Supreme Court Hears Oral Argument in Subsidy Eligibility Battle

On March 4, 2015, the U.S. Supreme Court heard oral arguments in *King v. Burwell,* a case that centers on the meaning of statutory language in the Patient Protection and Affordable Care Act (PPACA). At question in the case is whether or not the Internal Revenue Service (IRS) may issue regulations to extend tax-credit subsidies to coverage purchased through health Exchanges established by the federal government via the Department of Health and Human Services (HHS) under Section 1321 of PPACA.

The ruling from the court is expected in late May or June of 2015. The case involves challenges to the IRS ruling that individuals are eligible for the premium subsidy regardless of whether their state has a state-run or federally-run Marketplace or Exchange. In *King,* a lower court held that the current IRS interpretation of Section 36B, which provides for premium tax credits to anyone who purchases insurance on any Exchange, is reasonable. Conversely, another court, in a case called *Halbig v. Burwell*, held that, based on the way the law is written, the subsidies should only be available to people living in a state with a state-run exchange. As we await the decision, employees will still receive premium subsidies and employers should continue preparations to meet the employer-shared responsibility/"play or pay" requirements.

Section 36B. Section 36B of the Internal Revenue Code references premium subsidies that are available to an individual enrolled in a health plan "through an Exchange established by the state under Section 1311." King and other plaintiffs argue that this means subsidies are not available to individuals who enrolled in health plans through a federally-established Exchange or Marketplace.

Currently, 18 states have a federally-facilitated Marketplace (FFM), seven have an FFM with the state conducting plan management, two states run their own small business Marketplace (SHOP) while the individual Marketplace is federally-facilitated, seven states have a state-federal partnership, three have a state-run Marketplace using the federal website, and 13 states and Washington, D.C., have a state-run Marketplace.

Arguments. Michael Carvin, an attorney at Jones Day who frequently argues before the Supreme Court, argued on behalf of King and three other plaintiffs. Solicitor General Donald Verrilli, from the Department of Justice, argued on behalf of the government's respondents. Solicitor General Verrilli is the attorney who argued on behalf of the government in the landmark case involving PPACA, *Burwell v. Hobby Lobby Stores, Inc.*

King. Mr. Carvin led the arguments and began by stating "This is a straight-forward case of statutory construction where the plain language of the statute dictates the result." Before making it any further into his argument, Justice Ginsburg began asking questions about the standing of the plaintiffs, or whether or not they are legally able to bring the case forward. Whether or not the Court discusses standing remains to be seen, although most scholars think it is an unlikely issue. On rebuttal, Mr. Carvin affirmatively stated that one of the plaintiffs will be subject to a penalty in 2014 absent relief of the Court, which if correct, would likely give standing to the plaintiffs.

Mr. Carvin, returning to the merits of the case, argued that the subsidies are only available through an Exchange established by the state under Section 1311. Justice Breyer then asked about the definition of the term "Exchange," which is "an Exchange established under 1311." Looking to 1311, it states "An Exchange shall be a government agency established by the state." Justice Breyer then noted Section 1321 of PPACA says that if a state does not establish an Exchange, the Federal Secretary shall establish and operate such Exchange. Mr. Carvin agreed with Justice Breyer's statutory interpretation. Mr. Carvin then emphasized that Section 1311 does not state that all Exchanges are subsidy eligible, but stays "Exchanges established by the state."

Justice Kagan then interrupted with a hypothetical in which she assigned a legal memo to her clerk Will, and tells her clerk Elizabeth to edit the memo. She then, in the hypothetical, tells her third clerk Amanda that if Will is unable to complete the memo, Amanda must write it. Justice Kagan then asked Mr. Carvin if, in that hypothetical, should Amanda write the memo, would Elizabeth be responsible for editing it, and simply treating Amanda as a substitute for Will. Despite laughter, Mr. Carvin argued that no, Elizabeth should not edit Amanda's memo. Justice Kagan disagreed, stating that she had set up a substitute for whom the instructions carry over. Mr. Carvin argued that while Justice Kagan might be agnostic about who writes and edits memos, Congress was not agnostic about whether the states or HHS should establish Exchanges.

