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King v. Burwell: The Supreme Court Hears the Case About Health Insurance Subsidies

On March 4, 2015, the U.S. Supreme Court heard oral argument in *King v Burwell*, No. 14-1158, a case challenging the legality of an IRS rule under which federal subsidies are provided to individuals who purchase health insurance coverage through a federally facilitated exchange (FFE).

Background

On November 7, 2014, the Supreme Court agreed to take up *King*, a challenge to regulations implementing a key provision of the Affordable Care Act (ACA) dealing with the availability of premium tax credits for individuals purchasing coverage on Health Insurance Exchanges. The petitioners argued that regulations allowing premium tax subsidies through FFEs are invalid and that subsidies may be provided only through Exchanges established by States. If the challenge is successful, federal subsidies could cease as to insurance purchased on Exchanges for as many as 36 States, potentially impacting millions of enrollees.

At issue in *King* is an Internal Revenue Service regulation (the IRS Rule) that qualified persons may receive a premium subsidy if the individual is enrolled in a qualified health plan through an Exchange. The IRS Rule defines "Exchange" for this purpose as "an Exchange serving the individual market for qualified individuals… regardless of whether the Exchange is established and operated by a State (including a regional Exchange or subsidiary Exchange) or by [the U.S. Department of Health and Human Services]." The IRS Rule interprets Section 36B(b)(2) of the Internal Revenue Code as added by the ACA, which provides that the IRS is to calculate tax credits for premiums for qualified health plans (QHPs) "which were enrolled in through an Exchange established by the State under [Section] 1311 of the Patient Protection and Affordable Care Act."

The question under consideration by the Supreme Court is whether the IRS Rule is a valid interpretation of IRC § 36B(b)(2). On July 22, 2014, the U.S. Court of Appeals for the Fourth Circuit held in *King* that the IRS Rule is valid.[1] The Fourth Circuit upheld the IRS Rule by finding that IRC § 36B(b)(2) is ambiguous and then deferring to the IRS's reading of the statutory language as a permissible exercise of agency discretion under the *Chevron* doctrine.

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[1] On the same day, the U.S. Court of Appeals for the District of Columbia Circuit reached the opposite conclusion in *Halbig v. Burwell*. While the D.C. Circuit was willing to accept the government's argument that an FFE established under Section 1321 of the ACA could be said to have been established under Section 1311, it rejected the idea that the statutory language would permit such an exchange to be "an Exchange established by the State." The D.C. Circuit struck down the IRS Rule as contrary to the statute's plain language. That decision was vacated when the D.C. Circuit voted to take the case en banc. On September 30, 2014, in *State of Oklahoma ex rel. Pruitt v. Burwell*, the U.S. District Court for the District of Oklahoma issued a decision in which the court found the analysis of the *Halbig* panel more persuasive and held the IRS Rule invalid at the first stage of the *Chevron* analysis; the decision has been appealed to the Tenth Circuit. The State of Indiana and a number of its school districts have also filed suit challenging the IRS Rule; the parties have filed cross motions for summary judgment. These cases are being held in abeyance pending the Supreme Court's decision in *King v. Burwell*.

There are several other provisions of the ACA on which the parties in *King v. Burwell* focus attention. ACA § 1311 provides for the U.S. Department of Health and Human Services (HHS) to make awards to States for the development and establishment of an American Health Benefit Exchange. Section 1311(b)(1) provides that "[e]ach State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an 'Exchange') for the State" that meets certain requirements. ACA § 1321 requires HHS to establish standards for the exchanges, and provides that, if a State elects not to establish an Exchange (or is unable to do so in time), HHS "shall (directly or through agreement with a not-for-profit entity) establish and operate such Exchange within the State."

