

Supreme Court Hears Oral Argument in *King v. Burwell*: Will Impermissible Federal Coercion Save the ACA?

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Yesterday, the Supreme Court heard oral argument in *King v. Burwell*, which some describe as an argument over a mere four words – "established by the state." But to the surprise of many, the Justices did not spend most of the time debating canons of statutory interpretation; instead, they, and in particular Justice Kennedy, raised a federalism argument that may prove dispositive in this case.

The issue in *King v. Burwell* is whether individuals in the 34 states that have not established a state exchange and instead rely on the federal exchange are entitled to subsidies. Subsidies, which come in the form of premium tax credits and cost-sharing reductions, help lower monthly health-plan premiums so that individuals can afford health insurance. Without the subsidies, it is estimated that 9.6 million people would lose their health insurance. The Petitioners argue that Congress stated in clear terms that subsidies are available on "exchanges established by the state," and if Congress had intended the subsidies to apply to federally-run exchanges, it would have just referred to "exchanges," period, as it does in other parts of the Affordable Care Act (ACA). The government counters that this is a complex law and the Court cannot interpret four words of the statute in a vacuum. A review of the regulatory framework established under the ACA, the government argues, makes clear that the subsidies are available whenever an individual buys health insurance on an exchange, whether it is an exchange established by the state or by the federal government.

After few commentators correctly predicted the outcome of the challenge to the ACA in 2012, many are reluctant to speculate this time around, instead noting that the decision could go either way. Justice Kennedy, the likely swing vote, however, may have provided a reason for the government to be optimistic. His line of questioning focused on whether reading the statute to apply only to state-run exchanges would cause "serious constitutional problems of coercion." As Justice Kennedy pointed out, if "States are being told either create your own exchange, or we'll send your insurance market into a death spiral," Congress would not be respecting state sovereignty, but rather forcing states to act by putting a "gun to the[ir] head."[\[1\]](#) which would raise serious issues of constitutionality in our federal system. Under the doctrine of "constitutional avoidance," where there are multiple possible interpretations of a statute, the Court should adopt the reading that avoids the constitutional question which, in this case, means that the government's interpretation would be adopted.

Ironically, the federalism/coercion argument is what led the more conservative justices to strike down certain parts of the ACA's Medicaid expansion provisions in 2012. There, a majority of the Court found the ACA's Medicaid expansion unconstitutionally coercive of states because states did not have adequate notice to voluntarily consent to this change in the Medicaid program, as it put at risk states' existing federal Medicaid funding if they failed to expand their Medicaid program as required by the ACA. Prior to 2012, the concept of unconstitutional coercion had never been invoked as a basis for striking down a federal funding program. The point had only been raised as an aside that there could possibly be a future case in which a financial inducement offered by Congress could cross the line from permissible pressure on states to legislate according to Congress' policy objectives to unconstitutional coercion.[\[2\]](#)

The coercion issue raised by Justice Kennedy (and discussed by Justice Sotomayor) at oral argument yesterday is somewhat different from the coercion argument that prevailed in 2012. The coercive nature of the Medicaid expansion program turned on the fact that state governments would lose federal dollars if they did not comply with new federal requirements. In *King v. Burwell*, there are no federal dollars going to state governments to coerce their behavior; rather, federal subsidies are being given to individual residents of the states. But this may prove to be a distinction without a difference. Federal Medicaid dollars are essential for state Medicaid programs just like individuals who can afford to buy into the state marketplace (often with the help of subsidies) are essential for the effective operation of individual insurance markets under the ACA regime. Taking away Medicaid funding or taking away subsidies for insurance similarly undermines the viability of state insurance programs.

While at least theoretically and as suggested by Justice Scalia, if the law is clear and the ACA provision at issue can only be interpreted as impermissibly coercive, the Court could find for Petitioners and invalidate the ACA. This seems highly unlikely given Petitioners' counsel's concession that the provision at issue needed to be examined "in the context of the Act as a whole," and the questioning at argument, including Justice Kennedy's point that the unconstitutional coercion issue has to be in the "background of how we interpret... this statute."

The stated relevance of the coercion issue to statutory "interpretation" should please the government as it suggests that Justice Kennedy recognizes that the law is capable of different interpretations, and under principles of constitutional avoidance, must be interpreted to avoid the problematic constitutional question of coercion that he raised.

[\[1\]](#) *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2604 (2012).

[\[2\]](#) See *Steward Maching Co. v. Davis*, 301 U.S. 548 (1937); *South Dakota v. Dole*, 483 U.S. 203 (1987).

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