

All Eyes on Roberts, Kennedy As Court Weighs Health Reform

They emerge as key votes on an ideologically divided U.S. Supreme Court.

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March 9, 2015

The fate of the Affordable Care Act, and the ability of 8 million Americans to afford health insurance, may depend on two U.S. Supreme Court justices: John Roberts Jr. and Anthony Kennedy.

During arguments March 4 in *King v. Burwell*, Chief Justice Roberts (left) said very little to show his hand in this latest legal battle over the Affordable Care Act. And Kennedy gave initial hope to ACA supporters, but by the end of the argument the court's swing justice was back in the "unpredictable" column.

Roberts was crucial to the 2012 decision upholding the constitutionality of the law's requirement that individuals purchase health insurance. Kennedy dissented from that ruling, and if he changes sides in *King*, he could turn that case into another victory for the signature legislation of President Barack Obama's tenure as president.

Stock prices in health care companies soared after the argument, as a tentative consensus spread that the court will be reluctant to interpret the law in a way that would unravel it and leave millions of Americans with unaffordable health care options.

Yale Law School professor Abbe Gluck said afterward that it was "very good to see that the court understands the draconian consequences the challengers' reading would cause to individuals and the states, and also how the challengers' reading really makes nonsense of a host of other provisions in the statute."

But the possibility remained that the court will read the law strictly and yank federal subsidies of individual coverage in the 34 states that have not set up their own insurance exchanges.

The potential consequences of that outcome loomed large in the questions of justices on both sides, in contrast to typical high court arguments that rarely touch on the real-world impact of ruling one way or the other.

"In those states [where] their citizens don't receive subsidies, we're going to have the death spiral that this system was created to avoid," Justice Sonia Sotomayor (right) said. Justice Ruth Bader Ginsburg said at one point: "I have never seen anything like this, where if you take what the statute says you can have ... then you get these disastrous consequences."

Attempting to blunt the "death -spiral" predictions, Justices Samuel Alito Jr. and Antonin Scalia hinted at less -dramatic scenarios if the subsidies end. Alito said enforcement of the court's ruling could be stayed to give states time to set up exchanges, and "there would be no harm." Scalia asserted that Congress would act quickly to prevent the "dire consequences."

U.S. Solicitor General Donald Verrilli Jr. responded skeptically to Scalia's suggestion. "Well, this Congress, your honor ...," he said, drawing laughter. He ultimately acknowledged Scalia's and Alito's remedies were possible.

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As the fast-paced arguments unfolded before a packed courtroom that included key members of Congress and the Obama administration, justices appeared to split along familiar ideological lines.

The question before the court was whether a provision in the act provided federal tax credits or subsidies only for insurance purchased on state--created exchanges, not those operated by the federal government. Much of argument focused on the meaning the words "established by the states" used to describe exchanges where subsidies could be given. The Internal Revenue Service interpreted those four words to mean that subsidies would be available for purchases on federal exchanges.

"This is a straightforward case of statutory construction where the plain language of the statute dictates the result," argued Jones Day's Michael Carvin, counsel to four Virginia residents who do not want health insurance. They claim that because federal subsidies are available, they have to buy insurance or pay a penalty.

Justices Stephen Breyer, Sotomayor and Elena Kagan questioned Carvin's argument.

"It's not the simple four or five words" in the phrase at issue, Kagan said. "It's the whole structure and context" of the law in which the phrase is used that must be examined. Viewing the phrase in the context of the whole law, Breyer said, the challengers' argument was "much weaker."

Carvin countered that the context supported the challengers' interpretation. Con-gress, he said, knew how to distinguish between the state and federal exchanges and did so in the law.

"And, yet, the solicitor general is coming here to tell you that a rational, English-speaking person intending to convey subsidies available on [federal] exchanges would use the phrase 'exchanges established by the state,' " Carvin said.

But it was Carvin's second argument that triggered Kennedy's major concern. Carvin argued that Congress restricted federal subsidies to purchases on state-created exchanges to induce the states to establish their own exchanges: No exchange, no federal money.

"Let me say that from the standpoint of the dynamics of federalism, it does seem to me that there is something very powerful to the point that if your argument is accepted, the states are being told: 'Either create your own exchange, or we'll send your insurance market into a death spiral,' " Kennedy said. "It seems to me that under your argument — perhaps you will prevail in the plain words of the statute — there's a serious -constitutional problem if we adopt your argument."

But later, Kennedy seemed skeptical of Verrilli's arguments as well, asserting at one point that it would be a "drastic step" to defer to the Internal Revenue Service's interpretation of the statute.

Verrilli, who echoed the concerns of liberal justices about the "death spiral," said the challengers' reading of the text "produces an incoherent statute that doesn't work." That, he said, "cannot be the statute that Congress intended."

Scalia countered, "It may not be the statute they intended. The question is whether it's the statute that they wrote."

As Scalia's comment suggested, statutory construction will be crucial to the outcome of the case. "The context of the whole law is essential to resolving this case, and that principle was made clear" in the argument, said Elizabeth Wydra, chief counsel of the Constitutional Accountability Center. "If the court follows its own precedents that govern the reading of statutes, the Affordable Care Act's tax credits should be available nationwide."

But Ilya Shapiro of the Cato Institute, a leader in the challenge to the law, countered: "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."

"I fervently hope that Roberts and Kennedy decide to enforce the Affordable Care Act as written and let Congress clean up its own mess," he said.