The Parties' Briefs

Petitioners' Opening Brief

The *King* petitioners argue that the plain text of the statutory provision forecloses the IRS Rule and that there is no basis for rejecting the plain text of IRC § 36B. There is "no legitimate way to construe the phrase 'an Exchange established by the State under section 1311' to include one 'established by *HHS* under section *1321*'" (emphasis in original). In the ACA, Congress displayed a strong preference for the States to establish the exchanges; if Congress had wanted subsidies to be available in both State and HHS exchanges, there is no explanation for why Congress would have used the language that subsidies would be available only for coverage obtained "through an Exchange established by a State under section 1311."

The statute makes the availability of subsidies turn not on the type of exchange that is established, but on who establishes the exchange. And because HHS establishes the Exchange only upon the default of the State, HHS cannot be said be acting on behalf of the State in establishing such Exchange.

Because the statutory text is clear, that is the end of the inquiry under the Court's precedent because the plain language of the text does not produce an absurd result. Conditioning subsidies on State-established Exchanges serves a valuable purpose under the ACA: incentivizing the States to establish Exchanges. The Court's precedent is clear that "mere anomalies" never override plain text.

Finally, *Chevron* cannot justify the Fourth Circuit's decision. IRC § 36B is clear, so that should be the end of the inquiry under *Chevron* Step 1. Nor should the IRS be entitled to any deference under *Chevron* Step 2 in interpreting ambiguous statutes because (1) under a canon of statutory interpretation, provisions for tax credits must be unambiguous and (2) the language critical to the government's interpretation is not located in the IRC and, therefore, not within the IRS's expertise.

The Government's Response Brief

In response, the government focuses on the point that the ACA was enacted to provide quality, affordable health care for all Americans; in accordance with the ACA's purpose, the Treasury Department made tax credits available to eligible individuals in all States through the IRS Rule. Thus, the Fourth Circuit correctly held that the ACA authorizes the IRS to issue the IRS Rule; to hold otherwise would "thwart the [ACA's] core reforms in the 34 States," which "would face the very death spirals the [ACA] was structured to avoid, and insurance coverage for millions" in those States "would be extinguished." The ACA's text, structure and history demonstrate that tax credits are available through the Exchanges in every State. The phrase used in the IRC to describe the Exchange through which tax-credit eligible insurance coverage can be obtained—"an Exchange established by the State under [42 U.S.C. 18031]"—is a term of art that includes both an Exchange that a State establishes for itself and an Exchange that HHS establishes for the State.

The ACA's structure and design confirm the government's interpretation. Tax credits are essential to the ACA's nationwide insurance market reforms; the ACA found that the "individual coverage provision" (the individual mandate) is essential to

effective implementation of the ACA's insurance market reforms.[2]

The legislative history of the ACA supports such interpretation. Contrary to the petitioners' argument that Congress could have intentionally conditioned the availability of tax credits on the State establishment of an Exchange, it was well understood that some States would not establish Exchanges for themselves.

The government focuses much attention on "the contradictions, anomalies, and absurdities" that the petitioners' reading of the phrase in IRC § 36B would create in other provisions of the ACA, such as that there would be no individuals qualified to shop on FFEs if an "Exchange established by the State" is limited to State-established Exchanges because the phrase is used in ACA § 1312 in describing/defining a "qualified individual."

Petitioners' Reply Brief

The petitioners reject the government's argument that "Exchange established by the State under section 1311" is a term of art, noting that the government "explains neither *why* Congress would adopt a 'term of art' contrary to its plain English meaning nor *how* the Act transforms 'A' into 'B' without ever saying so in the text (or even legislative history)" (emphasis in original). This failure is amplified when the ACA is read as a whole because elsewhere in the statute, Congress uses broader formulations that encompass both State and HHS Exchanges. Furthermore, even if an HHS Exchange is established under Section 1311, it would still not have been "established by the State," as required by IRC § 36B. When Congress intended to depart from normal usage in the ACA, "it did so directly and expressly."

Oral Argument

Several general themes were the focus of questioning by the Justices during oral argument: standing, statutory interpretation and federalism.

