Administrative Law— Supreme Court to Consider Whether IRS Rule is a Permissive Interpretation of the ACA— *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014).

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A well-cited doctrine directs courts to apply a two-step analytic framework to determine whether an agency’s interpretation deserves deference in reviewing challenges to the agency’s construction of a statute.¹ The Supreme Court has held that courts should defer to agency interpretations unless the statutory interpretation is

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¹ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). If a case concerns a challenge to an agency’s construction of a statute, courts apply the two-step analytic framework set forth in *Chevron*. *Id.* As *Chevron’s* first step, a court looks to the “plain meaning” of the statute to determine if the regulation responds to it. *Id.* at 842-43. If it does, that is the end of the inquiry and the regulation stands. *Id.* However, if the statute is susceptible to multiple interpretations, the court then moves to *Chevron’s* second step and defers to the agency’s interpretation so long as it is based on a permissible construction of the statute. *Id.* at 843. See also *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1377-78 (Fed. Cir. 2011) (discussing application of *Chevron* deference test to ambiguous statutes); *Zuni Pub. Sch. Dist. No. 89 v. Dept’ of Educ.*, 550 U.S. 81, 89 (2007) (discussing upholding interpretation of language if it is reasonable); *Household Credit Serv., Inc. v. Pfennig*, 541 U.S. 232, 233 (2004) (applying two part test established by *Chevron*); *Duncan v. Walker*, 533 U.S. 167, 172 (2001). Courts will not disturb an agency rule unless it was “arbitrary or capricious in substance, or manifestly contrary to the statute.” *Pfennig*, 541 U.S. at 239-42. In construing a statute’s meaning, the court “begin[s], as always, with the language of the statute.” *Walker*, 533 U.S. at 172. See also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (analyzing issue in the case under *Chevron* test). “[I]f Congress has not specifically addressed the question, a reviewing court must respect the agency’s construction.” *Brown*, 529 U.S. at 132. See also *Dole v. Steelworkers*, 494 U.S. 26, 454 (1990) (asking “whether the agency’s answer is based on a permissible construction” if statute is ambiguous); *Nat’l R.R. Passenger Corp. v. Atchison, T. & S. F. R. Co.*, 470 U.S. 451 (1985). A statute is ambiguous only if the disputed language is “reasonably susceptible of different interpretations.” *Atchison*, 470 U.S. at 473.
unreasonable.\textsuperscript{2} The recent decision by the United States Court of Appeals for the Fourth Circuit in \textit{King v. Burwell}\textsuperscript{3} addressed whether the Patient Protection and Affordable Care Act ("ACA") permits the Internal Revenue Service ("IRS") to extend tax credit subsidies to health insurance coverage purchased through Health Insurance Marketplaces ("Exchanges") established by the federal government.\textsuperscript{4} The Fourth Circuit's analysis hinged on whether the words in the statute served as the sole guide to its interpretation, or whether Congressional intent should determine how to read the statutory language.\textsuperscript{5} The Fourth Circuit ruled that the IRS acted appropriately in determining that the ACA authorized tax subsidies for individuals who purchase insurance policies on the federal health Exchanges.\textsuperscript{6}

The ACA represents a significant regulatory overhaul of the United States healthcare system; its key feature is the implementation of Exchanges, which serve as marketplaces where consumers can purchase health insurance.\textsuperscript{7} A major provision of the ACA, known as "the individual mandate," requires most Americans to either obtain "minimum essential coverage" or pay a tax penalty imposed by the IRS.\textsuperscript{8} The ACA also

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\item\textsuperscript{2} \textit{Chevron}, 467 U.S. at 842.
\item\textsuperscript{3} \textit{King v. Burwell}, 759 F.3d 358 (4th Cir. 2014).
\item\textsuperscript{4} Id. See 26 U.S.C. § 36B(f) (2014). This section requires the IRS to reduce the amount of a taxpayer's end-of-year premium tax credit by the amount of any advance payment of such credit. See 26 U.S.C § 36B(f)(3) (2014). To enable the IRS to track these advance payments, the statute requires "[e]ach Exchange (or any person carrying out 1 or more responsibilities of an Exchange under section 1311(f)(3) or 1321(c) of the . . . Act)" to provide certain information to the Secretary and to the Department of the Treasury. Id. Congress provided for the creation of health insurance Exchanges to serve "as an organized and transparent marketplace for the purchase of health insurance where individuals . . . can shop and compare health insurance options." H.R. Rep. No. 111-443, pt. II, at 976 (2010).
\item\textsuperscript{6} \textit{Burwell}, 759 F.3d at 375-76.
\item\textsuperscript{8} See 26 U.S.C § 5000A(e)(1)(A) (2010) (excusing individuals whose annual cost of coverage exceeds eight percent of their projected household income). The individual mandate recently survived a constitutional attack. Id. See also \textit{Nat'l Fed'n of Indep. Bus.}, 132 S. Ct. at 2580 (discussing constitutionality of IRS tax penalty). See 42 U.S.C. § 18091(2)(I) (2014). Regarding the ACA's requirement to maintain minimum essential coverage, Congress made the following findings:

Congress recognized: [I]f there were no requirement, many individuals would
includes a "subsidy provision" which provides eligible individuals with tax credits intended to reduce the cost of acquiring a health insurance policy through an Exchange.¹⁹

wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the [individually required] requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and not exclude coverage of pre-existing conditions can be sold.

