

What Leading Lawyers Made of High Court Action

By Marcia Coyle and Tony Mauro

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Lawyers on all sides of the contentious debate over *King v. Burwell* attended the arguments Wednesday. Here are some first-blush reactions to what they saw and heard:

"The context of the whole law is essential to resolving this case, and that principle was made clear in today's argument. If the court follows its own precedents that govern the reading of statutes, the Affordable Care Act's tax credits should be available nationwide.

"Justice Kennedy's questions underscored the federalism implications of a decision stripping individuals of tax credits. As our brief, as well as the brief filed by Virginia and more than 20 other states make clear, no state understood the ACA to operate in the way that the King plaintiffs argue at the time the statute was enacted. Argument this morning underscored the absurdity of the King plaintiffs' interpretation of the ACA, which is less about the law and more about the 'never-ending saga,' as Justice [Elena] Kagan put it, of opposition to Obamacare."

—Elizabeth Wydra, chief counsel, Constitutional Accountability Center

"It all depends on what the meaning of 'by' is. The four liberal justices 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,' to quote the relevant statute. Justices [Antonin] Scalia and [Samuel] Alito (and presumably the silent [Clarence] Thomas) equally firmly believe that words mean what they say. So this case, as expected, turns on the views of Chief Justice [John] Roberts and Justice [Anthony] Kennedy, who gave very little away at oral argument. 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.

—Ilya Shapiro, senior fellow in constitutional studies, Cato Institute

"I thought the government made probably the stronger case. If the court agreed with the petitioners, then 34 states that have federal exchanges will see the subsidies evaporate. That means that 5 million people are going to lose their coverage. If that happens, it's going to be contrary to the purposes of the act. It also affects the employer mandate. Employers only have to

pay penalties if there are insurance subsidies in the state exchange. If the subsidies go away, the mandate goes away.

“The justices really probed the petitioners' arguments pretty heavily. They seemed very concerned about the consequences of their decision. They spent a lot of time on the statutory-construction issues, but frankly I was surprised at how concerned about the damage to the ACA and the health care system generally. I would be very surprised if the plaintiffs won.”

—Brian Pinheiro, chairman, Ballard Spahr's business and finance department and practice leader of the employee-benefits and executive-compensation group.

"Obamacare is a disaster in every way, and the Supreme Court clearly realized that fact today. The justices pressed the Obama administration hard on its claim that the IRS could distribute billions of dollars on tax credits based on an ambiguity. Congress passed a law that even the Obama administration doesn't like. But, as most of the justices seemed to recognize, it's not the court's place to rewrite the law just to fix an urgent policy problem. To do that, the political branches will have to work something out between themselves instead of letting the Obama administration unilaterally rewrite the law.

“If the plaintiffs win, tens of millions of people will be freed from Obamacare's awful mandates, and, with respect to those who are losing subsidies, there are any number of plans circulating that President Obama could choose from if he genuinely wanted to fix this mess he created.”

—Jonathan Keim, Judicial Crisis Network

"On the substance, Breyer, Kagan and Sotomayor peppered Carvin with questions. Clearly, they agreed with the government. Scalia and Alito peppered Verrilli with questions. Alito clearly agreed with the petitioners. Scalia probably did as well.

"The result thus will most likely turn on what Justice Kennedy and the chief justice think. Kennedy was plainly concerned about the federalism arguments. He suggested that, as read by petitioners, the statute might be unconstitutional because it did not give states sufficient notice that opting for a federal exchange would have such dramatic consequences, such as a death spiral in the insurance market. At one point, he mentioned the doctrine of constitutional avoidance. His questions underscored the importance of federalism values in reading the statute.

"The chief justice said very little—two questions, I believe, so it was difficult to get a good sense of where he stood. At the end of Verrilli's argument, he asked whether a ruling based on Chevron [USA v. Natural Resources Defense Council] deference to the IRS' regulation would leave a subsequent administration free to issue a different regulation. Verrilli said it would, but that administration would have a heavy burden to justify the change under the second step of Chevron, which looks to the legislative history and purpose. Although the question is not

necessarily a window into the chief justice's thinking, it does suggest a possible route to a limited (or at least impermanent) result, which he might find appealing."

—Robert Weiner, partner, Arnold & Porter and former Justice Department official who oversaw defense of the Affordable Care Act.

"Today appears to have been a relatively good day for the supports of the Affordable Care Act. Predictably, the four liberals on the court appeared to strongly support the government's position that tax credits can be given to citizens of states that have not set up their own exchanges. The conservatives who would be expected to oppose the government, on the other hand, offered only muted support for the petitioner's challenge—Chief Justice Roberts, for example, who provided the critical fifth vote saving the ACA in the previous challenge to the statute, said almost nothing.

"As so often occurs, the parties focused on Justice Kennedy's vote, and his questions overall appeared to support the government's position. He expressed concern that denying tax credits to citizens of states that do not have their own exchanges would inappropriately burden those states, as they would be forced to either create an exchange or suffer serious consequences to their state insurance programs. These concerns over the relationship between the federal and state governments—always high in Kennedy's mind—would support construing the ACA to allow citizens in states that do not have their own exchanges to nevertheless receive tax subsidies."

—Andrew Holly, partner, Dorsey & Whitney

"Justice Kennedy, the likely swing vote in today's argument, suggested that the choice given to the states—create your own exchange or send your state insurance system into a death spiral—raises a 'serious constitutional issue.' When it was pointed out to Kennedy that the government did not raise the constitutional issue, Kennedy quipped, 'sometimes we think of things the government doesn't.'

"The court appeared split, 5-4, in favor of upholding the law, with justices Breyer, Ginsberg, Kagan and Sotomayor siding with Kennedy. When Sotomayor suggested that the claimant's position would require some states to lose all Medicaid funding, she then asked rhetorically, 'How is that not coercive in an unconstitutional way?'

"For his part, Justice Scalia pressed the government to concede that if a statute is capable of only one reasonable interpretation, regardless of whether the interpretation produces disastrous consequences, the interpretation must be enforced. Scalia suggested that where a provision is unambiguous, 'but lord that would make a terrible mess' is not enough to avoid enforcement of the law.

—Erin Sweeney, of counsel, Miller & Chevalier, who counsels on health care reform and employee benefits.