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# *King v. Burwell*: The Supreme Court as Interpreter

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On June 25, 2015, the U.S. Supreme Court issued a decision in *King v. Burwell*, 576 U.S. ___ (2015) (Slip Op. No. 14-114). At issue in this case was whether a regulation issued by the Internal Revenue Service (IRS) providing for premium tax subsidies in both state-based and federally facilitated exchanges (the "IRS Rule")[1] was a permissible interpretation of the underlying statute, the Patient Protection and Affordable Care Act (ACA). By a vote of 6–3, the Supreme Court upheld the IRS Rule, maintaining access to subsidies for eligible individuals across all Exchanges—not merely those established by a state. In short, the Court maintained the status quo.

How the Court reached its decision is important. When analyzing an agency's interpretation of a statute, the Court typically uses the now familiar two-step *Chevron*[2] framework, which asks first if the statute is ambiguous and, if so, whether the agency interpretation is reasonable. As noted by the Court, *Chevron* is based on the premise that where there are ambiguities in the statute, Congress has implicitly delegated authority to the agency to fill the statutory gaps. In declining to follow the *Chevron* approach, the Court noted that, in "extraordinary cases," it is appropriate to "hesitate" before finding an implicit delegation of authority. The Court concluded that the issue in King was too fundamental to the ACA for the Court to rely on an implicit delegation of authority and that if Congress had wanted the IRS to decide this issue, it would have explicitly said so. Rather, the Court stated that it is "our task" to determine the correct reading of the statute. The Court relied on the context and structure of the ACA to conclude that the applicable provision allows tax credits for health insurance purchased on any Exchange created under the Act. The Court's approach could have potential ramifications on Executive power/authority and on administrative law and challenges to administrative actions for years to come.

Although the issue of subsidies is resolved for now, other issues remain under the ACA, including other litigation and a variety of legislative proposals to modify, repeal and/or replace the ACA.

## Background

On November 7, 2014, the Supreme Court agreed to take up *King*, a challenge to the IRS Rule implementing a key provision of the ACA allowing premium tax credits to be made available to all individuals purchasing coverage on

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1 26 C.F.R. § 1.36B-2(a)(1).

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

any of the 51 health insurance Exchanges. Petitioners argued that the IRS Rule should be held invalid on the grounds that, under the ACA, subsidies may only be made available for health insurance purchased through an Exchange "established by the State under [42 U.S.C. §18031]."

The IRS Rule defines "Exchange" for purposes of the premium tax credits as "an Exchange serving the individual market for qualified individuals … regardless of whether the Exchange is established and operated by a State (including a regional Exchange or subsidiary Exchange) or by [the U.S. Department of Health and Human Services]." The IRS Rule interprets Section 36B(b)(2) of the Internal Revenue Code (IRC) as added by the ACA, which provides that the IRS is to calculate tax credits for individuals' premiums for qualified health plans "which were enrolled in through an Exchange established by the State under [Section] 1311 of the Patient Protection and Affordable Care Act."

The question under consideration by the Supreme Court was whether the IRS Rule is a valid interpretation of IRC § 36B(b)(2). On July 22, 2014, the U.S. Court of Appeals for the Fourth Circuit held in *King* that the IRS Rule was valid as an exercise of agency regulatory authority under the *Chevron* analysis.[3] On the same day, the Court of Appeals for the District of Columbia Circuit vacated the IRS Rule in *Halbig v. Burwell*, 758 F. 3d 390. The Court granted certiorari in King.

## Opinion

From the outset, the Court utilizes a contextual canon of statutory interpretation. Unlike the Fourth Circuit, which found the provision ambiguous and deferred to the IRS's interpretation under *Chevron*, the Court's decision is based solely on its own construction of the statute. The Court finds the words focused on by the plaintiffs—"an Exchange established by the State"—to be ambiguous and then looks to the statute as a whole to conclude that premium subsidies are available through all types of Exchanges. In essence, the Court concludes that IRC § 36B, "fairly … read consistent with what we see as Congress's plan," "allows tax credits for insurance purchased on any Exchange created under the Act."[4]

Writing for the Court, Chief Justice John Roberts, joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor and Kagan, provides a robust background on the origins of the ACA, spanning from the 1990s through the Massachusetts health care reform initiatives. Of import, according to the Chief Justice, is that the ACA "adopts a version of three key reforms that made the Massachusetts system successful": guaranteed issue and community rating requirements, the individual mandate and refundable tax credits that seek to make insurance more affordable to certain low-income individuals. Chief Justice Roberts notes that these three reforms are "closely intertwined" and suggests that each reform would not be appropriately effective in the absence of the other two reforms. The interaction between these three reforms is therefore essential to the Court's holding; effectively, the Court finds that the provision in question, when read in context of the overall statute, cannot logically be read to establish the third essential component of reform, tax credits, in only some states.