Id. See also Alvin Tran, FAQ: How Will the Individual Mandate Work?, KAISER HEALTH NEWS, (September 3, 2013) http://kaiserhealthnews.org/news/faq-on-individual-insurance-mandate-aca/ (explaining mandate in part guarantees insurance companies have broad base of consumers). ¹⁹ See 26 U.S.C. § 36B (2014); Roundtable Discussion on Expanding Health Care Coverage: Hearing Before the Senate Comm. On Finance, 111th Cong. 504 (2009). Congress was informed of the importance of the subsidies to the overall legislative scheme. Id. See Transcript of Remarks by the President and Vice President at Signing of the Health Insurance Reform Bill, THE WHITE HOUSE (Mar. 23, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-and-vice-president-signing-health-insurance-reform-bill[http://perma.cc/3HNU-DE29]. President Barack Obama noted that “when this exchange is up and running, millions of people will get tax breaks to help them afford coverage, which represents the largest middle-class tax cut for health care in history. That’s what this reform is about.” Id. See also An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act, CONGRESSIONAL BUDGET OFFICE 24 (Nov. 30, 2009), available at http://www.cbo.gov/sites/default/files/11-30-premiums.pdf (estimating approximately 57% of people purchasing their own coverage would receive subsidies). See also Written Comments of Sandy Praeger Commissioner of Insurance State of Kansas On Behalf of The National Association of Insurance Commissioners for the Senate Finance Committee Roundtable Discussion on ‘Expanding Health Care Coverage,” NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 3 (May 5, 2009), http://www.naic.org/documents/testimony_0905_praeger.pdf. “State regulators can support these reforms to the extent they are coupled with an effective and enforceable individual purchase mandate and appropriate income-sensitive subsidies to make coverage affordable.” Id. See Felice J. Freyer, Health Care Law Debate Heats Up: MIT Professor Stirs Controversy, BOSTON GLOBE, (July 25, 2014), available at http://www.bostonglobe.com/lifestyle/health-wellness/2014/07/25/mit-gruber-obamacare-architect-calls-his-statements-video-mistake/q1kkjC9zpQXJuxhY2HbJ/story.html. Jonathan Gruber, a major architect of the ACA, made comments in 2012 that seem to support legal arguments advanced by the plaintiffs such as that Congress intentionally made subsidies unavailable on federally established exchanges so as to promote state-run Exchanges. Id. In an interview with the Boston Globe, Gruber attempted to explain his remarks:

I was speaking off-the-cuff . . . It was just a mistake. There was never any intention to literally withhold money, to withhold tax credits, from the states that didn’t take that step [to set up an exchange]. That’s clear in the intent of the law and if you talk to anybody who worked on the law.

Id. See also Halbig v. Sebelius, 27 F. Supp. 3d 1, 23 (D.C. Cir. 2014). “It makes little sense to
The IRS determines eligibility for the premium tax credits according to 26 U.S.C. section 36B, which refers specifically to policies purchased on “an Exchange established by the State under section 1311 of the [ACA].” While section 1311 provides that “each State shall . . . establish an Exchange,” section 1321 of the ACA clarifies that a state may “elect” to establish an Exchange. Furthermore, section 1321 provides that if a state does not “elect” to establish an Exchange by January 1, 2014, the Secretary of the Department of Health and Human Services (“HHS”) will create and run an Exchange within that state. Ambiguity in the statutory language regarding “Exchanges”—whether established by a state or the federal government—could have been remedied through routine changes to the statute, known as “technical corrections,” but given the political landscape, no “technical corrections” were ever made.

assume that Congress sacrificed nationwide availability of the tax credit . . . in an attempt to promote state-run Exchanges.”

