



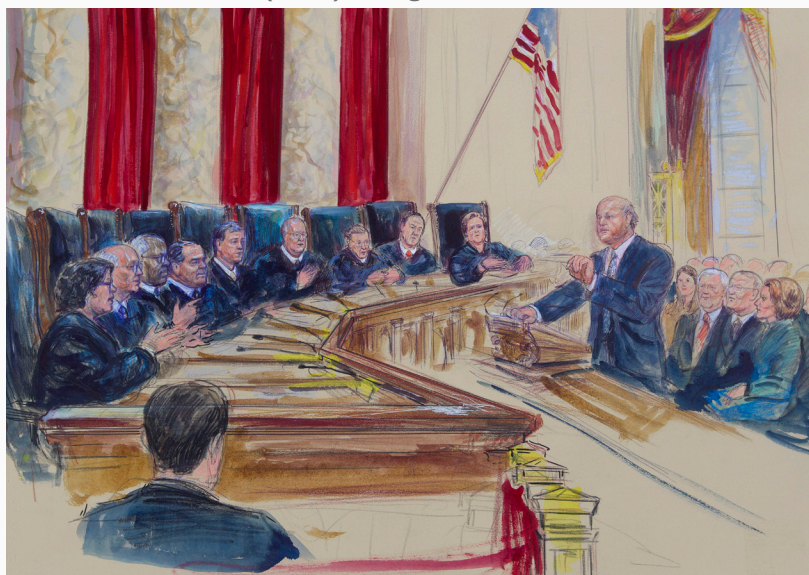
## KING V. BURWELL ORAL ARGUMENT

*The case that puts ACA consumer tax credits in question*

On Wednesday, March 4, 2015, the U.S. Supreme Court heard 90 minutes of oral argument in the case of *King v. Burwell*, which questions the validity of the Internal Revenue Service (IRS) regulation that allows eligible individuals who purchase health insurance through an exchange established by the federal government to receive premium tax credits. During the open enrollment period which ended on February 15th, there were 96,197 Kansans (including those who enrolled during the special enrollment period that ended on February 22nd) who selected a health insurance plan through the federal exchange, and 76,958 of them have been told they will receive premium tax credits to help pay for their plans during 2015. Whether or not they receive that financial assistance to purchase insurance depends on the outcome of this case.

Supporters of the Affordable Care Act (ACA) point out that if the Court determines that the IRS regulation is invalid, more than 7 million individuals in 34 states may no longer be eligible to receive tax credits to help pay for their health insurance premiums. The federal government and insurance industry officials have warned that the cost of health insurance for those individuals who are able to continue to pay their premiums without tax credits and remain in the health insurance market will rise significantly, resulting in even more individuals eventually losing coverage.

**Figure 1. Attorney for the Plaintiffs, Michael Carvin, speaks before U.S. Supreme Court justices in a major challenge to the Affordable Care Act (ACA)—King v. Burwell, March 4, 2015**



Source: Courtroom rendering via Dana Verkouteren/AP

On the other hand, critics of the ACA point out that a Court ruling that the premium tax credits are not allowable in the 34 states that have not established their own exchanges, including Kansas, could save the U.S. Treasury an estimated \$24 billion in subsidies that would otherwise be paid in 2015. This includes nearly \$195,000,000 in insurance subsidies to people living in Kansas.

The plaintiffs in the *King* case, represented by attorney Michael Carvin, contend that the language in Section 36B of the Affordable Care Act, which describes the calculation of premium tax credits, only allows individuals enrolled in an “Exchange established by the State” to receive tax credits. Since Kansas and 33 other states have so far elected not to establish a state exchange, individuals in those states are enrolling in insurance plans purchased through the HealthCare.gov exchange website established and operated by the federal government.

The federal government, represented by Solicitor General Donald Verrilli, Jr., contends that while the ACA authorizes states to establish exchanges, it also authorizes the federal government, in Section 1321 of the ACA, to “establish and operate **such** Exchange within the State” if a state elects not to establish a state exchange. (Emphasis added). The federal government argues that Congress intended an “Exchange established by the State” to include exchanges established by the federal government and the availability of tax credits through those exchanges.

