wiley

NEWSLETTER

SCOTUS Fall Dockets

September 2015

There are no Endangered Species Act or natural resources cases to be heard in the Fall Term of the U.S. Supreme Court. But there can always be surprises, such as the one last term in the Chief Justice's opinion in *King v. Burwell*:

When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*...Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.

This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.

It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS.[1]

In *King* v. *Burwell*, the Supreme Court provided its own, saving interpretation of an ambiguous statute—and held that it was not required to defer to the agency's interpretation. While this result may save the ACA from reinterpretation by a subsequent presidential administration, it may open the door to the testing of judicial

Practice Areas

Environment & Product Regulation

deference to an agency's interpretation of its authorities. Applied to current controversies over the Endangered Species Act and the Clean Air Act, this development could be highly significant.

This Fall, watch how the Court handles the administrative law questions raised in the combined cases *Federal Energy Regulatory Commission v. Electric Power Supply Association* (14-840) and *EnerNOC, Inc.* v. *Electric Power Supply Association* (14-841). The key question presented is whether FERC reasonably concluded that it has authority under the Federal Power Act[2] to regulate the rules used by operators of wholesale electricity markets paying for demand reductions and recouping those payments through adjustments to wholesale rates.

Under the traditional split in the electric marketplace, wholesale rates are regulated by FERC and retail rates by the states. The lower courts vacated FERC's rule on the ground that FERC exceeded its authority by regulating demand response, which in turn affects retail rates. FERC and its supporters argue that demand response payments directly affect wholesale rates because they are recouped in the rate paid in the wholesale market. If FERC's petition prevails, it could promote new energy conservation strategies and impact energy portfolios for years to come.

---

[1]135 S. Ct. 2480, 2488-89 (2015) (internal citations and quotations omitted).

[2]16 U.S.C. 791a *et seq.*