10 See Burwell, 759 F.3d at 369.
11 See ACA § 1311(b)(1), 1321 (2010); Burwell, 759 F.3d at 364. But see Julie Rovner, If High Court Strikes Federal Exchange Subsidies, Health Law Could Unravel, KAISER HEALTH NEWS (Dec. 2, 2014), http://kaiserhealthnews.org/news/if-high-court-strikes-federal-exchange-subsidies-health-law-could-unravel/ (highlighting political challenges to implementing state-run Exchanges). In seven states, “even if a governor wanted to establish an exchange for his or her state, the state legislature has specifically taken that authority away.” Id.
12 See ACA § 132142 (2010); U.S.C. § 18041(c)(1) (2014). Section 18041(c) provides that if a state fails to establish an Exchange by January 1, 2014, “the Secretary “shall . . . establish and operate such Exchange within the State and the Secretary shall take such actions as are necessary to implement such other requirements.” Id. See also Burwell, 759 F.3d at 364.

The government might be hesitant to argue that this lawsuit is premised on an error in how the law was drafted because it’s possible that the court would
In May 2012, the IRS interpreted the ACA to require IRS promulgation of regulations granting tax credits to individuals who purchase health insurance on both state-run and federally-facilitated Exchanges. Subsequent to the ACA’s enactment in 2010, thirty-four states, including Virginia, did not create Exchanges and relied on federally established and operated Exchanges. Virginia resident David King (“King”) did not want to purchase comprehensive coverage. He was eligible for a subsidy that reduced the cost of policies available to him on the federal Exchange, which would subsequently trigger the law’s minimum coverage penalty. King filed a complaint against Sylvia Burwell, in her official capacity as Secretary of HHS, challenging the IRS rule on the ground that the statutory language of the ACA precluded the interpretation of the text of the law — even if that text is flawed and contrary to Congress’s original intent — so, framing it as an “error” could result in losing the suit.

Id. See also Mark J. Oleszek & Walter J. Oleszek, Legislative Sausage-Making: Health Care Reform in the 111th Congress, in PARTY AND PROCEDURE IN THE UNITED STATES CONGRESS 253, 254 (Jacob R. Straus ed., 2012) (noting debate over health care was contentious from the legislation’s inception); Rovner, supra note 11. According to Nicholas Bagley, a law professor at the University of Michigan, many state legislatures “are full of new members after the mid-term elections who specifically campaigned against the ACA.” Rovner, supra note 11 (internal quotation marks omitted). See generally John Cannan, A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History, 105 LAW LIBR. J. 131, 136-68 (2013) (describing complicated legislative history of the ACA).


15 See Burwell, 759 F.3d at 364-65.


17 See id. David King, who turned sixty-three on January 1, 2014, had a $39,000 projected household income for 2014. Id. King was ineligible for government or employer-sponsored insurance, so the most affordable coverage for him was the cheapest bronze coverage available on the federal Exchange in Virginia. Id. Because the cheapest bronze would be more than eight percent of King’s 2014 projected household income, he would, absent a subsidy, be eligible for a certified exemption from the Minimum Coverage Provision penalty for 2014. Id. King was joined by three other plaintiffs with similar circumstances, Douglas Hurst, Brenda Levy, and Rose Luck, who also did not agree with the minimum coverage provision of the ACA. Id. at 420-21.
that credits are also available on federal Exchanges. The complaint further alleged that the IRS rule was arbitrary and capricious and that it exceeded the agency's statutory authority.

The district court held that the agency's interpretation survived scrutiny under the Supreme Court's two-step *Chevron* analysis because when read in context, the statute clearly evinced Congress's intent to make the tax credits available nationwide. Therefore, the district court granted Secretary Burwell's motion to dismiss King's complaint. The Fourth Circuit Court of Appeals ("Fourth Circuit") affirmed the district court's decision to defer to the IRS's determination and upheld the rule as a permissible exercise of the Agency's discretion. On November 7, 2014, the Supreme Court granted certiorari in *King v. Burwell*.

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18 *Burwell*, 759 F.3d at 365. The plaintiffs essentially argued that the inclusion of the word "state" meant the exclusion of "federal." *Id.* at 368. See also *Ex parte Young*, 209 U.S. 123 (1908) (allowing federal suits against officials acting on behalf of states despite guarantee of sovereign immunity). See generally 26 U.S.C. § 36B(b)(2)(A) (2014). This section describes how to calculate the amount of the premium tax credits for a taxpayer "enrolled in through an Exchange established by the State under 1311 of the [ACA]." *Id.* But see *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 676 (D.C. Cir. 1973). The D.C. Circuit reasoned that the statutory construction known as "*expressio unius est exclusio alterius*," meaning, "the express mention of one thing excludes all others," thereby "stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen." *Id.*

19 *Burwell*, 759 F.3d at 365. *Id.* at 365; *Sebelius*, 997 F. Supp. 2d at 431; *Chevron*, 467 U.S. at 842.

20 *Sebelius*, 997 F. Supp. 2d at 432.

