or the courts.

Administrative and constitutional law professors

A small group of law professors collaborated to argue that the IRS regulations violate separation-of-power principles and deserve no deference under the so-called Chevron doctrine, which counsels courts to defer to an agency's reasonable construction of a statute. Congressional power over appropriations, they say, is "the clearest of the boundaries" among the three branches of government. "For the IRS to arrogate that power to itself and then claim Chevron deference to that power-grab violates Congress' power over the purse and allocation of monies due and owing the Treasury." Catholic University Columbus School of Law professor Robert Destro is counsel of record on the brief.

Consumers' Research

This organization, described in its brief as an educational group that advocates "limited, law-bound governmental authority," seeks to allay any fears among the justices that calamity would result were the federal exchange subsidies struck down. Considering possible consequences of a ruling would be inappropriate for judges, writes Ronald Cass of Cass & Associates in Virginia. "[A]s so often is the case with such claims, the assertions of dire consequences fail to account for a variety of potential adjustments that could well eliminate or vastly reduce any of the predicted effects."

Obama Administration Supporters

22 states and the District of Columbia

Of the governments in this brief, 13 have established insurance exchanges and the rest use federal exchanges or federal-state partnerships. Their brief, written by Virginia Solicitor General Stuart Raphael, counters an argument that Congress restricted the subsidies to punish states that declined to establish exchanges. "From the states' perspective, then, not only was there no 'clear notice' that opting for a federally-facilitated exchange would deny citizens tax credits and ruin insurance markets, but a chorus of congressional leaders uniformly signaled the opposite," they wrote. Congress promised a cooperative-federalism model, "not a model based on federal threats and coercion."

Administrative and constitutional law scholars

These scholars from the University of Chicago Law School, Harvard Law School, New York University School of Law and the University of Washington School of Law argue that this case is "about good textual analysis vs. bad textual analysis. Textualism does not require courts to read statutory provisions in a vacuum." By focusing on the phrase "established by the State" in isolation, they argue, the challengers "violate textualism's core tenets and adopt an interpretation that would nullify the act as a whole." The brief, with nods to Justice Antonin Scalia's writings

on textualism, is by Lawrence Robbins of Robbins, Russell, Englert, Orseck, Untereiner & Sauber.

Former Treasury, Health & Human Services and Office of Management and Budget officials

If the justices decide the law is ambiguous, these former senior officials contend, the court should defer to the IRS interpretation. "Petitioners make a series of disparate arguments that are alike in one critical respect: If accepted, they would undermine the longstanding Chevron framework, encourage judicial superintendence of agency policy choices, limit agency flexibility to work within the boundaries that Congress has established, and interfere with the sound execution of the nation's laws," they say in a brief by Boris Bershteyn of Skadden, Arps, Slate, Meagher & Flom.

House and Senate Democratic leaders and 100 state legislators

These include Democratic leaders involved in drafting the ACA and state lawmakers who debated whether to establish state exchanges. They point to evidence in the legislative record; reports by the Congressional Budget Office; and statements by the Joint Committee on Taxation, U.S. Rep. Paul Ryan (R-Wis.) and other members of Congress indicating that they all understood that subsidies would be available on state or federal exchanges. Elizabeth Wydra (left) of the Constitutional Accountability Center is counsel of record.

American Hospital Association, medical colleges and related groups

"We will not mince words: Petitioners' position, if accepted, would be a disaster for millions of lower- and middle-income Americans. And it would devastate some hospitals and leave others without the resources they need to serve their communities — especially the most vulnerable," these organizations write. In the ACA, Congress made deep cuts to hospitals' federal funding expecting that federal subsidies would bring off setting revenues from newly insured patients. "This is no abstract case about principles of statutory construction. Petitioners' position, if accepted, means many more people will get sick, go bankrupt, or die," Hogan Lovells' Neal Katyal wrote.