

**Patients, Precedent, and Politics:
The Latest Challenge to The Affordable Care Act, the Value of Health
Insurance Exchanges, and the Ruling in *King v. Burwell***

I. Introduction

The United States Supreme Court is set to address a question that has challenged the entrenched American healthcare system, impacting the country from the patient's bed to the halls of political power, in the upcoming case *King v. Burwell*. The Patient Protection and Affordable Care Act (ACA) presented states with a major but politically charged decision: Whether to create a state-based exchange for the purchase of subsidized private health insurance. The ACA provides that, if states opt not to implement their own insurance exchanges, the federal government will run an exchange for them. Depending on various factors, individuals signing up through the state and federal exchanges would be eligible for subsidies, which drastically reduce the cost of health insurance coverage. The subsidies take the form of tax credits from the federal government, therefore both the Department of Health and Human Services (HHS) and the Internal Revenue Service (IRS) are included in this issue. Individuals from a handful of states that chose not to set up an exchange are challenging whether the federal government is able to offer subsidies, claiming it is a power left only to the states based on the language in the ACA.

In *King v. Burwell*¹, the Fourth Circuit of the United States Court of Appeals held that the federal government is permitted to grant subsidies to purchasers of health insurance through both state run and federally facilitated exchanges. In the decision, the court found that the language of the ACA is ambiguous and subject to interpretation. The court's majority opinion utilized a well-established test set forth by the United States Supreme Court known as the *Chevron* deference to

¹ *King v. Burwell*, 759 F.3d 358, (4th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3102 (U.S. Nov. 7, 2014) (No. 14-114).

rule that the subsidies are a permissible exercise of the federal government's discretion, while the concurrence opinion held for an inclusive plain reading of the statutory text.² Courts differ on this issue, however. The United States Court of Appeals for the District of Columbia in *Halbig v. Burwell*³ came to the opposite conclusion of *King*, holding that a plain reading of the ACA shows that Congress was unambiguous in its intent not to provide subsidies for federally operated exchanges because the language of the ACA makes clear that subsidies were available only for states that elected to establish an exchange. Additional cases from Oklahoma⁴ and Indiana⁵ challenging the law are moving upward from federal district courts as well.

The ruling in *Halbig* was, however, vacated and set for an *en banc* review scheduled for December 17, 2014. Court watchers theorized that the *en banc* review meant that the full D.C. Circuit would have likely disagreed with the three-judge panel's ruling, thus eliminating a split between the circuits for the Supreme Court to resolve.⁶ On November 7, 2014, overlooking the lack of a circuit split, the United States Supreme Court granted certiorari to review the *King v. Burwell* decision.⁷ Given the Supreme Court's actions, the D.C. Circuit since cancelled its December oral arguments, guaranteeing that no circuit split will exist when the Supreme Court hears *King*.⁸ Court watchers have projected that the Supreme Court's apparent haste to review *King* without a split between the circuits indicates a foreboding sign for the Fourth Circuit's

² *Id.*

³ *Halbig v. Burwell*, 758 F.3d 390, (D.C. Cir. 2014), *vacated by* 2014 WL 4627181 (2014) (vacated opinion not authority).

⁴ *Oklahoma ex rel. Pruitt v. Burwell*, No., 2014 WL 4854543 at *9 (E.D. Okla. 2014).

⁵ *Indiana v. IRS*, No., 2014 WL 3928455 (S.D. Ind., 2014).

⁶ Rich Samp, *Why 'King v. Burwell' Obamacare Case Is Not "NFIB v. Sebelius' Redux*, FORBES, (Nov. 12, 2014), available at <http://www.forbes.com/sites/wlf/2014/11/11/why-king-v-burwell-obamacare-case-is-not-nfib-v-sebelius-redux/>

⁷ *King v. Burwell*, 759 F.3d 358, (4th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3102 (U.S. Nov. 7, 2014) (No. 14-114).

⁸ Jess Bravin, *Appeals Court Cancels Arguments on Health Law Subsidies*, WALL STREET JOURNAL, (Nov. 12, 2014), available at <http://online.wsj.com/articles/appeals-court-cancels-arguments-on-health-law-subsidies-1415825553?KEYWORDS=health+reform>

ruling.⁹ Oral arguments have been scheduled for Wednesday, March 4th, 2015, triggering a flood of amicus curiae briefs and interested groups on all sides preparing for the ramifications of the Court's decision.

The purpose of this article is to show that, beyond the thinly veiled political motivations behind these issues, the rationale in the majority and concurrence opinions in *King v. Burwell*, when taken together, are superior both in law and in policy and provide the best foundation among these legal authorities for how the United States Supreme Court should rule.

This article first gives an overview of the ACA, the divisive politics surrounding the law's passage and implementation, the results the ACA has had on state healthcare choices, and the prior Supreme Court legal challenge to the ACA. Then the note lays out the changes the ACA made to the tax code and health regulation structures that are the center of the debate in *King v Burwell* as well as the key Supreme Court precedent at issue in this case. This note proceeds to examine the majority and concurrence opinions of the Fourth Circuit in *King*, and following that discussion, analyzes the court's majority and concurring arguments on the ACA's language, Supreme Court precedent used to interpret statutes, and the policy goals of the ACA. Finally, this note finds that the United States Fourth Circuit Court of Appeals made the correct decision in ruling that federal government is permitted to grant subsidies to purchasers of health insurance through both state run and federally facilitated exchanges. This article concludes that both the majority and concurring opinions of the Fourth Circuit ought to be combined because they collectively form the strongest arguments possible for how the United States Supreme Court should analyze the issues in this case and uphold the Fourth Circuit's ruling. The appellants in

⁹ Lyle Denniston, *Court to rule on health care subsidies*, SCOTUSBLOG (Nov. 7, 2014), available at <http://www.scotusblog.com/2014/11/court-to-rule-on-health-care-subsidies/>

King v. Burwell are now titled “petitioners” because of the approaching Supreme Court case, while Burwell and the appellees are now labeled “respondents”.

II. Background and History of Relevant Law

A. The Patient Protection and Affordable Care Act (ACA)

President Barack Obama signed the Patient Protection and Affordable Care Act into law in 2010, after nearly two years of unprecedentedly heated political and legal debate.¹⁰ The stated goals of the law were to increase the quality and affordability of health insurance, lower the number of uninsured Americans by expanding public and private coverage, and reduce the enormous costs of healthcare to individuals and the government.¹¹ These issues have haunted the country for decades and both major political parties have sought and attempted ways to make America’s healthcare better.¹² The ACA’s main reforms make up a “three-legged stool” meant to achieve near universal coverage: 1) Guaranteed issue, to ensure that anyone seeking insurance can get it regardless of preexisting conditions; 2) Individual mandate, market participation is required for all people to avoid an actuarial death spiral; 3) Subsidies, to make coverage more affordable for those who might struggle to obtain insurance.¹³ Some more specific changes represented a radical departure from the norm in American health insurance: every policy must contain minimum standards such as children staying on their parents’ plans until age 26; if insurance was not offered through the government or an employer, health insurance could be

¹⁰ *Health Care that Works for Americans*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/healthreform/healthcare-overview> (last visited October 3, 2014)

¹¹ *Id.*

¹² Lee H. Igel, *The History of Health Care as a Campaign Issue*, THE PHYSICIAN EXEC. J., May-June 2008, at 12.

¹³ Jonathan Gruber, *Health Care Reform is a “Three Legged Stool”: The Costs of Partially Repealing the Affordable Care Act*, CENTER FOR AMERICAN PROGRESS, (Nov. 12, 2014), available at <https://www.americanprogress.org/issues/healthcare/report/2010/08/05/8226/health-care-reform-is-a-three-legged-stool/>

bought through health insurance exchanges; an expansion in Medicaid to the states; Medicare payment bundling.¹⁴ The immense challenge the Affordable Care Act faced was implementing such a massive overhaul, particularly because of the federal government's pivotal role in almost all areas of the law.