Mr. Carvin also argued that Congress, knowing how to create equivalence between non-state Exchanges and Exchanges if and when it wanted to, did just that. Justice Sotomayor then questioned how Mr. Carvin envisioned the provision working, asking if the interpretation of the plaintiffs leads to states being coerced to establish their own Exchange. Stating "In those states that don't – their citizens don't receive subsidies, we're going to have a death spiral that the system was created to avoid." Mr. Carvin responded that outside the Supreme Court opinion in the PPACA case *NFIB v. Sebelius*, the Court has never suggested that a funding condition invades a state's police power.

Justice Kennedy then spoke up, as has been widely discussed in the media, stating that from the standpoint of Federalism dynamics "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." Mr. Carvin responded that the government has yet to make that argument, and before he could make his next point, Justice Scalia asked about the consequences of unconstitutionality. Justice Scalia noted "Very often you have an ambiguous provision, could be interpreted one way or another way. If interpreting it one way is unconstitutional, you interpret it the other way." Mr. Carvin agreed, and Justice Scalia then asked, if a provision was found to be unconstitutional, could the Court rewrite it. Mr. Carvin stated that no case law suggested that the Court could, and pointed to the "bizarre anomaly" in Medicaid coverage as a result of the Supreme Court's decision in *NFIB v. Sebelius*.

Mr. Carvin went on to argue that the plain language meaning of Section 36B was "much less risky a deal for Congress" because here "If they turn down the subsidy deal, they still get the valuable benefits of an Exchange," to which Justice Ginsburg interrupted to ask what benefits existed, and who would buy or sell on an Exchange with no subsidies? Mr. Carvin argued that although the Exchanges would not operate as Congress intended, because Congress intended all 50 states to create their own Exchange in return for the subsidies, they would still operate. Justice Sotomayor expressed disbelief that anyone would visit the Exchanges without subsidies. Mr. Carvin categorized this fear as "demonstrably untrue and not reflected anywhere in the legislative history." He argued that the subsidies are not required for the Exchanges and stated "There is not a scintilla of legislative history suggesting that without subsidies, there will be a death spiral."

Mr. Carvin went on to argue that throughout the language of PPACA, the terms "Exchanges" and "Exchanges under the Act" are used, which "naturally encompass both HHS Exchanges and state-established Exchanges." He went on to say that "And yet, the Solicitor General is coming here to tell you that a rational, English-speaking person intending to convey subsidies on HHS Exchanges use the phrase 'Exchanges established by the state.' He cannot provide to you any rational reason why somebody trying to convey the former would use the latter in formulation."

At this point, the Justices gave Mr. Carvin an additional 10 minutes, and Justice Kagan then asked why Congress was not more clear if it was intending to impose a heavy burden on the states, and noted that the ambiguous language was only in a technical formula and not found where you would expect in the law. Justice Kagan also expressed that the statute simply wasn't clear and noted that it took over a year and a half for anyone to even find the language at issue. Mr. Carvin replied that the most logical place for tax credit information is in the tax code. He explained the PPACA has three audiences: taxpayers, insurance companies, and states. Justice Kagan surmised that a state trying to decide whether it should open an Exchange wouldn't know where to look to find all of this information, to which Mr. Carvin argued the location of the language was logically placed in the tax code.

Mr. Carvin was then given time to speak without interruption and he argued a few points. First, he contended that there are no anomalies stemming from the plaintiff's interpretation of Section 36B. Mr. Carvin then argued that by the government's logic in their interpretation of Section 36B, their logic would force 34 states to lose Medicaid coverage-based statutory language regarding coordination between HHS Exchanges and state agencies. Another line of questioning ensued and Justice Kagan stated that it was clear that if you looked at the entire text of PPACA, it was clear that the words in Section 36B should not be treated the way the plaintiffs argued. If subsidies were provided to HHS Exchanges, it would gut Section 1311's preference for state-run Exchanges, concluded Mr. Carvin.