With respect to how the Court should analyze the issue, Chief Justice Roberts notes:

> When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*.... Under that that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable.… This approach "is premised on the theory that a statute's

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[3] *King v. Sebelius*, 997 F. Supp. 2d 415 (E.D. Va. 2014).

[4] *King v. Burwell,* 576 U.S. ___, No. 14-114 (2015).

> ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." … "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." This is one of those cases.[5]

The Court first observes that, "had Congress wished to assign [this question of deep economic and political significance] to an agency, it surely would have done so expressly." The Court also finds it unlikely that Congress would have delegated this decision to the *IRS*, "which has no expertise in crafting health insurance policy of this sort." In short, the Court does not apply *Chevron* analysis. Rather it conducts its own analysis and interpretation of the provision, reading it in the context of the overall statute and with an eye towards Congress's intent.

To further support this, the Chief Justice undertakes a lengthy textual analysis of the phrase "an Exchange established by the State under [42 U.S.C. §18031]" and concludes that it can be read to incorporate federal Exchanges. This analysis focuses in part on the use of the term "such Exchange" in ACA §18041(c)(1); this phrase "instructs the Secretary to establish and operate the *same* Exchange that the State was directed to establish under Section 18031," with all of the attributes and requirements that would otherwise attach. Chief Justice Roberts also evaluates a number of other statutory provisions within the ACA that would be rendered unworkable or illogical in the context of the law's structure and intent if they were limited to state-based Exchanges. "These provisions suggest that the Act may not always use the phrase 'established by the State' in its most natural sense. Thus, the meaning of that phrase may not be as clear as it appears when read out of context." What's more, if "Federal Exchanges were not established under Section 18031…, literally none of the Act's requirements would apply to them," which is bolstered only by the fact that "the Act repeatedly uses the phrase 'established under [42 U.S.C. §18031]' in situations where it would make no sense to distinguish between State and Federal Exchanges."

Chief Justice Roberts ultimately concludes that the "upshot of all of this is that the phrase 'an Exchange established by the State under [42 U.S.C. § 18031]' is properly viewed as ambiguous." The Court further notes that the ACA "contains more than a few examples of inartful drafting" and concludes that "[a]fter reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase 'an Exchange established by the State under [Section 18031]' is unambiguous." As a result, the Court "must turn to the broader structure of the Act to determine the meaning of *Section 36B*" (emphasis added).

The Court finds that "the statutory scheme [of the ACA] compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid." Chief Justice Roberts refers again to the three key reforms, once more highlighting the implications of their interrelatedness, noting that the first two (guaranteed issue/community rating and the individual mandate) were implemented nationwide, irrespective of an Exchange's establishment. The Court concludes that it "is implausible that Congress meant the Act to operate" in a manner that would prevent the reforms from working in certain states. The Court declined to accept the petitioners' suggestion that Congress intended to withhold tax credits in the federal Exchanges as an incentive to encourage states to establish their own. By establishing a fallback in the federal Exchange, the Court says, Congress "did not believe it was offering States a deal they would not refuse—it expressly addressed what would happen if a State *did* refuse the deal."

Finally, the Court notes that "the structure of Section 36B itself suggests that tax credits are not limited to State Exchanges." Section 36B(a) initially provides that tax credits "shall be allowed" for any "applicable taxpayer."

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[5] *Id.* at 8, quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

Section 36B(c)(1) then defines an "applicable taxpayer" as someone who (among other things) has a household income between 100 percent and 400 percent of the federal poverty line. Together, the Court reasons, "these two provisions appear to make anyone in the specified income range eligible to receive a tax credit." The Court also dispenses with the petitioners' argument that a string of tax code provisions, when taken together, effectively support the limitation on tax credits to individuals in state-based Exchanges. Instead, the Court holds that "in petitioners' view, Congress made the viability of the entire Affordable Care Act turn on the ultimate ancillary provision: a sub-sub-sub section of the Tax Code.… Had Congress meant to limit tax credits to State Exchanges, it … would not have used such a winding path of connect-the-dots provisions about the amount of the credit."

