

US Supreme Court hears oral arguments on the Affordable Care Act's tax credit provision



David M. Kall | Sunday, March 15, 2015

Last week, the Supreme Court heard oral arguments in *King v. Burwell*, one of the most anticipated cases of the year. The case focuses on whether the premium tax credit provision of the 2010 Patient Protection and Affordable Care Act (ACA) is legal and whether the statute permits individuals to receive a tax subsidy when they purchase their health insurance on a federally established exchange. The premium tax credit is critical to purchasers who live in any of the 34 states that have not established their own healthcare exchanges.

The government argues that the law permits the subsidy when the words “established by the state” are viewed in the context of the entire statute. Indeed, elsewhere there is language that extends premium payment assistance to anyone who is enrolled in one or more qualified health plans through “an exchange.” And in another provision, an exchange is defined as “any exchange, regardless of whether the exchange is established by a state or the Health and Human Services.”

On the other hand, the challengers contend that the actual language says, and means, that only those who purchase their insurance on an exchange “established by the state” can receive a subsidy.

The New York Times reported that the above mentioned 34 states decided not to set up their own exchanges after Congress passed the ACA, leaving their citizens to purchase health insurance on a federally established marketplace. Now, more than nine million people receive subsidies, which average \$3,000 per person. Should the Supreme Court agree with the challengers that Congress had no intention of subsidizing health insurance purchased on a federal exchange, most of those nine million people would likely pull out of the exchange, driving prices up for everyone else.

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The Tax Foundation analyzed how the annual subsidies would trend through 2018 and concluded that there would be a more than six-fold increase. In 2014, the first year of the subsidies, they amounted to \$15.5 billion. By 2018, they would reach \$100 billion.

SCOTUSBlog rounded up many news outlets' reports after the oral arguments were held. Oliver Roeder at FiveThirtyEight, cited the "wisdom of the crowd" and predicted that the government would prevail, leaving the ACA intact.

Predicting the same outcome but employing a different analysis, Jeffrey Toobin, writing for *The New Yorker*, indicated that most of the justices' positions were predictable. He opined that all four of the Democratic appointees (Justices Ginsburg, Breyer, Sotomayor, and Kagan) were likely to uphold the law as is, and three of the Republican appointees (Justices Scalia, Alito, and Thomas) would probably not, leaving Justice Kennedy and Chief Justice Roberts. According to Toobin, Justice Kennedy seemed inclined to defer to the executive branch's own interpretation, a principle known as Chevron deference, though he also expressed sympathy for the challengers' interpretation.

Toobin noted that the chief justice "scarcely said a word throughout." But when he did, he pursued the Chevron deference reasoning, and suggested that a new administration could interpret the law differently.

Toobin's analysis ultimately offered the possibility that Chief Justice Roberts might be loathe to limit presidential powers of statutory interpretation by siding with the challengers. But in so doing, he could insert a reminder that "a new election is fast approaching...[and] that a new president could undo the current president's interpretation of Obamacare as soon as he (or she) took office in 2017. In other words, the future of Obamacare should be up to the voters, not the justices."

The opinion is expected by late June.



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