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KING V. BURWELL:

THE SUPREME COURT’S MISSED OPPORTUNITY TO CURE
WHAT AILS CHEVRON

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The Patient Protection and Affordable Care Act PL 111-148 (ACA) and the Health Care and Education Reconciliation Act of 2010 (HCERA) represent “the most significant transformation of our health insurance market in more than 40 years . . . At the health law’s core is a ‘three-legged stool’ approach to reforming these markets: new rules that prevent insurers from denying coverage or raising premiums based on preexisting conditions, requirements that everyone buy insurance, and subsidies to make that insurance affordable.”¹ Considering health policy apart from its relationship to tax policy is nearly impossible since “health policy cannot be separated from the fact that government finances, essentially through taxes, many of the services or programs health policy establishes.”² In fact, the United States’ dependence on private, employer-based health insurance is primarily a function of the tax exclusion for health care that began with “a 1942 ruling by the War Labor Board that allowed employers to bypass wartime wage controls by providing fringe benefits to workers.”³ ACA not only maintains this system of tax-favored, employer-sponsored coverage, but with respect to tax administration, ACA is also arguably the most significant attempt ever to reform social welfare policy through the tax code.⁴ The sheer number

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1. Jonathan Gruber, *Health Care Reform Is a “Three Legged Stool”: The Costs of Partially Repealing the Affordable*

Care Act, CENTER FOR AMERICAN PROGRESS 2 (Aug. 2010), http://cdn.americanprogress.org/wp-content/uploads/issues/2010/08/pdf/repealing_reform.pdf.

2. BEAUFORT B. LONGEST, JR., *HEALTH POLICYMAKING IN THE UNITED STATES* 29 (Chicago: Health Administration Press, 5th Ed. 2014).

3. Tom Miller, *Kill the Tax Exclusion for Health Insurance*, NATIONAL REVIEW ONLINE, Aug. 19, 2014, at 1, available at <http://www.nationalreview.com/article/385704/kill-tax-exclusion-health-insurance-tom-miller>.

4. David Gamage, *Perverse Incentives Arising from the Tax Provisions of Healthcare Reform*, 65 TAX. L. REV. 669, 670 (2012).

of ACA tax provisions (33) is quite remarkable.⁵ Furthermore, these tax-related provisions of the ACA are expected to “create a new framework that will dramatically alter the U.S. system for health care finance.”⁶

Codified at Section 36B of the Internal Revenue Code, the ACA tax provision that has garnered the most attention is the one that subsidizes health insurance premiums through a refundable premium assistance tax credit (PTC).⁷ It is one of two companion provisions of the 2010 health care reform legislation that provides subsidies (that began in 2014) for low- and moderate-income individuals and families purchasing health insurance through state health insurance exchanges.⁸ An integral component of the ‘three-legged stool’ approach and the primary subsidy utilized to make insurance affordable, premium assistance tax credits, at first glance, seem to be a pretty straightforward concept.⁹ However, both complex and controversial, these subsidies resulted in multiple legal challenges with inconsistent holdings based on the application of a decades-old doctrine, the *Chevron* framework. The *Chevron* framework is a two-step process that allows for an unacceptable level of subjectivity by the Court. An extra step needs to be added to the framework to create a more consistent application of the doctrine, which would also help minimize political influence at the judicial level. Consequently, on November 17, 2014, the Supreme Court of the United States (SCOTUS) granted certiorari to review *King v. Burwell*, 759 F.3d. 358 (4th Cir. 2014), heard oral arguments on March 4, 2015, and issued its ruling in favor of the Obama Administration on June 25, 2015.

For a second time, SCOTUS saved ACA. If the court had perpetuated the inconsistent applications of the *Chevron* framework and ruled along familiar ideological/political lines in favor of the plaintiffs-appellants, the effects on healthcare reform would have been devastating. The premium assistance tax credits are “important to the overall structure of the law, because many middle-income Americans can’t afford to pay the full price of insurance premiums.”¹⁰ In fact, in a report issued on June 18, 2014, the Department of Health and Human Services reported the following:¹¹

Individuals who selected a Marketplace plan with a non-zero tax credit “have a post-tax credit premium that is 76 percent less than the full premium, on average, as a result of the tax credit—reducing their premium from \$346 to \$82 per month” (with

5. IRS, AFFORDABLE CARE ACT TAX PROVISIONS (2015), <https://www.irs.gov/Affordable-Care-Act/Affordable-Care-Act-Tax-Provisions>.

6. David Gamage, *Perverse Incentives Arising from the Tax Provisions of Healthcare Reform*, 65 TAX. L. REV. 669, 670 (2012).

7. Lawrence Zelenak, *Choosing Between Tax and Nontax Delivery Mechanisms for Health Insurance Subsidies*, 65 Tax L. Rev. 723 (2012).

8. *Id.*; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1401-1402, 124 Stat. 119, 213-24 (2010); Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1001, 124 Stat. 1029, 1030-32 (2010) [hereinafter ACA].

9. Jonathan Gruber, *Health Care Reform Is a “Three Legged Stool”: The Costs of Partially Repealing the Affordable Care Act*, CENTER FOR AMERICAN PROGRESS 2 (Aug. 2010), http://cdn.americanprogress.org/wp-content/uploads/issues/2010/08/pdf/repealing_reform.pdf.

10. Margot Sanger-Katz, *What’s at Stake in Supreme Court’s Latest Health Care Case*, N.Y. TIMES, Nov. 7, 2014, available at <http://www.nytimes.com/2014/11/08/upshot/whats-at-stake-in-supreme-courts-latest-health-care-case.html>.

11. Amy Burke et al., *Premium Affordability, Competition, and Choice in the Health Insurance Marketplace, 2014*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES ASPE (June 18, 2014), <http://aspe.hhs.gov/sites/default/files/pdf/76896/2014MktPlacePremBrf.pdf>.

an average subsidy of \$264 per month)¹² and

69 percent of individuals selecting plans with tax credits “have premiums of \$100 or less after tax credits—nearly half (46 percent) have premiums of \$50 or less after tax credits.”¹³

Consequently, a ruling in favor of the plaintiffs-appellants would have disallowed subsidies for about six million people in 34 states with federally operated insurance exchanges and likely resulted in the lapse of many of these health insurance policies.¹⁴ In fact, before the ruling, the Minority Staff of the Committee on Energy and Commerce released a report entitled, *District-by-District Impact of a Potential Supreme Court Ruling against Affordable Care Act Federal Exchange Tax Credits*, which stated:

“The Kaiser Family Foundation estimates that if the Supreme Court rules against the Administration, over 13 million Americans could lose tax credits to help pay for insurance coverage by 2016. These tax credits will be worth an average of over \$4,800 annually . . . a total of approximately \$65 billion in tax credits are at risk.”¹⁵

Furthermore, a ruling in favor of the plaintiffs-appellants, would have also rendered the employer mandate unenforceable in federally facilitated exchange states since “employers that fail to provide minimum essential coverage or fail to provide affordable and adequate coverage are only subject to a tax penalty if one or more of their employees receive premium tax credits for the purchase of a qualified health plan through an exchange.”¹⁶ The individual mandate would have also been weakened, “as many individuals who may owe a tax under the individual mandate are individuals for whom coverage would be unaffordable—and who would thus be exempt from the mandate—were it not for the assistance they will receive for purchasing insurance through premium tax credits.”¹⁷ As a consequence, premiums in the individual market would have likely risen “sharply in federally facilitated exchange states in the event of a plaintiffs’ ultimate victory.”¹⁸ For example, as the *King v. Burwell* opinion notes, studies predicted that premiums, both inside and outside of the Exchanges, would increase by 35 to 47 percent and enrollment would decrease by 69 to 70 percent.¹⁹ To summarize, although the ACA’s market reform provisions

12. *Id.*

13. *Id.*

14. *Id.*; Drew Altman, *Facing the Political Fallout From a King v. Burwell Ruling*, WALL ST. J.L. BLOG (June 19, 2015), <http://blogs.wsj.com/washwire/2015/06/19/facing-the-fallout-from-a-king-v-burwell-ruling>.

15. Minority Staff, *District-by-District Impact of a Potential Supreme Court Ruling Against Affordable Care Act Federal Exchange Tax Credits*, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON ENERGY AND COMMERCE (December 2014), <https://wayback.archive-it.org/4949/20141223160731/http://democrats.energycommerce.house.gov/sites/default/files/documents/Fact-Sheet-District-By-District-King-vs-Burwell-Impacts-2014-December.pdf>.

16. Timothy Jost, *Implementing Health Reform: Appellate Decisions Split on Tax Credits in ACA Federal Exchange*, HEALTH AFFAIRS BLOG (July 23, 2014), <http://healthaffairs.org/blog/2014/07/23/implementing-health-reform-appellate-decisions-split-on-tax-credits-in-aca-federal-exchange/>.

17. *Id.*

18. *Id.*

19. *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015), citing E. Saltzman & C. Eibner, *The Effect of Eliminating the Affordable Care Act’s Tax Credits in Federally Facilitated Marketplaces* (215) and L. Blumberg, M. Buettgens, & J. Holahan, *The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums* (2015).

would have remained in place, a ruling in favor of the plaintiffs-appellants and the resulting combination of no tax credits and an ineffective coverage requirement would have likely pushed some States' individual insurance markets into a death spiral.²⁰

These potential negative effects clearly demonstrate that the legal question presented in *King v. Burwell* held economic and political significance. Consequently, instead of applying the *Chevron* framework, as all the lower courts had done in the related legal challenges, SCOTUS found that using this doctrine (which defers to the administrative agency's judgment when Congressional intent is not clear) was not proper.²¹ The court explained that the ACA does not expressly delegate the authority to interpret the statute to the Internal Revenue Service (IRS).²² Thus, SCOTUS found that determining the correct reading of Section 36B was its responsibility and reasoned that "it is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy."²³ Unfortunately, however, the problem with this approach is that SCOTUS squandered an opportunity to address the flaws in *Chevron* that were clearly demonstrated by the inconsistent application of the doctrine in the related cases in the lower courts. Therefore, the goals of this article are to outline the construct of the ACA's premium assistance tax credits, to explore the legal controversies surrounding these subsidies, to use the tax subsidies cases to demonstrate the flaws in the *Chevron* framework, and to argue that the Supreme Court should have framed its *King v. Burwell* analysis in a way that would have cured, rather than ignored, the ails of *Chevron*.

I. PREMIUM ASSISTANCE TAX CREDITS AND ADVANCED PREMIUM TAX CREDITS

Starting in 2014, PPACA and HCERA add to the Internal Revenue Code (IRC) a refundable 'premium assistance [tax] credit'²⁴ to defray an "applicable taxpayer['s]" outlays for individual market health care coverage purchased through a state-run insurance exchange."²⁵ Premium assistance tax credits are provided to people with projected household income between 100 percent (133 percent in states that have chosen to expand their Medicaid programs as that expansion will cover those up to 133 percent of the Federal Poverty Line (FPL) including childless adults) and

20. Jonathan Gruber, *Health Care Reform Is a "Three Legged Stool": The Costs of Partially Repealing the Affordable Care Act*, CENTER FOR AMERICAN PROGRESS 2 (Aug. 2010), http://cdn.americanprogress.org/wp-content/uploads/issues/2010/08/pdf/repealing_reform.pdf; *King v. Burwell*, 135 S. Ct. 2480 (2015).

21. *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015).

22. *Id.* at 2489.

23. *Id.* at 2483.