The Court ultimately concludes that while the petitioners' arguments about the plain meaning of the statute are "strong," in this instance, "the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase." In closing, Chief Justice Roberts says:

> A fair reading of legislation demands a fair understanding of the legislative plan. Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

## Dissent

Writing in dissent, Justice Antonin Scalia, joined by Justices Thomas and Alito, challenges the majority's interpretation that "Exchange established by the State" means "Exchange established by the State or the Federal Government," which he labeled as "quite absurd," noting that "[w]ords no longer have meaning if an Exchange that is *not* established by a State is 'established by the State.'"[6] He states that "[u]nder all the usual rules of interpretation, in short, the Government should lose this case," but that the "normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved."

Justice Scalia agrees "wholeheartedly" with the Court that "sound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections" and that "[c]ontext always matters." But, he notes, context matters "as a tool for understanding the terms of the law, not an excuse for rewriting them." The ordinary connotation of words does not always prevail in interpreting statutes, "but the more unnatural the proposed interpretation of a law, the more compelling the contextual evidence must be to show that it is correct."

To the majority's argument that the ACA's context justifies its interpretation, Justice Scalia replies that "other contextual clues undermine [the interpretation] at every turn," providing examples of how the ACA distinguishes between the establishment of an Exchange by a state and an Exchange established by the federal government. He references "the elementary principle" of statutory construction of giving effect, if possible, to all clauses and words; citing *Marbury v. Madison*, he notes that lawmakers do not tend to use terms that "have no operation at all."[7] The majority's opinion "nullif[ies] the term 'by the State'" many times throughout the ACA. Justice Scalia also notes that equating "establishment 'by the State' with establishment by the Federal Government," as the Court does, "makes nonsense of other parts" of the ACA and that Congress knew how to equate the two types of Exchanges when it chose to do so.

To the majority's argument that several provisions of the ACA would make little sense if tax credits were not available

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[6] *King v. Burwell,* 576 U.S. ___, No. 14-114, Dissent (2015).

[7] *Id.* at 5, quoting *Marbury v. Madison*, 1 Cranch 137, 174 (1803).

on federal Exchanges, the dissent notes that the observation "would show only oddity, not ambiguity" and that laws "often include unusual or mismatched provisions." Quoting Justice Kagan's decision in *Michigan v. Bay Mills Indian Community*, issued last term, he notes that the Court "does not revise legislation … just because the text as written creates an apparent anomaly."[8] He notes that the structure of the tax credit limitation, far from being strange, is "in fact quite common" and is drafted in such manner because tax credit mechanics require it.

Justice Scalia notes that a statute's structure and purpose only matter "to the extent they help clarify an otherwise ambiguous provision." He disputes that the phrase is ambiguous, saying that if what the Court points to would make a statute ambiguous, "everything is ambiguous." Justice Scalia notes that it is possible for the other health insurance reforms to operate independently of the tax credits. The projections of what would happen in the absence of tax credits, if true, "would show only that the statutory scheme contains a flaw," not that the statute means the opposite of what it says. He notes that if the Court's economic predictions are correct, the less likely it is that they will occur because the states would establish Exchanges.

The dissent further objects to the majority decision because the Court "has no free-floating power 'to rescue Congress from its drafting errors'"; a court may correct mistakes "[o]nly when it is patently obvious to a reasonable reader that a drafting mistake has occurred." If Congress "does not do its job properly," it is not the Court's place "to make everything come out right" and the Court "should have left it to Congress to decide what to do about the Act's limitation of tax credits to state Exchanges."[9] The majority's decision, rather, "both aggrandizes judicial power and encourages congressional lassitude."

Justice Scalia concludes by observing that the decision "changes the usual rules of statutory interpretation for the sake of the [ACA]"—which he notes should now be called "SCOTUScare"—but "[t]he somersaults of statutory interpretation [the Court has] performed … will be cited by litigants endlessly, to the confusion of honest jurisprudence."