Even since enactment, the ACA has been among the most divisive and bitterly resisted issues in the nation. The bill first passed with slim, almost entirely party-line majority votes in Congress: 60-39 in the Senate and 219-212 in the House.¹⁵ As of this writing, twenty-two states have opted not to expand Medicaid¹⁶ and only three out of those twenty-two states: Wisconsin, Virginia, and Maine voted for the Democrat President Obama in both 2008 and 2012.¹⁷ Similarly, only fourteen states have created and implemented their own state-based health insurance exchanges, an option provided for in the ACA, while thirty-six states have not.¹⁸ Twelve of those fourteen states voted for President Obama in both elections.¹⁹ Since taking the majority in 2010, the Republican-controlled House of Representatives has voted over fifty times to repeal, defund, or amend the law.²⁰ Two lawsuits have been filed by Congressional Republicans: One joined by thirty-eight lawmakers in regard to their own health insurance²¹ and another approved by the majority of House Republicans to sue the Secretaries of the Treasury

¹⁴ Norma J. Goodwin, M.D., *12 Simply States Features of the Affordable Care Act*, HEALTH POWER FOR MINORITIES, (Oct. 18, 2014), available at <http://www.healthpowerforminorities.com/NewsDetails.aspx?id=360>

¹⁵ H.R. 3590, 111th Cong. (2009) (enacted).

¹⁶ *States Decisions on Health Insurance Marketplaces and the Medicaid Expansion, as of August 28, 2014*, Kaiser Family Foundation Health Facts, KFF.ORG, <http://kff.org/health-reform/state-indicator/state-decisions-for-creating-health-insurance-exchanges-and-expanding-medicaid>. [hereinafter *States Decisions*].

¹⁷ PUB. DISCLOSURE DIV., FED. ELECTION COMM'N, FEDERAL ELECTIONS 2012: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE, AND THE U.S. HOUSE OF REPRESENTATIVES 181 (2013). [hereinafter *Election Results*]

¹⁸ *States Decisions*, *supra* note 6.

¹⁹ *Election Results*, *supra* note 7, at 181 (the other two are Kentucky and Idaho).

²⁰ Ed O'Keefe, *The House has voted 54 times in four years on Obamacare. Here's the full list.*, THE WASHINGTON POST (Mar. 21, 2014), available at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list/>

²¹ Ed O'Keefe, *38 GOP lawmakers join Ron Johnson's Obamacare lawsuit*, THE WASHINGTON POST (Nov. 21, 2014), available at <http://www.washingtonpost.com/blogs/post-politics/wp/2014/04/22/38-gop-lawmakers-join-ron-johnsons-obamacare-lawsuit/>

and Health and Human Services for unilateral decision-making.²² All fifteen members of Congress who are supporting the petitioners as amici in *King v. Burwell* are Republicans,²³ including 2012 Republican Vice-Presidential candidate and Chair of the powerful House Budget Committee during the ACA's passage, Paul Ryan. In summary, the law continues to be subject to incredibly fierce political debate and the battle lines have been drawn: Democrats and liberals have mostly supported the provisions of the ACA, while Republicans and conservatives have largely rejected them.

In addition to the option to establish state-operated insurance exchanges, states have been further empowered to select the extent of their involvement with the ACA due to the United States Supreme Court's ruling in the law's biggest test: *National Federation of Independent Business v. Sebelius*. The Supreme Court controversially upheld the constitutionality of the ACA's mandate that every individual have health insurance through Congress' taxing power with the conservative Chief Justice John Roberts²⁴ as the deciding vote between the Court's liberals and conservatives.²⁵ The Court did however, with no single opinion majority, modify the law by ruling that Congress cannot force states to participate in the ACA's Medicaid expansion, particularly because the law called for the threat of states losing their current Medicaid funding if they did not expand Medicaid in their states.²⁶ The majority did not strictly address the health

²² Paul Kane & Jose A. DelReal, *House Republicans sue Obama administration over Obamacare*, THE WASHINGTON POST (Apr. 22, 2014), available at <http://www.washingtonpost.com/blogs/post-politics/wp/2014/11/21/house-republicans-sue-obama-administration-over-obamacare/>

²³ *King v. Burwell*, 759 F.3d 358, (4th Cir. 2014), cert. granted, 83 U.S.L.W. 3102 (U.S. Nov. 7, 2014) (No. 14-114).

²⁴ Biographical Directory of Federal Judges, FEDERAL JUDICIAL CENTER, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Nov. 6, 2014) (measured as a "conservative" due to appointment to Supreme Court by conservative Republican President George W. Bush).

²⁵ *National Federation v. Sebelius*, 132 S.Ct. 2566, 2594-2596 (2012).

²⁶ *Id.* at 2607.

insurance exchanges in its opinion. Justices Thomas, Alito, Kennedy, and Scalia²⁷ did, however, and argued in the dissenting opinion that the exchanges were also unconstitutional because they are exceedingly interdependent with the unconstitutional policies of the Medicaid expansion and the individual mandate.²⁸ However, in making that conclusion, the dissent acknowledged the essential purpose of the federal subsidies in health insurance exchanges and the symbiotic relationship with the other two pillars of the ACA:

In the absence of federal subsidies to purchasers, insurance companies will have little incentive to sell insurance on the exchanges. Under the ACA's scheme, few, if any, individuals would want to buy individual insurance policies outside of an exchange, because federal subsidies would be unavailable outside of an exchange. Difficulty in attracting individuals outside of the exchange would in turn motivate insurers to enter exchanges.... That system of incentives collapses if the federal subsidies are invalidated. Without the federal subsidies, individuals would lose the main incentive to purchase insurance inside the exchanges, and some insurers may be unwilling to offer insurance inside of exchanges. With fewer buyers and even fewer sellers, the exchanges would not operate as Congress intended and may not operate at all.²⁹

We will see the majority and concurrence in *King* share the same view and crucially acknowledge the purpose of subsidies in the exchanges. Despite the dissent's view, the ACA emerged from the Supreme Court constitutionally intact, although modified and with the law's weaker points highlighted, exposing it to further challenges.

B. Key Provisions in the ACA

1. 26 U.S.C. §36B

The ACA had to amend the tax code for the purpose of offering subsidies in proportion to income for purchasers of health insurance through the exchanges. 26 U.S.C. §36B addresses

²⁷ See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, (Amy Gutmann ed., 1998).

²⁸ *National Federation v. Sebelius*, 132 S.Ct. 2566, 2643 (2012).

²⁹ *Id.* at 2674.

refundable tax credits for coverage under a qualified health plan as amended by the ACA.³⁰ 26 U.S.C. § 36B(c)(2)(A)(i) states that an individual qualifies for a subsidy if: 1) the person meets the income threshold for a subsidy; and 2) the person is covered by a qualified health plan via an exchange “established by the state.”³¹ This adjustment—the “established by the state” phrase in particular—to the tax code’s language is at the center of the debate in *King v. Burwell*.

2. §§1311 and 1321 of the ACA

Sections 1311 and 1321 of the ACA are two key sections that address health insurance exchanges. While section 1311 lays out the structure for providing affordable health plans,³² section 1321 establishes the states’ requirements and flexibilities in the operation of the exchanges.³³ For the purposes of this case note, the crucial language and the key controversy in *King* is that neither section used unquestionable language to state that the federal government was to step in and run a health insurance exchange on the state’s behalf.³⁴ Section 1311(b)(1) simply says: “Each state shall, not later than January 1, 2014, establish an American Health Benefit Exchange for the state...”³⁵ Section 1321(c), however, directs that when a state does not elect to establish an exchange, the Secretary of Health and Human Services will “establish and operate such [an] Exchange within the State and the Secretary shall take such actions as are necessary to implement other such requirements.”³⁶ This lack of total clarity between the two sections of the ACA is the *casus belli* for the controversy in these cases.

³⁰ 26 U.S.C. §36B (2014).

³¹ 26 U.S.C. §36B(c)(2)(A)(i) (2014).

³² 42 U.S.C.A. §18031 (2014).

³³ 42 U.S.C.A. §18041 (2014).

³⁴ 42 U.S.C.A. §18031 (2014), 42 U.S.C.A. §18041 (2014).

³⁵ 42 U.S.C.A. §18031(b)(1) (2014).

³⁶ Patient Protection and Affordable Care Act §1321, 42 U.S.C.A. §18041 (West, Westlaw through P.L. 111-148).

C. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.