24. Edward A. Zelinsky, *The Health-Related Tax Provisions of PPACA and HCERA: Contingent, Complex, Incremental and Lacking Cost Controls*, N.Y.U. REV. EMP. BENEFITS & EXEC. COMP. 5, 5-38 (2010), <http://ssrn.com/abstract=1633556> (summarizing the many tax provisions of the ACA); 26 U.S.C.A. § 36B (West 2011).

25. Edward A. Zelinsky, *The Health-Related Tax Provisions of PPACA and HCERA: Contingent, Complex, Incremental and Lacking Cost Controls*, N.Y.U. REV. EMP. BENEFITS & EXEC. COMP. 5, 26 (2010), <http://ssrn.com/abstract=1633556> (summarizing the many tax provisions of the ACA).

400 percent of FPL and who are not covered by Medicaid and/or eligible for “affordable”²⁶ employer-sponsored health insurance, which provides “minimum value.”²⁷ The primary “target population for the PTC is those with household incomes of more than 133 percent but not more than 400 percent of the poverty line.”²⁸ Within the range of credit-eligible household incomes, the credit decreases as household income increases so that the after-credit cost of basic health insurance (“the applicable second lowest cost silver plan with respect to the taxpayer”²⁹) will not exceed a specified percentage of the taxpayer’s household income, “with the specified percentage increasing as the household income (expressed as a percentage of the poverty line) increases.”³⁰ “For taxpayers with household incomes of up to 133% of the poverty line, the credit will reduce the after-credit health insurance premium to 2% of household income . . . [and] At the other end of credit-eligible household income, for a taxpayer with income of 300% to 400% of the poverty line, the after-credit premium will be 9.5% of household income.”³¹ Because families that spend more than 10 percent of their income on health care are considered to have high medical cost burdens, the goal was to keep premiums below this 10 percent threshold.³² The amount of the credit is determined on a monthly basis using the following four step process:³³

1. The taxpayer identifies the “adjusted monthly premium”³⁴ for the “applicable second lowest cost silver plan. . . of the individual market in the rating area in which the taxpayer resides.”³⁵ The applicable silver plan may be a self-only coverage plan for a single insured individual³⁶ or a family plan.³⁷
2. Multiply the taxpayer’s annual household income by an “applicable percentage” and divide the resulting product by twelve.³⁸ The applicable percentage is based on the following table:³⁹

26. Employer-provided coverage is deemed affordable if the employee’s required contribution for the annual premium is less than or equal to 9.5 percent of the employee’s household income. 26 U.S.C.A. § 36B(c)(2)(C)(i)-(iv) (West 2011). The 9.5 percent figure will be indexed to reflect the extent to which health insurance premiums grow faster than do income and consumer prices.

27. An employer-provided health plan provides “minimum value” if “the plan’s share of the total allowed costs of benefits provided under the plan is (at least) 60 percent of such costs.” 26 U.S.C.A. § 36B(c)(2)(C)(ii) (West 2011); Lawrence Zelenak, *Choosing Between Tax and Nontax Delivery Mechanisms for Health Insurance*

Subsidies, 65 Tax L. Rev. 723, 724 (2012).

28. Lawrence Zelenak, *Choosing Between Tax and Nontax Delivery Mechanisms for Health Insurance Subsidies*, 65 Tax L. Rev. 723, 724 (2012).

29. I.R.C. § 36B(b)(2)(B)(i) (West 2015).

30. Zelenak, *supra* note 7, at 724-25.; I.R.C. § 36B(b)(3)(A) (West 2015).

31. Zelenak, *supra* note 7, at 724-25.

32. Peter J. Cunningham, *The Share of People with High Medical Costs Increased Prior to Implementation of the Affordable Care Act*, 34 HEALTH AFFAIRS, 117, 118 (2015).

33. Zelinsky, *supra* note 24, at 27-28.

34. I.R.C. § 36B(b)(2)(B)(i) (West 2015).

35. *Id.* § 36B(b)(3)(A); *see also* 42 U.S.C.A. § 18022(d)(1)(B) (West 2015).

36. I.R.C. § 36B(b)(3)(B)(ii)(I) (West 2015).

37. *Id.* § 36B(b)(3)(B)(ii)(II).

38. *Id.* § 36B(b)(2)(B)(ii).

39. *Id.* § 36B(b)(3)(A)(i).

Household Income (expressed as percent of poverty line)	The initial premium per-centage is	The final premium per- centage is
Up to 133%	2.00%	2.00%
133% up to 150%	3.00%	4.00%
150% up to 200%	4.00%	6.30%
200% up to 250%	6.30%	8.05%
250% up to 300%	8.05%	9.50%
300% up to 400%	9.50%	9.50%

For taxable years beginning in any calendar year after 2014, these “applicable percentages” will be indexed depending upon the extent to which health insurance premiums grow faster than income and consumer prices.⁴⁰

3. Subtract from the “adjusted monthly premium” (determined in the first step) the amount calculated in the second step.⁴¹
4. If the resulting difference is negative or zero, the taxpayer is not entitled to the premium assistance tax credit, but if the resulting difference is positive, the amount is then compared to the monthly premium the taxpayer actually pays through the exchange.⁴² “The lesser of these figures is the amount of the premium assistance tax credit to which the taxpayer is entitled for the month,”⁴³ and “the sum of these monthly amounts constitutes the refundable tax credit the taxpayer may take for the year.”⁴⁴

An eligible taxpayer is entitled to the credit only with respect to the months for which he (or a family member) is covered by a qualified health plan, but he may choose to have all or a portion of the PTC paid in advance to the issuer of the health plan to reduce the monthly premiums.⁴⁵ This is referred to as the ‘Advance Premium Tax Credit’ (APTC).⁴⁶ Individuals that take advantage of the APTCs must complete IRS Form 8962 to reconcile the APTC paid and the PTC for which they were eligible on their annual tax return.⁴⁷ If the advance credit amount was less than the amount of the credit to which the taxpayer is actually entitled, the taxpayer receives the remaining credit amount as tax refund.⁴⁸ However, “if the advance payment amount was greater than the amount of credit to which the taxpayer is actually entitled, the general rule is that the taxpayer must repay the entire amount of the excess.”⁴⁹ Recognizing that repayment could potentially impose a hardship for some taxpayers,

40. *Id.* § 36B(b)(3)(A)(ii)(I).

41. *Id.* § 36B(b)(2)(B).

42. *Id.* § 36B(b)(2)(A).

43. Zelinsky, *supra* note 24, at 27-8; see I.R.C. § 36B(b)(2) (West 2015).

44. Zelinsky, *supra* note 24, at 27-8; see I.R.C. § 36B(b)(1) (West 2015).

45. Zelenak, *supra* note 7, at 727; I.R.C. § 36B(b) (West 2015).

46. Amy Burke, Arpit Misra & Steven Shiengold, *Premium Affordability, Competition, and Choice in the Health Ins. Marketplace, 2014*, U.S. DEP’T OF HEALTH AND HUMAN SERVICES (June 18, 2014), <http://aspe.hhs.gov/HEALTH/REPORTS/2014/PREMIUMS/2014MKTPLACEPREMBRF.PDF>.

47. *Id.*

48. Zelenak, *supra* note 7, at 727; see I.R.C. § 36B(f)(1) (West 2015).

49. Zelenak, *supra* note 7, at 727; see I.R.C. § 36B(f)(2)(A) (West 2015).

Congress initially instituted a cap on the amount to be repaid in the case of taxpayers whose actual income for the credit year was less than 400% of the poverty line (\$400 in the case of family insurance coverage and \$250 in the case of individual coverage).⁵⁰ However, to offset the cost of other provisions contained in the amending legislation, Congress has twice adjusted the cap to require greater reconciliation.⁵¹ Late in 2010, it replaced the \$400 cap with a variable cap, ranging from \$600 in the case of taxpayers with household income of less than 200% of the poverty line to \$3500 in the case of taxpayers with household income of at least 450% but less than 500% of the poverty line. In April 2011, Congress changed the caps to \$600 for a taxpayer with household income of less than 200% of the poverty line, \$1500 for a taxpayer with household income of at least 200% but less than 300% of the poverty line, \$2500 for a taxpayer with household income of at least 300% but less than 400% of the poverty line, and no cap for a taxpayer with household income at or above 400% of the poverty line.⁵² Therefore, “practical eligibility for and the amount of the PTC are functions of both income for the official year of the credit and income for one or both of the two preceding years. The relevance of income of both the current year and an earlier year (or years) is explicit in the case of a taxpayer relieved of the burden of full reconciliation by the cap of §36B(f).⁵³

However, “[i]n the case of a taxpayer not entitled to advance payment of the credit (based on income prior to the official credit year), §36B purports to base the amount of the credit solely on the taxpayer’s income for the official credit year.”⁵⁴

The premium tax credit program regulations are detailed and some of the issues addressed are extremely complicated and very technical. Hence, this article will not include a detailed discussion of all the regulations associated with the premium assistance tax credits. However, the Internal Revenue Service (IRS) website provides a great timeline of the release of the applicable regulations by the Department of Treasury (Treasury) and IRS.⁵⁵

II. THE LEGAL CONTROVERSIES

On November 7, 2014, The Supreme Court of the United States (SCOTUS) released the order granting review of *King v. Burwell*, 759 F.3d 358, 363 (4th Cir. 2014), which was one of several Administrative Procedure Act challenges to the premium assistance tax credit program. The other cases included *Halbig v. Burwell* from the District of Columbia Circuit, *Pruitt v. Burwell* from the Tenth Circuit, and *State of Indiana v. IRS* from the Southern District of Indiana. All the plaintiffs contended

50. Zelenak, *supra* note 7, at 727; *see also* I.R.C. § 36B (West 2015).

51. Zelenak, *supra* note 7, at 727.

52. *Id.*; *see* Medicare and Medicaid Extenders Act of 2010, Pub. L. No. 111-309, § 208(a), 124 Stat. 3285, 3291-92 (2010); Comprehensive 1099 Taxpayer Prot. and Repayment of Exch. Subsidy Overpayments Act of 2011, Pub. L. No. 112-9, § 4, 125 Stat. 36, 36-37 (2011).

53. Zelenak, *supra* note 7, at 727-8.

54. *Id.* at 728.

55. *Affordable Care Act Tax Provisions*, IRS.GOV, <http://www.irs.gov/Affordable-Care-Act/Affordable-Care-Act-Tax-Provisions>.

that the Internal Revenue Service's broad interpretation of §36B to authorize the subsidy for insurance purchased on Exchanges established by the Federal government (IRS Rule) was contrary to the language of the statute, which, they asserted, authorized tax credits only for individuals who purchase insurance on state-run Exchanges.⁵⁶ Despite virtually identical claims, the rationale and rulings of the various courts differed, yet, many were surprised that the Supreme Court granted certiorari. As a general rule, in the absence of an active circuit split, there is no conflict to resolve to ensure the uniformity of federal law.⁵⁷ Both *Indiana v. IRS* and *Pruitt v. Burwell* are United States District Court cases. In *Indiana v. IRS* cross motions for summary judgment were filed, while *Pruitt v. Burwell* was appealed to the Tenth Circuit after The Eastern District Court in Oklahoma vacated the IRS rule. However, further proceedings were stayed pending the Supreme Court's decision in *King v. Burwell*. The *Halbig v. Burwell* decision, which vacated the IRS rule, was a panel decision, but an en banc rehearing of the case was scheduled on December 17, 2014. Further proceedings were also stayed pending the Supreme Court's decision in *King v. Burwell*. Nevertheless, per Supreme Court Rule 10, *King v. Burwell*, "unquestionably concerns an 'important question of federal law,' as the resolution of this case could have a significant impact on the implementation of the PPACA, particularly in the 36 states that have not established their own exchanges."⁵⁸ Furthermore, "an additional reason to take the case now is that the litigation creates substantial uncertainty about the operation of the law, and should the plaintiffs' claims be upheld, policymakers, insurance companies, and those who would otherwise be eligible for subsidies will need time to figure out how to respond."⁵⁹

As previously mentioned, the rationale and rulings of the various courts differed despite the fact the plaintiffs' claims are virtually identical in all the cases. Additionally, all the courts applied the framework from *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to analyze the legal merits of each case, as outlined below.