21 See *Burwell*, 759 F.3d at 363.

22 See *Burwell*, 759 F.3d at 365.


The easiest fix — changing the law to specify that it allows subsidies for
scheduled for March 4, 2015, with a decision to be released before the end of the Court's term in July 2015.24

As a basic principle of administrative law, courts apply the two-step framework set forth by the Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, coverage purchased through the federal government as well as state exchanges — would mean reopening the debate in Congress.

But Republican leaders — fresh over their Tuesday election victories — now have control of the legislative branch, and vow to revisit key parts of the law, and may be in little mood to compromise with Obama and Democrats.

_Id._ See also Rovner, _supra_ note 11 (discussing Supreme Court’s decision as to whether tax credits are limited to state Exchanges). The author discussed the consequences of a decision to strip away the availability of tax credits on federal Exchanges:

The immediate impact is that the Internal Revenue Service would stop paying subsidies to those persons otherwise eligible to use them in the 34 States within federally run exchanges. In 2014, more than 4.6 million people were getting those subsidies but the number may grow to as many as 13.4 million by 2016 . . . Most of those who lose subsidies would no longer be required by the “individual mandate” to have insurance, because they would fall into an exemption in the law for those who have to pay more than 8 percent of family income for health insurance.

_Id._ See _supra_ note 8 (discussing interlocking nature of individual mandate and premium tax subsidies, essential for ACA function).

Inc. to determine whether an agency's construction of a statute is permissive.\textsuperscript{25} \textit{Chevron}'s first step requires courts to consider whether Congress has spoken directly to the precise question at issue.\textsuperscript{26} If so, the court, as well as the agency, must follow the unambiguously expressed intent.\textsuperscript{27} In determining whether Congress has clearly expressed its intent, courts must employ all the traditional tools of statutory construction.\textsuperscript{28} In a line of cases refining the \textit{Chevron} test, the Supreme Court made clear

\textsuperscript{25} \textit{Chevron}, U.S.A., Inc. v. NRDC Inc., 467 U.S. 837, 842 (1984). \textit{See} Greenhouse, \textit{supra} note 23 (noting that \textit{Chevron} is among the most often invoked Supreme Court decisions of all time).

\textsuperscript{26} \textit{Chevron}, 467 U.S. at 842.

\textsuperscript{27} \textit{Chevron}, 467 U.S. at 842-43. \textit{See also} LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 302 (2nd ed. Carolina Academic Press 2013). In \textit{Chevron}, the Court rationalized deference to an agency's interpretation by suggesting that when Congress enacts gaps and creates ambiguities, Congress implicitly intends to delegate interpretive authority to the agency. \textit{Id.} Ambiguity means that there is more than one equally plausible meaning. \textit{Id.} at 89. A broader definition of ambiguity allows judges to review extra-textual evidence of meaning more readily, while a narrower definition constrains judicial review of such evidence. \textit{Id.} \textit{See}, e.g., Grapevine Imports, Ltd. v. United States, 636 F.3d 1368, 1377 (Fed. Cir. 2011). The court noted, "[t]he objective of \textit{Chevron} step one is not to interpret and apply the statute to resolve a claim, but to determine whether Congress's intent in enacting it was so clear as to foreclose any other interpretation." \textit{Id. See also} Nat'l R.R. Passenger Corp. v. Atchison, T. & S. F. R. Co., 470 U.S. 451, 475-79 (1985). Shortly after the \textit{Chevron} decision, the Supreme Court clarified that a statute is ambiguous only if the disputed language is "reasonably susceptible of different interpretations." \textit{Id.}

that a reviewing court should not confine its analysis to examining a particular statutory
provision in isolation. The Supreme Court recently reiterated this principle, making it
clear that even when a statute is not a masterpiece of "legislative draftsmanship," courts
must bear in mind that the "words of a statute must be read in their context and with a
view to their place in the overall statutory scheme." 

If a contextual reading of a statute renders it susceptible to multiple
interpretations, a court then moves to Chevron's second step. Under the second step, a
court defers to the agency's interpretation so long as it is not "arbitrary, capricious, or
manifestly contrary to the statute." Expounding on Chevron step-two, the Supreme
Court held that when an agency interprets ambiguities in a statute, it is reasonable for
surrounding text, to the statute's history, to legal traditions, to precedent, to the statute's
purposes, and to its consequences evaluated in light of those purposes." Id. "I find the last
two—purposes and consequences—most helpful." Id.

