Although the ACA has been among the preeminent issues of national debate since its passage in 2010, and although its complicated structure, sheer length, and unprecedented nature have led to a host of disputes, the Supreme Court of the United States, despite repeated invitations to do so, has not gone out of its way to resolve many such issues.

This is unsurprising, given the fact that the Supreme Court only will accept cases (and then not all of them) where there is a split in the Circuits or an important issue of federal law has been presented. And this trend generally has held in the ACA context, although some would argue, without apparent evidence, that the conservatives on the Court have gone out of their way to take the one ACA case currently pending argument before the Court.

In any event, since early 2012, the Court has taken three ACA-related cases, and each has been significant. In 2012, the Court decided the fundamental challenge to the constitutionality of the ACA’s “individual mandate” provision. The Court held, in a case led by Chief Justice Roberts and the four liberals on the Court, that even though the mandate cannot be authorized under the Commerce Clause, it could be upheld under the Taxing Clause of the Constitution. National Federation of Independent Business v. Sibelius, 132 S.Ct. 2566 (2012).

Next, on the last day of the 2013-2014 term, another sharply divided court decided Burwell v. Hobby Lobby Stores, Inc., __ S. Ct. __ (2014), holding that the Religious Freedom Restoration Act of 1993 (“RFRA”), which prohibits the “Government [from] substantially burden[ing] a person’s exercise of religion,” prevented the application to closely held (non-public) corporations of the ACA provision requiring that employers offer birth control coverage to their employees. The Court ruled that closely held for-profit corporations are entitled to religious freedom protections and, in contravention of RFRA, the government did not demonstrate that the mandate was the least restrictive means of furthering a compelling government interest. Although controversially recognizing a closely held corporation’s right to free exercise, the case has not spawned a host of successful challenges to the ACA, civil rights laws, and other statutes as some critics feared.

This term, indeed on March 4, 2015, the Court will hear argument in King v. Burwell, No. 14-114, a case that touches upon a central mechanism of the ACA: tax credit subsidies payable to economically eligible citizens. This feature of the ACA works hand in hand with the individual mandate upheld in NFIB v. Sibelius to allow lower-income persons to purchase health insurance and to assure that insurance pools contain healthier, younger people to offset adverse selection that might drive up insurance costs. At the time the Court granted certiorari, there was no split in the Circuits with respect to the issue presented, although, in a subsequently vacated decision, the D.C. Circuit had disagreed with the Fourth Circuit’s approval of the Internal Revenue Service (“IRS”) regulation in King.

Section 36B of the Internal Revenue Code, which was enacted as part of the ACA, authorizes federal tax credit subsidies for health insurance coverage that is purchased through an “Exchange established by the State under section 1311” of the ACA. The question presented in King is whether the IRS may permissibly promulgate...
regulations to extend tax-credit subsidies to coverage purchased through exchanges established by the federal government under Section 1321 of the ACA. This is a classic case that will pit judicial conservatives who believe in a plain-meaning review of text against judicial liberals who argue that the Court should not focus on a single provision, however literal its terms, that is at odds with the overall legislative scheme.

As even casual observers of the ACA understand, Congress provided for the establishment of insurance exchanges to be marketplaces for health insurance in the states. The ACA provided for the establishment of exchanges by the states themselves but, where states refused to do so (and most did), the federal government could, and did, step in to establish state-based exchanges on its own.

The supporters of King argue that the Court need go no further than the literal terms of the provision: in other words, “States” means “States.” And, in the face of the argument that to rely on that view would gut the entire ACA program, these conservatives reply that Congress could have done otherwise but, instead, used the subsidy provision as a “carrot” to get the states to opt in. The failure of that option lies at the feet of Congress, and it is not for the Court to rewrite the statute.

Faced with the clear language of Section 36B, the government’s response is often quite tortured but, putting aside the immense amount of handwringing and overstatement in the Solicitor General’s brief to the Court, there are two essential, and potentially attractive, features of the government’s argument. The first is that the tax credit subsidies are a necessary component to make the ACA work and to eliminate them would then keep many people from being able to purchase health insurance and would result in a disparate number of unhealthy, and therefore more expensive, people in the insurance pool. This is demonstrably correct, but does it justify the Court’s fixing the statute?

The second pillar of the government’s argument is that, taken as a whole, all of the provisions of the ACA demonstrate that Congress intended that the subsidies at issue would be available to the citizens of every state, whoever was the author of the exchange there. Thus, for example, the Court might look to 26 U.S.C. 36B(a), in which Congress provided that a premium tax credit “shall be allowed” to any “applicable taxpayer.” That term is defined as a taxpayer whose household income is between 100 percent and 400 percent of the federal poverty level. 26 U.S.C. 36B(c)(1)(A). Thus, says the government, not without force, Section 36B(a) defines all income-eligible taxpayers as potentially eligible to receive a credit—regardless of their state of residence or whether that state has elected to operate its own exchange.

Many Court observers believe that there is little question that the three most consistently conservative Justices—Scalia, Thomas, and Alito—will accept the literal argument and strike down the regulation. These observers also believe that the four most liberal Justices—Ginsberg, Breyer, Sotomayor, and Kagan—will accept the government’s “totality” argument. Given Chief Justice Roberts’s surprising position in NFIB and Justice Kennedy’s general unpredictability, those two justices are going to be the prime points of the competing arguments in a case likely to be decided just as the Court is closing for business in June.

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