McDermott Will & Emery

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Sharp Questions Dominate Supreme Court Oral Arguments Regarding the Challenge to the Availability of ACA Premium Tax Credits

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On March 4, 2015, the Supreme Court of the United States heard oral arguments in *King v. Burwell*, the highest profile challenge to the Affordable Care Act (ACA) since the Supreme Court's 2012 decision to uphold the law. The oral arguments featured sharp questioning of both sides. A decision is anticipated in June to determine whether the high court will maintain the status quo with respect to the availability of premium tax credits to lower-income exchange customers in all states.

The Issue

The plaintiffs in *King* seek to invalidate a May 2012 Internal Revenue Service (IRS) rule providing that health insurance premium tax credits will be available to all taxpayers nationwide, regardless of whether they obtain coverage through state-based exchanges or federally funded exchanges (FFEs).[i] The plaintiffs argue that the plain language of the ACA limits the availability of premium tax credits to health care insurance plans purchased through state exchanges. Only 13 states and the District of Columbia have established state exchanges for 2015;[ii] the other 37 states will use FFEs in 2015.[iii] The plaintiffs' argument is based on statutory language providing that premium tax credits are available only for health care plans that are "enrolled in through an Exchange *established by the State* under section 1311 of the [ACA]."[iv]

Case History

In 2013, two groups of individual taxpayers brought lawsuits contending that the IRS rule violates the plain language of the ACA. The government successfully defended the IRS rule before the U.S. District Court for the District of Columbia (in *Halbig v. Burwell*) and the U.S. District Court for the Eastern District of Virginia (in *King*) by asserting that the plaintiffs' isolation of a phrase in the statute was inconsistent with the legislative history, structure and purpose of the ACA. The plaintiffs appealed both decisions to the U.S. Court of Appeals for the D.C. Circuit and the Fourth Circuit, respectively. On July 22, 2014, in *Halbig*,[v] a divided three-judge panel of the D.C. Circuit struck down the IRS rule and held that the plain language of the ACA clearly restricted the availability of premium tax credits to consumers purchasing insurance through state-based exchanges. On that same day, a unanimous panel in the Fourth Circuit upheld the same IRS rule in *King,*[vi] concluding that it must defer to the government's reasonable interpretation of the ACA reflected in IRS rule under *Chevron*.[vii] Although the D.C. Circuit agreed to rehear *Halbig en banc*, which potentially could have rectified the circuit split, the Supreme Court granted the plaintiffs' petition to hear *King*.

The Oral Argument at the Supreme Court

STANDING BRUSHED ASIDE

Although Justice Ginsburg raised the issue of standing within the first few seconds of the argument by Michael Carvin, counsel for the plaintiffs, the issue was brushed aside by the other justices and seems unlikely to be addressed by the Supreme Court. The government did not challenge the plaintiffs' standing in its brief, and on the record before the Supreme Court there is no question that the challengers have standing. Mr. Carvin, counsel for plaintiffs, represented that there had been no factual change that

would affect standing, and the Supreme Court appeared satisfied with his representation.

THE MERITS: QUESTIONS FOR PLAINTIFFS' COUNSEL

The questions to Mr. Carvin primarily focused on two issues. First, Justices Breyer, Kagan, Ginsburg and Sotomayor repeatedly questioned Mr. Carvin concerning other provisions in the ACA that the government contends support its interpretation of the statute, read as a whole. In their questions, those justices made clear that they supported the government's interpretation of the statute. Justice Breyer, in particular, outlined the statutory case in support of the government's interpretation, noting that Section 1321 of the ACA required the federal government to establish "*such* Exchange within the state"[viii] in those states that did not do so—and that this language effectively meant that the back-up FFEs were "established by the State" for purposes of the Act.