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on text alone could misinterpret an ambiguity in order to substitute his own
subjective policy view for those of Congress. A court that looks to purposes is
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See Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2563 (2013) (reasoning ambiguity of certain
words may only become evident when placed in context); Nat'l Ass'n of Home Builders v.
Defenders of Wildlife 551 U.S. 644, 666 (2007) (emphasizing statutory construction as holistic
defavor that must be interpreted as coherent regulatory scheme). See also Maracic v. Spears,
133 S. Ct. 2191, 2203 (2013). "In expounding a statute, [a court] must not be guided by a single
sentence, but look to the provisions of the whole law, and to its object and policy." Id. But see
drafted legislation in effort to avoid apparent anomalies within statute). See generally Breyer, supra
note 28, at 101.

interpretation "with a view to their place in the overall statutory scheme"). See United States v.
Irvine, 511 U.S. 224, 238 (1994). "Revenue laws are to be construed in the light of their general
purpose to establish a nationwide scheme of taxation uniform in its application." Id. See also
Cannan, supra note 13, at 171. Context, while always helpful in parsing through legislative
material, now plays an even more important role because more legislating may be taking place
away from committee meetings and chamber floors. Id.

See Chevron, 467 U.S. at 842-43.

Id. at 844. A construction meets this standard if it represents a reasonable accommodation of
conflicting policies that were committed to the agency's care by the statute. Id. at 844-45. See
Philip Morris USA, Inc. v. Vilsack, 736 F.3d 284, 289 (4th Cir. 2013) (affirming agency's
interpretive authority if not "arbitrary, capricious, or manifestly contrary to the statute"); Nat'l
Elec. Mfrs. Ass'n, 654 F.3d at 505 (explaining presumption in favor of agency action valid if
construction is a reasonable policy choice); Ohio Valley Envt'l Coal. v. Aracoma Coal Co., 556
F.3d 177, 192 (4th Cir. 2009) (stating that arbitrary interpretations will be set aside law).
that agency to consider policy arguments that are rationally related to the statute's goals. Furthermore, an agency's construction of an ambiguous statute may be considered permissive even if the reviewing court would not adopt the agency construction as the "best" interpretation. The Supreme Court has also established that courts have an obligation to avoid adopting statutory constructions that yield absurd results. Under this principle, courts will not give effect to a statute's literal meaning when doing so would render the statute absurd or "create an outcome so contrary to perceived social values that Congress could not have intended it." 

33 See Vill. of Barrington v. Surface Transp. Bd., 636 F.3d 650, 666 (D.C. Cir. 2011) (reasoning agencies may consider policy arguments that are "rationally related to the [statute's] goals"); Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1287 (D.C. Cir. 2000) (noting agencies are free to make policy choices in interpreting the statute). See also Chevron, 467 U.S. at 842-43 (reasoning when Congress explicitly leaves gap for an agency to fill, the agency's interpretation controls).

34 See Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (interpreting Chevron to require courts to accept agency's construction, even if different from court's interpretation); Chevron, 467 U.S. at 843.

35 See, e.g., Clinton v. City of New York, 524 U.S. 417, 429 (1998) (accepting new reading of § 692 produces "unjust result which Congress could not have intended"); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 454-55 (1989) (advising courts "to remember that statutes always have some purpose or object to accomplish"); Jackson v. Lykes Bros. S.S. Co., 386 U.S. 731, 735 (1967) (holding that Congress did not intend absurd or unjust results when it passed the law); United States v. Brown, 333 U.S. 18, 27 (1948) (reasoning that no rule of construction requires acceptance of an interpretation resulting in absurd consequences); Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 333 (1938) (noting an established judicial obligation to construe statutes so as to avoid glaringly absurd results); Sorrells v. United States, 287 U.S. 435, 447-49 (1932) (reasoning "all laws should receive a sensible construction"); United States v. Katz, 271 U.S. 354, 362 (1926) (advising courts to avoid literal applications of a statute that would lead to extreme or absurd results); Hawaii v. Mankichi, 190 U.S. 197, 213-14 (1903) (presuming that the legislature intended exceptions to its language, which would avoid absurd interpretations); Church of the Holy Trinity v. United States, 143 U.S. 457, 472 (1892) (however broad, the language is "not within the intention of the legislature"); JELLUM, supra note 27, at 90-93.

A judge has a choice: interpret the statute pursuant to its ordinary meaning and make the legislature correct any unintended absurdity or interpret the statute in a way that eliminates or at least diminishes the absurdity. Unfortunately absurdity, like ambiguity is not consistently defined in the jurisprudence. Because the doctrine allows judges to avoid the ordinary meaning of a statute and look extra-textually for meaning, some suggest the doctrine allows judges to cross the border from interpreting law to making law.

Id. at 93.

