PUBLICATION

King v. Burwell: An Interchangeable Exchange [Ober|Kaler]

2015: Issue 14

The Supreme Court ruled recently in favor of the Obama Administration and its defense of another provision of the Patient Protection and Affordable Care Act (ACA or the Act). *King v. Burwell*, No. 14-114 (U.S. June 25, 2015).

The Court interpreted the phrase *established by the State* interchangeably with an exchange *established by the federal government in a State*, which allows necessary tax credits to flow to qualified individuals whether they buy insurance through a state-created insurance Exchange, or one created by the federal government. Depending on one's point of view, the opinion either reinforces the Court's view that the overall purpose of ACA is paramount to interpreting its voluminous text, or that the Court seems to engage in interpretive jiggery-pokery whenever faced with precise legal challenges to ACA's broad mandate.

Background

It is important to view *King v. Burwell* in the context of the previous legal challenge to ACA, *National Federation of Independent Business v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566 (2012).

In *National Federation of Independent Business* the Court examined an individual mandate and a state issue. The Court first explained that ACA's individual mandate was beyond Congress' almost unlimited Commerce Clause powers yet well within Congress' plenary power to "lay and collect taxes." However, the mandatory penalty for states that failed to expand Medicaid, which would have removed all of a state's federal Medicaid funding, was struck down.

The Court explained in 2012 that removing all of a state's federal Medicaid funding exceeded Congress' Spending Clause authority. ACA did not expand Medicaid; instead, it created an entirely different, national health insurance benefit that exceeded the health insurance plan known pre-ACA as Medicaid. The Court removed the mandatory fail-to-expand Medicaid penalty from ACA, which left states to choose whether to accept Medicaid expansion and the contribution of at least 90 percent of the funding for the expansion from the federal fisc, or to reject Medicaid expansion altogether without any change in that state's existing federal Medicaid contribution.

King v. Burwell provided a different challenge to ACA. Drawing heavily from policy arguments in favor of ACA, the Court' opined that the Act's success in insuring more individuals largely depends on three key mechanisms: (1) insurers cannot use pre-existing health conditions to determine insurance premiums; (2) every person must have health insurance or make a payment to the Internal Revenue Service (IRS); and (3) qualified individuals that do not qualify for Medicaid may get tax credits to help purchase health insurance. Without all three provisions working in unison, the coverage pool is subject to "death spiral" conditions in which there are not enough people, or not enough healthy people, in the insurance pool, causing insurers to raise rates and the system to collapse. The third provision, the tax credit to low-income individuals, is the subject in this case.

ACA allows tax credits for taxpayers enrolled in an insurance plan through "an Exchange *established by the State* under" ACA. The Act requires the creation of an "Exchange," or insurance marketplace, in each state.

States may establish their own Exchanges, but if they do not, the federal government will establish "such Exchange" and make it available to individuals in that state.

Meanwhile, an IRS rule made the tax credit available to qualified taxpayers who enrolled in a plan through an insurance Exchange, regardless of whether the Exchange was established and operated by a state or by the federal government. The credit enabled qualified individuals to afford insurance, join the coverage pool and support a healthy insurance system.

The four petitioners lived in Virginia, one of 34 states with a Federal Government Exchange because it did not make a State Exchange. They claimed that the Virginia Federal Exchange did not qualify as "an Exchange established by the State" by the plain terms of ACA, and so they did not qualify for any tax credits. Without those tax credits, insurance would cost them more than 8 percent of their income, exempting them from compliance with ACA and its requirement to purchase insurance.

The issue before the Court was whether ACA's tax credits, as administered by IRS rule, are available to individuals in states that have a Federal Exchange, or only those states that establish their own Exchanges. The Court, by a majority vote of 6-3, held that the credits are available to all Exchanges, State and Federal.

Majority's Analysis

The Court began its analysis by side-stepping *Chevron* deference, a theory of legal analysis by which courts defer to agency interpretation of the statutes they are charged with enforcing, unless such interpretations are unreasonable. Essentially, where a statute is ambiguous, it marks an implicit delegation from Congress to the agency to fill statutory gaps, so long as the agency does so within reason. However, as the Court said, in extraordinary cases, there are reasons to doubt that Congress intended to delegate such interpretation. Here, the Court found that the tax credit issue was deeply significant to ACA's survival, as one of its three mechanisms for success, and so Congress would not have delegated its authority to the IRS to make a rule about which individuals, on which Exchanges, should receive the credit. Accordingly, the Court chose not to apply *Chevron* deference to the IRS rule, instead undertaking its own review of the statutory context and structure of ACA, paired with Congressional intent.

The Court structured its analysis in three parts, noting first that for the tax credits to be available to the Federal Exchange, the Federal Exchange would have to be "an Exchange," which it clearly is. Second, it would have to be "established by the State." And third, it would have to be an Exchange established under ACA. As to this third point, the Court found that by requiring the states to establish the Exchange or, alternatively, the federal government to establish "such Exchange," ACA actually means for the Federal Exchange to be the equivalent of the State Exchange, and so the Court considered both as established "under" ACA. The second point, "established by the State," required more analysis.

