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A Supreme Court Rematch for a Lawyer Targeting the Health Care Act

By **SHERYL GAY STOLBERG** MARCH 4, 2015

WASHINGTON — In March 2012, a blunt-talking and rumpled lawyer named Michael A. Carvin told Supreme Court justices that President Obama's health care law was an unconstitutional attempt to "regulate every activity from cradle to grave."

He lost that case — and has never quite gotten over it.

"The operation was a success, but the patient died," Mr. Carvin said then, insisting he had won at least a moral victory.

Now Mr. Carvin, 58, has a second chance to dismantle a law that conservatives despise. On Wednesday, he will again appear before the Supreme Court, this time on behalf of plaintiffs in King v. Burwell, a case that could cripple the Affordable Care Act — and, the White House says, deprive as many as 7.5 million Americans of their health coverage.

"The solicitor general will get up there and say, 'Mr. Chief Justice, if you rule against us, people will lose their insurance and they may die,' " said Josh Blackman, the author of a book on the 2012 health care case and an assistant professor at South Texas College of Law. "No lawyer other than Michael Carvin could make the argument: 'So what?'"

"So what?" is not precisely the argument Mr. Carvin will make Wednesday in confronting Solicitor General Donald B. Verrilli Jr., but the phrase does come close to capturing his aggressive courtroom style. Instead he will tell the justices that Mr. Obama must be held to the letter of his own law — a principle that he argues trumps the fate of the uninsured.

“Carvin is a genius and the truest of true believers,” said Tom Goldstein, a lawyer who argues Supreme Court cases and publishes Scotusblog, which tracks the high court. “When he has a case he bleeds the client’s blood, and the justices know that. He is the hard right’s best advocate.”

When Mr. Carvin argued a case similar to King v. Burwell last year, he clashed heatedly with Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit. “Who cares?” the judge exclaimed at one point, trying to poke holes in Mr. Carvin’s argument.

“Ben Nelson cares!” Mr. Carvin shot back, referring to the former Nebraska senator who cast a crucial vote in passing the health care law.

Some found Mr. Carvin disrespectful to the judge. Not so, said Sam Kazman, general counsel of the Competitive Enterprise Institute, the libertarian group behind the King case. “Judge Edwards was really pounding him,” Mr. Kazman said, “and Mike really kept his cool under fire.”

A passionate libertarian who is decidedly not tech savvy — he edits legal briefs in longhand and only recently learned to use email — Mr. Carvin has toiled in conservative legal circles for decades, building a reputation for taking on the government and a specialty in elections law. He declined to be interviewed.

He crossed paths with a young John G. Roberts Jr. — now the chief justice — in the 1980s when both were up-and-comers in President Ronald Reagan’s Justice Department, and again in 2000 when both were in Tallahassee during the Florida recount controversy, which ultimately decided that year’s presidential election in favor of George W. Bush.

In an early round in the case, Mr. Carvin argued before the Florida Supreme Court in Tallahassee — and lost.

Here in Washington, he has a sterling Supreme Court record: six cases and one loss, the 2012 lawsuit challenging the constitutionality of the health law. Mr. Carvin, representing the National Federation of Independent Business, argued alongside Paul D. Clement, a former solicitor general, who represented states that opposed the health act. Chief Justice Roberts cast the deciding vote against them.

"I think Mike was stunned and disappointed by losing John Roberts in that case," said Jeffrey Toobin, The New Yorker writer and CNN commentator, who followed the case and considers himself "kind of a Mike Carvin expert."

The King case rests on four simple words: "established by the state." Under the law, tax credit subsidies are to be awarded to people living where an insurance marketplace, known as an exchange, had been "established by the state." But in 34 states the federal government runs the insurance exchange.

That distinction, little noticed when Mr. Obama signed the bill in 2010, gave the Competitive Enterprise Institute an opening to claim that the law was being applied improperly and that subsidies awarded through the federal exchange were invalid. It recruited plaintiffs — including David King, a Virginia resident whose name is attached to the case — and hired Mr. Carvin to represent them and hone the argument.

"I've always thought from Day 1 that this case was very serious — much more serious than the constitutional challenge because it has such a strong hook in the language of the statute," Mr. Goldstein said. "This is no joke, and in part that owes to Carvin's advocacy."

Some legal experts, though, are unimpressed.

"For the average citizen, Carvin's legal argument is much simpler than the government's to understand," said Douglas Laycock, a law professor at the University of Virginia. "His whole argument comes down to that one phrase — an exchange established by the state — and if you ignore the other 974 and a half pages of the law, it's very clear. But I don't think it will persuade the justices."

The son of a textile salesman and a homemaker, Mr. Carvin grew up in Port Chester, N.Y., where he developed his talent for arguing on the high school debate team and around the family dinner table, said his older brother, Joe, who is the Rye town supervisor and who ran unsuccessfully for Congress in 2012.

"We always knew he'd be a very good lawyer," Joe Carvin said.

Today Michael Carvin is a partner in the Washington office of Jones Day, one of the nation's largest law firms, where colleagues like him — but liberals

avoid talking politics with him. He is a sometime golfer and avid fisherman who, friends say, can spend hours watching bass fishing on television. He also loves movies; his favorite is “The Producers,” a satire by Mel Brooks.

Clients praise Mr. Carvin as witty and direct.

“He does not waste time, which is good, because he’s expensive,” said Marjorie Dannenfelser, president of the Susan B. Anthony List, an anti-abortion group for which Mr. Carvin won an election-law case in front of the Supreme Court last year. (His regular hourly fee is \$975, though he is charging a reduced rate in the King case, Mr. Kazman said.)

If Mr. Carvin prevails in *King v. Burwell*, he will cement his reputation as the conservative movement’s pre-eminent Supreme Court advocate. One Jones Day colleague, Glen D. Nager, calls him “the most visible, really great lawyer after Ted Olson’s generation” — a reference to Theodore B. Olson, 74, who won the *Bush v. Gore* recount case before the Supreme Court in 2000 and later served as solicitor general.

Of the comparison, Mr. Olson said by email: “He deserves better than that.”

But winning the King case would invariably prompt Mr. Carvin’s critics to vilify him as the unfeeling conservative who deprived millions of their health care coverage. Joe Carvin says that would be wrong and “very unfair,” but that his brother can live with it.

“He’s got a thick skin,” Mr. Carvin said, “and thank the Lord he does.”