36 E.g., United States v. Cook, 594 F.3d 883, 891 (D.C. Cir. 2010). A statutory outcome is absurd if it creates "an outcome so contrary to perceived social values that Congress could not have intended it." Id.
Federal appeals courts have issued conflicting rulings on whether the IRS rule, which extends tax credit subsidies to federal exchanges, would survive *Chevron* deference.³⁷ In a prominent circuit case, *Halbig v. Burwell*,³⁸ a panel for the Court of Appeals of the District of Columbia ("D.C. Circuit") held that Section 36B unambiguously foreclosed the interpretation embodied in the IRS Rule and instead limited the availability of premium tax credits to state-established Exchanges.³⁹ Using the Supreme Court’s guidance on *Chevron* step-one, the D.C. Circuit analyzed the text of Section 36B and concluded that the statute distinguishes Exchanges established by states from those established by the federal government.⁴⁰ Turning to the ACA’s purpose and legislative history, the *Halbig* court remained unconvinced that Congress clearly intended

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³⁷ *See Oklahoma ex rel. Pruitt v. Burwell, No. CIV-11-30-RAW, 2014 U.S. Dist. LEXIS 139501, at *1 (E.D. Okla. Sept. 30, 2014).* The U.S. District Court for the Eastern District of Oklahoma held that the plain text of the ACA does not allow for the provision of subsidies to individuals purchasing health coverage through a federally-facilitated exchange. *Id.* at *27. *See also* Lyle Denniston, *Oklahoma Seeks Faster Health Care Appeal*, SCOTUSBLOG (Nov. 22, 2014, 8:03 AM), http://www.scotusblog.com/2014/11/oklahoma-seeks-faster-health-care-appeal/. Following a request by the Obama administration, Oklahoma’s case is now on hold at the United States Court of Appeals for the Tenth Circuit, while the Justices review the *Burwell* case. *Id.* But Oklahoma’s attorney general, Scott Pruitt, sought to bypass the Tenth Circuit, while the Justices review the *Burwell* case, with a new petition for expedited review. *Id.* *See also* Indiana v. IRS, 2014 U.S. Dist. LEXIS 111068, *1* (S.D. Ind. Aug. 12, 2014). Indiana and thirty-nine of its public school districts argued that the IRS rule directly injures the state and school districts in their capacities as employers by subjecting them to increased compliance costs and administrative burdens. *Id.* at *4.* Oral argument on the merits took place October 9, 2014. *Id.* at *42.* But see Jonathan H. Adler, *Will the Supreme Court Grant Certiorari in King v. Burwell?* THE WASHINGTON POST (Nov. 3, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/03/will-the-supreme-court-grant-certiorari-in-king-v-burwell/. On the same day the Fourth Circuit upheld the IRS rule, the D.C. Circuit reached the opposite result in *Halbig v. Burwell*, concluding that the IRS rule was illegal and that it contradicted the plain text of the ACA. *Id.* While these two opinions are in conflict, the D.C. Circuit vacated the initial panel’s judgment so there are no conflicting appellate court judgments. *Id.*

³⁸ *Halbig v. Burwell, 758 F.3d 390 (D.C. Cir. 2014).*

³⁹ *See id. at 412. See also* Julie Rovner, *If High Court Strikes Federal Exchange Subsidies, Health Law Could Unravel,* KAISER HEALTH NEWS (Dec. 2, 2014), http://kaiserhealthnews.org/news/if-high-court-strikes-federal-exchange-subsidies-health-law-could-unravel/). "Legal scholars say a decision like that would deal a potentially lethal blow to the law because it would undermine the government-run insurance marketplaces that are its backbone, as well as the mandate requiring most Americans to carry coverage." *Id.*

⁴⁰ *See* *Halbig, 758 F.3d at 398-99.* The court rejected the government’s argument that sections 1311 and 1321 of the Act establish complete equivalence between state and federal Exchanges, such that when the federal government establishes an Exchange, it does so standing in the state’s shoes. *Id.* at 399.
something other than the literal reading of Section 36B. The D.C. Circuit reasoned that such construction does not render other provisions of the ACA unworkable, let alone so unreasonable as to justify disregarding Section 36B’s plain meaning. On September 4, 2014, however, the D.C. Circuit vacated its decision and agreed to rehear the appeal en banc, but it subsequently stayed further action in light of the Supreme Court’s decision to review *King v. Burwell*.

In *King v. Burwell*, the Fourth Circuit applied the *Chevron* deference test to determine whether the IRS acted appropriately in promulgating regulations that granted tax credits for health insurance purchased on both state-run and federally established Exchanges. The court began its analysis under *Chevron* step-one, focusing on the text and legislative history of the ACA. The court reasoned that when ACA sections 1311 and 1321 are “read in tandem with 26 U.S.C. § 36B,” the statute could be understood to require the federal government to act on behalf of a state to establish an Exchange.