The United States Supreme Court set forth the standard for determining when to defer to a government agency's interpretation of a statute that the agency administers in *Chevron v. NRDC*.³⁷ The Court established a two-step analysis: First, if Congress precisely expressed its intent in the language of the statute, a court and the government agency need not interpret the statute any further because Congress was unambiguous;³⁸ Second, if the statute is ambiguous however, the administering agency's interpretation is deferred to and a court must judge whether the agency's interpretation is based on an acceptable construction of the statute.³⁹ Although this reasoning has been criticized for usurping judicial interpretation of statutory language and enabling unelected government agency power to grow in cases like *United States v. Mead Corp.*,⁴⁰ the *Chevron* deference test has remained largely intact, even as recently as 2013, where the United States Supreme Court once again upheld the use and legitimacy of the two-step *Chevron* test in *City of Arlington v. FCC*.⁴¹ In *King v. Burwell*, the fundamental dispute is whether to acknowledge that a plain reading of Congress' language is unambiguous in its intent that only states are to operate exchanges because Congress failed to mention federally operated exchanges or to follow the *Chevron* deference and accept the IRS' statutory interpretation that the federal government will establish and operate an exchange when a state does not.

The United States Supreme Court seemed to reignite the ideologically driven debates surrounding the ACA amidst an already hostile political atmosphere in Washington D.C. when it granted certiorari to *King v. Burwell* in November of 2014. In accordance with the previously

³⁷ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

³⁸ *Id.* at 842-43.

³⁹ *Id.*

⁴⁰ *United States v. Mead Corp.*, 533 U.S. 218 (2001).

⁴¹ *City of Arlington, Tex. v. F.C.C.*, 133 S.Ct. 1863. 1874-75 (2013).

drawn battle lines, the issues in this case have received political spin from both supporters and opponents of the ACA: Conservatives have largely held firm to the plain meaning of the “established by the state” language⁴² while liberals have offered a much broader range of explanations, even that this case is a result of a simple “typo” mistake by Congress.⁴³ Although the arguments in *King v. Burwell* are far more legally grounded, the omnipresent political firestorm surrounding the ACA could be hard for the United States Supreme Court to ignore and, indeed, the Court’s political motivations may be as prominent as the Justices themselves.⁴⁴

III. Statement of the case

A. Facts and Procedural Posture

Petitioners originally brought suit asserting that they were harmed economically by the IRS’ subsidies through the federally facilitated health insurance exchange because the IRS subsidy denies them exemption from the individual mandate and therefore, the option to not buy health insurance at all.⁴⁵ Virginia residents and petitioners David King, Douglas Hurst, Brenda Lew, and Rose Luck were not eligible for government or employer-sponsored health insurance coverage and each individual had a projected household income of between \$35,000 and \$45,000 a year.⁴⁶ The cheapest insurance coverage available to each person was the bronze coverage

⁴² Michael F. Cannon, *Seven Myths about King v. Burwell*, CATO INSTITUTE, (Nov. 10, 2014), available at <http://www.cato.org/publications/commentary/symposium-seven-myths-about-king-v-burwell> (Michael F. Cannon is listed as supporting the petitioners in *King* as amici).

⁴³ Paul Krugman, *Death by Typo: The Latest Frivolous Attack on Obamacare*, NEW YORK TIMES, (Nov. 9, 2014), available at http://www.nytimes.com/2014/11/10/opinion/paul-krugman-the-latest-frivolous-attack-on-obamacare.html?ref=opinion&_r=1

⁴⁴ Jennifer Haberkorn, *Supreme Court move comes at challenging time for Obamacare*, POLITICO, (Nov. 7, 2014), available at <http://www.politico.com/story/2014/11/supreme-court-to-hear-obamacare-subsidies-case-112687.html> (quoting Ron Pollack, Executive Director of Families USA: “This is a clear indication that at least some of the justices are determined to enter the political fray about the Affordable Care Act”).

⁴⁵ *Id.* at 422-23.

⁴⁶ *King v. Sebelius*, 997 F.Supp. 2d. 415, 420-421 (E.D. Va), *aff’d*, 759 F.3d 358 (4th Cir. 2014).

offered through the federally run health insurance exchange in Virginia.⁴⁷ Given the cost of coverage relative to their incomes, the petitioners would be eligible for an exemption from the individual mandate provision of the ACA.⁴⁸ A subsidy offered through the federally operated exchange, however, would bring each petitioner back within the financial requirements of the individual mandate.⁴⁹ None of the petitioners wanted to comply with the individual mandate provision.⁵⁰

As a result, the petitioners alleged that they would incur a financial cost by either being forced to buy insurance or pay the penalty for not having insurance from the individual mandate provision.⁵¹ The petitioners argued that Congress was unambiguous in the relevant language and a plain meaning of the statute shows, first, Congress intended to condition the structure of a health insurance exchange upon states affirmatively establishing their own exchanges and, second, that offering subsidies exceeds the IRS's statutory authority in an arbitrary and capricious manner.⁵² The government, as defendants, responded with a motion to dismiss the complaint.⁵³ The Eastern District Court of Virginia held that the IRS's interpretation passed the two-step *Chevron* test because the petitioners' arguments failed to show that only their interpretation was reasonable and the court dismissed.⁵⁴ The petitioners appealed to the Fourth Circuit.⁵⁵ Between the district court decision and the appeal, the named defendant in this case,

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ King, 997 F.2d at 422.

⁵² *Id.* at 427.

⁵³ *Id.* at 415.

⁵⁴ *Id.* at 432.

⁵⁵ King v. Burwell, 759 F.3d 358, (4th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3102 (U.S. Nov. 7, 2014) (No. 14-114).

the Secretary of Health and Human Services, changed from Secretary Kathleen Sebelius, who resigned during this case's proceedings, to newly appointed Secretary Sylvia Burwell.⁵⁶

B. The King v. Burwell Decision

1. Majority opinion

The United States Fourth Circuit Court of Appeals affirmed the district court's decision to dismiss the case stating that "we find that the applicable statutory language is ambiguous and subject to multiple interpretations. Applying deference to the IRS's determination, however, we uphold the rule as a permissible exercise of the agency's discretion. We thus affirm the judgment of the district court."⁵⁷

The majority applied the two-step standard for reviewing the clarity of a statute's text and evaluating whether to defer to the interpretation of the agency charged with implementing the statute as set forth in the influential *Chevron* case.⁵⁸ In the court's view, the first step establishes that if the statute is clear and unambiguous "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."⁵⁹ A statute is only judged to be ambiguous when the disputed language is "reasonably susceptible to multiple interpretations."⁶⁰ The objective in using the *Chevron* step one test is to determine whether Congress' intent was so clear as to exclude any other interpretation.⁶¹

⁵⁶ Amy Goldstein, *Senate confirms Sylvia Mathews Burwell as new secretary of HHS*, THE WASHINGTON POST (June 5, 2014), available at http://www.washingtonpost.com/national/health-science/senate-poised-to-confirm-burwell-as-new-secretary-of-hhs/2014/06/05/bbd79400-ec06-11e3-9f5c-9075d5508f0a_story.html (discussing the quick Senate confirmation to replace Sebelius and the challenges the new Secretary faces).

⁵⁷ *King*, 759 F.3d at 358.

⁵⁸ *Id.* at 367.

⁵⁹ *Id.* at 367. (quoting *Chevron v. NRDC*, 467 U.S. 837, 842–43, (1984)).

⁶⁰ *Id.* (quoting *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 473 (1985)).

