



Written by [Raven Clabough](#) on March 5, 2015

## Supreme Court Appears Split on ObamaCare Subsidies

Reports indicate that the Supreme Court appeared to be divided strictly along ideological lines on Wednesday during opening arguments in the *King v. Burwell* case, one in a series of lawsuits challenging portions of the Affordable Care Act (ObamaCare). “Burwell” refers to Health and Human Services Secretary Sylvia Matthews Burwell, named as the defendant in the cases. A decision in the case is expected by the end of June, and would potentially impact eight million people.



The Competitive Enterprise Institute (CEI), a libertarian think tank in Washington, D.C., is providing support for the challengers, including financial support in the *King* case. The focus is on language in the law regarding subsidies for those who purchase insurance on exchanges “established by the state.” The plaintiffs contend that the administration incorrectly interpreted the language to allow subsidies nationwide and that the language of the law explicitly establishes that the subsidies should only be available to those who live in states that established their own health-insurance marketplace.

On Wednesday, the justices heard arguments on the case for 85 minutes. Present in the courtroom were more than a dozen top members of Congress from both parties, including Senate President Pro Tem Orrin Hatch (R-Utah), Senate Minority Whip Dick Durbin (D-Ill.), House Majority Leader Kevin McCarthy (R-Calif.) and House Minority Leader Nancy Pelosi (D-Calif.).

According to Reuters, Justice Anthony Kennedy is likely to be the swing vote in the ruling. Reuters writes, “Kennedy, a conservative who often casts the deciding vote in close cases, raised concerns to lawyers on both sides about the possible negative impact on states if the government loses the case, suggesting he could back the Obama administration. But he did not commit to supporting either side.”

Kennedy raised concerns about the implications of ruling in favor of the challengers. “There’s a serious constitutional problem if we adopt your argument,” Kennedy told CEI’s lawyer, Michael Carvin. Kennedy states that by ending the subsidies, states would essentially be unconstitutionally “punished” for failing to set up their own exchanges. Cutting the subsidies could also cause an insurance “death spiral” as premiums would increase, Kennedy added. An analysis by the healthcare firm Avalere found that in the event that the Obama administration loses the case, Americans who lose their subsidies would see premiums increase an average of 225 percent.

However, Kennedy indicated he remained open to the challengers’ interpretation. “It may well be that you’re correct as to these words, and there’s nothing we can do,” he said.

Kennedy’s concerns resembled those declared by Justice Ruth Bader Ginsberg, who stated that allowing subsidies only to people in states that set up their own exchanges would be “disastrous.” Of the 50 states, just 13, along with the District of Columbia, have created their own exchanges. An additional 34 exchanges are run by the federal government, while three are run by both the state and the federal government.

Assertions that a ruling against the government would create titanic problems were rebuffed by Justices Samuel Alito and Antonin Scalia, who stated that the law could be amended to avoid disruption, and



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that the ruling's effective date could be delayed until the end of the tax year.

Justice Roberts suggested that one possible outcome in the case is that the court may find the law ambiguous and defer to the administration's interpretation, which would allow the next president to change it. However, Justice Kennedy indicated that he did not believe such a decision would be a viable solution.

Fox News reports that Carvin remained positive after arguments ended on Wednesday, telling reporters that the argument against the administration is "very compelling." The "IRS pulled a bait and switch," Carvin said.

*USA Today* notes that following Wednesday's arguments, White House Press Secretary Josh Earnest stated that the administration was confident that U.S. Solicitor General Donald Verrilli made a strong case for the constitutionality of the law. "The administration was quite pleased with the performance of the solicitor general in making a strong case to the court about the constitutionality of the law," Earnest said. "We also feel like the session was useful, because it gave him an opportunity to illustrate how clearly the law reads and how strong our legal arguments are in the case."

And while the Supreme Court weighs in on subsidies in *King v. Burwell*, another case involving subsidies may also make its way to the high court. Last November, the House of Representatives filed a lawsuit that asks a federal court to invalidate cost-sharing subsidies because Congress never appropriated funds for them.

*Forbes* provides some background on that suit: "*House [v. Burwell]* claims the president cannot issue 'cost-sharing subsidies' in *any* state, because Congress never appropriated funds for those subsidies. Spending federal dollars not pursuant to a congressional appropriation is a federal crime."

That case would block \$3 billion in subsidies this year, and \$175 billion over the next 10 years.



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