



## Has the Supreme Court Given Advance Notice how it will Decide *King v. Burwell*?

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On Wednesday, March 4, 2015, the Supreme Court will hear argument in *King v. Burwell*, the most publicized case in some time. Most readers are aware that the issue is whether certain tax subsidies essential to the proper fiscal management of the ACA will only be available on exchanges "established by the state," or whether those words can be interpreted to mean that the tax subsidies apply to exchanges established by the federal government as well, where states have failed to set the exchanges up. Much has been written about the court's likely analysis; but within the last week the court has provided what should be a strong guide to its reasoning in this case, if the rules of statutory interpretation are to be consistent from one case to the next.

You have probably all read about the court's decision last week that a provision of a criminal statute that criminalizes destruction of any "tangible object" "with the intent to impede" any government investigation is not to apply to the destruction of undersize fish that the defendant had illegally caught but threw into the ocean after a patrol officer had instructed him to bring the fish ashore. That case, *Yates v. United States*, No. 13-7451, turned on whether the just quoted statute "covers the waterfront, including fish from the sea." (All quoted passages are from the Court's opinion in the Yates case.)

The court was plain and clear in its approach to the subject: It noted that "the ordinary meaning of an 'object' . . . is 'a discrete . . . thing,'" citing Webster's dictionary. That definition would include a fish. But the court continued: "Whether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words. Rather, [t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." After extensive analysis to support that position, the court said: "In short, although dictionary definitions . . . bear consideration, they are not dispositive of the meaning of "tangible object" in §1519."

The court went on for many paragraphs to examine the context of the language within the broader scheme of the statute, the rules of *noscitur a sociis*, "a word is known by the company it keeps," and *eiusdem generis*, "to ensure that a general word will not render specific words meaningless." The court held that from the context of its review of related parts of the statute, "Congress had no reason to enact" this section when literally read. The court also stated that "We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute."

This reasoning should clearly support the government's interpretation of the Affordable Care Act in *King v. Burwell*. We have quoted from the four-Justice plurality opinion, but read the fifth, concurring opinion of Justice Alito as based on the same essential reasoning, "that traditional tools of statutory construction confirm that John Yates has the better of the argument."

In our reading about the forthcoming argument, our opinion is that we have seen nothing that provides a logical structure for allowing the tax subsidies only where a state, not the federal government, operates the relevant exchange within a given state's borders. The challengers simply rely on the language quoted at the beginning of this E-Alert. But when considered against the Court's pronouncements on statutory construction just within the week, it would seem apparent that standard statutory construction rules should result in a victory for the federal government.