Second, Justices Sotomayor, Kagan and Kennedy asked whether the plaintiffs' interpretation necessarily raised a serious constitutional question; specifically, they inquired whether the ACA (so read) unconstitutionally coerced the states into establishing exchanges in view of the very severe consequences flowing from their failure to do so. If so, that could implicate the doctrine of constitutional avoidance, under which a court—if confronted with two plausible interpretations of a statute—should choose the interpretation that would avoid the potential conflict with the U.S. Constitution.

THE MERITS: QUESTIONS FOR THE SOLICITOR GENERAL

Like the questioning of counsel for the plaintiffs, the justices' questioning of Solicitor General Donald Verrelli focused primarily on the meaning of the statute and whether the plaintiffs' challenge implicated the doctrine of constitutional avoidance. As to the former, Justices Scalia, Alito and Kennedy expressed—to varying degrees—skepticism regarding the government's interpretation of the statute. In particular, Justice Scalia repeatedly emphasized that it is not unusual for Congress to enact a poorly designed statute that produces unfortunate results, and that a statute should not be given an unreasonable interpretation in order to avoid unfortunate results.

As to whether plaintiffs' interpretation triggered the doctrine of constitutional avoidance because it resulted in the ACA coercing the states, Justice Alito observed that only six of the states that do not have state-based exchanges had made that argument. In other words, if the ACA were coercive by withholding tax subsidies from the residents of those states failing to establish exchanges, most of the states so coerced were not complaining about it. Justice Kennedy, however, quite directly stated that if plaintiffs' argument is correct, the ACA coerces states to establish exchanges because declining to do so "is just not a rational choice." That in turn, he observed, would trigger the doctrine of avoidance.

Finally, the solicitor general was questioned by the justices regarding the government's alternative argument that the IRS's interpretation of the statute was entitled to deference under the *Chevron* case, under which courts defer to reasonable agency interpretations of ambiguous federal statutes. Justices Kennedy and Alito observed that applying *Chevron* deference here would conflict with the Supreme Court's cases holding that the tax code is to be construed narrowly against tax credits and deductions. Chief Justice Roberts—in his only merits-related statement of the entire argument—observed that, if *Chevron* applies here, the next presidential administration presumably could reverse course and withdraw tax subsidies for health plans purchased on the FFEs.

Potential Impact of a Ruling for the Plaintiffs

The Supreme Court is anticipated to render its decision by late June. If the Supreme Court strikes down the IRS rule as contrary to the ACA, that would have significant financial consequences for millions of U.S. citizens receiving premium tax credits through the FFEs, which would reverberate throughout the entire health insurance market.

POTENTIAL IMPACT IN 2015

The vast majority (87 percent) of individuals selecting health care plans in the 37 states using the FFEs in 2015 qualify for premium tax credits.[ix] Insurers are concerned that a Supreme Court ruling that such insureds are ineligible to receive premium tax credits, whether or not it goes into immediate effect, may prompt consumers to drop their coverage mid-year. Insurers are already locked into their rates for 2015 and it is unclear whether insurers would be allowed to withdraw from the FFEs mid-year. During oral argument, Justice Alito noted that the Supreme Court could mitigate some of the immediate impact of such a ruling by delaying its implementation so that the states using the FFEs could set up exchanges, in order to preserve their citizens' access to premium tax credits.

POTENTIAL IMPACT BEYOND 2015

One study has concluded that, if the Supreme Court rules against the government, about 9.3 million people living in FFE states would no longer receive subsidies by 2016.[x] That study also projects that such a ruling would increase the number of uninsured people by 8.2 million, leaving only less-healthy consumers in the individual insurance marketplace and driving up 2016 average premiums 35 percent, a so-called health insurance "death spiral."[xi]

Because the Supreme Court will likely rule after insurers have made their regulatory filings for their 2016 health plans, some insurers are contemplating proposing alternative plan offerings and two different sets of rates—one for each potential outcome—with the intention to drop certain offerings before they are finalized. The Department of Health and Human Services has not publicly discussed any contingency plans. Three Republican senators pledged that they have a plan to provide financial assistance for a transitional period to individuals who may lose subsidies.[xii] Nevertheless, one can only speculate about what—if anything—Congress and the administration would do in that event.