## Conclusion and Implications

By upholding the IRS Rule permitting subsidies to be made available in all Exchanges, the Court effectively maintains the status quo in the individual Exchange market. As a result, the ruling also perpetuates other existing requirements established under the ACA that had the potential to be obviated in states that rely on federal Exchanges.

### *Impact on employers*

For employers in particular, the Court's decision confirms the employer shared responsibility requirements under IRC § 4980H (often referred to as the employer "pay or play" penalties) and related requirements remain in place.

The pay or play penalties apply to employers with at least 50 full-time equivalent employees and generally took effect on January 1, 2015, for calendar year plans. Large employers with fewer than 100 employees may be eligible for a delay until 2016. The penalties are triggered if even one full-time employee receives a premium tax subsidy. If the Court had overturned the IRS Rule, employers' potential liability for penalties would have varied based on where employees were located. Given the Court's decision, the penalty structure remains unaffected. The next major compliance deadline for employers is reporting requirements related to an offer of health coverage under pay or play. Employers that provide minimum essential coverage to employees, even if they are not subject to the penalties,

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[8] *Id.*, quoting *Michigan v. Bay Mills Indian Community*, 572 U.S. __, ___ (2014) (slip op. at 10).

[9] *Id.* at 19; see also *id.*at 18 (the Court does not have the "prerogative to repair laws that do not work out in practice").

may be subject to reporting requirements.

***Implications for administrative law***

For administrative law, there are notable implications of the decision because the majority opinion does not follow the ordinary *Chevron* rules for interpreting ambiguous provisions in a statute. Ordinarily, when a court construes an ambiguous statutory provision under *Chevron*, the court would defer to the interpretation adopted by the federal agency that administers the statute (here the IRS) as long as that interpretation is reasonable—even if the court does not believe the agency's interpretation to be the best interpretation of the statute. As noted in the Court's opinion, the basis for deference is the theory that by enacting an ambiguous provision, Congress delegated responsibility to the pertinent agency to fill in the gaps in the statute. A corollary to that delegation (and deference) is that the agency could change its regulatory interpretation of the statute as long as the agency's new interpretation is a reasonable or plausible interpretation of the statute.

Here, the Supreme Court construes ambiguous statutory language directly, in lieu of deferring to the IRS's interpretation. The Court acknowledges that this is a departure from the ordinary rules of interpretation but is necessary, given that *King* is an "extraordinary case." The Court reasons that the availability of tax credit subsidies (to make health insurance affordable) is so central to the statutory scheme that Congress would not have intended to delegate responsibility to the IRS to decide the question. Although the Court's approach is unusual, it ends up with the same result as if the Court had applied *Chevron* deference: upholding the IRS Rule implementing the tax credit subsidies. While the Court's interpretive approach does not lead to a different outcome than would likely have obtained under a *Chevron* step 2 analysis of the IRS Rule, both its approach and its conclusion that Congress would not have delegated authority to the IRS to fill the gaps in the statutory provision by rulemaking could have implications on a future administration's ability to change the IRS Rule: If the Congress did not delegate authority to the IRS to interpret IRC § 36B, a future administration cannot amend the IRS Rule to limit premium subsidies to insurance policies purchased through state-established Exchanges.

The Court's message is clear: Courts need not *always* defer to the pertinent agency when construing ambiguous statutes. Although this is a victory for the current Administration, the majority's decision in *King v. Burwell* could be seen as reducing the power of the Executive Branch in interpreting and implementing statutory schemes—and increasing that of the Judicial Branch in the situations where a court chooses not to apply *Chevron* deference but to independently interpret an ambiguous statutory provision for itself.

## Looking Ahead

There is ongoing litigation in other areas that will continue unaffected by the decision in *King*. These cases include challenges to the ACA contraceptive coverage requirements, a case by the House of Representatives challenging the IRS delay of the employer pay or play penalties and the cost-sharing subsidies program, and a challenge to the Independent Payment Advisory Board. Further challenges may arise as implementation efforts continue.

In Congress, several leading Republicans in the House and Senate were immediately critical of the decision and quickly restated their objections to the ACA, including renewed calls for its complete repeal. However, any significant changes to the core provisions of the ACA will likely be opposed by Democrats and vetoed by the President, making change of any magnitude virtually impossible until and unless Republicans control the Executive Branch in 2017.

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