⁶¹ *Id.*

Petitioners asserted that the language simply says what it says and a plain reading of the text is the only interpretation needed.⁶² The petitioners' arguments were that if Congress intended to include federally run exchanges and their subsidies, it would not have specifically chosen the word "state" without reference to the federal government in §1311.⁶³ For more evidence of Congressional intent: Tax terms such as "coverage months" or "premium assistance amount" were written only within the scope of the exchanges that are "established by the State under §1311," and therefore, petitioners urged that the ACA's amendments to 26 U.S.C. §36B showed that Congress purposefully limited the availability of subsidies to individuals purchasing insurance on state run exchanges and not at all for purchasers of insurance through the federal exchange.⁶⁴ Lastly, the petitioners concluded that the omission in 26 U.S.C. § 36B of any reference to federal exchanges that might be argued as being established in §1321 actually represents an intentional choice by Congress to exclude federal exchanges (petitioners claimed that the "such Exchange" phrase in §1321(c) would apply to the previously-defined, state-established exchange).⁶⁵

The court, however, leaned toward the government's argument that §1311, §1321, and 26 U.S.C. §36B cannot be read exclusive of each other and out of context.⁶⁶ Although Congress described an exchange as being established by a state in §1311, it is proper to read §1321(c)'s directive that the Department of Health and Human Services establish "such Exchange" to mean that the federal government would act on behalf of a state when a state elected against

⁶² King, 759 F.3d at 368.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 368-69.

establishing its own health insurance exchange under §1311.⁶⁷ Further, section 1563(b) of the ACA establishes “[t]he term ‘Exchange’ means an American Health Benefit Exchange established under [§]1311,” further supporting the government’s notion that any exchange is best considered as if it were established by a state.⁶⁸ Therefore, “[i]n the absence of state action, the federal government is required to step in and create, by definition, ‘an American Health Benefit Exchange established under [§]1311’ on behalf of the state.”⁶⁹

The majority also tilted toward the government’s use of other portions of the law to buttress their contextual argument and show Congress’ intent—though not without debate. The language on reporting tax information under 26 U.S.C. §36(f) requires “[e]ach exchange (or any person carrying out 1 or more responsibilities of an Exchange under section 1311(f)(3) or 1321(c))” must provide specific information subsequently listed in order to receive subsidies.⁷⁰ The government inferred that a tax reporting requirement for the aggregate tax subsidies granted in “each exchange” would be meaningless if the subsidies were meant to be available only in state-run exchanges and not federally operated exchanges.⁷¹ Additionally, petitioners pointed out that the ACA’s “qualified individuals” provision in §1312 states that only “qualified individuals” are eligible to purchase health insurance from the exchanges and that “qualified individuals” are defined as people who reside in states that established an exchange, which meant to the petitioners that only health insurance purchasers in states with state-run exchanges were intended by Congress.⁷² The court found, however, that the petitioners argument would lead the federal exchanges to be left with no “qualified individuals” to purchase insurance, which is, the majority

⁶⁷ King, 759 F.3d at 369.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 369-70.

⁷¹ King, 759 F.3d at 370.

⁷² *Id.*

finds, “a result Congress could not possibly have intended.”⁷³ The majority held that, given the debate on the statutory language and context, it could not conclude that Congress’ intent was so clear and unambiguous as to rule out any other interpretation of the statute.⁷⁴

In finding that Congress had not spoken “to the precise question at issue” or that it had at least spoken ambiguously, the court found that the statutory language did not pass step one of the *Chevron* analysis and moved to the second step of the *Chevron* standard.⁷⁵ As mentioned earlier, *Chevron* step two directs a court to ask whether the interpretation of the statute’s implementing agency “is based on a permissible construction of the statute.”⁷⁶ To meet the *Chevron* standard of deferring to an agency’s interpretation, a court should not usurp an agency’s interpretive authority with its own construction unless the agency’s interpretation is arbitrary, capricious, or manifestly contrary to the statute.⁷⁷ The majority points out that an agency’s interpretation meets the standard if “it represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute.”⁷⁸

With the rules laid out, the majority next had to examine whether the statute does, indeed, allow for subsidies through the federally operated exchanges to see if the IRS’s interpretation of the statute represented a “reasonable accommodation” of ambiguous policies or if the IRS’s interpretation was outside the scope of the law.⁷⁹ The majority reasoned that Congress would not have hampered its own policy goal of overhauling the nation’s entire health insurance market by giving states the option to create a health insurance exchange and then leaving it there, with no

⁷³ *Id.*

⁷⁴ King, 759 F.3d at 369.

⁷⁵ King, 759 F.3d at 372.

⁷⁶ *Id.* (quoting *Chevron v. NRDC*, 467 U.S. 837, 843 (1984)).

⁷⁷ *Id.* at 844-45. (quoting *Phillip Morris U.S.A., Inc. v. Vilsack*, 736 F.3d 284, 290 (2013)).

⁷⁸ *Id.*

⁷⁹ King, 759 F.3d at 373.

benefits of the exchanges reaching Americans who live in states that chose not to establish an exchange.⁸⁰ The majority saw that the highly interconnected nature of the ACA's provisions support this analysis:

Several provisions of the Act are necessary to achieving these goals. To begin with, the individual mandate requires nearly all Americans to have health insurance or pay a fine. Increasing the pool of insured individuals has the intended side-effect of increasing revenue for insurance providers. The increased revenue, in turn, supports several more specific policy goals contained in the Act. The most prominent of these are the guaranteed-issue and community-rating provisions. In short, these provisions bar insurers from denying coverage or charging higher premiums because of an individual's health status. However, these requirements, standing alone, would result in an "adverse selection" scenario whereby individuals disproportionately likely to utilize health care would drive up the costs of policies available on the Exchanges. Congress understood that one way to avoid such price increases was to require near-universal participation in the insurance marketplace via the individual mandate.⁸¹

The Fourth Circuit argued that Congress showed its major concern over the price of insurance by creating three of the key pillars of the ACA: the individual mandate compelling demand, exchanges to bring prices down through competition, and subsidies to incentivize market participation.⁸² The absence of subsidies to encourage purchasers of health insurance through the federally run exchanges would trigger a "death spiral" in the ACA's structure: no subsidies leads to unaffordable insurance prices, which leads to less consumer market participation and a smaller policy-holder base for insurers to make the ACA's reforms effective, which leads to "adverse selection" in the market, causing premiums to rise and further discouraging potential consumers.⁸³ The majority concludes that to avoid such a "death spiral", the IRS's interpretation of the statute represents Congress' true intention: "The IRS Rule avoids both these unforeseen and undesirable consequences and thereby advances the true purpose and

⁸⁰ *Id.* at 373-74.

⁸¹ *Id.*

⁸² *King*, 759 F.3d at 374.

⁸³ *Id.*

means of the Act. It is thus entirely sensible that the IRS would enact the regulations it did, making Chevron deference appropriate.”⁸⁴

Finally, the majority addressed legislative history in the formation of the ACA to try to determine if Congress truly intended for subsidies to apply only to purchasers of insurance coverage through state-run exchanges. The court first turned to floor statements from Senate leaders at the time. Senator Max Baucus stated that the subsidies “will help ensure *all* Americans can afford quality health insurance,”⁸⁵ and later noted “60 percent of those who are getting insurance in the individual market on the exchange will get tax credits.”⁸⁶ Senator Dick Durbin also laid out his goals for the bill, stating that half of the “30 million Americans today who have no health insurance ... will qualify for ... tax credits to help them pay their premiums so they can have and afford health insurance.”⁸⁷ Similarly, Representative Paul Ryan, one of the most vigorous opponents of the ACA, made arguments in a Congressional hearing just two weeks before the ACA was implemented that seemed to reflect his understanding that subsidies would be available to consumers no matter whether they purchased coverage in a state or federal exchange:

You're taking money out of this program to create a brand new open-ended entitlement. And it's a new open-ended entitlement that basically says to just about everybody in this country, people making less than \$100,000, 'You know what? If your health care expenses exceed anywhere from 2 to 9.8 percent of your adjusted gross income, don't worry about it. Taxpayers got you covered. Government's gonna subsidize the rest.' ... From our perspective, these state-based exchanges are very little in difference between the House version — which has a big federal exchange, just putting the same rules in place. But what we're basically saying to people making less than 400 FPL [400

⁸⁴ King, 759 F.3d at 375.

⁸⁵ *Id.* at 371. (citing 155 Cong. Rec. S11,964 (Nov. 21, 2009)).

⁸⁶ *Id.* (citing 155 Cong. Rec. S12,764 (Dec. 9, 2009)).

⁸⁷ *Id.* (citing 155 Cong. Rec. S13, 559 (Dec. 20, 2009)).

percent of the federal poverty level], or in real language that's about \$100,000, is 'Don't worry about it. Taxpayers got you covered.'⁸⁸

The majority concluded that the data both proponents and opponents in Congress used only made sense if all financially eligible Americans were understood to have access to the credits, whether their state established an exchange or not.⁸⁹

It is possible, the majority reasoned, that the Senators expected that every state would establish its own exchange and so their statements did not necessarily address whether the credits would be available in the absence of state-run exchanges.⁹⁰ To this point, the petitioners continued their state-centric arguments that Congress could not have anticipated that so few states would establish their own exchanges, even despite Congress' attempt to "coerce" the states into establishing exchanges by conditioning the availability of subsidies on the creation of an exchange; meaning states could either choose to establish an exchange on their own and have subsidies for purchasers or not set one up and go with a federally-operated exchange and no purchaser would benefit from the subsidies:⁹¹

The [petitioners] contend that Congress struck an internal bargain in which it decided to favor state-run Exchanges by incentivizing their creation with billions of dollars of tax credits. According to the [petitioners], however, Congress's plan backfired when a majority of states refused to establish their own Exchanges, in spite of the incentives. The [petitioners] thus acknowledge that the lack of widely available tax credits is counter to Congress's original intentions, but consider this the product of a Congressional miscalculation that the courts have no business correcting.⁹²

The majority held that it was at least plausible that Congress was interested in ensuring state involvement in the establishment and operation of the exchanges, which would make a literal

⁸⁸ Sahil Kapur, *Did Paul Ryan Undermine the SCOTUS Case to Topple Obamacare?*, THE TALKING POINTS MEMO (January 16, 2015), available at <http://talkingpointsmemo.com/dc/paul-ryan-obamacare-supreme-court-king-burwell> (discussing Paul Ryan's interpretation in context of *King v. Burwell*).

