

# HealthAffairs Blog

## Who Authored Obamacare's Exchanges? King v. Burwell And Justice Kagan's Law Clerks

By Ilya Shapiro

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Despite all the media hubbub and intense scrutiny, we didn't learn all that much from the [oral argument](#) in *King v. Burwell*. The four liberal justices—Ginsburg, Breyer, Sotomayor, and Kagan—clearly believe that an exchange established “for” or “in” a state by the federal government is the same as an exchange “established by the state” (or at least that it's ambiguous and the tie goes to the IRS). Justices Scalia and Alito—and presumably the silent Thomas—equally believe that words mean what they say.

So the case, as expected, turns on the views of Chief Justice Roberts and Justice Kennedy, who gave very little away. Indeed, I've never seen John Roberts so quiet at an oral argument—holding his cards so close that they risk being permanently imprinted on his vest—while Anthony Kennedy was characteristically inscrutable. In other words, 4-3 in the government's favor with two wild cards.

That's exactly what everyone knew going into the argument, and 85 minutes later if anyone tried to tell you that they knew what the outcome would be, they were engaging in spin or wishful thinking. To put an even finer point on it: whichever side you thought had the better chance of winning, downgrade your expectations to 50-50.

### A Revealing Exchange

But getting beyond the prognostication—which is almost always a futile exercise—there was one exchange that at least illuminated what this case turns on. Not surprisingly, it came in a colloquy between Justices Kagan and Alito (with the petitioners' counsel, Mike Carvin, acting as the foil). As seasoned court-watchers know, those two justices are the ones to focus on if you want to understand the crux of any matter before the Court. They're rarely the swing votes, but their questioning is clear, incisive, and to the point.

Here's Kagan's initial question:

*So I have three clerks, Mr. Carvin. Their names are Will and Elizabeth and Amanda. Okay? So [to] my first clerk, I say, Will, I'd like you to write me a memo. And I say, Elizabeth, I want you to edit Will's memo once he's done. And then I say, Amanda, listen, if Will is too busy to write the memo, I want you to write such memo. Now, my question is: If Will is*

*too busy to write the memo and Amanda has to write such memo, should Elizabeth edit the memo?*

Carvin stylized this hypothetical a bit, positing that the original plan was to pay Will for a memo and Amanda ends up writing the memo, then “under plain English and common sense,” Will doesn’t get paid (presumably regardless of whether Elizabeth edits the memo). Justice Kagan cut him off before he finished this explanation, saying:

*Gosh . . . you run a different shop than I do . . . . Because in my chambers, if Elizabeth did not edit the memo, Elizabeth would not be performing her function. In other words, there’s a substitute, and I’ve set up the substitute. And then I’ve given instructions: Elizabeth, you . . . edit Will’s memo, but of course if Amanda writes the memo, the instructions carry over. Elizabeth knows what she’s supposed to do. She’s supposed to edit Amanda’s memo, too.*

Carvin again explained that the difference between Kagan’s chambers and the case at hand was that the justice was “agnostic” as to which of her clerks writes the memo, while Congress “was not agnostic as to whether States or HHS established the Exchange.” In other words, while Justice Kagan doesn’t care who authors her memo (regardless of whether Elizabeth edits it)—and might be willing to pay any of her clerks if money were in play—the political dynamics surrounding the passage of the Affordable Care Act indicate that Congress very much wanted to have states “author” exchanges.

At this point, Justice Alito cut to the chase:

*Well, Mr. Carvin, if I had those clerks . . . and Amanda wrote the memo, and I received it and I said, This is a great memo, who wrote it? Would the answer be it was written by Will, because Amanda stepped into Will’s shoes?*

“That was my first answer,” Carvin quickly rejoined, provoking the fourth transcript notation of “(Laughter.)” during this interplay. “He’s good,” Justice Kagan said with a smile, pointing to Justice Alito.

Carvin then reiterated his point that “Congress was not agnostic as between State and Federal exchanges.” Justice Kagan agreed with this, suggesting that this conclusion meant that the answer to her original question really depends on context rather than “four or five words.” And that’s absolutely true—one of the canons of statutory construction is not to read a provision in a way that creates an absurd result—but Justice Alito showed that it’s just as nonsensical to say that the federal government established an “exchange established by the state” as it is to say that Will wrote the memo that Amanda wrote.

### **Reconciling Plain Meaning And A Reasonable Reading Of Congressional Intent**

So the only question here is whether reading the statute in the way that makes grammatical sense produces absurd results: Is there a reasonable explanation for why Congress would create a structure that denies premium subsidies to people who buy health insurance through federally run exchanges?

The answer to that is obvious: If Congress really wanted a system where states set up exchanges—and, under well-settled constitutional understandings, it couldn't force them to do so—it would have to provide an incentive. The incentive here is the premium subsidy, which Obamacare's designers apparently felt was an offer no state would refuse.

That's a very easy story to tell and understand, and Congress has offered these sorts of carrots/sticks before (not least with Obamacare's Medicaid expansion, which the Court rewrote three years ago to remove the unconstitutionally coercive elements). Is that what really happened here?

There's no dispositive evidence going either way—and really can't be, given that Congress had to pass the law to find out what was in it—though ACA “architect” Jonathan Gruber's infamous videos do suggest that at least the idea wasn't foreign to the staffers who crafted the legislation behind closed doors.

But the point is that it's a perfectly plausible contextual explanation, which means that there's no need to depart from the plain text of the law and somehow decree that ~~Amanda's memo was written “by” Willa~~ a federal exchange was established “by” the state.

In short, the fact that enforcing the Affordable Care Act produces a result that Congress may very well have intended but which has certain negative consequences is no reason to abandon the rule of law and allow the IRS to rewrite the statute. While Justice Kagan's chambers may run like a well-oiled machine, Obamacare has been a mess from the very beginning. Roberts and Kennedy should enforce the law as written and thereby direct Congress to write better memos.

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