

King v. Burwell arguments point to high-stakes decision

Boils down to four words in 900-plus pages of legislation

By Neil Versel

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The oral arguments the U.S. Supreme Court heard Wednesday in the latest challenge to the Patient Protection and Affordable Care Act did not address any health IT provisions of Obamacare – or even anything provider-related like accountable care or hospital readmissions – but the ruling could have far-reaching effects on the future of American healthcare.

The case, King v. Burwell, boils down to four words in 900-plus pages of the legislation: "established by the State." A technical section of the ACA said that subsidies for purchasing insurance were only available for those who buy insurance through exchanges "established by the state." But does this mean exchanges set up by individual states, or does "state" mean government in a more generic sense?

Defenders of the 2010 law, including the congressional Democrats who wrote it, said that this was a linguistic oversight; they clearly intended to subsidies to depend on income, not whether the buyer used a state-run or the federal insurance exchange. Opponents said the language speaks for itself.

Based on news accounts, the typical liberal/conservative split looks to be developing. Left-leaning justices Elana Kagan, Sonia Sotomayor, Stephen Breyer and Ruth Bader Ginsburg reportedly hinted that they were leaning toward upholding the law, while Justices Antonin Scalia and Samuel Alito strongly suggested by their questioning that they bought the challengers' argument, according to SCOTUSblog.

Chief Justice John Roberts, who generally comes at things from a center-right perspective, did not tip his hand. Reliably conservative Clarence Thomas seldom speaks during oral arguments, while regular swing vote Anthony Kennedy offered mixed signals.

Roberts famously joined the liberal wing in casting the deciding vote in the 5-4 decision in National Federation of Independent Business v. Sebelius that upheld most of the ACA in 2012.

In the first few seconds of argument, Ginsburg cut in to ask whether the plaintiffs even had standing to sue because they might qualify for government-provided insurance coverage through

Medicare or the Department of Veterans Affairs. Plaintiffs' attorney Michael Carvin told the court that he only had to prove standing for one of his clients.

Sotomayor suggested that if the Supreme Court were to strike down this key part of ACA, it would lead to a "death spiral" in states where residents lose federal insurance subsidies.

Healthy people would drop their coverage, leading to higher costs for those sick enough to need insurance, which would push more and more people out of the market, to the point that states would feel coerced to set up their own exchanges, Sotomayor's argument went.

Kennedy, normally a defender of states' rights, called this scenario "a serious constitutional problem," according to reports. He later brought up states' rights in challenging the argument of Solicitor General Don Verrilli, who defended Obamacare on behalf of the government, suggesting that Kennedy's vote was still up for grabs.

Verrilli faced rather straightforward questioning from Scalia who said that the court must rule on the actual language in the law, not try to discern the intent. Scalia and Alito challenged the administration's argument that Congress never intended to force states to run their own exchanges in order for residents to receive subsidies.

Not surprisingly, interest groups and pundits have been flooding the Internet with their opinions.

"If the government wins here, then not only will Obamacare continue to be rewritten by the IRS, but any executive agency – and any future president – will be able to rewrite any law. Accordingly, for the sake of the rule of law, I fervently hope that Roberts and Kennedy decide to enforce the Affordable Care Act as written and let Congress clean up its own mess," wrote Ilya Shapiro of the Cato Institute, a libertarian think tank.

"[I]n contrast to other landmarks in Supreme Court history, the King case is notable mostly for the cynicism at its heart. Instead of grandeur, there is a smallness about this lawsuit in every way except in the stakes riding on its outcome," Jeffrey Toobin countered in the liberal New Yorker.

Twitter user @Shadox1 offered a straightforward assessment: "pretending #SCOTUS will decide ACA fate based on 'law' rather than politics is a fantasy. #KingvBurwell."

It's hard to see any other outcome.