Government. Solicitor General Verrilli also began by discussing standing and noted that the issue of standing was dependent on incomes and obligations from the 2014 tax year. However, Solicitor General Verrilli made it clear he was raising the issue of standing and merely trying to provide information as the Court asked about it at the beginning of Mr. Carvin's arguments. He then went on to the merits of the case and argued that the interpretation of the statute by King and the other plaintiff's "produces an incoherent statute that doesn't work, and second, our reading is compelled by the Act's structure and design." Going on to describe King's interpretation of the statute as a "mockery" of the express promise of state flexibility and creates death spirals in the insurance industry that PPACA as a whole was designed to avoid. He concluded "That cannot be the statute that Congress intended."

Justice Scalia disagreed with the Congressional intent suggested by Solicitor General Verrilli, positing that it might not be what Congress intended, but it might be what Congress wrote. Solicitor General Verrilli provided a hypothetical in which a statute would require a state to construct an airport, and if it does not, the federal government will. If there were also a statute saying airplanes could only land at airports constructed by the state, no one would prevent airplanes from landing at airports built by the federal government for the state. Justice Scalia then asked about the principle that if the only reasonable interpretation of a provision produces disastrous consequences in the rest of the statute, would the interpretation still stand? Solicitor General Verrilli answered that there were limitations to the principle.

Solicitor General Verrilli was then asked by Justice Alito if King's interpretation were adopted, and the subsidies were found impermissible for those purchasing insurance via the federal Exchange, would that be unconstitutionally coercive? Solicitor General Verrilli, who would likely be required to defend a potentially unconstitutional statute in future theoretical litigation, stated that it would be a novel constitutional question and one that he was not prepared to declare unconstitutional.

Justice Alito then brought up the *amicus briefs*, which are briefs filed by individuals or groups who are interested in the case, that were filed by states. Justice Alito noted that only six states signed a brief making the argument that they were caught off guard and not given adequate notice of PPACA's requirements regarding Exchanges. Solicitor General Verrilli responded that there were 22 states that filed briefs that they didn't understand the statute to compel states to create Exchanges or risk losing subsidies. Solicitor General Verrilli also noted that during the IRS' rulemaking period, none of the states that filed comments addressed the issue now before the Court. Solicitor General Verrilli argued that if states thought they would not be eligible for subsidies if they used the federal Exchange, the issue would have been "front and center" in the rulemaking comments.

Solicitor General Verrilli also argued that as a practical matter, it was unrealistic to hope that state Exchanges could reconfigure in time for the next open enrollment period if a decision in the case required them to do so. Justice Scalia then asked Solicitor General Verrilli if he really thought "Congress is just going to sit there-while- while all of these disastrous consequences ensue?" Although there was laughter in the courtroom, Solicitor General Verrilli indicated that, in theory, Congress could fix any issues to which Justice Scalia indicated that the current Congressional body would fix "consequences as disastrous as you say."

Justice Kennedy went on to ask Solicitor General Verrilli if the state's choice to use the federal Exchange was "a mechanism for states to show they had concerns about the wisdom and workability of the Act in the form that it was passed." Solicitor General Verrilli responded that the government's interpretation of the statute, that subsidies are available on the federal Exchange, still allows states to decline to participate without invoking adverse consequences on its citizens.

Justice Scalia then noted that PPACA was "not the most elegantly drafted statute" and was pushed through in an expedited process. He then asked if it would be surprising if one of its imperfections is that the tasks of the states is not obvious enough in its writing. Solicitor General Verrilli stated that the language in Section 36B was "not the product of some last-minute deal" as it had come through Senate Finance Committee markup, which went on for weeks and was televised in a public hearing on C-SPAN. Justice Scalia asked the Solicitor General if there were Senators who opposed having the federal government "run the whole thing" due to concerns about a single-payer system, and wouldn't the provision that subsidies are only eligible on state Exchanges prevent the Federalization of the entire act? Solicitor General Verrilli responded that although there was an earlier argument that this was the work of

Senator Ben Nelson, D-Neb., there is “no contemporaneous evidence, none whatsoever, that anybody thought that way.”