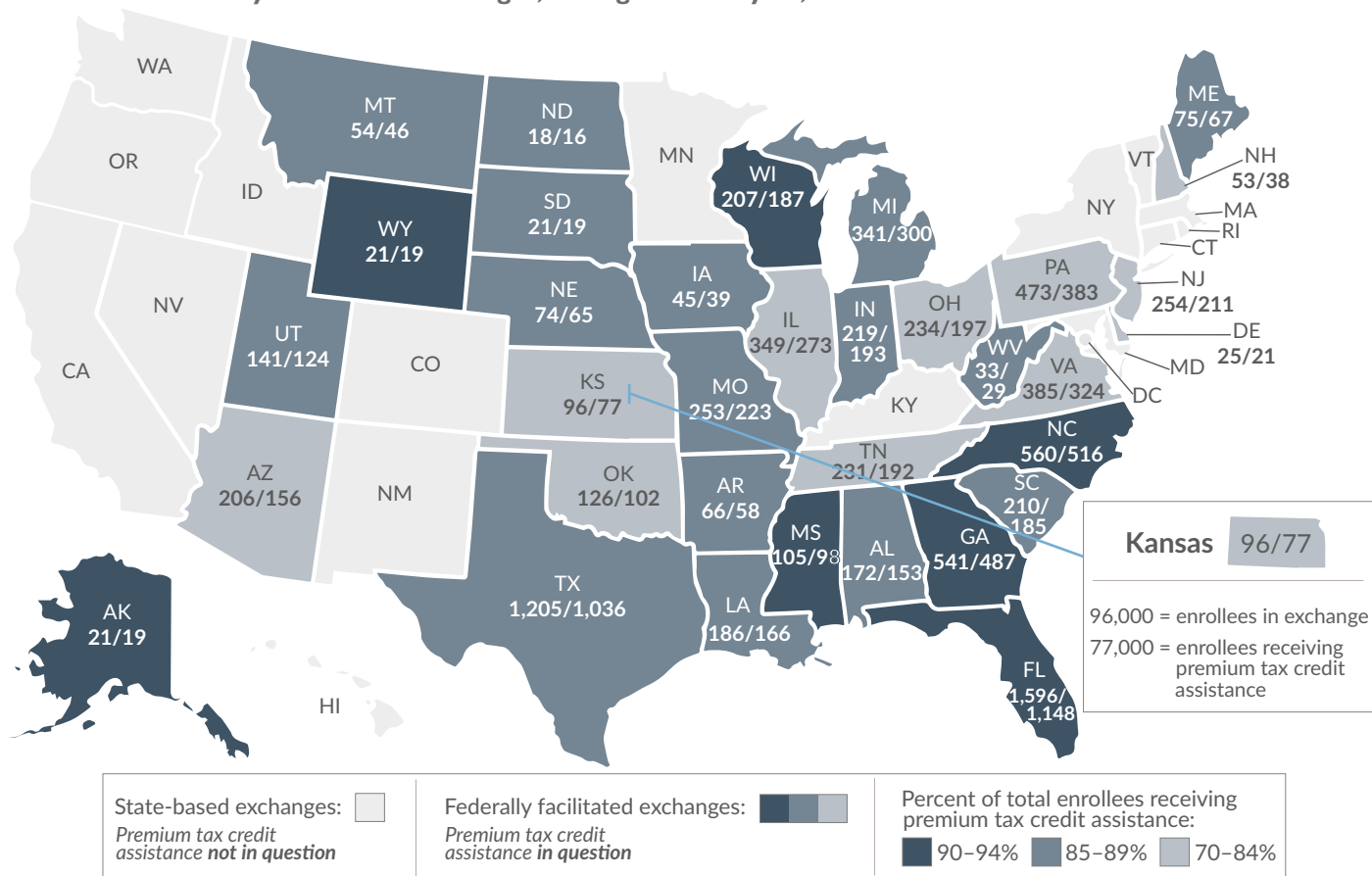
As expected, Supreme Court Justices Ginsberg, Breyer, Kagan and Sotomayor appear to be inclined to support the position of the federal government and the availability of tax credits in states using the federal exchange. Justices Alito, Scalia and Kennedy were active in challenging the position of the government, but Justice Kennedy was also active in raising questions for the plaintiffs. Chief Justice Roberts asked very few questions and Justice Thomas was silent throughout the arguments. Legal experts have suggested that Chief Justice Roberts and Justice Kennedy are potential votes for either side of the case.