Standing

Because several petitioners' eligibility for either a hardship exemption or for health insurance outside of the Exchanges had been suggested, Justice Ruth Bader Ginsburg raised the issue of standing almost as soon as Michael Carvin, the counsel for petitioners, began to speak, noting that "before we get to a question of statutory construction . . . at least one plaintiff has to have a concrete stake in these questions. They can't put them as ideological questions." Mr. Carvin defended the standing of two of the petitioners. In the course of his argument, Solicitor General Donald Verrilli virtually conceded that at least one of the petitioners has standing.

Statutory Interpretation, Plain Language and Reading in Context

As one would expect in a case that raises questions concerning the government's interpretation of a statute, oral argument touched on various canons of statutory interpretation, including plain language meaning, contextual interpretation and tax law interpretation, and the implications of *Chevron* deference for the case.

During oral argument, Mr. Carvin argued that the plain language of IRC § 36B(b)(2), "Exchange established by the State under [Section] 1311," cannot mean an exchange established by HHS. From the outset, he emphasized that "[t]his is a straightforward case of statutory construction where the plain language of the statute dictates the result" because "the only provision in the Act which either authorizes or limits subsidies says, in plain English, that the subsidies are only available through an exchange established by the State under Section 1311." Using an extended analogy about her clerks, Justice Elena Kagan, however, noted, "We don't look at four words. We look at the whole text, the particular context, the more general context, [and] try to make everything harmonious with everything else."

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[2] The express legislative findings in the ACA address the individual mandate, not the provision of subsidies, although many witnesses in congressional hearings apparently noted the importance of subsidies to the affordability of health insurance.

In responding to Justice Stephen Breyer's question relating to the language of "such Exchange" in Section 1321, Mr. Carvin noted that the same language was used in the ACA provision on territorial Exchanges, but in that provision, Congress provided that the territories "shall be treated as a State"—"language which is notably omitted from 1321"—which "shows that Congress knew how to create equivalence between non-State Exchanges and Exchanges if and when it wanted to." Later, returning to the theme of context, Mr. Carvin argued that "Section 1311 is a key part of this context. It says in the strongest possible terms we want States to run these Exchanges. . . . [I]f you condition subsidies, Congress accomplishes both of its goals. Widespread subsidies, plus State-run Exchanges." Mr. Carvin further argued that the government "cannot provide to you any rational reason" why Congress would use "Exchange established by the State under [section] 1311" to convey both State-established Exchanges and HHS-established Exchanges.

Justice Samuel Alito addressed this line of analysis with General Verrilli, asking, "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? Why didn't they use other formulations that appear elsewhere in the Act? Why didn't they say, 'established under the Act'? Why didn't they say, 'established within the State'?" General Verrilli responded that, because Section 1321 directs HHS, "when a State hasn't elected to meet the Federal requirements [to establish an Exchange under Section 1311]," to set up "such Exchange," "what HHS is doing . . . is fulfilling the requirement of the Section 1311(b)(1) that each State establish an Exchange, and for that reason we say that it qualifies as an Exchange established by the State." Justice Anthony Kennedy expressed some concern about this interpretation, while Justice Antonin Scalia expressed skepticism about the reasoning, labeling it "gobbledygook."

General Verrilli defended the IRS Rule as "follow[ing] directly from the text of the Act's applicable provisions and it's really the only way to make sense of Section 36B and the rest of the Act" and as being "compelled by the Act's structure and design." He emphasized that the petitioners' reading produces an "incoherent statute that doesn't work," "forces HHS to establish rump Exchanges that are doomed to fail," "makes a mockery" of the ACA's "express textual promise of State flexibility," "precipitates the insurance market death spirals" and "revokes the promise of affordable care for millions of Americans," concluding "[t]hat cannot be the statute that Congress intended."