Complaint: Indiana v. IRS

The State of Indiana and several Indiana school corporations and districts filed a Complaint for Declaratory and Injunctive Relief and Judicial Estoppel. The suit is an Administrative Procedure Act challenge to the IRS regulation implementing the Patient Protection and Affordable Care Act (ACA).⁶⁰ The complaint states, "The United States has expanded the class of beneficiaries entitled to federal insurance subsidies by redefining the term 'exchange' in Section 1401(a) of the ACA to include

56. *King v. Burwell*, 759 F.3d 358, 363 (4th Cir. 2014); *Halbig v. Burwell*, 758 F.3d 390, 398 (D.C. Cir. 2014); *State of Ind. v. Internal Revenue Serv.*, No. 1:13-CV-1612 (S.D. Ind. 2014); *Pruitt v. Burwell*, No. 14-7080 (10th Cir. 2014).

57. Jonathan H. Adler, *Will the Supreme Court grant certiorari in King v. Burwell?*, THE WASHINGTON POST, November 3, 2014, available at <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/03/will-the-supreme-court-grant-certiorari-in-king-v-burwell/>.

58. Jonathan H. Adler, *Why Did the Court Grant Cert in King v. Burwell?*, THE WASHINGTON POST (Nov. 7, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/07/why-did-the-court-grant-cert-in-king-v-burwell/>.

59. *Id.*

60. Complaint at 2, *Indiana v. IRS*, 38 F. Supp. 3d 1003 (S.D. Ind. 2014) (No. 1:13-cv-1612).

both state-run insurance exchanges and federally-run exchanges”⁶¹ and that “this re-definition causes injuries to States and their political subdivisions as sovereign policymakers and employers.”⁶² The complaint claims that because the Tenth Amendment precludes Congress from being able to require States to set up their own Exchanges, “instead it created a system designed to convince states to do so voluntarily.”⁶³ Furthermore, the complaint elaborates that “in addition to providing funds for start-up costs, Congress wrote into the ACA subsidies for citizens who purchased health insurance on *state-established* Exchanges, but provided no similar benefits for citizens who purchase insurance using *federally-established* Exchanges”⁶⁴ and explains the congressional rationale, stating that “the availability of *exclusive* federal subsidies to customers of state exchanges would prompt citizens to pressure state officials to establish (and ultimately absorb the expense of operating) Insurance Exchanges.”⁶⁵ Given Indiana’s decision not to establish a State Exchange, the complaint argues that “the result *should* be that, commencing in 2014, Indiana citizens purchasing coverage from a Federal Exchange would not receive subsidies for doing so, with the consequence that Indiana employers (including the State and its political subdivisions) who do not afford minimum essential coverage to all employees working 30 hours or more per week would not have to pay Employer Mandate penalties.”⁶⁶ Consequently, the IRS rule “stating that citizens who purchase coverage on a Federal Exchange are entitled to the same subsidies as citizens who purchase from a State Exchange (“IRS Rule”)”⁶⁷ “contravenes the text of the ACA, thwarts Indiana’s ability to execute State policy,”⁶⁸ and “violates both the Administrative Procedure Act and the Tenth Amendment.”⁶⁹

*Pruitt v. Burwell (formerly Pruitt v. Sebelius)*⁷⁰ Complaint

Interestingly, the original complaint that the ACA was an unconstitutional exercise of Congress’s Commerce Clause and Necessary and Proper Clause powers was filed back in 2011 before the Supreme Court issued its decision in *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. (2012) (“*NFIB*”). Proceedings were stayed while the SCOTUS decision was pending, but after *NFIB* resolved the commerce clause and necessary proper clause issues, the State of Oklahoma and Scott Pruitt, in his official capacity as Attorney General, amended the complaint to raise new claims. The amended complaint asked for “declaratory and injunctive relief with respect to

61. *Id.* ¶ 4.

62. *Id.*

63. *Id.* ¶ 5.

64. *Id.*

65. *Id.*

66. *Id.* ¶ 6.

67. *Id.*

68. *Id.*

69. *Id.* ¶ 7.

70. The named defendant in these complaints against the U.S. Department of Health & Human Services is the Secretary of Health and Human Services. When the complaint was originally filed, Kathleen Sebelius held this office. After the resignation of Secretary Sebelius, Sylvia Mathews Burwell was nominated, confirmed, and then sworn into the role on June 9, 2014.

final federal regulations (the “Final Rule”) that were issued under Internal Revenue Code Section 36B,”⁷¹ stating that “the Final Rule was issued in contravention of the procedural and substantive requirements of the Administrative Procedures Act (“the APA”), 5 U.S.C. § 702; has no basis in any law of the United States; and directly conflicts with the unambiguous language of the very provision of the Internal Revenue Code it purports to interpret.”⁷² The complaint further explains that the ACA leaves the policy judgment of whether or not to establish an Exchange to the States, but “the Final Rule upsets this balance by providing, contrary to the Act, that qualifying taxpayers are eligible for premium tax credits and ‘advance payments’ if they enroll for health insurance through the Exchange where they live, regardless of whether it is a State-established Exchange or an HHS-established Exchange.”⁷³ Consequently, the complaint argues that “if the Final Rule is permitted to stand, federal subsidies will be paid under circumstances not authorized by the Congress; employers will be subjected to liabilities and obligations under circumstances not authorized by Congress; and States will be deprived of the opportunity created by the Act to choose for itself whether creating a competitive environment to promote economic and job growth is better for its people than access to federal subsidies.”⁷⁴

*Pruitt v. Burwell: U.S. District Court for the Eastern District of Oklahoma
Court Opinion*

In response to the cross-motions of the parties for summary judgment, on September 30, 2014, U.S. District Judge Ronald A. White, a George W. Bush appointee, issued an order, which held “that the IRS Rule is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, pursuant to 5 U.S.C. §706(2)(A), in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, pursuant to 5 U.S.C. §706(2)(C), or otherwise is an invalid implementation of the ACA, and is hereby vacated.”⁷⁵ The court prefaced its explanation of the *Chevron* analysis with the statement that the court found the rationale of *Halbig v. Burwell* more persuasive than that of *King v. Burwell*.⁷⁶ Next, it outlined the steps of the *Chevron* framework that it used, stating

Chevron entails two steps. If the court determines “at the first stage of the inquiry that ‘Congress has directly spoken to the precise question at issue,’ the court ‘must give effect to the unambiguously expressed intent of Congress.’” See *Ron Peterson Firearms, LLC v. Jones*, 760 F.3d 1147, 1155 (10th Cir. 2014)(citation omitted). If, however, “the statute is silent or ambiguous with respect to the specific issue,” the court “will uphold the agency’s interpretation if it is based on a permissible construction of the statute.” “The first question, whether there is such an ambiguity, is for the

71. Amended Complaint at 3, Oklahoma ex rel. *Pruitt v. Sebelius*, (E.D. Okla. 2014) (No. CIV-11-030-RAW).

72. *Id.* ¶ 3-4.

73. *Id.* ¶ 4-5.

74. *Id.* ¶ 5.

75. Oklahoma ex rel. *Pruitt v. Burwell*, 51 F. Supp. 3d 1080, 1093 (E.D. Okla. 2014).

76. *Id.* at 1087.

court, and we owe the agency no deference on the existence of ambiguity.”
Am. Bar Ass’n v. FTC, 430 F.3d 457, 468 (D.C. Cir. 2005).⁷⁷

The court goes on to explain that similar to the majority in *Halbig*, it “resolved the issue at the first stage of *Chevron*, finding that inasmuch as ‘the ACA unambiguously restricts the section 36B subsidy to insurance purchased on Exchanges ‘established by the State.’”⁷⁸ In the remainder of the order, the court also compares and contrasts the *Halbig* and *King* opinions to demonstrate its alignment with the rationale of *Halbig*.⁷⁹ Furthermore, the court even implies that it believes that the *Chevron* framework is not the appropriate legal standard by citing the *Yazoo* requirement (see quote below), which both the *Halbig* and *King* opinions brushed aside, instead identifying as controlling, the holding of *Mayo Foundation for Medical Educ. and Research v. United States*, 562 U.S. 44 (2011) that found that *Chevron* applies with full force in the tax context.

At the first step of the *Chevron* analysis, the court asks “whether Congress has directly spoken to the precise question at issue.” *In re FCC 11-161*, 753 F.3d 1015, 1040 (10th Cir. 2014)(citation omitted). On this particular “precise question,” however, case law does not provide “wobble room” for finding ambiguity. This is because tax credits must be expressed in “clear and unambiguous language.” *Yazoo & Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 186 (1889). See also *Shami v. C.I.R.*, 741 F.3d 560, 567 (5th Cir. 2014)(Tax credits are a matter of legislative grace, are only allowed as clearly provided for by statute, and are narrowly construed).⁸⁰

The order concludes by acknowledging, but not quite echoing, the *Halbig* majority’s stated reluctance in vacating the IRS rule.⁸¹ Instead, the court downplays the stakes of the ruling, characterizes the statement regarding “Appellants’ not-so-veiled attempt to gut the Patient Protection and Affordable Care Act (‘ACA’)”⁸² in Judge Edwards’ dissent in *Halbig* as apocalyptic, emphasizes that the case is simply one of statutory interpretation and that “the court is upholding the Act as written” with the assumption that “Congress says what it means,” and restates its holding vacating the IRS Rule.⁸³

As previously mentioned, the government timely filed an appeal to the Tenth Circuit, and further proceedings were stayed until the Supreme Court’s decision in *King v. Burwell*.

77. *Id.* at 1088.

78. *Id.* at 1089.

79. *Id.* at 1087.

80. *Id.* at 1090-91.

81. *Id.* at 1091.

82. Oklahoma *ex rel.* Pruitt v. Burwell, 51 F. Supp. 3d 1080, 1091 (E.D. Okla. 2014) (citing *Halbig v. Burwell*, 758 F.3d 390, 412-13 (D.C. Cir. 2014)).

83. *Id.* at 1092-93.

*Halbig v. Burwell (formerly Halbig v. Sebelius)*⁸⁴ Complaint

The parties in this case are numerous and include individuals and entities from several different states, including Virginia, West Virginia, Tennessee, Texas, and Kansas. The individual plaintiffs (Halbig, Klemencic, Lowery, and Rumpf) are complaining that absent the IRS Rule, based on realistic estimates of their expected incomes, they would not be required to purchase health insurance because they would fall within the unaffordability exemption to the individual mandate penalty in 2014.⁸⁵ However, because the IRS Rule makes them eligible for premium assistance, they will be disqualified from that exemption and subject to the individual mandate penalty.⁸⁶ As a result, they will be forced to either pay a penalty or purchase more insurance than they would prefer to buy.⁸⁷ The plaintiffs that are legal entities are complaining that absent the IRS Rule, they would not be threatened by the employer mandate, because their employees would not be eligible for federal subsidies and, therefore, their businesses would not be subject to assessable payments under the employer mandate.⁸⁸

Furthermore, the complaint explains:

to encourage states to establish Exchanges, Congress used carrots, such as startup grants to help fund the creation of Exchanges . . . The biggest carrot was the offer of premium-assistance subsidies from the Federal Treasury refundable tax credits to help a state's low- and moderate-income residents buy insurance—if that state set up its own Exchange.⁸⁹

However, according to the complaint:

States rejecting the offer got a stick instead: the imposition of a federally-established, federally operated Exchange in the state, with no subsidies at all . . . That choice has left the federal government with the burden of establishing Exchanges in those states, but without the burden of paying for premium-assistance subsidies to the residents of those states—just the balance that Congress struck.⁹⁰

Finally, the complaint asserts:

Notwithstanding express statutory language limiting premium-assistance

84. The named defendant in these complaints against the U.S. Department of Health & Human Services is the Secretary of Health and Human Services. When the complaint was originally filed, Kathleen Sebelius held this office. After the resignation of Secretary Sebelius, Sylvia Mathews Burwell was nominated, confirmed, and then sworn into the role on June 9, 2014.