## Issues Raised During Argument

### Standing

At the beginning of the plaintiffs’ argument, Justice Ginsberg raised the issue of standing. Under federal law, courts are limited by the Constitution to only hearing cases in which a plaintiff, the individual or party who has filed the claim, has actually suffered an injury. The four plaintiffs in this case, who reside in Virginia, have claimed they are liable to pay the individual mandate tax penalty for 2014 if tax credits are available in states, like Virginia, that chose not to establish a state exchange. Prior to last week’s arguments, questions had been raised as to whether any of the four plaintiffs will actually be required to pay the penalty. Although there was no definitive response to Justice Ginsberg’s questions from either Mr. Carvin or General Verrilli regarding whether any of the four plaintiffs actually had standing, neither of the lawyers seemed interested in having the case decided on this issue.

Figure 2. Total Number (in thousands) of Enrollees/Number Receiving Premium Tax Credit Assistance in States with Federally Facilitated Exchanges, through February 22, 2015



Source: KHI analysis of U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, report released March 10, 2015.

## *The definition of an “exchange”*

Justice Breyer began his questioning of Mr. Carvin by laying out the main point of the federal government’s argument, specifically that the term “exchange” is a defined term in the ACA. Section 1311(b) of the ACA states that each state “shall, . . . establish an American Health Benefit Exchange (referred to . . . as an ‘Exchange’) for the State . . .” Section 1321 states that if a state does not elect to establish an exchange under Section 1311(b), then “the Secretary [of HHS] shall establish and operate such Exchange within the State . . .” Concluding that the statute tells HHS to set up “such Exchange” and that federal exchanges can’t work without the tax credits, Justice Breyer asked, “So what’s the problem?” Mr. Carvin maintained that the express wording in Section 36B only authorizes tax credits in exchanges established by a state under Section 1311.

Justice Kagan countered that focusing on just “four or five words” was insufficient and that “an understanding of the law as a whole” was important. She also asserted it was necessary to look at the “whole structure and context of the provision” of the law to determine whether the tax credit instructions in Section 36B also apply to exchanges established by the federal government as a substitute for state exchanges.

Mr. Carvin pointed out that Congress included language in other provisions of the law that show it knew how to make clear that state exchanges and federal exchanges were the same or equivalent, but that no such language exists in Section 36B. Justice Kagan insisted the Court should look “at the whole text, [to] try to make everything harmonious with everything else.”

Mr. Carvin alleged that Congress wanted states to run the exchanges and that the language in Section 36B limiting tax credits to state exchanges was intentionally placed there to encourage them to do so. He concluded by asserting that no “rational, English-speaking person” would have used the term “exchange established by the state” to include the federal exchanges.

As General Verrilli began his argument, Justice Alito questioned why Congress used the phrase “established by the state” if it intended to allow federal exchanges to grant tax credits. General Verrilli replied that the language in the ACA refers to an exchange geographically located within a state and that a state “establishes” an exchange when it elects to have the federal government operate it.

General Verrilli then declared that the only way to read the statutory language that makes sense is to conclude that federal exchanges are able to provide tax credits if a state elects not to establish its own exchange, and that this approach is completely consistent with the overall structure, purpose, and intent of the ACA.

He argued that adopting the plaintiffs’ view would make “a mockery” of Congress’ intent to provide states with flexibility with regard to establishing exchanges and would result in exchanges “doomed to fail,” insurance market death spirals, and loss of affordable care for millions of Americans. Justice Scalia contended that while it may not be the statute Congress intended, “the question is whether it’s the statute that they wrote” and the Court cannot “twist the words as necessary to make [sense]” in an “ill-conceived” statute.