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41 See *id*. The court reasoned that “[n]othing in section 1321 deems federally-established Exchanges to be “Exchange[s] established by the State.” *Id.* at 400. The court found this omission particularly significant since it reasoned that “Congress knew how to provide that a non-state entity should be treated as if it were a state when it sets up an Exchange.” *Id.*

42 *Id.* at 402. Despite the government’s arguments that a construction of the statute precluding premium tax credits on federally-established Exchanges would generate absurd results, the court reasoned that a given construction must cross a “high threshold” of unreasonableness before it could conclude that a statute does not mean what it says. *Halbig*, 758 F.3d at 402. A provision thus “may seem odd” without being “absurd” and in such instances “it is up to Congress rather than the courts to fix it,” even if it “may have been an unintentional drafting gap.” *Id.* See also *United States v. Cook*, 594 F.3d 883, 891 (D.C. Cir. 2010) (imposing “high threshold” when determining whether statutory construction is “absurd”); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005) (explaining Congressional responsibility to fix “unintentional drafting gaps”). See also *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) (reasoning court’s role is not to “correct” statutory text so to better serve statute’s purposes). But see *Rovner*, supra note 11 (discussing absurd consequences if *Halbig* ruling were to stand).


45 See *King*, 759 F.3d at 368-69.

46 See *id*.
The court acknowledged that the plaintiffs had a plausible interpretation of the statute because if Congress meant to make premium tax subsidies available on federally run Exchanges, Congress should not have chosen the word "state" or referenced section 1311. The Fourth Circuit, however, concluded that the statute was ambiguous because the Fourth Circuit reasoned that the plaintiffs and defendants presented equally plausible interpretations.

The court then continued its analysis under Chevron's highly deferential second step and reasoned that the IRS interpretation was "not arbitrary, capricious or contrary to law." In reaching that conclusion, the court considered policy arguments, noting that when the ACA was drafted and passed, Congress understood that premium tax credits were an essential component of the law. The court also noted that the IRS rule helped achieve the ACA's goal of increasing the number of Americans covered by health insurance because the rule ensured that premium tax credits would be widely available to help consumers afford policies. The court then reasoned that with only sixteen state-run Exchanges in place, the economic framework supporting the Act would fail if the credits were unavailable on federal Exchanges. Furthermore, the court reasoned that giving effect to the statute's literal meaning would leave millions of individuals without access to affordable health insurance. After considering the relevant statutory language, the context of related provisions, the legislative history and the purposes of the Act, the Fourth Circuit deferred to the Agency's action because it found that the IRS crafted a rule that would further the ACA's goals.

47 Id. at 368. The court described the plaintiff's reasoning that if Congress intended to make credits available to consumers on state and federal levels it would have been easy to write in broader language. Id. at 369.
48 Id.
49 Id. at 372-73. See supra note 27 and accompanying text (discussing presumption of finding agency action valid under Chevron's second step).
50 See supra note 9 and accompanying text (discussing importance of premium tax credits and noting Congress was aware credits essential to ACA).
51 See King, 759 F.3d at 375; supra note 8 and accompanying text (highlighting tax credits as the centerpiece of the ACA). See also Breyer, supra note 28, at 88-105 (explaining why justices should consider consequences of particular interpretation, evaluated in light of statutory purposes).
52 See King, 759 F.3d at 375; CBO Analysis of Health Insurance Premiums, supra note 9 (describing necessity of tax credits for approximately 78% of people purchasing their own coverage); supra note 12 and accompanying text (detailing legal process for federal government to set up exchange if state fails to establish); supra note 14 and accompanying text (noting the small number of state exchanges in operation).
53 King, 759 F.3d at 375. See also supra note 36 and text accompanying note 35 (discussing the absurdity doctrine).
54 See King, 759 F.3d at 375; supra note 9 and accompanying text (discussing ACA's goal of making
Notwithstanding the Supreme Court’s decision to grant certiorari, the Fourth Circuit’s holding in King v. Burwell was justified under Chevron deference. In determining whether the statute was ambiguous, the court’s analysis hinged on deciding which cannons of statutory construction it would apply. Accordingly, the court understood that certain methods of statutory interpretation should yield when there is evidence that the drafter did not intend for a particular cannon to apply to a specific situation. This reasoning led the court to dismiss King’s argument that the legislature intentionally used the words “state exchange” instead of “federal exchange” because the court recognized that Congress never intended to withhold tax credits from federal Exchanges. Yet the court correctly reasoned that since there was more than one plausible reading of the challenged phrase in section 36B, the statute was ambiguous under Chevron’s first step.