⁸⁹ *Id.*

⁹⁰ *King*, 759 F.3d at 371-72.

⁹¹ *Id.* at 372.

⁹² *Id.*

reading of 26 U.S.C. §36B more logical.⁹³ The court concluded that while Congress did contemplate a scenario in case states failed to act, “it is not clear from the legislative record how large a role Congress expected the federal Exchanges to play in administering the Act.”⁹⁴

In conclusion, the majority identified the possibility of more than one statutory interpretation for whether Congress intended to make subsidies available through federally facilitated exchanges in step one of the *Chevron* test.⁹⁵ In fact, the majority argued, “the relevant statutory sections appear to conflict with one another, yielding different possible interpretations.”⁹⁶ At *Chevron* step two, the majority concluded that the IRS’s interpretation of the statute was consistent with Congress’ intent and was probably more in line with Congress’ policy goals than petitioners’ interpretation.⁹⁷ In light of the uncertainty, the Fourth Circuit upheld the district court’s ruling and concluded that the *Chevron* deference should apply because the IRS’s interpretation that subsidies offered through federally operated health insurance exchanges are supported by the language of the ACA is valid.⁹⁸

II. Concurrence

Senior Circuit Judge Andre M. Davis fully joined the majority’s holding but introduced an alternative rationale in his concurrence. Davis argued that Congress eliminated any ambiguity and fulfilled step one of the *Chevron* deference right away because Congress expressly mandated that the IRS provide subsidies to all consumers of health insurance coverage regardless of whether the exchange they purchased coverage through is an element of the state or federal

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *King*, 759 F.3d at 375.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 376.

bureaucracy.⁹⁹ While the ACA affirmatively contemplates insurance exchanges run by the state in §1311(b)(1), Davis contends that a plain reading of the statute shows that Congress also deliberately created a “contingency provision” in §1321(c)(1) that explicitly calls for the federal government to establish an exchange if a state elects not to create one.¹⁰⁰ This issue is not part of the enduring debate between plain reading textualists and more holistic purposivists.¹⁰¹ Rather, a plain reading of the contingency provision and additional language of the ACA dispels remaining doubt over Congress’ intent:

[T]he contingency provision does not create two-tiers of Exchanges; there is no indication that Congress intended the federally-operated Exchanges to be lesser Exchanges and for consumers who utilize them to be less entitled to important benefits. Thus, I conclude that a holistic reading of the Act’s text and proper attention to its structure lead to only one sensible conclusion: The premium tax credits must be available to consumers who purchase health insurance coverage through their designated Exchange regardless of whether the Exchange is state- or federally-operated.¹⁰²

The concurrence finds the petitioners’ reading of the ACA more cramped than literal, turning to the U.S. Supreme Court to show that no precedent calls for literal readings of only certain sections of a law in a vacuum, without the context of other parts of the operative text.¹⁰³ Such a cramped reading would entirely ignore Congress’ purpose in enacting this legislation, which was to overhaul the American healthcare system and provide insurance coverage for those who previously could not afford it, no matter what state a person happened to live in.¹⁰⁴ Using the petitioners’ text-focused logic, the concurrence argued that if Congress truly intended for a two-tiered insurance exchange system or if Congress wanted to limit the availability of subsidies

⁹⁹ King, 759 F.3d at 376. (Davis, J., concurring).

¹⁰⁰ *Id.* at 376-77.

¹⁰¹ *Id.* at 377.

¹⁰² *Id.*

¹⁰³ *Id.* at 378. (citing National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 666, (2007)). (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132, (2000)).

¹⁰⁴ *Id.* at 379.

exclusively to purchasers of health insurance through state-run exchanges, it would have done so expressly and deleted the contingency provision.¹⁰⁵ Since Congress had left the “contingency provision” in, “the drafters' perceived inconsistencies (if that is what they are at all) are far less probative of Congress' intent than the unqualified and broad contingency provision.”¹⁰⁶

Senior Judge Davis concludes that the petitioners’ stance is meant to achieve a political goal by effectively destroying the statute by declaring a new rule that would make subsidies unavailable to consumers who purchased insurance coverage from federally operated exchanges, “but of course, as their counsel largely conceded at oral argument, that is their not so transparent purpose.”¹⁰⁷ If petitioners do not wish to purchase health insurance, they can either pay to obtain insurance anyway or refuse to pay and run the risk of incurring a tax penalty.¹⁰⁸ No matter what the choices made by those individuals are, the concurrence concludes, keeping other citizens from benefitting from subsidies to lower the cost of purchasing health insurance is unacceptable: “What [petitioners] may not do is rely on our help to deny to millions of Americans desperately-needed health insurance through a tortured, nonsensical construction of a federal statute whose manifest purpose, as revealed by the wholeness and coherence of its text and structure, could not be more clear.”¹⁰⁹

IV. Analysis

The Fourth Circuit was correct in upholding the lower court’s ruling that Congress intended for the health insurance exchange and subsidy provisions of the ACA to apply to both

¹⁰⁵ King, 759 F.3d at 379. (Davis, J., concurring).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

state and federally operated healthcare exchanges on the grounds that the *Chevron* deference should apply to the IRS's interpretation of the statute as an appropriate construction of the law.¹¹⁰ The concurrence utilized an encompassing textual analysis to support the ruling and deepened the majority's rationale that Congress fully intended for this law to apply to all consumers of health insurance through the exchanges.¹¹¹ In the majority and concurrence, the Fourth Circuit established a two-pronged ironclad structure for statutory analysis to appeal to the preferences of any Justice on the Supreme Court. The United States Supreme Court would produce the strongest legal reasoning possible if it utilized the *King* majority's precedent-based *Chevron* analysis or the concurrence's precedent-based inclusive plain reading or a combination of both.

The overarching challenge in *King v. Burwell* is how the Supreme Court should approach resolving the question of ambiguity in the disputed exchange and subsidy language of the ACA. Both the majority and the concurrence asserted the value of the *Chevron* deference in the face of a limited plain reading argument. If the United States Supreme Court followed the majority's view, Congress' mixed references to state and federally run exchanges should lead a deciding court to engage the two-step *Chevron* deference.¹¹² Essentially, in cases of ambiguity, a court should turn to the interpretation of the government agency that is tasked with enacting the law, given the agency's more complete experience with the terms of the statute. In the likely case that an agency's interpretation is consistent with the goals of the statute, the *Chevron* deference dictates that the agency's interpretation applies to the ambiguous language of the statute. If the United States Supreme Court valued the concurrence's more direct construction in a proper plain

¹¹⁰ *King v. Burwell*, 759 F.3d 358, (4th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3102 (U.S. Nov. 7, 2014) (No. 14-114).

¹¹¹ *King*, 759 F.3d at 379. (Davis, J., concurring).

¹¹² *Id.* at 376.

reading of the ACA, which reads like a recipe where one section integrates previous sections, the *Chevron* analysis is fulfilled at step one and the matter is resolved.¹¹³

In short, a plain reading analysis of a statute may be suitable, however, not at the expense of a plain reading of subsequent, interconnected elements of the law. The opportunity to apply either the majority or the concurrence analysis (or combine them) leaves less room for the petitioners' restricted version of a plain reading argument to succeed and offers a multi-faceted, well-reasoned solution for the United States Supreme Court. The majority and the concurrence offer a buffet of solutions for the United States Supreme Court to pick and choose from in upholding the Fourth Circuit decision. Also, crucially, the majority's analysis of the statute's ambiguity using the *Chevron* precedent and the concurrence's holistic plain reading based on Supreme Court precedent stand as two daunting hurdles the Supreme Court will have to defy in reversing the Fourth Circuit. If the Court would reverse *King*: The Court would weaken its own legitimacy by ignoring seemingly endless examples of the Court's precedent to the contrary and it would possibly trigger the "death spiral"¹¹⁴ of the ACA's interdependent "three legged stool"¹¹⁵ that both the majority in *King* and the dissent in *NFIB v. Sebelius*¹¹⁶ contemplated.