Justice Scalia noted that "it may not be the statute they intended. The question is whether it's the statute that they wrote." General Verrilli argued that it was not the statute that Congress wrote because the rule is "that you don't read statutory provisions in isolation; you read them in context . . . in order to ensure that the statute operates as a harmonious whole. You read them so that you don't render the statutory provisions ineffective." Justice Scalia challenged him on this, noting that such rule "only applies where there are alternative readings that are reasonable," but if a provision "can only reasonably mean one thing, it will continue to mean that one thing even if it has untoward consequences for the rest of the statute."

Justice Kennedy asked General Verrilli about the application of *Chevron* deference to the case, noting if the statute is "ambiguous, then we think about Chevron," but that it seemed a "drastic step" to permit the IRS to make the call on the availability of subsidies: The Court's "cases say that if the Internal Revenue Service is going to allow deductions using these, that [the statute] has to be very, very clear." In response, General Verrilli noted the ACA's express delegation of authority to the IRS, and that, under the Court's precedent, *Chevron* applies to "big questions as well as small" and "to the tax code like anything else." In one of his few substantive comments of the oral argument, Chief Justice John Roberts noted that if the government is "right about Chevron, that would indicate that a subsequent administration could change that interpretation."

Federalism, Unconstitutional Coercion, Constitutional Avoidance and Clear Notice

During the course of oral argument, the Justices took up two issues relating to federalism (federal/state relations) and the implications of those issues on the petitioners' interpretation of "an Exchange established by the State": (1) whether the petitioners' interpretation of the statute, with tax subsidies only available to residents of States that established an Exchange, would be unduly (i.e., unconstitutionally) coercive, an issue not directly raised by the government's brief, but one featured in the briefs of certain amici; and (2) whether the statute failed to provide sufficient notice to States that their citizens would

be ineligible for a tax credit if the State elected to allow the federal government to establish an Exchange for the State.

Both the government and petitioners argued that their interpretation of the statute yielded pro-federalism results. General Verrilli argued to Justice Kennedy that "the Federalism values are promoted by our interpretation" because if a State preferred not to be involved in ACA implementation, "the structure of the Act . . . fully vindicates that concern. They can decide not to participate without having any adverse consequences visited upon the citizens of the State"; the petitioners' position is "the anti-Federalism reading, and that's a powerful reason to reject it."

Mr. Carvin rejected this idea in his rebuttal: In discussing the employer mandate (and referencing an amicus brief from the State of Indiana), he noted that "[u]nder [the government's] view of the statute, the Federal government gets to unilaterally impose on States . . . a requirement that States insure their own individuals. It [applies] the employer mandate to States. So … under their theory, the States are absolutely helpless to stop this Federal intervention into their most basic personnel practices. Whereas under our theory, they are able to say, no. So actually, the more intrusive view of the statute is [the government's]."

Unconstitutional Coercion and Constitutional Avoidance

Justice Sonia Sotomayor first raised the coercion issue with Mr. Carvin, noting certain alleged implications of the petitioners' interpretation and stating, "If we read [the provision] 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." Mr. Carvin responded that condition on the tax subsidies "is hardly invading State sovereignty and it's the kind of routine . . . funding condition that this Court has upheld countless times."

Justice Kennedy jumped in, "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."[3] Mr. Carvin rejected the idea: "[I]f this was unconstitutional, then the Medicaid statute that this Court approved in NFIB would be unconstitutional."[4]

Justice Alito asked General Verrilli: "If we adopt Petitioners' interpretation of this Act, is it unconstitutionally coercive?" Importantly, General Verrilli was unwilling to take that position: He stated that it would "certainly be a novel constitutional question, and I think that I'm not prepared to say to the Court today that it is unconstitutional. It would be my duty to defend the statute and on the authority of New York v. United States, I think we would do so." However, if it raises a serious constitutional question, "the doctrine of constitutional avoidance becomes another very powerful reason to read the statutory text our way."