85. Amended Complaint at 4-5, *Oklahoma ex rel. Pruitt v. Sebelius*, (E.D. Okla. 2014) (No. CIV-11-030-RAW).

86. *Id.*

87. *Id.*

88. *Id.* ¶ 16-18.

89. *Id.* ¶ 2.

90. *Id.* ¶ 2-3.

subsidies to Exchanges established by states, the Internal Revenue Service (“IRS”) has promulgated a regulation (“the IRS Rule” or “the Subsidy Expansion Rule”) purporting to authorize subsidies even in states with only federally-established Exchanges, thereby disbursing monies from the Federal Treasury in excess of the authority granted by the Act. The IRS Rule squarely contravenes the express text of the ACA, ignoring the clear limitations that Congress imposed on the availability of the federal subsidies. And the IRS promulgated the regulation without any reasoned effort to reconcile it with the contrary provisions of the statute.⁹¹

The complaint closes by requesting the following relief – a declaratory judgment that the IRS Rule violates the APA, a preliminary and permanent injunction prohibiting the application or enforcement of the IRS Rule, and all other relief deemed just and proper.⁹²

Halbig v. Burwell: U.S. District Court for the District of Columbia Opinion

On January 15, 2014, United States District Judge Paul L. Friedman, a Clinton appointee, issued an opinion in response to the parties’ cross-motions for summary judgment granting the defendants’ motion, denying the plaintiffs’ motion, and entering a judgment for the defendants.⁹³ The court first outlines the *Chevron* framework it used:

“Under step one of *Chevron*, [the court] ask[s] whether Congress has directly spoken to the precise question at issue.” *Sec’y of Labor, Mine Safety & Health Admin. v. Nat’l Cement Co. of California, Inc.*, 494 F.3d 1066, 1073 (D.C. Cir. 2007) (internal quotation and quotation marks omitted). In determining whether Congress has directly spoken to the precise question at issue, the Court uses the “traditional tools of statutory construction,” including an examination of the statute’s text, the structure of the statute, and (as appropriate) legislative history. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. at 843 n.9; see *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Meredith v. Fed. Mine Safety & Health Review Comm’n*, 177 F.3d 1042, 1053 (D.C. Cir. 1999) (internal quotation omitted).

If, however, the Court concludes that “the statute is silent or ambiguous with respect to the specific issue . . . , [the Court] move[s] to the second step and defer[s] to the agency’s interpretation as long as it is ‘based on a permissible construction of the statute.’” *In Def. of Animals v. Salazar*, 675

91. *Id.* ¶ 4.

92. *Id.* at V.

93. *Halbig v. Sebelius*, 27 F. Supp. 3d 1, 25-26 (D.D.C. 2014).

F. Supp. 2d 89, 94 (D.D.C. 2009) (quoting *Sec’y of Labor, Mine Safety & Health Admin. v. Nat’l Cement Co. of California, Inc.*, 494 F.3d at 1074). At Chevron step two, the court must uphold the agency’s interpretation “if it is reasonable and consistent with the statutory purpose and legislative history.” *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d at 1049. “Unlike [the court’s] Chevron step one analysis, [its] review at this stage is ‘highly deferential.’” *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 665 (D.C. Cir. 2011) (quoting *Nat’l Rifle Assn. of Amer. v. Reno*, 216 F.3d 122, 137 (D.C. Cir. 2000)).

Plaintiffs also object to the IRS Rule as being arbitrary and capricious. An agency rule is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Agape Church, Inc. v. FCC*, — F.3d —, 2013 WL 6819158, at *11 (D.C. Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). As the D.C. Circuit recently noted, “[t]he analysis of disputed agency action under Chevron Step Two and arbitrary and capricious review is often ‘the same, because under Chevron step two, [the court asks] whether an agency interpretation is arbitrary or capricious in substance.’” *Id.* at *11 (quoting *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011)).⁹⁴

In his analysis, Judge Friedman starts out reviewing 26 U.S.C. § 36B(a), the statutory provision that authorizes the premium tax credits, and he immediately highlights the fact that it “does not distinguish between taxpayers residing in states with state-run Exchanges and those in states with federally-facilitated Exchanges.”⁹⁵ Next, he emphasizes that “the tax credit to a qualifying individual is tied to the cost of insurance purchased ‘through an Exchange established by the State under [42 U.S.C. § 18031],’”⁹⁶ but “the term ‘Exchange’ is not defined in Section 36B.”⁹⁷ However, he explains, “the phrase ‘established by the State under [42 U.S.C. § 18031]’ directs the Treasury Secretary and the IRS Commissioner to define ‘Exchange’ with reference to other provisions of the ACA, located in Title 42 of the United States Code. 26 U.S.C. § 36B(b)(2); 26 U.S.C. § 36B(c)(2)(A)(i).”⁹⁸ Accordingly, Judge Friedman summarily rejects the plaintiffs’ contention, that

by using the phrase “established by the State under [42 U.S.C. § 18031],” as opposed to a phrase like “established under this Act,” see 42 U.S.C. § 18032(d)(3)(D)(i)(II), Congress intended to refer exclusively to state-run

94. *Id.* at 16-17.

95. *Id.* at 18.

96. *Id.*

97. *Id.*

98. *Id.*

Exchanges, as opposed to federally-facilitated Exchanges, and thus to limit the availability of the Section 36B tax credits to persons residing only in the states that have established their own Exchanges.⁹⁹

Instead, Judge Friedman argues that “under plaintiffs’ construction of the Act, a taxpayer in a state with a federal Exchange will never purchase insurance ‘enrolled in through an Exchange established by the State under [42 U.S.C. § 18031]’”¹⁰⁰ because “the premium assistance credit amount available to ‘applicable taxpayers’ residing in states with federally-facilitated Exchanges” would always be zero.¹⁰¹ The court then acknowledges that “the plain language of 26 U.S.C. § 36B(b)-(c), viewed in isolation, appears to support plaintiffs’ interpretation,”¹⁰² but stresses that in making the threshold determination under *Chevron*, however, the meaning – or ambiguity – of certain words or phrases must be placed in context explaining that “one cannot look at just a few isolated words in 26 U.S.C. § 36B, but also must at least look at the other statutory provisions to which it refers. (citing *United States v. McGoff*, 831 F.2d 1071, 1080 (D.C. Cir. 1987) (rejecting construction that isolated disputed statutory provision from expressly cross-referenced statute).”¹⁰³ Next, the opinion highlights the inconsistency in the plaintiffs’ argument, which supports a very literal interpretation of the language despite the fact that both “plaintiffs and defendants agree that 42 U.S.C. § 18031 does not mean what it literally says; states are not actually required to “establish” their own Exchanges. Pls.’ SJ Opp. 14 (‘All agree that states are free *not* to establish Exchanges.’)”¹⁰⁴ because “if a state will not or cannot establish its own Exchange, the ACA directs the Secretary of HHS to step in and create ‘such Exchange’ – that is, by definition under the statute, ‘an American Health Benefit Exchange established under [Section 18031].’ 42 U.S.C. § 18041(c); 42 U.S.C. § 300gg-91(d)(21).”¹⁰⁵ To summarize, Judge Friedman explains “even where a state does not actually establish an Exchange, the federal government can create ‘an Exchange established by the State under [42 U.S.C. § 18031]’ *on behalf of* that state.”¹⁰⁶

Although he finds the defendants’ arguments “more credible when viewed in light of the cross-referenced provisions,”¹⁰⁷ because each side provides a plausible construction of the language of section 36B(b)-(c), Judge Friedman considers other “tools of statutory construction under *Chevron* step one, including the structure of the statute and the context in which the language of Section 36B is set.”¹⁰⁸ In doing so, he focuses on two provisions in the ACA: the reporting requirements for state and federal Exchanges (Section 36B(f)), and the eligibility requirements for individuals

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 18-19.

104. *Id.* at 19.

105. *Id.*

106. *Id.* at 20.

107. *Id.*

108. *Id.* at 29 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. at 843 n.9).

purchasing insurance through the Exchanges (42 U.S.C. § 18032)¹⁰⁹ and “finds the defendants’ arguments compelling and the plaintiffs’ counterarguments unpersuasive.”¹¹⁰ Explaining that -

if construed literally, these provisions would be nullified when applied to states without state-run Exchanges, leading to strange or absurd results. These provisions make far more sense when construed consistently with defendants’ interpretation of the Act – *i.e.*, viewing 42 U.S.C. § 18041 as authorizing the federal government to create “an Exchange established by the State under [42 U.S.C. § 18031]” on behalf of a state that declines to establish its own Exchange.¹¹¹

Next, Judge Friedman rebutted the plaintiffs’ premise that tax credits are available only on the state-run Exchanges with the argument that it “runs counter to this central purpose of the ACA: to provide affordable health care to virtually all Americans. Such an interpretation would violate the basic rule of statutory construction that a court must interpret a statute in light of its history and purpose.”¹¹² Additionally, he refutes the plaintiffs’ explanation for the inconsistency – that “Congress desperately wanted to keep the federal government out of the business of running any Exchange, and it therefore sought to persuade the states to establish and operate the Exchanges”¹¹³ by offering the tax credits as an inducement to those states that set up their own Exchanges – by showing that “there is simply no evidence in the statute itself or in the legislative history of any intent by Congress to ensure that states established their own Exchanges.”¹¹⁴ In fact, the judge argues that the legislative history confirms Congress’s intent with evidence that “early proposals for comprehensive health insurance reform contemplated that the federal government would establish and operate the Exchanges, and an earlier version of the House Bill so provided,”¹¹⁵ and that “the Senate Finance Committee expressly contemplated that the federal government could “establish state exchanges.”¹¹⁶

To summarize, Judge Friedman held that “the plain text of the statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges”¹¹⁷ and, therefore, concluded “that ‘Congress has directly spoken to the precise question’ of whether an ‘Exchange’ under 26 U.S.C. § 36B includes federally-facilitated Exchanges.”¹¹⁸ As a consequence, he settled the matter at step one of

109. Halbig v. Sebelius, 27 F. Supp. 3d, at 21 (2014).

110. *Id.* at 20.

111. *Id.* at 22.

112. *Id.*

113. *Id.*

114. *Id.* at 23.

115. *Id.* at 36; See Reconciliation Act of 2010, H.R. 4872 §§ 141(a), 201(a) (2010) (version reported in the House on March 17, 2010) (establishing a national exchange within a newly created Health Choices Administration located in the Executive Branch); see also H. REP. NO. 111-443, at 18, 26 (2013).

116. Halbig v. Sebelius, 27 F. Supp. 3d at 36 (2014); See S. REP. NO. 111-89, at 19 (Oct. 19, 2009).

117. Halbig, *supra* note 93, at 25.

118. *Id.* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. at 842).