Justice Alito then asked the million-dollar question, “Well, the puzzle that’s created by- your interpretation is this: If Congress did not want the phrase ‘established by the state’ to mean what that would normally be taken to mean, why did they use that language?” Solicitor General Verrilli responded that a better reading of Section 36B is that, by cross-referencing Section 1311, PPACA is discussing a specific Exchange in a specific state, rather than the general rules for Exchanges. Solicitor General Verrilli then urged the Court to focus “not on the who, but on the what; on the thing that gets set up and whether it qualifies as an Exchange established by the state, and these Exchanges do qualify.”

The Court then began a discussion on the weight of the word “such” in front of the word “Exchange” and Justice Scalia stated that Solicitor General Verrilli’s interpretation of “such” was “gobbledygook” to which the Solicitor General disagreed, stating his interpretation was the only reading that allows the Court to be faithful to the text of 1311(b)(1), the word ”shall,” and the Tenth Amendment (which centers on the idea of Federalism).

The Court then discussed the meaning of the word “qualified” as it relates to the requirement that Exchanges only enroll “qualified” individuals. Solicitor General Verrilli argued that the meaning of the word qualified was to distinguish between people who are eligible and ineligible on the Exchanges. Solicitor General Verrilli argued it is defined as a person who resides in a state, to prohibit people from shopping for insurance across state lines. This led to Justice Kennedy bringing up the *Chevron* doctrine, which sets forth the legal test for determining whether a court should grant deference to a government agency’s interpretation of a statute it administers, noting that to him it seems “a little odd that the director of the Internal Revenue didn’t- didn’t identify this problem if it’s ambiguous and advise Congress it was.” Solicitor General Verrilli argued that the *Chevron* doctrine supports the government’s position, as the IRS was given authority to make any decisions necessary to implement Section 36B.

At the conclusion of his argument, Solicitor General Verrilli stated “You should- you should read it according to its terms. And when you read this provision according to its terms and you read it in context and you read it against the background principles of Federalism, you have to affirm the government’s interpretation.”

Rebuttal. Mr. Carvin began his rebuttal by stating that one of the plaintiffs in the case, Mr. Hurst, would be subject to a tax penalty for 2014 absent relief from the Court. He discussed the idea of a funding condition by Section 36B, arguing “There is no way to view this statute as more coercive or harmful than Medicaid- version of Medicaid that was approved by this Court in NFIB, and indeed, the NFIB dissenting opinion pointed to this provision as something that was an acceptable noncoercive alternative.” Mr. Carvin argued that failing to interpret PPACA that way would intrude on state sovereignty.

Conclusion. It is currently unknown how the Court will rule this summer. A close decision with just a single swing vote would not be a surprise, nor would a majority opinion with multiple concurring or dissenting opinions. Certainly, a final decision that the premium subsidies are only legally available in states that have state-run Exchanges would have a huge impact. It would mean that all the people enrolled in federally-facilitated Exchanges who are currently receiving subsidies would no longer be eligible to receive them (it seems unlikely that subsidies that have already been received would have to be repaid). It would also mean that fewer people would be subject to the individual mandate since there is an exception to that requirement if coverage is not affordable. Whether or not a “death spiral” would occur in those states is speculation at this point. If the Supreme Court were to rule against the government and

declare individuals in states with an FFM ineligible for subsidies, they could also potentially write an opinion that includes a solution for those states. Absent that, Congress could be pressed to pass legislation, and the Centers for Medicare & Medicaid Services (CMS) could be pressured to work to help states open their own Exchanges. If a federal solution is unachievable, states would be forced to find solutions on an individual basis.

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