**Baker Botts v King v Burwell**

**Did the Court tip its hand about King?**

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Last Monday, the Supreme Court decided [*Baker Botts v. ASARCO*](http://www.supremecourt.gov/opinions/14pdf/14-103_bpdg.pdf), a bankruptcy case about whether certain kinds of attorneys’ fees are available under the Bankruptcy Code. In deciding the case, did the Court tip its hand about the outcome in *King v. Burwell*, [as some have speculated](http://www.nationallawjournal.com/id%3D1202729463460/Baker-Botts-Loses-Bankruptcy-Fee-Argument-in-High-Court#ixzz3dEpqIhvL)?

Perhaps. On behalf of a six-justice majority, for example, Justice Thomas [wrote](http://www.supremecourt.gov/opinions/14pdf/14-103_bpdg.pdf#page=12) that “the only way to reach [the government’s] reading of the statute would be to excise the phrase ‘for actual, necessary services rendered’ from the statute.” Substitute “established by the State” and you’ve got the plaintiffs’ argument in *King*. Later, Thomas [said](http://www.supremecourt.gov/opinions/14pdf/14-103_bpdg.pdf#page=16) that “[o]ur job is to follow the text even if doing so will supposedly ‘undercut a basic objective of the statute.’” The *King* plaintiffs say the same.

It’s hard to believe Thomas drafted these portions of the opinion without an eye to *King*. Indeed, Justice Sotomayor seemed to confirm as much. She was the only one of the four liberals to vote with Thomas, and [she wrote separately](http://www.supremecourt.gov/opinions/14pdf/14-103_bpdg.pdf#page=17) to emphasize that “there is no textual, *contextual*, or other support” for the contrary interpretation. That word “contextual” is all over the government’s briefs in *King*; it’s a signal that Sotomayor doesn’t buy into the rigid textualism that Thomas’s opinion displays.

So yes, Thomas and Sotomayor are likely jousting over *King*. And yes, both Chief Justice Roberts and Justice Kennedy signed onto Thomas’s opinion without cavil—and didn’t sign onto Sotomayor’s concurrence. *Baker Botts* may thus be a harbinger of what’s to come.

But I think it’d be a mistake to make too much of these entrails. The fact that the Chief and Kennedy didn’t join Sotomayor’s concurrence isn’t much of a signal. After all, Thomas never eschewed reading a statute in context. To the contrary, he was quite attentive to the broader context of the Bankruptcy Code. There wasn’t any obvious need to sign Sotomayor’s opinion to emphasize the importance of contextual interpretation.

Consider the Court’s internal procedures, too. When Thomas circulated his draft opinion in *Baker Botts*, the Chief and Kennedy would have seen immediately that it included language tailor-made for *King*. If they were poised to rule for the government in *King*, would they have asked Thomas to excise that language before they signed on?

Maybe, but I doubt it. The Chief and Kennedy could easily distinguish *Baker Botts* if they were so inclined; after all, Thomas’s opinion says nothing that the Court hasn’t said millions of times before in different contexts. Even if they meant to side with the government in *King*, they could still sign onto Thomas’s opinion.

That’s not to say they *will* side with the government. I’m every bit as nervous about that as I was [when the Court first granted the case](http://www.scotusblog.com/2014/11/symposium-the-court-will-hear-king-thats-bad-news-for-the-aca/). For now, however, I’m reluctant to make too much of *Baker Botts*.

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