Continuing its analysis under Chevron’s second step, the Fourth Circuit properly focused on the legislative history and policy arguments to interpret the ambiguity in ACA sections 1311 and 1321. Since making tax credits widely available was essential to fulfilling the ACA’s primary goals, the court correctly held that the IRS regulation was a permissive interpretation of the statute. While a simple technical correction bill would resolve any ambiguous text, that solution remains politically impossible due to the contentious political debate over the ACA. The circumstances under which the legislation was drafted therefore appropriately informed the Fourth Circuit’s decision to

55 See supra note 14 and accompanying text (explaining that Act gives IRS authority to resolve ambiguities in relevant ACA provisions).
56 See supra note 5 (explaining that court must decide whether statutory words are sole guide to law’s function).
57 See JELLUM supra note 27, at 141 (arguing certain methods of statutory interpretation should yield when contradictory to drafter’s intent).
58 See King, 759 F.3d at 368. The court considered whether plaintiffs’ textual argument that the phrase “established by the State under [42 U.S.C. § 18031],” in the provision about how to calculate the amount of the credit, meant that Congress intended that premium tax credits would not be available on federally-run Exchanges. Id. at 368-69.
59 See supra notes 27-28 and accompanying text (discussing how courts determine whether a statute is ambiguous).
60 See supra notes 9, 11-12 and accompanying text (laying out purposes of Act, including importance of premium tax credits).
61 See supra note 9 and accompanying text (discussing legislative intent and important role of premium tax credits).
62 See supra note 13 and accompanying text (describing contentious political debate over ACA’s enactment and ad hoc procedures used in drafting).
rely mostly on context and policy when interpreting the statute.\textsuperscript{63}

Since the Supreme Court granted certiorari, many journalists and legal scholars speculated about the justices' motivation to assert jurisdiction.\textsuperscript{64} In anticipation of the decision, some legal scholars predicted that Justices Scalia, Kennedy, Thomas and Alito — the four justices who dissented in \textit{Sebelius v. National Federation of Independent Business} — would favor the plaintiffs' plain-text argument, finding the credits not available on federal Exchanges.\textsuperscript{65} On the other hand, the justices should recognize that a literal reading of 26 U.S.C. Section 36B essentially renders the ACA ineffective because the law's structural integrity relies on the availability of premium tax credits.\textsuperscript{66} In light of the ACA's overall structure, the Supreme Court's analysis ought to give significant weight to the purpose and intent of the law.\textsuperscript{68} Furthermore, the Supreme Court should allow the Fourth Circuit's ruling to stand because the IRS regulation survives \textit{Chevron} deference as a permissive agency action.\textsuperscript{69}

In \textit{King v. Burwell}, the United States Court of Appeals for the Fourth Circuit considered whether the IRS could permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government under section 1321 of the ACA.\textsuperscript{70} The court reasoned that the cross-referenced sections, the surrounding provisions, and the ACA's structure and purpose all evinced Congress's intent to make premium tax credits available on both state-run

\textsuperscript{63} \textit{See supra} note 13 and accompanying text (noting the political circumstances under which ACA was drafted); \textit{supra} note 28 and accompanying text (describing the importance of context).

\textsuperscript{64} \textit{See supra} notes 23-24 (questioning why Supreme Court of United States would have granted certiorari without a circuit split).

\textsuperscript{65} \textit{See Fairfield}, \textit{supra} note 24 (explaining breakdown of liberal and conservative justices); Rubin, \textit{supra} note 23 (suggesting four justices voting to invalidate ACA in NFIB v. Sebelius voted to grant certiorari); Wolf, \textit{supra} note 24 (predicting dissenting justices in NFIB v. Sebelius would likely strike down agency action).

\textsuperscript{66} \textit{See supra} note 25 (describing use of textual cannons of constructions); Bravin, \textit{supra} note 24 (discussing which justices would uphold IRS rule, but omitting prediction of how Chief Justice Roberts would rule).

\textsuperscript{67} \textit{See supra} note 8 (discussing importance of tax credits in accomplishing the goals of ACA).

\textsuperscript{68} \textit{See supra} note 8 (noting congressional findings regarding necessity of tax credits and individual mandate); \textit{supra} note 34 (advising courts to remember statutes always have some purpose or objective to accomplish); \textit{supra} note 29 (statutory words must be read in view of their place in overall statutory scheme).

\textsuperscript{69} \textit{See supra} note 53 and accompanying text (reasoning IRS rule survived \textit{Chevron} deference).

\textsuperscript{70} \textit{King}, 759 F.3d at 365.
and federally-facilitated Exchanges.71 Since there was more than one plausible reading of the challenged statutory phrase, the court's analysis under Chevron step-two was justified, and the court correctly concluded that the IRS regulation was a permissive interpretation of the ACA.72

71 See id. at 375.
72 See id. See also supra note 8 and accompanying text (discussing ACA's goal of making premium tax credits widely available).