

## Supreme Court justices appear split on ACA tax subsidies

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Supreme Court justices appear to differ over whether the Affordable Care Act allows tax subsidies for patients who purchase insurance through the federal exchange. During oral arguments March 4 in *King v. Burwell*, justices expressed mixed perspective not only on the ACA language on tax credits, but also on the ramifications of striking down use of the subsidies in states that rely on the federal exchange.

“One thing that was surprising was that the justices spent a lot of time asking questions about the consequences of agreeing with the petitioners,” said Brian M. Pinheiro, a Philadelphia-based health care and employee benefits attorney who attended the oral arguments. He said that some justices asked questions to find out “ ‘if the court struck down subsidies in the 34 states that had federal exchanges, what would that do to that law? What would that do to the health system, and could Congress have intended that result?’ I think that did trouble several of the justices who were thinking of the ultimate consequences of the decision.”

*King v. Burwell* centers on whether people who live in states that rely on the federal marketplace are eligible for tax credits to purchase insurance or whether such assistance can go only to residents whose states run their own marketplaces. The ACA states that tax credits apply to insurance purchased through an exchange “established by the state.” Challengers argue the law does not mention the federal exchange. The government interprets the ACA to allow subsidies whenever patients buys insurance on any exchange. Only 16 states and the District of Columbia have established a state-based exchange.

Recent research from the Urban Institute predicts that as many as 6 million Americans could lose their insurance coverage if the court rules against the government and strikes down the federal subsidies. Further, analysts from consultancy Avalere Health predict also that patients could see significant premium increases and health care providers could lose billions due to increased uncompensated care.

During the March 4 debate, the court’s four liberal justices appeared to side with the government’s reading of the law, including Justice Ruth Bader-Ginsberg and Justice Sonia Sotomayor, said Eric J. Segall, professor of law at Georgia State University, Atlanta. Justice Sotomayor said the plaintiffs’ interpretation of the ACA would mean Congress intended to coerce states into creating exchanges.

“The choice the state had was establish your own exchange or let the federal government establish it for you,” Justice Sotomayor said to plaintiff’s attorney Michael Carvin. “If we read it the way you’re saying, then we’re going to read a statute as intruding on the federal/state relationship because then the states are going to be coerced into establishing their own exchanges. In those states that don’t, their citizens don’t receive subsidies. We’re going to have the death spiral that this system was created to avoid.”

But the high court’s more conservative judges, including Justice Samuel Alito and Justice Antonin Scalia, appeared to agree with the plaintiff’s reading. Justice Scalia noted that whether the ACA functions well or not based on King’s interpretation should not be the issue. “Is it not the case that if the only reasonable interpretation of a particular provision produces disastrous consequences in the rest of the statute, it nonetheless means what it says?” Justice Scalia asked Solicitor General Donald B. Verrilli Jr., who represented the government. Justice Scalia stressed that addressing flaws within a law is the business of legislators. “You really think Congress is just going to sit there while all of these disastrous consequences ensue?”

Justices also grilled attorneys about whether the plaintiffs in the case have standing to sue, an issue that arose late in the litigation. The question surrounds whether all four plaintiffs have legal authority to challenge the ACA since some, or all, may not be penalized if they do not buy health insurance. Mr. Carvin argued the plaintiffs have clear standing to sue, while Mr. Verrilli indicated that the government was not interested in having the case decided on the basis of standing.

Although dismissing the case based on standing would be an easy out for the Supreme Court, the outcome is highly unlikely, Mr. Segall said.

“The court will do what it wants, regardless of the law of standing,” he said in an interview. “It felt like nobody wanted to get rid of this case based on standing. They’re going to basically ignore” the issue.

Mr. Pinheiro said that he believed the government had the stronger case. He predicted the Supreme Court will rule 6-3 in favor of the government. Ilya Shapiro of the Cato Institute had originally predicted a 6-3 rule in favor of the challengers. However, after the arguments, he now says it’s anyone’s call.

“My only prediction is that it’s a complete toss-up,” he said in an interview. “Whichever side anyone thought had the edge before argument has to temper their expectations, because I would give each side an even 50-50 shot at this point.”

The Justices’ decision is expected in June.