Chevron, stating it “must give effect to the unambiguously expressed intent of Congress”¹¹⁹ and that the IRS appropriately promulgated “regulations authorizing the provision of tax credits to individuals who purchase health insurance on federally-facilitated Exchanges as well as to those who purchase insurance on state-run Exchanges.”¹²⁰

Halbig v. Burwell: U.S. Court of Appeals for the D.C. Circuit – Panel Opinion

The plaintiffs timely appealed to the U.S. Court of Appeals for the D.C. Circuit, and a three judge panel consisting of Thomas B. Griffith, a George W. Bush appointee, Harry T. Edwards, a Jimmy Carter appointee, and A. Raymond Randolph, a George H.W. Bush appointee heard oral arguments on March 25, 2014. Judge Griffith filed the panel’s opinion on July 22, 2014, with Judge Randolph concurring and Judge Edwards strongly dissenting. The panel concluded “that the ACA unambiguously restricts the section 36B subsidy to insurance purchased on Exchanges ‘established by the State,’”¹²¹ reversed the District Court, and vacated the IRS’s regulation.¹²² The panel defined its *Chevron* framework as follows:

On the merits, this case requires us to determine whether the ACA permits the IRS to provide tax credits for insurance purchased through federal Exchanges. To make this determination, we begin by asking “whether Congress has directly spoken to the precise question at issue,” for if it has, we must give effect to its unambiguously expressed intent. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). The text of section 36B is only the starting point of this analysis. That provision is but one piece of a vast, complex statutory scheme, and we must consider it both on its own and in relation to the ACA’s interconnected provisions and overall structure so as to interpret the Act, if possible, “as a symmetrical and coherent scheme.” See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted); *Wolf Run Mining Co. v. Fed. Mine Safety & Health Review Comm’n*, 659 F.3d 1197, 1200 (D.C. Cir. 2011).¹²³

The panel then declared that the “appellants have the better of the argument: a federal Exchange is not an ‘Exchange established by the State,’ and section 36B does not authorize the IRS to provide tax credits for insurance purchased on federal Exchanges.”¹²⁴ The panel reached the conclusion by first examining “section 36B in light of sections 1311 and 1321, which authorize the establishment of state and federal Exchanges.”¹²⁵ The judges found that “nothing in section 1321 deems federally-

119. *Id.*

120. *Id.*

121. *Halbig v. Burwell*, 758 F.3d 390, 394 (D.C. Cir. 2014).

122. *Id.*

123. *Id.*

124. *Id.* at 399.

125. *Id.*

established Exchanges to be ‘Exchange[s] established by the State,’¹²⁶ explaining that the “omission is particularly significant since Congress knew how to provide that a non-state entity should be treated as if it were a state when it sets up an Exchange”¹²⁷ since “in a nearby section, the ACA provides that a U.S. territory that ‘elects . . . to establish an Exchange . . . shall be treated as a State.’ 42 U.S.C. § 18043(a)(1).”¹²⁸ Therefore, the panel reasoned that “the absence of similar language in section 1321 suggests that even though the federal government may establish an Exchange ‘within the State,’ it does not in fact stand in the state’s shoes when doing so.”¹²⁹

Next, the judges considered the defendant’s argument that the plaintiffs’ construction generates absurd results when the plain meaning of section 36B is not adopted since the “obligation to avoid adopting statutory constructions with absurd results is well-established.”¹³⁰ Under this principle, a court “will not give effect to a statute’s literal meaning when doing so would ‘render [the] statute nonsensical or superfluous or . . . create[] an outcome so contrary to perceived social values that Congress could not have intended it.’”¹³¹ However, this absurdity doctrine has a very narrow domain, and a high threshold is necessary before a court can conclude that a statute does not mean what it says.¹³² “A provision thus ‘may seem odd’ without being ‘absurd,’ and in such instances ‘it is up to Congress rather than the courts to fix it,’ even if it ‘may have been an unintentional drafting gap.’”¹³³ Using this standard, it is unsurprising that the panel rejected the government’s argument that vacating the IRS rule would render the reporting requirements in section 36B(f) superfluous.¹³⁴ The court argues that “even if credits are unavailable on federal Exchanges, reporting by those Exchanges still serves the purpose of enforcing the individual mandate—a point the IRS, in fact, acknowledged in promulgating a recent regulation, 26 C.F.R. § 1.6055-1(d)(1);”¹³⁵ therefore, “the government’s claim that section 36B(f)(3)’s reporting requirement serves no purpose other than reconciling credits is therefore simply not true.”¹³⁶ The panel further elaborates that “requirements would still allow the reconciling of credits on state Exchanges; as applied to federal Exchanges, they would simply be over-inclusive. “Over-inclusiveness, however, remains a problem even if we were to agree that section 36B allows credits on federal Exchanges . . . [and] [a] weakness common to both views of the availability of credits hardly serves as a basis for choosing between them.”¹³⁷ Similarly, the panel rebuts the defendant’s

126. *Id.* at 400.

127. *Id.*

128. *Id.* (quoting 42 USC §18043).

129. *Id.*; *See NFIB*, 132 S. Ct. at 2583 (where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally. (citing *Russello v. United States*, 464 U.S. 16, 23 (1983))).

130. *Id.* at 402; *see Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 454-55 (1989).

131. *Id.* (quoting a statute’s literal meaning in *United States v. Cook*, 594 F.3d 883, 891 (D.C. Cir 2010)).

132. *See generally id.*

133. *Id.* (citing *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005); *see also Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C.Cir.2002).

—134.—*See id.* at 403.

135. *Id.*

136. *Id.* at 404

137. *Id.* at 404.

argument regarding the “absurd consequences appellants’ interpretation of section 36B would have for section 1312 of the ACA, which defines the rights of ‘qualified individuals.’”¹³⁸ If given its plain meaning, “the 36 states with federal Exchanges (that, obviously, the states did not establish) have no qualified individuals.”¹³⁹ “That outcome is absurd, the government argues, because, in its view, section 1312 restricts access to Exchanges to qualified individuals alone.”¹⁴⁰ “The absence of qualified individuals would mean that federal Exchanges have no customers and therefore no purpose.”¹⁴¹ The government urges the panel “to avoid this outcome by interpreting section 1321 to authorize the federal government to establish Exchanges ‘on behalf of’ states that decline to do so.”¹⁴² The panel declines, explaining:

Section 1312(a)’s actual language simply establishes the right of a qualified individual to enroll in any qualified health plan, at any level of coverage. On this reading, giving the phrase “established by the State” its plain meaning creates no difficulty, let alone absurdity. Federal Exchanges might not have qualified individuals, but they would still have customers—namely, individuals who are not “qualified individuals.” Several other provisions in section 1312 imply that not only “qualified individuals” may participate in an Exchange. . . participation in an Exchange does not depend on “qualified individual” status. That proposition gains further strength from section 1312(d)(3), which states, first, that “[n]othing in this title shall be construed to restrict the choice of a qualified individual to enroll or not to enroll in a qualified health plan or to participate in an Exchange,” 42 U.S.C. § 18032(d)(3)(A), and, second, that “[n]othing in this title shall be construed to compel an individual to enroll in a qualified health plan or to participate in an Exchange,” *id.* § 18032(d)(3)(B).¹⁴³

To conclude, the panel finds “that the government has failed to make the extraordinary showing required for such judicial rewriting of an act of Congress. Nothing about the imperative to read section 36B in harmony with the rest of the ACA requires interpreting ‘established by the State’ to mean anything other than what it plainly says.”¹⁴⁴

Finally, the panel considered the ACA’s purpose and its legislative history and found that the government again came “up short in its efforts to overcome the statutory text.”¹⁴⁵ The panel’s “inquiry into the ACA’s legislative history [was] quite narrow.”¹⁴⁶ The judges asked “only whether the legislative history provides evidence that this literal meaning is ‘*demonstrably* at odds with the intentions’ of the ACA’s

138. *Id.* (citing 42 U.S.C. § 18032 (2010)).

139. *Id.*

140. *Id.* (citing 45 C.F.R. § 155.20 (2015)).

141. *Id.*

142. *Id.*

143. *Id.* at 405.

144. *Id.* at 406.

145. *Id.* at 399.

146. *Id.* at 407.

drafters,”¹⁴⁷ explaining that “[T]here must be evidence that Congress meant something other than what it literally said before a court can depart from plain meaning.”¹⁴⁸ Additionally, during this inquiry, the court offered the example of the proposed bill by The Senate Committee on Health, Education, Labor, and Pensions (HELP) “that specifically contemplated penalizing states that refused to participate in establishing ‘American Health Benefit Gateways,’ the equivalent of Exchanges, by denying credits to such states’ residents for four years”¹⁴⁹ to refute the government’s argument and demonstrate “that members of Congress at least considered the notion of using subsidies as an incentive to gain states’ cooperation.”¹⁵⁰ The panel’s majority also was not persuaded by both the government’s and the dissent’s “more abstract form of legislative history—Congress’s broad purpose in passing the ACA—urging the court to view section 36B through the lens of the ACA’s economic theory and ultimate aims” to achieve near universal coverage and lower insurance premiums.¹⁵¹ The majority instead asserted that “the ACA’s ultimate aims shed little light on the ‘precise question at issue,’ namely, whether subsidies are available on federal Exchanges because such Exchanges are ‘established by the State’.”¹⁵² Additionally, the majority argued that “the legislative record provides little indication one way or the other of congressional intent, but . . . Section 36B plainly makes subsidies available only on Exchanges established by states. And in the absence of any contrary indications, that text is conclusive evidence of Congress’s intent.”¹⁵³ As a result of the conclusion that the IRS Rule is not a permissible reading of the ACA, the court ‘reluctantly’ reversed the District Court and remanded with instructions to grant summary judgment to appellants and vacate the IRS Rule.¹⁵⁴

The defendants timely filed a Petition for Rehearing En Banc, and the order was granted on September 14, 2014. Oral arguments were scheduled for December 17, 2014. However, after the Supreme Court granted certiorari in *King v. Burwell*, the appellants filed a motion requesting that the court hold its en banc proceedings in abeyance pending the Supreme Court’s decision.

*King v. Burwell (formerly King v. Sebelius)*¹⁵⁵ Complaint

The parties in this Administrative Procedure Act challenge—David King, Douglas Hurst, Brenda Levy, and Rose Luck—are all individuals of the age of 55 or older and residents of Virginia.¹⁵⁶ With projected household incomes of \$48,000 or less in 2014 and no eligibility for employer or government sponsored health coverage

147. *Id.*

148. *Id.*

149. *Id.* at 408.

150. *Id.*

151. *Id.*

152. *Id.* at 411 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council Inc.*, 467 U.S. 837 (1984)).

153. *Id.* at 421.

154. *Id.*

155. The named defendant in these complaints against the U.S. Department of Health & Human Services is the Secretary of Health and Human Services. When the complaint was originally filed, Kathleen Sebelius held this office. After the resignation of Secretary Sebelius, Sylvia Mathews Burwell was nominated, confirmed, and then sworn into the role on June 9, 2014.