The Court read the phrase *established by the State* in context, with an eye towards the overall statutory scheme, rather than reading the phrase in isolation. It must be read in conjunction with the requirement that all Exchanges are required to make available qualified health plans to qualified individuals – those who reside in the "State that established the Exchange." Indeed, the Court found that if it gave the phrase *State that established the Exchange* its most natural meaning, there would be *no* qualified individuals on Federal Exchanges, despite the fact that the Act contemplates that qualified individuals will exist on every Exchange, including the Federal Exchanges. If there are no qualified individuals, then an Exchange cannot meet ACA's requirements, which is a preposterous outcome. Similarly, to the majority, the phrase *established by the State* is not used in its most natural sense throughout the Act, but is more of a moving target. The Court found it possible that the phrase was limited to State Exchanges, or to *all* Exchanges, both State and Federal "at least

for purposes of the tax credits." At best, it was used ambiguously enough to allow the Court to search for its meaning here.

After concluding the phrase was ambiguous, the Court was free to search the broader structure of the Act for meaning. Because ACA's three key mechanisms for success are meant to prevent "death spirals," the Court rejected the plain meaning of *established by the State* – that plain meaning would destabilize the individual insurance market in any State or Federal Exchange, which is precisely what Congress meant to avoid. Without tax credits, and without enrollees like the petitioners, the insurance coverage pool would flounder, which is not what Congress intended.

So the Court saved ACA and the IRS rule because "Congress passed the Affordable Care Act to improve health insurance markets, not destroy them." After finding the phrase *established by the State* ambiguous, the Court was free to use the statutory context of the phrase to expand *established by the State* beyond the 16 states that had established State Exchanges. Accordingly, the tax credits apply to individuals in any Exchange, State or Federal.

Dissenting Opinion

Justice Scalia's dissent took issue with the majority's willingness to ignore the plain language of the law, in preference for policy, politics, and "interpretive jiggery-pokery." It began by restating the majority holding: "when the [ACA] says 'Exchange established by the State' it means 'Exchange established by the State or the Federal Government.'" Continuing, "[t]hat is of course quite absurd, and the Court's 21 pages of explanation make it no less so." In his eyes, the majority rendered the words *by the State* meaningless, with no operative effect, and none of the majority's arguments "come close to establishing the implausible conclusion that Congress used 'by the State' to mean 'by the State or not by the State.'"

Justice Scalia surmised that "[w]ords no longer have meaning if an Exchange that is *not* established by a State is 'established by the State. . . .Under all the usual rules of interpretation, in short, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved."

While agreeing with the majority that the context of the law as a whole is important for *understanding* the terms of the law, the dissent notes that context is "not an excuse for rewriting them." Furthermore, according to Justice Scalia, that "context" actually undermines the majority's interpretation of the phrase *established by the State* at every turn because, for instance, other parts of the Act sharply distinguish between the states and the federal government. For instance, the states' authority to create an Exchange comes from a totally different section of the Act than the federal government's authority to create an Exchange.

Justice Scalia comments that "[i]t is common sense that any speaker who says 'Exchange' some of the time, but 'Exchange established by the State' the rest of the time, probably means something by the contrast." The majority disagreed, but as Justice Scalia highlights, the majority's nullification of the words *by the State* makes other parts of the Act nonsensical. For instance, the Act requires states to use secure electronic means to determine an individual's eligibility for tax credits, but how could a state control the electronic interface that the federal government uses (if the state did not create an exchange, but relied on the Federal Exchange instead)? Similarly, the Act allows the state to oversee contracting decisions for Exchanges established by a state, yet if the state uses the Federal Exchange, surely Congress did not intend for the states to have control over federal contracting choices.

Justice Scalia was unimpressed by the majority's death spiral rationale as well. He notes that even "[i]f true, these projections would show only that the statutory scheme contains a flaw; they would not show that the statute means the opposite of what it says." It is not the Court's prerogative to "rescue Congress from its drafting errors."

Ultimately, as Justice Scalia concludes, this case, along with the prior Supreme Court decision upholding the constitutionality of ACA, "will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites." Justice Scalia observed wryly that perhaps ACA should be now called SCOTUScare.

Ober | Kaler's Comments

Whether it is called ACA, Obamacare or SCOTUScare, the Court has turned down challenges to ACA founded in how ACA affects individuals because the argument supporting the individual cause failed against ACA's greater purpose of providing health insurance to more Americans. Justice Scalia's concluding remarks ring true, in that the majority has twice engaged in mental gymnastics to deny challenges to the individual mandate and to an individual's ability to receive tax credits under Exchanges not established by the state.

Curiously, although not too surprising considering the scope of previous Spending Clause opinions, the Court supported the state challenge to the Medicaid expansion penalty. A plain comparison of these cases on a more basic level is that the Court seems more willing to preserve challenges tied to the state fisc and state sovereignty and less willing to be persuaded by technical, legal challenges brought for individual purposes.

It is uncertain that an actual death spiral would have occurred had the *King* petitioners prevailed – commercial markets are difficult to predict and the adverse selection death spiral has been espoused by naysayers for decades. More realistically, had *King* concluded differently, states with Federal Exchanges would have had tremendous economic and political pressure to establish State Exchanges to make the tax credit available. After all, the failure of the Medicaid expansion penalty was not fatal to the roll out of ACA. Either way, one could pick through countless statutes that distinguish between the states and the federal government and stir up questions about what was meant. This case adds to the confusion of statutory interpretation, but it saves ACA, Obamacare and SCOTUScare.