Mr. Carvin summed up the petitioners' position on the issue in rebuttal, reiterating that "even if there's a constitutional doubt under a novel constitutional question, as Justice Scalia pointed out, there's no alternative reading of the statute that … avoids that, because either way, you're intruding on State sovereignty."

Clear Notice

Justices Sotomayor, Ginsburg, and Kagan raised the issue of notice with Mr. Carvin, with Justice Kagan noting that "there's at least a presumption . . . that Congress does not mean to impose heavy burdens and Draconian choices on States unless it says so awfully clearly," that the limitation is "not in the place that you would expect it to be put in," but in a "technical formula," and that "in terms of interpreting statutes, that's not the clarity with which we require the government to speak when it's upsetting Federal-State relations like this." In response, Mr. Carvin asked, "[W]here else would you expect a tax credit except in the tax code?"

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[3] Justice Kennedy acknowledged to Mr. Carvin that "[i]t may well be that you're correct as to these words, and there's nothing we can do. I understand that." He later returned to the issue with General Verrilli, noting that "it does seem to me that if Petitioners' argument is correct, this is just not a rational choice for the States to make and that they're being coerced."

[4] Referencing *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012).

Justice Alito took up this idea, asking, "[I]f I were a State official and I was trying to decide whether my State should establish an Exchange, and I wanted to know whether individuals who enrolled in a plan on my possible State-established Exchange would get a credit, where would I look?" He also noted that "if [States] were all caught off guard and they were upset about this, you would expect them to file an amicus brief telling us that," but "of the 34 [States that did not establish Exchanges], only 6 of them signed the brief that was submitted by a number of States making that argument."

General Verrilli countered this argument. He noted that several States supporting the petitioners had filed comments during the IRS rulemaking, but had not raised the issue, stating that "if they really understood the statute as denying subsidies in States that did not set up their own exchanges, that would have [been] front and center in their rulemaking comments, but they said nothing about it and I think that tells you a good deal about . . . what everybody understood that this statute was."[5] He also argued that if Congress's plan was for every State "to establish an Exchange for itself . . . if that was really the plan, then the consequence for the States would be in neon lights in this statute. You would want to make absolutely sure that every State got the message."

Justice Alito suggested that any potential harm arising from insufficient notice to States could still be ameliorated, noting that "it's not too late for a State to establish an exchange if we were to adopt Petitioners' interpretation of the statute. So going forward, there would be no harm." When General Verrilli responded that tax credits would be cut off, imposing significant adverse effects immediately, Justice Alito noted that the Court could "stay the mandate until the end of this tax year as we have done in other cases where we have adopted an interpretation of the constitutional—or a statute that would have very disruptive consequences." Justice Scalia also noted that "[i]f the consequences are as disastrous as [the government] say[s], . . . I think this Congress would act."

Outlook

It is always difficult to predict how the Supreme Court will decide any particular case it decides to hear, and especially difficult when the case involves high-profile, politically charged issues. Often, a Justice's comments or questions during oral argument prove no gauge of how he or she ultimately decides in the case. However, it seems likely that the decision in *King v. Burwell* will be a close decision, with the Court issuing its opinion during the last week of the Court's session (the last week of June). Based solely on their comments during oral argument, it seems likely that Justices Ginsburg, Breyer, Sotomayor and Kagan will side with the government, with Justices Scalia, Alito and Thomas[6] siding with petitioners. The Chief Justice and Justice Kennedy will likely prove the deciding votes. The Chief Justice said little during oral argument by which to gauge his thinking, while Justice Kennedy made statements and raised serious issues about each party's positions.

We will continue to provide updates and analysis on *King v. Burwell* as circumstances warrant at www.alston.com.

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5 He also noted that the provision could not "possibly [be] justif[ied] . . . as adequate notice to the States."

6 Although Justice Clarence Thomas did not say anything during oral argument, it seems likely that he would side with petitioners given the issues presented by the case.

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