156. Complaint at 3-4, *King v. Sebelius*, 997 F.Supp 2d 415 (E.D.Va. 2014) (No. 13-CV630).

that satisfies the individual mandate, absent the IRS Rule, they would all be entitled to a certificate of exemption from the individual mandate penalty for 2014 because the cheapest bronze plan on the federal Exchange in Virginia would cost more than 8% of their projected household incomes.¹⁵⁷ Therefore, they will either be forced to pay a penalty or purchase more insurance than they would prefer.¹⁵⁸ Consequently, the plaintiffs complain that the Internal Revenue Service (“IRS”) regulation (“the IRS Rule”) purporting to authorize subsidies, even in states with only federally established Exchanges, disburses monies from the Federal Treasury in excess of the authority granted by the Act.¹⁵⁹ They argue that “[t]he IRS Rule squarely contravenes the express text of the ACA, ignoring the clear limitations that Congress imposed on the availability of the federal subsidies. And the IRS promulgated the regulation without any reasoned effort to reconcile it with the contrary provisions of the statute.”¹⁶⁰ As a consequence, the subsidies financially injure and restrict their economic choices.¹⁶¹

For these people, the IRS Rule, by reducing to some extent the out-of-pocket cost of health coverage, effectively subjects them to the individual mandate’s requirement to purchase costly, comprehensive health insurance that they otherwise would forgo; further, it prevents them from purchasing cheaper, high-deductible catastrophic coverage that under the ACA may only be sold to individuals who are under age 30 or who have a certificate of exemption from the individual mandate penalty.¹⁶²

Accordingly, the plaintiffs sought a declaratory judgment that the IRS Rule is illegal under the Administrative Procedure Act, and injunctive relief barring its enforcement.¹⁶³

*King v. Burwell: U.S. District Court Eastern District of Virginia Richmond
Division Opinion*

In response to a Motion for Summary Judgment filed by Plaintiffs and a Motion to Dismiss filed by Defendants, on February 18, 2014, District Judge James R. Spencer, a Ronald Reagan appointee, issued a memorandum opinion, which granted the Defendant’s Motion to Dismiss and denied as moot all remaining motions.¹⁶⁴ To begin analysis of the statutory interpretation, Judge Spencer outlines the *Chevron* framework as follows:

157. *Id.*

158. *Id.*

159. *Id.* at 1.

160. *Id.*

161. *Id.* at 2.

162. *Id.*

163. *Id.*

164. *King v. Sebelius*, 997 F.Supp 2d 415, 432 (E.D.Va. 2014).

“*Chevron* deference is a tool of statutory construction whereby courts are instructed to defer to the reasonable interpretations of expert agencies charged by Congress to fill any gap left, implicitly or explicitly, in the statutes they administer.” *Nat’l Elec. Mfrs. Ass’n v. U.S. Dep’t of Energy*, 654 F.3d 496,504 (4th Cir. 2011) (quoting *Am. Online, Inc. v. AT&T Corp.*, 243 F.3d 812, 817 (4th Cir. 2001)) (internal quotation marks and alterations omitted). *Chevron* deference requires a court to undertake a two-part analysis to review an agency’s regulation. *Chevron U.S.A., Inc. v. Natural Res Def. Council, Inc.*, 467 U.S. 837 (1984). At the first step, a court must look to the “plain meaning” of the statute and determine if the regulation responds to it. *Id.* at 837, 842-43. If it does, the inquiry need not continue. *Id.* At the second step, if the statute is silent or ambiguous, a court must determine whether a given regulation is a permissible construction. *Id.* at 843; *Nat’l Elec. Mfrs. Ass’n*, 654 F.3d at 504.

1. *Chevron* Step One

Under *Chevron*, if a statute is unambiguous regarding the question presented, the statute’s plain meaning controls. *Morgan v. Sebelius*, 694 F.3d 535,537 (4th Cir. 2012). In order to be ambiguous, disputed language must be ‘reasonably susceptible of different interpretations.’ *Nat’l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 473 n.27 (1985). At the first step of *Chevron*, a court may also employ traditional tools of statutory construction to ascertain whether Congress has expressed its intent regarding the precise question at issue. *Chevron*, 467 U.S. at 843 n.9; *Nat’l Elec. Mfrs. Ass’n*, 654 F.3d at 504.¹⁶⁵

After discussing the meaning of “Exchange” as used in Section 36B, Judge Spencer explains, “[a]t first blush, each party presents seemingly credible constructions of the language in section 36B. Viewed in a vacuum, it seems comprehensible that the omission of any mention of federally-facilitated Exchanges under section 36B(b)(2)(A) could imply that Congress intended to preclude individuals in federally-facilitated Exchanges from receiving tax subsidies. However, when statutory context is taken into account, Plaintiffs’ position is revealed as implausible.”¹⁶⁶ He elaborates that “[c]ourts have a duty to construe statutes as a whole”¹⁶⁷ and that “Plaintiffs’ reading of section 36B grows even weaker when other sections of the ACA are taken into account.”¹⁶⁸ Next, the opinion addresses “the more anomalous results of Plaintiffs’ reading of section 36B at length.”¹⁶⁹ The defendants argued that “part of the definition of the term ‘qualified individual’ requires that the individual

165. *Id.* at 426-27.

166. *Id.* at 427-28.

167. *King v. Sebelius*, 997 F.Supp 2d at 428; *see, e.g., Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010).

168. *King v. Sebelius*, 997 F.Supp 2d at 428.

169. *Id.*

reside in a State that establishes an Exchange under Section 1311 (“Residency Requirement”).¹⁷⁰ Therefore, “under Plaintiffs’ reading of section 36B, no person in a state with a federally-facilitated Exchange could become a ‘qualified individual.’”¹⁷¹ Judge Spencer finds the defendants argument more persuasive, stating that “plaintiffs’ insistence that the Court should read the Residency Requirement out of the ACA or not apply Section 1312 to federally-facilitated Exchanges is a telltale sign that their reading of section 36B is wrong? If construed literally, the eligibility provision would be nullified when applied to states with federally-facilitated Exchanges, rendering the provision superfluous.”¹⁷² The second anomalous provision the opinion discusses involves the reporting requirements under Section 36B(f)(3).¹⁷³ “Defendants assert that under Plaintiffs’ reading, federally-facilitated Exchanges would perform an ‘empty act’ because they would have to report the aggregate amount of any advance payment of subsidies as zero, and would not have to report any individualized information necessary to determine eligibility for subsidies.”¹⁷⁴ Plaintiffs counter, “without support, that this provision is an example of sensible draftsmanship because otherwise Congress would have had to draft separate sections detailing reporting requirements.”¹⁷⁵ However, Judge Spencer concludes that the Plaintiffs’ interpretation would make section 36B(f) “superfluous with respect to federally-facilitated Exchanges under Section 1321 because such Exchanges would not be authorized to deliver tax credits.”¹⁷⁶ Instead, he argues “Section 36B(f) thus indicates that Congress assumed that premium tax credits would be available on any Exchange, regardless of whether it is operated by a state under [Section 1311] or by HHS under [Section 1321].”¹⁷⁷

Next, since “it is firmly established that legislative history is one of the traditional tools of interpretation to be consulted at *Chevron*’s step one,”¹⁷⁸ Judge Spencer considers the “various legislative history materials including, but not limited to, past versions of the ACA, committee reports, reports by the Congressional Budget Office (“CBO”) and Joint Committee on Taxation (“JCT”), and finally, even news media” presented by the parties.¹⁷⁹ However, his review ultimate ends with the conclusion that “what *is* clear is that there is no direct support in the legislative history of the ACA for Plaintiffs’ theory that Congress intended to condition federal funds on state participation.”¹⁸⁰ Instead, “[t]he legislative history of the ACA ‘reveals an intent to grant states the option of establishing their own Exchanges, rather than an intent to

170. *Id.* (citing 42 U.S.C. § i8032(f)(i)(A)(ii)).

171. *Id.* at 429.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* (quoting *Halbig v. Sebelius*, 27 F.Supp.3d 1, 15 (D.D.C. 2014)).

178. *Id.* at 430 (citing *Morgan v. Sebelius*, 694 F.3d 535, 538-39 (4th Cir. 2012)).

179. *Id.*

180. *Id.* at 431 (citing *Halbig v. Sebelius*, 27 F.Supp.3d at 16 (holding that there is no evidence in the legislative record that the House, the Senate, any relevant committee of either House, or any legislator ever entertained the idea of conditioning federal tax credits upon state participation in the creation of the Exchanges)).

coerce or entice states into participating.’ Further, the text of the ACA and its legislative history evidence congressional intent to ensure broad access to affordable health coverage for all.”¹⁸¹

Finally, assuming for the sake of argument that the text of section 36B is ambiguous, Judge Spencer finds that “Plaintiffs’ arguments fail at *Chevron* step two. *Chevron* deference is afforded only when an ‘agency’s interpretation is rendered in the exercise of [its] authority [to make rules carrying the force of law]’ . . . [and] HHS and IRS should receive *Chevron* deference in their interpretation of section 36B and the ACA because the ACA is a ‘shared-administration’ statute and both HHS and the Department of the Treasury are in full agreement about how to interpret the word ‘Exchanges’ within the context of section 36B.”¹⁸² To summarize, Judge Spencer concluded that even if the “Plaintiffs’ interpretation of the ACA, section 36B, and related HHS regulations is reasonable, Plaintiffs have not met their burden to show that Defendants’ contrary reading is unreasonable;”¹⁸³ therefore, “in light of the applicable legislative history of the ACA and the above discussion of the anomalous consequences of Plaintiffs’ reading of the ACA, Defendants at the very least have presented a reasonable interpretation of HHS’s regulations and, thus, section 36B.”¹⁸⁴

King v. Burwell: U.S. Court of Appeals for the Fourth Circuit – Panel Opinion

The Plaintiffs timely appealed to the Fourth Circuit Court of Appeals, and on July 22, 2014, Judge Roger L. Gregory, a William Clinton appointee; Stephanie D. Thacker, a Barack Obama appointee; and Andre M. Davis, a Barack Obama appointee, issued an opinion. The court upheld the IRS rule “as a permissible exercise of the agency’s discretion, affirming the judgment of the district court.”¹⁸⁵ When evaluating the merits of the case, because it concerns a challenge to an agency’s construction of a statute, the court applied the familiar two-step analytic framework set forth in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).¹⁸⁶ The court outlined the framework as follows:

At *Chevron*’s first step, a court looks to the “plain meaning” of the statute to determine if the regulation responds to it. *Chevron*, 467 U.S. at 842-43. If it does, that is the end of the inquiry and the regulation stands. *Id.* However, if the statute is susceptible to multiple interpretations, the court then moves to *Chevron*’s second step and defers to the agency’s interpretation so long as it is based on a permissible construction of the statute. *Id.* at 843.

A.

At step one, “[i]f the statute is clear and unambiguous ‘that is the end of

181. *Id.* (citing *Halbig v. Sebelius*, 27 F.Supp.3d at 17)

182. *Id.*

183. *Id.*

184. *Id.*

185. *King v. Burwell*, 749 F.3d at 363.