THE McDERMOTT DIFFERENCE

McDermott Will & Emery represents a group of deans, chairs and faculty members from Schools of Public Health, as well as the American Public Health Association, who filed *amici curiae* briefs in support of the federal government in both *Halbig* and *King*.

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i ACA § 1401(a), codified at 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added).

ii Thirteen states (plus the District of Columbia) have implemented and will run their own State-Based Exchanges: California, Colorado, Connecticut, Hawaii, Idaho, Kentucky, Maryland, Massachusetts, Minnesota, New York, Rhode Island, Vermont and Washington for 2015. Office of the Assistant Secretary for Planning and Evaluation Issue Brief: Health Insurance Marketplace 2015 Open Enrollment Period: January Enrollment Report for the Period: Nov. 15, 2014 – Jan. 16, 2015, 25–26 (Dep't Health & Human Serv. Jan. 27, 2015) [hereinafter HHS Report].

iii The 37 states using the FFEs for 2015 include (a) the seven partnership Exchange states (Arkansas, Delaware, Illinois, Iowa, Michigan, New Hampshire and West Virginia); (b) the 27 states whose Exchanges will be run fully by the FFEs in 2015 (Alabama, Alaska, Arizona, Florida, Georgia, Indiana, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin and Wyoming); and (c) the three states whose State Based Exchanges will use the FFEs website platform for 2015 (Nevada, New Mexico and Oregon). Office of the Assistant Secretary for Planning and Evaluation Issue Brief: Health Insurance Marketplace 2015 Open Enrollment Period: January Enrollment Report for the Period: Nov. 15, 2014 – Jan. 16, 2015, 25–26 (Dep't Health & Human Serv. Jan. 27, 2015) [hereinafter HHS Report]. At the time of the appellate decisions in King and Halbig, 36 states used the FFEs in 2014: (a) the seven above-mentioned partnership Exchange states; (b) 27 states whose Exchanges were run fully by the FFEs in 2014; and (c) two states whose state-based Exchanges were supported by the FFEs website platform for 2015 (Idaho and New Mexico.). Office of the Assistant Secretary for Planning and Evaluation Issue Brief: Health Insurance Marketplace: January Enrollment Report for the Period: Oct. 1, 2013 – Feb. 1, 2014, 22–24 (Dep't Health & Human Serv. Feb. 12, 2014). For 2015, Idaho is running its state-based Exchange but Nevada and Oregon are using the FFEs website platform. HHS Report at 25–26. The D.C. and Fourth Circuits made no distinction in the application of their rulings between those states operating under the FFEs with state assistance versus those states whose exchanges are fully run by the FFEs.

iv ACA § 1401(a), codified at 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added).

v Halbig v. Burwell, 758 F.3d 390 (D.C. Cir. 2014).

vi King v. Burwell, 759 F.3d 358 (4th Cir. 2014).

vii Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

viii 42 U.S.C. § 18041(c)(1).

ix Office of the Assistant Secretary for Planning and Evaluation Issue Brief: Health Insurance Marketplace 2015 Average Premiums After Advance Premium Tax Credits Through January 30 in 37 States Using the Healthcare.gov Platform, 2 (Dep't Health & Human Serv. Feb. 9, 2015).

x Linda J. Blumberg, Matthew Beuttgens and John Holahan, The Implications for a Supreme Court Finding for the Plaintiffs in King v Burwell: 8.2 Million More Uninsured and 35% Higher Premiums, Urban Institute, http://www.urban.org/UploadedPDF/2000062-The-Implications-King-vs-Burwell.pdf, Jan. 2015, at 5.

xi Id. at 6.

xii Sen. Orrin Hatch (R-Utah), Sen. Lamar Alexander (R-Tenn.), and Sen. John Barrasso (R-Wyo.), Op-Ed, We have a plan for fixing health care, Wash. Post, Mar. 1, 2015.

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