

Senator Cruz Questions for the Record for
Michael F. Cannon, Director of Health Policy Studies at the Cato Institute
Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts
“Rewriting the Law: Examining the Process That Led to the ObamaCare Subsidy Rule”
Thursday, June 4, 2015

I. Potential Economic Savings under Proper Statutory Construction

1. If the Supreme Court strikes down the availability of premium tax credits via federal government-run health insurance exchanges, please explain how it will affect:

a. Federal spending generally.

As you are aware, the Patient Protection and Affordable Care Act (ACA) authorizes refundable “premium assistance tax credits” to certain taxpayers who enroll in coverage “through an Exchange established by the State,”¹ much as it conditioned the renewal of Exchange start-up grants on states taking steps to establish Exchanges and implement other parts of the law,² and conditioned continued federal Medicaid grants on states expanding Medicaid eligibility.³ The Exchange subsidies trigger tax penalties under the ACA’s individual mandate and employer mandate. The plaintiffs in *King v. Burwell* challenged an Internal Revenue Service regulation implementing those taxes and subsidies in the 38 states that refused or otherwise failed to establish Exchanges.

In a 6-3 ruling issued on June 25, 2015, the Supreme Court held the IRS did not have the authority to issue the challenged regulation. Instead, the Court itself interpreted the ACA not only to permit, but to require the IRS to issue “premium assistance tax credits” in states that failed to establish Exchanges.⁴ The Court’s ruling expanded the reach of the ACA’s individual and employer mandates beyond what the Court acknowledged the plain meaning of the operative text allowed. As a result, *King v. Burwell* is subjecting to taxation as many as 100 million individuals and employers whom Congress had expressly exempted.⁵

The finality of the Court’s ruling in *King v. Burwell* does not make that ruling any less incorrect. Jonathan Adler and I examine the flaws in the *King* ruling in the attached article.⁶

Impact of *King v. Burwell* Ruling on Federal Spending

King v. Burwell had an even more dramatic impact on federal spending than most observers or even the Supreme Court knew. The Court’s ruling expanded the availability of Exchange subsidies by authorizing the IRS to implement them in states with federal Exchanges. All sides acknowledged that the federal government had established Exchanges in 34 to 38 states that had failed to establish Exchanges themselves. That would suggest that some \$600 billion (i.e., roughly two-thirds) of the total \$925 billion the federal government will spend on Exchange subsidies from 2015 through 2026 is due entirely to *King*.⁷

In fact, *King* is responsible for all \$925 billion of that spending, because no states took the steps necessary to avoid a federal Exchange. As I have explained elsewhere:

Yet another feature of the ACA, one never raised before any court, is that, in effect, Congress also required the federal government to establish exchanges in all 50 states. Just as the ACA directs the secretary of HHS to establish exchanges in states that fail to establish their own, it also directs her to establish exchanges in states that fail to establish a reinsurance program. Or a risk-adjustment program. Or that fail to implement the ACA's numerous health-insurance regulations.

Indeed, if a state "fail[s]" to "elect" to implement *any* of these "requirements," Congress left the secretary no discretion: "the Secretary shall ... establish and operate such Exchange ... and ... implement such other requirements." Since the most natural reading of the pertinent statutory phrase is that a federal exchange means no subsidies, the ACA as written thus conditions subsidies on the states' implementing each of those requirements...

And as it happens, not a single state elected to meet those requirements. Only Connecticut elected to establish a reinsurance program. Only Massachusetts elected to establish a risk-adjustment program. No state elected to establish both. The ACA, as enacted by Congress, therefore leaves the HHS secretary no discretion. She must establish exchanges in *all* states. That means that premium subsidies are not authorized in *any* state.⁸

The *King* challengers and their amici strategically chose not to highlight this feature of the ACA, though they did allude to it in briefs.⁹ They feared (presciently, as it turns out) that the Court would be even more reluctant to rule against the government if doing so would end Exchange subsidies in all 50 states, as opposed to just 38 states.

b. The employer mandate within states that have opted not to create their own exchanges.

Since the ACA as written requires the Secretary of Health and Human Services to establish Exchanges in all 50 states, and thereby withholds Exchange subsidies in all 50 states, it also exempts employers in all 50 states from the employer mandate, and further exempts roughly 100 million individual workers and taxpayers from the employer mandate and/or the individual mandate. *King v. Burwell* imposed those taxes on those individuals and employers without congressional authorization—indeed, despite the fact that Congress exempted them. As I have written elsewhere:

Had the justices simply upheld the ACA as Congress wrote it, they would have immediately freed 70 million Americans in 34 states from unauthorized taxes, and enabled 30 million Americans in the remaining 16 states (California, New York, etc.) to sue for similar relief — if Congress didn't provide relief first, which is both likely and how democracy is supposed to work. Instead, the Court allowed the IRS to continue

implementing a *nationwide* system of taxes and entitlements in direct conflict with the words Congress chose to govern the question presented.