186. *Id.* at 367.

the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (quoting *Chevron*, 467 U.S. at 842-43). A statute is ambiguous only if the disputed language is “reasonably susceptible of different interpretations.” *Nat’l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 473 n.27 (1985). “The objective of *Chevron* step one is not to interpret and apply the statute to resolve a claim, but to determine whether Congress’s intent in enacting it was so clear as to foreclose any other interpretation.” *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1367, 1377 (Fed. Cir. 2011). Courts should employ all the traditional tools of statutory construction in determining whether Congress has clearly expressed its intent regarding the issue in question. *Chevron*, 467 U.S. at 843 n.9; *Nat’l Elec. Mfrs. Ass’n v. U.S. Dep’t of Energy*, 654 F.3d 496, 504 (4th Cir. 2011).¹⁸⁷

After evaluating the parties’ arguments and the plain language of the statute, the court admits, “there can be no question that there is a certain sense to the plaintiffs’ position. If Congress did in fact intend to make the tax credits available to consumers on both state and federal Exchanges, it would have been easy to write in broader language, as it did in other places in the statute.”¹⁸⁸ However, the court further explains that “when conducting statutory analysis, ‘a reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather, [t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.’”¹⁸⁹ Therefore, with that in mind, the court concluded that “the defendants’ primary counterargument points to ACA §§ 1311 and 1321, which, when read in tandem with 26 U.S.C. § 36B, provide an equally plausible understanding of the statute, and one that comports with the IRS’s interpretation that credits are available nationwide.”¹⁹⁰ Finally, the court adds that “[g]iven that Congress defined ‘Exchange’ as an Exchange established by the state, it makes sense to read § 1321(c)’s directive that HHS establish ‘such Exchange’ to mean that the federal government acts on behalf of the state when it establishes its own Exchange.”¹⁹¹ However, the court chose not to “ignore the common-sense appeal of the plaintiffs’ argument”¹⁹² since “a literal reading of the statute undoubtedly accords more closely with their position. As such, based solely on the language and context of the most relevant statutory provisions,”¹⁹³ the court decided “that Congress’s intent is so clear and unambiguous that it ‘foreclose[s] any other interpretation.’”¹⁹⁴

187. *Id.*

188. *Id.* at 368 (citing 42 U.S.C. § 18032(d)(3)(D)(i)(II) (referencing Exchanges “established under this Act”).

189. *Id.* at (citing *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007)).

190. *Id.* at 368-69.

191. *Id.* at 369.

192. *Id.*

193. *Id.*

194. *Id.* (quoting *Grapevine Imps. Ltd. v. United States*, 636 F.3d 1367, 1377 (Fed. Cir. 2011)).

The judges then examined the provisions of the Act—the reporting provisions in Section 36B(f) and the ‘qualified individuals’ provision under ACA § 1312—which the defendants argue would be superfluous if the court accepted the plaintiffs’ interpretation of the statute, “to see if they shed any more light on Congress’s intent.”¹⁹⁵ After reviewing the interpretations of both provisions by both parties, the court states, “while we think the defendants make the better of the two cases, we are not convinced that either of the purported statutory conflicts render Congress’s intent clear. Both parties offer reasonable arguments and counterarguments that make discerning Congress’s intent difficult.”¹⁹⁶ Additionally, the court noted “that the Supreme Court has recently reiterated the admonition that courts avoid revising ambiguously drafted legislation out of an effort to avoid ‘apparent anomal[ies]’ within a statute.”¹⁹⁷ As a result, the court declined “to accept the defendants’ arguments as dispositive of Congress’s intent.”¹⁹⁸

Next, “noting that, ‘in consulting legislative history at step one of *Chevron*, we have utilized such history only for limited purposes, and only after exhausting more reliable tools of construction,’”¹⁹⁹ the court ultimately concludes “nothing in the legislative history of the Act provides compelling support for either side’s position.”²⁰⁰ Consequently, “having examined the plain language and context of the most relevant statutory sections, the context and structure of related provisions, and the legislative history of the Act,”²⁰¹ the judges decided that they were “unable to say definitively that Congress limited the premium tax credits to individuals living in states with state-run Exchanges”²⁰² and that “the statute is ambiguous and subject to at least two different interpretations.”²⁰³ As a result, the court was “unable to resolve the case in either party’s favor at the first step of the *Chevron* analysis.”²⁰⁴

Moving to *Chevron*’s second step, the court asked “whether the ‘agency’s [action] is based on a permissible construction of the statute,’”²⁰⁵ and found that “this is a suitable case in which to apply the principles of deference called for by *Chevron*.”²⁰⁶ The court further explained that it was “primarily persuaded by the IRS Rule’s advancement of the broad policy goals of the Act”²⁰⁷ since it is “clear that widely available tax credits are essential to fulfilling the Act’s primary goals and that Congress was aware of their importance when drafting the bill.”²⁰⁸ Therefore, to summarize, the court concluded “[i]t is thus entirely sensible that the IRS would enact

195. *Id.* at 369 (citing *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (‘A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole.’)).

196. *Id.* at 371.

197. *Id.* (citing *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014)).

198. *Id.*

199. *Id.* (citing *Nat’l Elec. Mfrs. Ass’n v. U.S. Dept. of Energy*, 654 F.3d 496, 505 (4th Cir. 2011)).

200. *Id.* at 372.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* (citing *Chevron*, 467 U.S. at 843).

206. *Id.* at 373 (citing *See Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014)).

207. *Id.*

208. *Id.* at 374.

the regulations it did, making *Chevron* deference appropriate. Confronted with the Act's ambiguity, the IRS crafted a rule ensuring the credits' broad availability and furthering the goals of the law. In the face of this permissible construction, we must defer to the IRS Rule²⁰⁹ and accordingly affirm the judgment of the District Court.²¹⁰

Both the *King v. Burwell* and *Halbig v. Burwell* opinions were published on July 12, 2014 with polar opposite conclusions. While the defendants in *Halbig* timely filed a Petition for Rehearing En Banc, the plaintiffs in *King* instead filed a Petition for a Writ of Certiorari. As previously mentioned, despite the absence of a circuit split, the Supreme Court granted certiorari on November 7, 2014. Oral arguments were held on March 4, 2015, and the opinion was issued on June 25, 2015.

III. INCONSISTENT HOLDINGS PRODUCED BY *CHEVRON*

Interestingly, as previously mentioned, despite virtually identical claims and the application of the *Chevron* framework by all the courts, the rationale and rulings have differed substantially. The following chart demonstrates the anomalous rulings rendered before the Supreme Court's ruling in *King v. Burwell*:

Court	District Court	District Court	District Court	DC Circuit	District Court	4th Circuit
Case	Indiana v. IRS	Pruitt v. Burwell	Halbig v. Burwell	Halbig v. Burwell	King v. Burwell	King v. Burwell
Ruling in Favor of	No Ruling	Plaintiffs	Defendant	Plaintiffs	Defendant	Defendant

209. *Id.* (citing *Scialabba*, 134 S. Ct. at 2213).

210. *Id.* at 376.

Court	District Court	District Court	District Court	DC Circuit	District Court	4th Circuit
Chevron-Step One		X	X	X		
Chevron-Step Two					X	X

Throughout the discussion of the legal controversy in Section II, the different iterations of the *Chevron* framework that each court used was identified. Although similar, considering that *Chevron* is a well-established framework, and in fact, “the most famous rule of administrative law”²¹¹ with more than 7000 case and 5000 law review references,²¹² the enormity of the variations is somewhat surprising. However, from a legal perspective, the differing rulings seem completely unacceptable. The same framework applied to similar or identical facts should yield the same result, yet the rulings in *Halbig v. Burwell* are a perfect example of the inconsistencies in application. In the District Court, Judge Friedman settled the matter at step one, holding that “the plain text of the statute, the statutory structure, and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally-facilitated Exchanges.”²¹³ Furthermore, he concluded “that ‘Congress has directly spoken to the precise question’ of whether an ‘Exchange’ under 26 U.S.C. § 36B includes federally-facilitated Exchanges.”²¹⁴ The Circuit Court’s panel also settled the matter at step one but concluded “that the ACA unambiguously restricts the section 36B subsidy to insurance purchased on Exchanges ‘established by the State.’”²¹⁵ The District Court and DC Circuit Court came to polar opposite conclusions when examining *the exact same facts and claims*. The only differences are the political affiliations of the jurists. United States District Judge Paul L. Friedman is a Democratic appointee, while two of the three-member panel in the DC Circuit Court were Republican appointees.²¹⁶ In fact, it is notable that in the lower courts, the only Republican appointed jurist that held in favor of the Administration was U.S. District Judge James R. Spencer.²¹⁷ The first African-American

211. Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607 (2014).

212. *Id.* at 612 (citing Jack M. Beermann, *End the Failed Chevron Experiment Now*, 42 CONN. L. REV. 779, 782 n.6 (2010)).

213. *Halbig*, 27 F. Supp. 3d at 25.

214. *Id.* (citing *Chevron*, 467 U.S. at 842).

215. *Halbig*, 27 F. Supp. 3d at 394.

216. Timothy Jost, *Implementing Health Reform: Appellate Decisions Split on Tax Credits in ACA Federal Exchange*, HEALTH AFF. BLOG, (Oct. 16, 2015, 10:27 AM), <http://healthaffairs.org/blog/2014/07/23/implementing-health-reform-appellate-decisions-split-on-tax-credits-in-aca-federal-exchange/>.

217. Tom Howell Jr., *Federal Judge in Va. Delivers Setback For Legal Theory About Obamacare Subsidies*, THE WASHINGTON TIMES (Feb. 19, 2014), <http://www.washingtontimes.com/news/2014/feb/19/federal->

to serve as a federal judge in Virginia, Judge Spencer was appointed by President Ronald Reagan and was already scheduled to step down from active status to become a senior judge on March 25, 2014 when he issued the memorandum opinion in *King v. Sebelius*.²¹⁸

To conclude, these cases were clearly brought for a political purpose—to bring down the ACA.²¹⁹ The political underpinnings of a case should not dictate its outcome. The major problems with the *Chevron* framework are not only its political manipulability, but also the inconsistent application of the doctrine that is permissive under the current construct.

IV. WHAT AILS *CHEVRON*

When cases reach the Supreme Court, “it’s always a mystery how much the justices consider extralegal factors in politically charged cases, including the ruling’s implications for the court’s legacy, public opinion and political repercussions; or the consequences for ordinary people.”²²⁰ However, Professor Jack M. Beermann’s examination of the voting records of individual Justices in cases citing *Chevron* reveals that the Court generally splits “along familiar ideological lines, with liberals deferring to liberal agency interpretations and conservatives deferring to conservative agency interpretations”²²¹ and doesn’t “seem to turn on a diversity of views concerning *Chevron* deference and related doctrines.”²²² Based on the data Professor Beermann gathered, agencies seemed to be winning at the Supreme Court more often since 2010.²²³ They prevailed in 9.5 of the thirteen cases decided and “slightly fewer than half of the decisions are unanimous (six of thirteen).”²²⁴ Following is a table with the aggregate voting totals for each Justice still on the Court and since the beginning of Justice Roberts’ tenure and before the most current term:²²⁵

Supreme Court Voting Splits in Cases Citing <i>Chevron</i>		
<i>Supreme Court Justice</i>	<i>With Agency</i>	<i>Against Agency</i>
Chief Justice Roberts	19.5	10.5
Justice Scalia	16.5	13.5
Justice Kennedy	19.5	10.5

judge-va-delivers-another-setback-legal-th/.²²

218. Frank Green, *Va.’s First African-American Federal Judge to Semi-Retire Next Year*, RICHMOND TIMES-DISPATCH (Apr. 29, 2013, 12:00 AM), http://www.richmond.com/news/local/va-s-first-african-american-federal-judge-to-semi-retire/article_9d6e296d-5d1f-5902-867a-59ccb913afe5.html.

219. Jost, *supra* note 221.

220. Drew Altman, *How 13 Million Americans Could Lose Insurance Subsidies*, WALL ST. J., (Oct. 16, 2015, 10:36 AM), <http://blogs.wsj.com/washwire/2014/11/19/how-13-million-americans-could-lose-insurance-subsidies/tab/print/>.

221. Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 731–732 (2014) (citing Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 839–40 (2010)).

222. *Id.* at 733.

223. *Id.*

224. *Id.*

225. *Id.* at 735.