General Verrilli then explained that the language in Section 1311, which states that each state “shall” establish an exchange, required Congress to include the default alternative back to the federal government to avoid a violation of the 10th Amendment by imposing this requirement on the states. He insisted that the Court should focus on “what” needed to be established, not on “who” was authorized to do it, because Section 1321 directs HHS to establish “such” exchange, in order to fulfill the requirement for an exchange in each state under Section 1311. Justice Scalia characterized General Verrilli’s emphasis on the word “such” as “gobbledygook.”

General Verrilli then referred back to Justice Kagan’s earlier comments about the need to read statutory provisions in context to ensure the statute “operates as a harmonious whole.” Justice Scalia responded that “if the only reasonable interpretation of a particular provision produces disastrous consequences in the rest of the statute, it nonetheless means what it says.” General Verrilli countered that that principle should be limited when there is a “conflict within a statutory scheme” and that the Court should do its best to “try to harmonize and reconcile the provisions.”

## *Constitutional Coercion*

Justice Sotomayor expressed concern that if the Court were to agree with the plaintiffs’ reading of the law, it would need to read the statute as “intruding on the State-Federal relationship” because states were being coerced into establishing their own exchanges.

She noted that citizens in states that failed to establish an exchange receive no subsidies, which results in a “death spiral” in the state’s insurance market. She asserted that since insurers in all states, regardless of whether the state establishes an exchange, are required to adopt other insurance market changes in the ACA, such as guaranteed issue, coverage for young adults to age 26, and modified community rating, states would experience a rise in costs for all insurance plans. She then concluded that the loss of tax credits for a state’s citizens and the potential damage to a state’s insurance market were unconstitutionally coercive or threatening to states and that principles stated in prior court opinions require the Court to read a statute in a way that doesn’t impinge on states’ rights.

She also asked Mr. Carvin if he really believed that states fully understood that their citizens would not get tax credits if they let the federal government establish their exchange. He responded that states had three years to figure this out, and if they had read Section 36B and the IRS had “done its job,” they would have been fully informed.

Justices Ginsberg and Kagan continued this line of questioning by pointing out that the language that Mr. Carvin contends limits the tax credits to exchanges established by the state is included in the “technical” tax code section of the ACA, and that states that chose to use the federal exchange had no clear notice that tax credits would not be available to their citizens.

Justice Kagan stated there is a presumption that Congress will not “impose heavy burdens and Draconian choices on States unless it says so awfully clearly,” and Justice Ginsberg noted that it “took a year and a half for anybody to even notice this language” in the law. Justice Kagan declared that when the Court is interpreting statutes, it requires “clarity” when the government speaks and is “upsetting Federal-State relations.” Neither of the parties in the case presented evidence that officials in states that elected or defaulted to a federal exchange were told or understood that their citizens would not be eligible for tax credits.

Justice Kennedy also joined in this line of questioning and stated that if the plaintiffs’ argument is adopted, there is a “serious constitutional problem” if states were told to “create your own Exchange, or we’ll send your insurance market into a death spiral, your citizens will be paying the individual mandate without access to tax credits, and the cost of insurance will be “sky-high.”

“*... the premium assistance amount [tax credit]... for qualified health plans offered in the individual’s market within a State which cover the taxpayer... and which were enrolled in through an Exchange, established by the State under 1311 of the Patient Protection and Affordable Care Act...*”

**-Section 36(b)(2) of the Affordable Care Act**

When Justices Ginsberg and Sotomayor inquired as to why Congress would create exchanges that would not have access to tax credits, Mr. Carvin referred to other “valuable benefits of an Exchange,” such as one-stop shopping. Justice Kagan pointed out that during the *NFIB v. Sebelius* case in 2012, which challenged the constitutionality of the individual mandate and the expansion of Medicaid, Mr. Carvin had argued that without subsidies, insurance companies would have no reason to offer their products through the exchanges and the exchanges would not operate as Congress intended. Mr. Carvin conceded that the exchanges might not operate as intended, but that there was no legislative history suggesting that Congress considered tax credits essential to the operation of the exchanges or that there would be a “death spiral” in state health insurance markets if there were no subsidies.