Now, 100 million Americans are living under taxes no Congress ever authorized, that no Congress had the votes to authorize, and that Congress allowed only if their states met certain requirements. Millions of taxpayers nationwide are buying unwanted coverage or paying penalties under the individual mandate, even though “the most natural reading of the pertinent statutory phrase” exempts them. Every employer who pays a penalty for failing to offer minimum affordable coverage is paying a tax from which Congress exempted them. In effect, so are the millions of workers who lose income when employers take steps to avoid those penalties.¹⁰

The total burden of these never-legislated taxes will approach \$200 billion by 2025.¹¹

c. The economies of states that have opted not to create their own exchanges.

As a result, *King v. Burwell* damaged the economies of all states by imposing taxes that require individuals to divert income toward tax penalties and away from more highly valued uses, and imposed a tax on job creation that has reduced job growth from what it otherwise would have been.¹²

II. General Question

2. Are there any other points or issues that were not explored (or sufficiently explored) during the hearing that you would like to bring to the Subcommittee’s attention?

For a fuller critique of the *King v. Burwell* ruling, I commend to the Subcommittee the attached article I coauthored with Prof. Jonathan Adler.¹³

¹ PPACA § 1401(c)(2)(A)(i); 26 U.S.C. § 36B(c)(2)(A)(i).

² 42 U.S.C. § 18031(a).

³ But see *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

⁴ *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), http://www.supremecourt.gov/opinions/14pdf/14-114_q011.pdf.

⁵ See Michael F. Cannon, “Benefits Of ‘King v. Burwell’: More Jobs, Higher Incomes & 70 Million Freed From Illegal Taxes,” *Forbes.com*, June 24, 2015, <http://www.forbes.com/sites/michaelcannon/2015/06/24/benefits-of-king-v-burwell-more-jobs-higher-incomes-70-million-freed-from-illegal-taxes/>; and Michael F. Cannon, “King v. Burwell Expanded Obamacare Even More Than You Know,” *National Review Online*, July 29, 2015, <http://www.nationalreview.com/article/421723/king-v-burwell-expanded-obamacare-even-more-you-know-michael-cannon>.

⁶ Jonathan H. Adler and Michael F. Cannon, “*King v. Burwell* and the Triumph of Selective Contextualism,” *Cato Supreme Court Review: 2014-2015* (Ilya Shapiro, ed.), October 1, 2015,

<http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2015/9/2015-supreme-court-review-chapter-2.pdf>.

⁷ See U.S. Congressional Budget Office, *The Budget And Economic Outlook: 2016 To 2026*, January, 2016, p. 182, https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51129-2016Outlook_OneCol-2.pdf.

⁸ Michael F. Cannon, “King v. Burwell Expanded Obamacare Even More Than You Know,” *National Review Online*, July 29, 2015, <http://www.nationalreview.com/article/421723/king-v-burwell-expanded-obamacare-even-more-you-know-michael-cannon> (emphasis in original).

⁹ Brief of Amici Curiae Jonathan H. Adler and Michael F. Cannon, *King v. Burwell*, No. 14-114 (U.S. Dec. 29, 2014), at 17-19, http://object.cato.org/sites/cato.org/files/pubs/pdf/jonathan_h_adler_and_michael_f_cannon_-_brief_1.pdf (“Non-compliance with the requirements detailed in Section 1321(c)” —which go beyond the requirement to establish an Exchange—“*automatically* triggers the federal government’s obligation to establish an Exchange, rendering state residents ineligible for tax credits. Section 1321 is thus the linchpin of a carefully worded statutory scheme that gives states a choice between implementing various provisions of the Act or forgoing tax credits.” Emphasis in original.).

¹⁰ Michael F. Cannon, “King v. Burwell Expanded Obamacare Even More Than You Know,” *National Review Online*, July 29, 2015, <http://www.nationalreview.com/article/421723/king-v-burwell-expanded-obamacare-even-more-you-know-michael-cannon> (emphasis in original). See also Michael F. Cannon, “Benefits Of 'King v. Burwell': More Jobs, Higher Incomes & 70 Million Freed From Illegal Taxes,” *Forbes.com*, June 24, 2015, <http://www.forbes.com/sites/michaelcannon/2015/06/24/benefits-of-king-v-burwell-more-jobs-higher-incomes-70-million-freed-from-illegal-taxes/>.

¹¹ The CBO estimates that from 2016 through 2015, individual mandate penalties will total \$43 billion, while employer-mandate penalties will total roughly \$167 billion. While the plain meaning of the ACA would exempt all employers from penalties, an unknown number of individual taxpayers would still subject to penalties under the individual mandate. U.S. Congressional Budget Office, *Insurance Coverage Provisions of the Affordable Care Act—CBO’s March 2015 Baseline*, March 9, 2015, <https://www.cbo.gov/sites/default/files/cbofiles/attachments/43900-2015-03-ACAtables.pdf>, p. 2.