Supreme Court Voting Splits in Cases Citing Chevron		
Justice Thomas	17.0	12.0
Justice Alito	18.0	10.0
Justice Ginsburg	18.0	12.0
Justice Breyer	18.0	10.0
Justice Sotomayor	10.0	3.0
Justice Kagan	9.0	2.0

“Critics blame Chevron’s manipulability, but arguably the blame lies more with the legal indeterminacy of all of the other statutory interpretation rules upon which Chevron relies.”²²⁶ *Chevron* “and the other canons of interpretation are inextricably linked through *Chevron*’s own formulation”²²⁷ because *Chevron*’s famous two-step provides:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. [n.9] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.²²⁸

“As to the ascertainment of ambiguity, . . . *Chevron* tells courts to defer to reasonable agency statutory interpretations if the statute is ambiguous, but it *also* tells courts that they first should attempt to resolve any ambiguities themselves using the traditional tools of statutory construction.”²²⁹ However, the problem “is that the Court never sets out what those—traditional tools are, likely because it could not agree on them if it wanted to. The result is that *Chevron* has become a punching bag for those who argue that courts are result-oriented in their approach to agency deference,”²³⁰ and these uncertainties about the relationships among the non-*Chevron* canons cause inconsistencies in the *Chevron* cases themselves.²³¹ For example, “the Court is divided about whether legislative history should be used to eliminate statutory ambiguity (and so preclude agency deference under *Chevron*);”²³² so, “the federal courts are generally inconsistent in their use of such canons at Step One.”²³³ Consequently, “understanding the statutory interpretation landscape makes clear that

226. Gluck, *supra* note 216, at 607.

227. *Id.* at 617.

228. *Id.*

229. *Id.* at 617-18.

230. *Id.* at 618.

231. *Id.*

232. *Id.*

233. *Id.*

the disputes are not really about *Chevron*. Rather, they reflect a lack of consensus on the court about the *other* interpretive tools.²³⁴ These tools are “murky at best, because the Court cannot agree on what the traditional tools of construction are, or in what order they should be applied, and because the Court will not treat any decision on such matters as carrying any kind of stare decisis effect.”²³⁵ To summarize, “the lack of methodological consensus in the federal courts when it comes to the rest of the interpretive principles,”²³⁶ not the *Chevron* framework itself, is the primary reason for the inconsistencies demonstrated by the rulings in the ACA tax subsidy cases.

V. *KING V. BURWELL*, A MISSED OPPORTUNITY FOR A *CHEVRON* CURE

As previously discussed, instead of applying the *Chevron* framework, SCOTUS found that using this doctrine, which defers to the administrative agency’s judgment when Congressional intent is not clear, was not proper because the legal question presented in *King v. Burwell* was one of “deep ‘economic and political significance’” that should not be delegated to the IRS absent the express intent of Congress.²³⁷ This rationale is persuasive since, as the court correctly stated, “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.”²³⁸ However, it is also evident that the Supreme Court wanted to settle this important matter without deferring to the IRS, likely not only for the reasons that it stated in the opinion, but also because when President Obama completes his second term, the newly elected administration could have completely reversed the current interpretation of the IRS if the court had used *Chevron* and found that the intent of Congress was not clear. The Supreme Court should have framed its *King v. Burwell* analysis in a way that would have addressed the ails of *Chevron* rather than simply choosing not to apply the framework.

As discussed in sections III and IV, politics definitely played a role in the lower courts’ application of *Chevron*, and research shows that the Supreme Court also generally splits along familiar ideological lines.²³⁹ Furthermore, extralegal factors also play a role in politically charged cases, and the absence of such partisanship would likely have allowed Congress simply to change the language in ACA to make its intent clear.²⁴⁰ However, even attempting to address the inherently political nature of cases, such as *King v. Burwell*, is virtually impossible without fundamentally changing the nature of our democracy. Instead, SCOTUS should clearly define which tools of statutory construction should be used, the order in which they should

234. *Id.*

235. *Id.* at 618-19.

236. *Id.* at 619..

237. *King v. Burwell*, 135 S.Ct. 2480, 2483 (2015)

238. *Id.* at 2489.

239. Beermann, *supra* note 224, at 731(citing Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 839-40 (2010).

240. Altman, *supra* note 221; Margot Sanger-Katz, *What’s at Stake in Supreme Court’s Latest Health Care Case*, THE NEW YORK TIMES, November 7, 2014, available at http://www.nytimes.com/2014/11/08/upshot/whats-at-stake-in-supreme-courts-latest-health-care-case.html?_r=0.

be applied, and give this clarification the effect of *stare decisis*. Following is a discussion of how SCOTUS could have revised and applied the *Chevron* framework in *King v. Burwell*.

The Supreme Court essentially states in *King v. Burwell* that *Chevron* does not apply because the case is too important to defer to the judgment of the IRS; therefore, it is the court's responsibility to determine the meaning of the statute. The framework should apply to any case of statutory interpretation by an agency. Specifically, SCOTUS should use the modified version of the framework described below. In *King v. Burwell*, the IRS clearly interpreted the statute, and its interpretation is the central legal issue in not only *King*, but also all the related cases previously discussed. Accordingly, the Supreme Court should have applied *Chevron*, just as the lower courts did, and the revised, first step in the court's analysis should have been to determine whether or not the legal controversy was about an agency's interpretation of a statute.

Next, the first question posed after determining that the *Chevron* framework applies is "whether Congress has directly spoken to the precise question at issue," or in other words, whether "the intent of Congress is clear."²⁴¹ In this step, SCOTUS applies tools of statutory construction to conclude whether or not Congressional intent is clear. In *King v. Burwell*, despite its refusal to apply the *Chevron* framework, the Supreme Court performs this analysis primarily by utilizing the legislative history and 'the Whole Act Rule', which encompasses context and consideration of the purposes of the legislation.²⁴² Furthermore, the majority specifically declines to apply both the plain meaning rule and the rule to avoid surplusage.²⁴³ The plain meaning rule assumes "that the words of a statute mean what an 'ordinary' or 'reasonable' person would understand them to mean," and the rule to avoid surplusage, "is based on the principle that each word or phrase in the statute is meaningful and useful, and thus, an interpretation that would render a word or phrase redundant or meaningless should be rejected."²⁴⁴ The court's analysis and application of these rules and tools yielded the conclusion that "the phrase 'an Exchange established by the State under [42 U.S.C. § 18031]' is properly viewed as ambiguous."²⁴⁵

Due to the court's conclusion that the phrase is ambiguous or, in other words, that "the court determines Congress has not directly addressed the precise question at issue," if the court had applied the *Chevron* framework, it would have been unable to "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation."²⁴⁶ Instead, the question for the court would have been "whether the agency's answer is based on a permissible construction of the statute."²⁴⁷ Yet, as previously discussed, to avoid deferring to the IRS,

241. Gluck, *supra* note 216 at 617.

242. *King*, 135 S.Ct. at 2498; Katherine Clark and Matthew Connolly, *A Guide to Reading, Interpreting and Applying Statutes*, available at <http://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf> (citing William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (3d. ed. 2001)).

243. *King*, 135 S.Ct. at 2483.

244. *Id.*; Clark and Connolly, *supra* note 245, at ____.

245. *King*, 135 S.Ct. at 2483.

246. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842.

247. *Id.*

SCOTUS declined to apply the doctrine, arguing that the legal question presented in *King v. Burwell* was one of such “deep ‘economic and political significance’” that it should not be delegated to the IRS absent the express intent of Congress.²⁴⁸ The Supreme Court should have applied *Chevron*, just as the lower courts did, since this legal controversy is about an agency’s interpretation of a statute. Instead of completely bypassing the *Chevron* framework, SCOTUS should have added an intermediate question to the framework, after completing the step one analysis. After finding that the statute is ambiguous, the court should have posed the question, “Does the statute expressly delegate sole authority to the agency to interpret the statute?” In *King v. Burwell*, asking this question as an intermediate step would have achieved the result that SCOTUS aimed to achieve – eliminating the deference to the agency. In this revised version of *Chevron*, if the statute does not expressly delegate sole authority to the administrative agency that issued the regulation being challenged, the court should then step in to determine the meaning of the statute by using the legislative history, context, and purposes of the legislation as its guide. However, if the statute does expressly delegate authority to the agency, it is appropriate for court to move the question of “whether the agency’s answer is based on a permissible construction of the statute.”²⁴⁹

The revised *Chevron* framework would be:

Is the legal controversy about an agency’s interpretation of a statute?

If yes, apply the *Chevron* framework (go to #2).

If no, apply another appropriate framework/analysis.

Has Congress directly spoken to the precise question at issue, or, in other words, is the intent of Congress clear?

The court should utilize the following tools, in the precise order defined below (as used by SCOTUS in the *King v. Burwell* opinion), to answer the question:

Context and Structure– require the reader to use contextual and structural clues to interpret the meaning or scope of a particular word or phrase.²⁵⁰

Legislative History – the court should consult the “legislative history to see what a statute’s history might suggest about the meaning of a word or phrase.”²⁵¹

Purpose – the court should use purpose clauses to help discern the intent of the legislature and/or when choosing between multiple interpretations, “refer to the statute’s purpose in deciding which interpretation is superior.”²⁵²

Using the aforementioned tools, if the court decides that “the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”²⁵³

“If, however, the court determines Congress has not directly addressed the precise question at issue,” the court should move to the question posed in #3.

In the statute, does Congress expressly delegate *sole* authority to interpret the

248. *King*, 135 S.Ct. at 2483.

249. *Chevron*, 467 U.S. at 842.

250. Clark & Connolly, *supra* note 245, at 7.

251. *Id.* at 5.

252. *Id.* at 6.

253. *Chevron*, 467 U.S. at 842.

statute to the agency that has issued the challenged interpretation?²⁵⁴

If no, the court may impose its own construction on the statute.

If yes, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”²⁵⁵

This revised framework would have allowed SCOTUS to use the same rationale that it proffered in its *King v. Burwell* opinion and reach the same conclusion—“that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act.” Furthermore, it would have provided more clarity on how courts should determine the answer to the question regarding whether or not Congress has directly spoken to the precise question at issue. Designating the precise tools of statutory construction to utilize and defining the order in which to use them should reduce the framework’s results-oriented manipulability. For example, an investigation of the *Halbig v. Burwell* decisions proves that this method may have resulted in more consistent holdings despite the differing political ideologies of the judges. Although both opinions consider all three tools - context, legislative history, and the purpose of the statute – similar to Scalia’s dissent in *King v. Burwell*, the Circuit Court relied heavily on the “plain meaning rule,” thereby, essentially eschewing other contextual clues. Considering that most contemporary statutes span hundreds of pages Applying the context rule, rather than the plain meaning rule, especially if the court is also compelled to consider both the legislative history and purposes of the statute, is a more reasonable method to determine Congressional intent.

VI. CONCLUSION

Not only should the Supreme Court have followed its established precedent of analyzing an agency’s interpretation of a statute by applying the *Chevron* framework, but it also should have used its *King v. Burwell* analysis to revise the framework to fix the flaws that have allowed courts to manipulate the doctrine. Similar to *King v. Burwell*, litigation in health policy cases with significant economic and political consequences will inevitably involve challenges to administrative agencies’ interpretation of legislation. Thus, the framework used to determine these cases should be a structured, well-reasoned one that produces consistent, legally supported holdings, rather than results-oriented, political outcomes. The revised framework recommended in this article should help to accomplish this important goal.

254. In the District Court decision issued by Judge Paul L. Friedman, he cites 26 U.S.C. § 36B(g) as expressly delegating authority to the Secretary of the Treasury to resolve any ambiguities in Section 36B. However, the plaintiffs presented a counterargument, which cites 42 U.S.C. § 18082(a), whereby Treasury and Health and Human Services share joint responsibility for administering the premium assistance tax credits.

255. *Chevron*, 467 U.S. at 842.