Justice Alito returned to the coercion issue raised by Justices Sotomayor and Kennedy and asked if General Verrilli agreed that plaintiffs’ interpretation of the statute makes it unconstitutionally coercive. Although it is usually the Solicitor General’s job to defend statutes against claims of unconstitutionality, General Verrilli admitted that it would “certainly be a novel constitutional question” but that he was not prepared to tell the Court that it was unconstitutional. Justice Kennedy suggested the Court would need to invoke the doctrine of “constitutional avoidance” if the plaintiffs’ argument was correct because “this is just not a rational choice for the States to make and . . . they’re being coerced.” This doctrine is a legal principle that states the Court should avoid ruling on constitutional issues and resolve cases on other grounds. This typically means if there are two possible interpretations of a statute, one that is clearly constitutional and one that is questionable, the Court will interpret the statute as having the clear constitutional meaning in order to avoid the constitutional questions raised by the other interpretation.



General Verrilli replied that if the Court believed there was a serious constitutional question this was “another very powerful reason to read the statutory text [the government’s] way.” He also repeated concerns expressed during Mr. Carvin’s argument about “onerous consequences for State residents” and that states were not given adequate notice of these consequences.

Justice Scalia then stated that the ACA was not the “most elegantly drafted statute” and perhaps one of the imperfections was a lack of clear notice to states regarding the loss of tax credits when the federal government established the exchange.

General Verrilli countered that there is no evidence that Congress intended for states with federal exchanges to lose their tax credits and encouraged Justice Scalia to review the C-SPAN archives of the Senate Finance Committee markup hearing because it was clear that Congress intended for tax credits to be “available in every state.”

### *Ambiguity*

Justice Kennedy asked if General Verrilli believed the statute was ambiguous and that the Court should defer to the IRS under the “*Chevron* rule.” This rule was established by the U.S. Supreme Court in 1984 when it held that courts should defer to the way an agency has interpreted a statute unless the interpretation is unreasonable. Justice Kennedy stated that it seemed like a drastic step to defer to the IRS when “billions of dollars in subsidies” are involved and declared that the Court should only defer to the IRS if the law was “very, very clear.”

General Verrilli insisted that the Court should rule for the federal government on the text of the law as it exists, because Congress specifically delegated authority to the IRS in Section 36B to determine how to implement the tax credits. But, if it determined the statute was ambiguous, it should defer to the IRS. Chief Justice Roberts asked that if the Court determined that *Chevron* applied, wouldn’t it be possible for a subsequent administration to interpret the statute in a different way?

General Verrilli answered that under the *Chevron* case, a subsequent administration would need to make a very strong argument for reinterpreting the law.

### **How to fix the problem**

Justice Alito suggested the Court could rule for the plaintiffs but delay the termination of the tax credits to the end of 2015. General Verrilli questioned whether the Court could temporarily create tax credits that it had found were not authorized by Congress, and also pointed out that the regulatory deadlines and requirements for obtaining the federal government’s approval for a state exchange made it unlikely that states could establish exchanges by the end of the year.

Justice Scalia asserted that if the Court ruled in favor of the plaintiffs, Congress could act to avoid any disastrous consequences caused by the loss of the tax credits in the federal exchanges. General Verrilli responded by questioning the ability of “this Congress” to act.

### **What happens next?**

The Court met on Friday, March 6<sup>th</sup> to discuss the case and may have voted at that time. Since the oral argument in the *NFIB* case in 2012 provided no insight into how the Court ultimately ruled in that case, any attempts to predict the outcome of this case based on the March 4<sup>th</sup> argument seem fruitless. The plaintiffs’ argument appears to be supported by Justices Scalia and Alito, and perhaps Justice Thomas, who has frequently joined in their decisions in the past. The federal government’s position seems to be clearly supported by Justices Ginsberg, Breyer, Sotomayor, and Kagan. Justice Kennedy’s aggressive questioning of both parties appears to indicate he was still weighing his decision, and the Chief Justice gave no hint as to where he stands on the issues. It is expected the Court will issue its opinion at the end of June.

### **About the Issue Brief**

This brief is based on work done by Linda Sheppard, J.D. It is available online at [www.khi.org](http://www.khi.org).

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