The Fourth Circuit majority opinion takes on *Chevron* step two and provides a worthwhile avenue for the Supreme Court to simply acknowledge the statute's lack of clarity, use its own *Chevron* precedent, and easily resolve the issue. *Chevron* is a standard that the Supreme Court has relied on for decades to streamline government administration and interpret Congressional intent. Even in Supreme Court cases referenced above like *U.S. v. Mead Corp.* where the Court restrained from applying the *Chevron* deference, Justice Antonin Scalia (an

¹¹³ *Id.* at 379. (Davis, J., concurring).

¹¹⁴ *Id.* at 374.

¹¹⁵ Gruber, *supra* note 13.

¹¹⁶ *National Federation v. Sebelius*, 132 S.Ct. 2566, 2643 (2012).

administrative law expert and self-described textualist, who might prefer the concurrence’s plain reading¹¹⁷) vehemently defended its use:

As to principle: The doctrine of Chevron—that all authoritative agency interpretations of statutes they are charged with administering deserve deference—was rooted in a legal presumption of congressional intent, important to the division of powers between the Second and Third Branches. When, Chevron said, Congress leaves an ambiguity in a statute that is to be administered by an executive agency, it is presumed that Congress meant to give the agency discretion, within the limits of reasonable interpretation, as to how the ambiguity is to be resolved. By committing enforcement of the statute to an agency rather than the courts, Congress committed its initial and primary interpretation to that branch as well.... Ambiguity means Congress intended agency discretion. Any resolution of the ambiguity by the administering agency that is authoritative—that represents the official position of the agency—must be accepted by the courts if it is reasonable.¹¹⁸

As recently as 2013, the United States Supreme Court preserved *Chevron* once more in *City of Arlington v. FCC*.¹¹⁹ In that case, the FCC set limits on the amount of time it should take for wireless phone service providers to obtain zoning approvals from local governments.¹²⁰ The local governments claimed that the FCC could not set these limits because the Federal Communications Act of 1934 did not expressly grant such a power to the FCC and, even if *Chevron* applied, setting such limits is outside the jurisdiction of the FCC.¹²¹ In the six vote majority opinion of the Court, Justice Antonin Scalia once again aggressively stood for the use of the *Chevron* deference because: First, when a statute is unclear, courts must defer to the implementing agency so long as that agency’s interpretation is a “permissible construction” of the law; and second, that an agency can adopt a construction of a jurisdictional provision of a statute it administers, meaning, an agency can take on the powers that would follow from the

¹¹⁷ Scalia, *supra* note 27.

¹¹⁸ *United States v. Mead Corp.*, 533 U.S. 218, 241, 257 (2001) (Scalia, J., dissenting).

¹¹⁹ *City of Arlington, Tex. v. F.C.C.*, 133 S.Ct. 1863. 1874-75 (2013).

¹²⁰ *Id.* at 1866-67.

¹²¹ *Id.* at 1867.

statute's language in order to implement the law.¹²² For Justice Scalia, this result was clearly based on the “now-canonical formulation” of *Chevron* and its value in deferring to experts who administer the law:

Chevron is rooted in a background presumption of congressional intent: namely, “that Congress, when it left ambiguity in a statute” administered by an agency, “understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.” Chevron thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.¹²³

Justice Scalia argues that challenges to the legitimacy of the *Chevron* deference are still more about an agency taking action when Congress may not have explicitly ordered it to: “[I]t becomes clear that the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not.”¹²⁴ Amidst a litany of Supreme Court rulings that have similarly upheld the *Chevron* deference, Justice Scalia seems to reject the arguments the petitioners in *King v. Burwell* attempted: If judges are able to make public policy by setting the meaning of ambiguous statutory language, “[t]he effect would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts.... That is precisely what *Chevron* prevents.”¹²⁵ In rejecting the dissent's arguments in *City of Arlington*, Justice Scalia's majority opinion also goes further to reject the consequences of what would likely result if a court were to align with the arguments of the petitioners in *King*:

¹²² *City of Arlington, Tex. v. F.C.C.*, 133 S.Ct. 1863, 1874-75 (2013).

¹²³ *Id.* at 1868.

¹²⁴ *Id.* at 1871. (quoting H. Edwards & L. Elliott, *Federal Standards of Review* 146 (2007)).

¹²⁵ *Id.* at 1873.

[The dissent] offers no standards at all to guide this open-ended hunt for congressional intent (that is to say, for evidence of congressional intent more specific than the conferral of general rulemaking authority). [An analysis other than the *Chevron* deference] would simply punt that question back to the Court of Appeals.... which is really, of course, not a test at all but an invitation to make an ad hoc judgment regarding congressional intent. Thirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*. The excessive agency power that the dissent fears would be replaced by chaos. There is no need to wade into these murky waters. It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.¹²⁶

Justice Scalia's fear of such aimless judicial groping for Congressional intent in cases like *Chevron* was put more simply in his dissent in *Mead Corp.*: "Is it conceivable that decisions specifically committed to [an agency's] high-level officers are meant to be accorded no deference, while decisions by [the judiciary] left in place without further discretionary agency review are authoritative? This seems to me quite absurd, and not at all in accord with any plausible actual intent of Congress."¹²⁷ If Justice Scalia's conclusion is accurate, the Fourth Circuit majority's use of *Chevron* step two succeeds and the ruling in *King* must be upheld.

It would seem, given Justice Scalia's vigorous defense of the *Chevron* standard, that he and perhaps other Supreme Court justices would agree with both the virtue and legal analysis of the majority opinion of the Fourth Circuit, particularly the Fourth Circuit's *Chevron* step two analysis. Inconsistencies in the health exchange language of the ACA compelled the Fourth Circuit to move past step one of the *Chevron*. The Fourth Circuit then held that the IRS's statutory interpretation passed the second step of the *Chevron* test because its interpretation was a permissible construction of §§1311 and 1321 of the ACA and therefore, the agency's interpretation was valid and the *Chevron* deference applied—the exact analysis used in *City of*

¹²⁶ *Id.* at 1874.

¹²⁷ *United States v. Mead Corp.*, 533 U.S. 218, 244-45 (2001) (Scalia, J., dissenting).

Arlington. While it was obvious even to the petitioners in *King* that the IRS was the proper agency to issue tax credits as subsidies for insurance purchasers, the Fourth Circuit stayed consistent with *City of Arlington* by holding that the ACA statute expressly called for—or at least, contemplated an agency taking proper actions to carry out the statute—the IRS’s arrangements for tax credits as subsidies for purchasing insurance through exchanges. The question then returns back to whether the ACA calls for only state governments or both the state and federal government to operate health insurance exchanges.

In *Chevron*, *City of Arlington*, and *King v. Burwell*, the test is uniformly applied: 1) Is the language indisputably clear so as to rule out any inconsistency or additional interpretations? 2A) Is the agency’s interpretation within or considerably outside the scope and intent of the law? 2B) Does the agency have either the express or adopted power to properly carry out the statute as interpreted by the agency? At every turn, the majority in the Fourth Circuit utilizes rationale that fits within the framework the Supreme Court set out in *Chevron* and, more recently, *City of Arlington*. If the Supreme Court were searching for a way to rule in this case, all it need do is follow the outline the Court established for itself in earlier rulings and uphold the precedent-based ruling in *King v. Burwell*.

Applying the Fourth Circuit’s majority opinion rationale would demonstrate that the Supreme Court is careful not to overlook the principle of judicial restraint that underlies the use of the *Chevron* deference. The principles of the separation of powers may call for courts to step in and provide clarity when legislation is questioned, however, the Court established the *Chevron* deference for government agencies that administer statutes and for over thirty years, this precedent has been a vital step in statutory analysis in cases like this.¹²⁸ *Chevron* stands as a

¹²⁸ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

guard against policymaking by the judiciary that, under the separation of powers, is properly left to the Executive and Legislative branches. Failing to recognize the *Chevron* deference’s well-tested legitimacy by redefining language in a statute would be an act of judicial activism and unnecessarily trample upon the reliance on government agencies to administer laws—two intrusions the U.S. Supreme Court has traditionally been wary of.

If the use of the United States Supreme Court *Chevron* deference precedent is not substantial enough for the Court to agree with the majority in the Fourth Circuit, then Senior Judge Davis’ concurrence suggests a battle of textual, plain reading arguments, which would satisfy *Chevron* step one. The concurrence’s assertion that §1321(c)(1) is a “contingency provision” that Congress expressly created in the event a state chose not to create an exchange is in direct contrast to the petitioners’ argument that only §1311 be read literally.¹²⁹ The concurrence’s plain reading follows that the §1321(c)(1) language indicates that Congress contemplated federally facilitated exchanges, otherwise, if exchanges were truly meant only for states, the language explaining the duties of the Secretary of Health and Human Services, the IRS, and the federal government would be unnecessary language that adds a useless layer of government bureaucracy. The §1321(c) “contingency provision” states that the Secretary of Health and Human Services must establish “such an exchange” in the event that states failed to established a §1311 exchange. “Such an exchange” refers to the §1311 exchanges, meaning that the Secretary of Health and Human Services (and the federal government) assumes the role of the state. So, while the federal government is would act pursuant to §1321(c), the exchange the federal government sets up is a §1311 exchange, identical to a state-run exchange. The concurrence concluded that a plain reading of only one section of the law like §1311 while

¹²⁹ King, 759 F.3d at 376-77. (Davis, J., concurring).

disregarding other essential and interconnected sections like §1321(c) “bespeaks a deeply flawed effort to squeeze the proverbial elephant into the proverbial mouse hole.”¹³⁰ A holistic plain reading of the ACA’s text reveals that Congress expressly directed the federal government to step in and facilitate a health insurance exchange in the place of a state that chose not to establish an exchange.

The petitioners’ version of the plain reading argument is a classic in statutory interpretation and certainly remains the preferable choice for many who review this case, including the courts in *Halbig*¹³¹ and *Pruitt*¹³². Those courts do not consider or address an argument like the concurrence’s in *King* that §1321(c) is a “contingency provision” expressly created by Congress. Then, how should United States Supreme Court textualists like Justice Scalia who typically prefer plain reading arguments view this issue?¹³³ Returning to his opinion in *City of Arlington*, “Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.”¹³⁴ It seems that Justice Scalia in *City of Arlington* and Senior Judge Davis’ concurrence in *King* share faith that Congress knew exactly how it drafted the language in the ACA.

Justice Scalia’s “Congress carefully chooses its words” approach would tend to support the concurrence’s conclusion that Congress expressly drafted a “contingency provision” in §1321(c)(1), providing for the possibility that a state might choose not to establish its own exchange and that the federal government would stand in the state’s shoes. Overlooking this analysis, petitioners’ still stuck to the contention only §1311 of the ACA should receive a plain

¹³⁰ *Id.* at 379.

¹³¹ *Halbig v. Burwell*, 758 F.3d 390, (D.C. Cir. 2014), *vacated by* 2014 WL 4627181 (2014) (vacated opinion not authority).

¹³² *Oklahoma ex rel. Pruitt v. Burwell*, No., 2014 WL 4854543 at *9 (E.D. Okla. 2014).

¹³³ Scalia, *supra* note 27.

¹³⁴ *City of Arlington, Tex. v. F.C.C.*, 133 S.Ct. 1863, 1868 (2013).

reading analysis, which would reveal that Congress only contemplated state-run health insurance exchanges. However, as instructed by the Supreme Court, the concurrence relied upon the context of subsequent sections of the ACA like §1321 to support its conclusion that Congress knowingly created the “contingency provision” in the event §1311 did not apply because a state did not establish its own exchange.

As with the Fourth Circuit’s majority opinion, the concurrence followed multiple United States Supreme Court precedents for this issue, saying that a plain reading analysis should not be exclusive of context and, indeed, context often can inform the plain reading analysis. In the case cited above, *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court laid out the principles in determining statutory interpretation and Congressional intent by stating that a court reviewing a statute “should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”¹³⁵ A fundamental canon of statutory construction is that the words of a statute must be read in their context and within a view to their in the overall statutory scheme.¹³⁶ Therefore, a court must interpret the statute as “a symmetrical and coherent regulatory scheme”¹³⁷ and “fit, if possible, all parts into an harmonious whole.”¹³⁸ Other laws or sections of laws, particularly when Congress has spoken subsequent to the disputed language or more specifically to the topic at hand may affect the meaning of one statute or part of a statute.¹³⁹ Lastly, the Supreme Court directed a reader of a statute to be guided by common sense as to the

¹³⁵ *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

¹³⁶ *Id.* at 133. (quoting *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

¹³⁷ *Id.* at 133. (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).

¹³⁸ *Id.* at 133. (quoting *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)).

¹³⁹ *Id.*

manner in which Congress is likely to delegate to an administrative agency such a nationally important policy decision such as an overhaul of the health insurance system.¹⁴⁰

It once again appears that the concurrence’s holistic plain reading of the operative statutory text at issue in *King v. Burwell* is exactly in line with the structure established by the Supreme Court in *FDA v. Brown & Williamson*, in that, even if a plain reader of §1311 found absolutely no ambiguity in the language, the reader would, at least, be obligated to read a bit further to see whether the statute added anything to the preceding text. The concurrence argues that the subsequent language in §1321 modifies §1311 with its “contingency provision” as step-by-step approach, and therefore, based on the precedent set by the United States Supreme Court, the two sections must be read and considered together as part of the same statutory structure—one set of statutory text cannot apply without the other. This argument has far more substance than the petitioners’ anemic mention of how §1321 applies only to state-run exchanges. A plain reader of the statutory language in context would see the language all point in one direction: Subsidies are—and were intended to be, without any typo errors¹⁴¹—available to all purchasers of health insurance through exchanges, regardless of whether the state or federal government established them.

Additionally, the concurrence is in lockstep with the Supreme Court by applying the ever-elusive common sense policy guide to the manner in which Congress was likely to delegate the implementing of such a monumental statute addressing a massive portion of the nation’s economy.¹⁴² The concurrence questioned if Congress would intend to overhaul the health insurance system, but then leave a key portion of it entirely contingent upon sacrificing federal

¹⁴⁰ *Brown & Williamson*, 529 U.S. at 133.

¹⁴¹ See Krugman, *supra* note 43.

¹⁴² *Id.*

government control to whether states take the option of implementing exchanges that are merely suggested by federal law? The risk of failure and millions of American citizens missing out on the opportunity to get better and cheaper health insurance would be overwhelming. The concurrence concludes that it would then not be an overhaul at all: “The real danger in the Petitioners' proposed interpretation of the Act is that it misses the forest for the trees by eliding Congress' central purpose in enacting the Act: to radically restructure the American health care market with ‘the most expansive social legislation enacted in decades.’”¹⁴³ Common sense and logic would likely guide a plain reader to conclude that Congress would, indeed, pass a law where it still maintained some control (like stepping in for states that choose not to establish exchanges) in order to achieve its goal of overhauling the health insurance system and providing more affordable health insurance coverage to all Americans. Both the majority and the concurrence in *King* upheld a structure that followed logically with the law that was passed and the United States Supreme Court should as well.

Finally, failing all other legal arguments about plain reading or Congressional intent or statutory interpretation, one might still be left wondering how the petitioners found that Congress was overwhelmingly obvious about one of the essential pillars to its healthcare overhaul law. If Congress truly was so unambiguously clear as to its intent that only purchasers of insurance from state-run exchanges will benefit from subsidies as petitioners contend, why would Congress express this unambiguous intent in subsection (b)(2)(A) in a section of subpart C of Part 4 of subchapter (a) of Chapter 1 of the Internal Revenue Code discussing the calculation of tax credits?¹⁴⁴ Even for Congress, that is a nonsensical construction of a statute. Petitioners' arguments ask the United States Supreme Court to interpret a four-word “established by the

¹⁴³ *King*, 759 F.3d at 379. (Davis, J., concurring) (quoting Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Into Law, With a Flourish*, N.Y. TIMES, March 24, 2010, at A19).

¹⁴⁴ 42 U.S.C.A. §18031(b)(1) (2014).

state” phrase in a massive law by reading it out of context, and because of the absence of context, to ignore the possibility (and existence) of an alternative reading of the law. The Fourth Circuit majority concluded that, at the very least, the statute is ambiguous. If the United States Supreme Court does not totally agree with either the petitioners or the majority in *King* about the very best interpretation of the statute, then the *Chevron* deference precedent kicks in and, because the IRS’s interpretation advances Congress’ goal of more affordable and more universal coverage as established above, the Supreme Court must recognize its own precedent and uphold the Fourth Circuit’s ruling.

While the majority in the Fourth Circuit may have set aside addressing any underlying political motivations in its opinion, the concurrence, however, bluntly recognized the political realities that have long drenched any discussion surrounding the ACA.¹⁴⁵ In the three cases that have ruled on this issue (*King*, *Halbig*, and *Pruitt*), each court has ruled in line with the expected political philosophy of the judges ruling in the case. If we measure a federal judge’s expected political philosophy by which political party the President at the time belonged to when the judge was appointed, we see the partisanship develop. In *Pruitt*, Judge Ronald A. White ruled against the ACA and subsidies through federal exchanges.¹⁴⁶ Republican President George W. Bush appointed Judge White in 2005.¹⁴⁷ In *Halbig*, the two-person majority of Judge Thomas B. Griffith and Senior Judge A. Raymond Randolph ruled against the ACA as well.¹⁴⁸ President George W. Bush appointed Judge Griffith in 2004¹⁴⁹ and Republican President George H.W.

¹⁴⁵ *Id.* at 379.

¹⁴⁶ Oklahoma ex rel. Pruitt v. Burwell, No., 2014 WL 4854543 at *9 (E.D. Okla. 2014).

¹⁴⁷ FEDERAL JUDICIAL CENTER, *See supra* note 24, at <http://www.fjc.gov/servlet/nGetInfo?jid=3038&cid=999&ctype=na&instat=na> (last visited Nov. 6, 2014).

¹⁴⁸ *Halbig v. Burwell*, 758 F.3d 390, (D.C. Cir. 2014), *vacated by* 2014 WL 4627181 (2014) (vacated opinion not authority).

¹⁴⁹ FEDERAL JUDICIAL CENTER, *See supra* note 24, at <http://www.fjc.gov/servlet/nGetInfo?jid=3090&cid=999&ctype=na&instat=na> (last visited Nov. 6, 2014).

Bush appointed Judge Randolph in 1990.¹⁵⁰ In contrast, Democrat President Jimmy Carter appointed the lone dissenter in *Halbig*, Senior Judge Harry T. Edwards, in 1980.¹⁵¹ Finally, in *King*, Democrat President Bill Clinton appointed both Judge Roger L. Gregory in 2000¹⁵² and Senior Judge Andre M. Davis in 1995.¹⁵³ Democrat President Barack Obama appointed the third member of the majority in *King*, Judge Stephanie D. Thacker, in 2011.¹⁵⁴ Similar to the previous discussion of the ACA's legislative history, the political battle lines seem to have been drawn.

Using the same measurement, the United States Supreme Court might well have its decision already made. Republican Presidents appointed five Supreme Court Justices: Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito.¹⁵⁵ Likewise, Democrat Presidents have appointed four: Justices Ginsburg, Breyer, Sotomayor, and Kagan.¹⁵⁶ And while the United Supreme Court is certainly not immune to the political atmosphere and motivations, the Court has shown that it can rise above and focus judicial opinions on the law and not be dominated by politics.¹⁵⁷

In the face of these political realities, this is what makes the Fourth Circuit's majority and concurrence so superior though: Both opinions applied, often times word-for-word, United States Supreme Court precedent. Whether in the verbatim application of the Supreme Court's *Chevron*

¹⁵⁰ FEDERAL JUDICIAL CENTER, *See supra* note 24, at <http://www.fjc.gov/servlet/nGetInfo?jid=1964&cid=999&ctype=na&instat=na> (last visited Nov. 6, 2014).

¹⁵¹ FEDERAL JUDICIAL CENTER, *See supra* note 24, at <http://www.fjc.gov/servlet/nGetInfo?jid=692&cid=999&ctype=na&instat=na> (last visited Nov. 6, 2014).

¹⁵² FEDERAL JUDICIAL CENTER, *See supra* note 24, at <http://www.fjc.gov/servlet/nGetInfo?jid=2888&cid=999&ctype=na&instat=na> (last visited Nov. 6, 2014).

¹⁵³ FEDERAL JUDICIAL CENTER, *See supra* note 24, at <http://www.fjc.gov/servlet/nGetInfo?jid=570&cid=999&ctype=na&instat=na> (last visited Nov. 6, 2014).

¹⁵⁴ FEDERAL JUDICIAL CENTER, *See supra* note 24, at <http://www.fjc.gov/servlet/nGetInfo?jid=3423&cid=999&ctype=na&instat=na> (last visited Nov. 6, 2014).

¹⁵⁵ FEDERAL JUDICIAL CENTER, *See supra* note 24, at <http://www.supremecourt.gov/about/biographies.aspx> (last visited Nov. 6, 2014).

¹⁵⁶ *Id.*

¹⁵⁷ *See generally supra* note 24.

deference standard or aligning with the Court's statutory interpretation reasoning in *City of Arlington* or following the Court's directions on plain reading analyses in *Brown & Williamson*, the Fourth Circuit brought together an assortment of legal reasoning that should be immune from political motivations because of its dedication to Supreme Court precedent and well-tested analyses for statutory interpretation. The two Fourth Circuit opinions form a two-tiered test for the United States Supreme Court to put this case through: First, apply the concurrence's holistic plain reading analysis; Second, apply the majority opinion's *Chevron* deference analysis. The Fourth Circuit's all-encompassing legal structure in *King v. Burwell* has aspects that should appeal to every Justice of the Supreme Court, from the most dedicated plain reading textualist Justice to the most interpretive holistic purposivist. The United States Supreme Court is bound by its own legal precedents, which have stood the tests of time and political controversy. The Court would have to break from its own reasoning and maneuver around the appearance of political impropriety in order to disagree with the Fourth Circuit and severely disable a key element of the ACA.

V. Conclusion

The United States Supreme Court is now tasked with addressing delicate question of determining how to interpret key provisions of the ACA in *King v. Burwell*. The majority in the Fourth Circuit's ruling determined that the statutory language was ambiguous and open to multiple interpretations and, therefore, the Supreme Court precedent that directs courts to defer to the federal government's interpretation of the law should apply. The concurrence utilized a commanding grasp of Supreme Court precedent that instructs courts to interpret statutory language holistically and within context when applying a plain reading analysis. Taken together,

the Fourth Circuit's majority and concurring opinion established an ironclad structure for ruling on this case and offered the United States Supreme Court a strong reminder to rise above political impulses and stay committed to the Court's own previous reasoning and time-tested precedent.

Perhaps the largest concern of all the issues present in this case was what the concurrence reminded all of us to remember: that, while it is not out of the ordinary to utilize the legal system to weaken or destroy a law because of a political disagreement with it, the real losers if the Supreme Court would reject the Fourth Circuit's ruling would not be the political opponents to the ACA or the government that implements it, but rather, the millions of Americans who are desperately in need of affordable health insurance. Trumping any debate over federalism or state-versus-national governing power, an American should not be restrained from the opportunity for affordable health insurance coverage strictly because the state that person resides in decided to create a political dispute against the federal government while Americans in other states benefit from such an opportunity. That was not the purpose of the Affordable Care Act and should not be the policy of this country.

It is in the nation's best policy interest to have all Americans insured. Although an imperfect law, the ACA's critical provision of establishing health insurance exchanges was intended to balance this best interest with the national virtue of stimulating free market competition. The states that object to establishing an insurance exchange do a disservice to the nation's best policy interest and free market competition as well as to their own citizens. In that gap, the federal government must be allowed to provide assistance, as called for in the ACA, to make it easier to obtain proper health insurance coverage, which is made more affordable by subsidies that incentivize both purchasing necessary healthcare for consumers and market

participation for insurers. The majority and concurrence of the Fourth Circuit in *King v. Burwell* offered a legal framework for the United States Supreme Court to set aside political gamesmanship, use precedent-based legal reasoning, and serve the country's best interest by focusing on affordable access to healthcare coverage for all Americans.