¹² See Michael F. Cannon, “Obamacare Is Destroying Jobs--And Here's The Evidence,” *Forbes.com*, Feb 4, 2016, <http://www.forbes.com/sites/michaelcannon/2016/02/04/obamacare-is-destroying-jobs-and-heres-the-evidence/>; and Michael F. Cannon, “Clean Up Your Act, PolitiFact: Why Ted Cruz Was Right On Obamacare And Jobs,” *Forbes.com*, Feb 4, 2016, <http://www.forbes.com/sites/michaelcannon/2016/02/04/clean-up-your-act-politifact-why-ted-cruz-was-right-on-obamacare-jobs/>.

¹³ Jonathan H. Adler and Michael F. Cannon, “*King v. Burwell* and the Triumph of Selective Contextualism,” *Cato Supreme Court Review: 2014-2015* (Ilya Shapiro, ed.), October 1, 2015, <http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2015/9/2015-supreme-court-review-chapter-2.pdf>.

Question for the Record from Sen. Vitter

June 4, 2015, Hearing of the Senate Judiciary Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts

Ms. Wydra and Mr. Weiner invoked Principles of Interpretation, particularly the Presumption Against Ineffectiveness and the Presumption Against Absurdity, in their justifications for the IRS rule subsidizing coverage for individuals from States that opted not to create exchanges. Do you think these principles are applicable in this circumstance? Why or why not?

As you are aware, the Patient Protection and Affordable Care Act (ACA) authorizes refundable “premium assistance tax credits” to certain taxpayers who enroll in coverage “through an Exchange established by the State,”¹ much as it conditioned the renewal of Exchange start-up grants on states taking steps to establish Exchanges and implement other parts of the law,² and conditioned continued federal Medicaid grants on states expanding Medicaid eligibility.³ The Exchange subsidies trigger tax penalties under the ACA’s individual mandate and employer mandate. The plaintiffs in *King v. Burwell* challenged an Internal Revenue Service regulation implementing those taxes and subsidies in the 38 states that refused or otherwise failed to establish Exchanges.

In a 6-3 ruling issued on June 25, 2015, the Supreme Court held the IRS did not have the authority to issue the challenged regulation. Instead, the Court itself interpreted the ACA not only to permit, but to require the IRS to issue “premium assistance tax credits” in states that failed to establish Exchanges.⁴ The Court’s ruling expanded the reach of the ACA’s individual and employer mandates beyond what the Court acknowledged the plain meaning of the operative text allowed. As a result, *King v. Burwell* is subjecting to taxation as many as 100 million individuals and employers whom Congress had expressly exempted.⁵

The finality of the Court’s ruling in *King v. Burwell* does not make that ruling any less incorrect. Jonathan Adler and I examine the flaws in the *King* ruling in the attached article.⁶

Neither a presumption against ineffectiveness nor the absurd-results doctrine can redeem the *King* ruling or any similar rationale for expanding the reach of the ACA’s mandates and subsidies.

The Presumption Against Ineffectiveness

The presumption against ineffectiveness is an interpretive tool that guides courts in resolving statutory ambiguities. In *King v. Burwell*, the Court misused this presumption by employing it to *create* a supposed ambiguity. Ironically, the Court’s misuse of this presumption itself rendered ineffective both the operative text and the statute’s main tool for advancing Congress’ goal of encouraging states to operate Exchanges.

In matters of statutory interpretation, the Supreme Court holds one canon above all others: when “Congress has directly spoken to the precise question at issue... the court... must

give effect to the unambiguously expressed intent of Congress.”⁷ The Court has elaborated on the primacy of the “plain meaning rule”:

In interpreting a statute a court should always turn first to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there... When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.⁸

In *King v. Burwell*, the majority and the dissenting opinions both found that Congress did in fact speak directly to the question presented, and that the operative language of the statute was clear and unambiguous.

- All nine justices agreed that “the most natural reading of the pertinent statutory phrase”—Chief Justice John Roberts’ euphemism for the operative language of the statute—is that “premium assistance tax credits” are available only “through an Exchange established by the State.”⁹
- All nine justices agreed that Congress even *defined* “State” in a manner “that does not include the Federal Government.”¹⁰

There was no dissent on either of these points. In addition, all nine justices implicitly acknowledged the operative text was the only place where Congress spoke directly to the question presented. Neither the government, nor its amici, nor the Court, presented any evidence, from the Act or its legislative history, where any member of Congress ever indicated they believed or intended the ACA *would* offer tax credits in federal Exchanges.

The presumption against ineffectiveness encourages courts to resolve statutory ambiguities in a manner that advances the statute’s purposes. As such, it is inapplicable in a case such as *King*, where the Court found the operative text is clear. Indeed, it is inapplicable even if that clear operative text would make some other part of the statute ineffective:

When different constructions may be put upon an act, one of which will accomplish the purpose of the legislature, and the other render the act nugatory, the former should be adopted; but when the provisions of the act are such that to make it operative would violate the declared meaning of the legislature, courts should be astute in construing it inoperative.¹¹

The presumption against ineffectiveness must not override unambiguous text, because to do so would shift lawmaking power from the legislature to the judiciary:

Our decision may in this particular case operate to defeat the object of the act, but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the legislature.¹²

Logically, then this presumption comes into play only after a court determines a statute is ambiguous. A court that applies this presumption *before* it identifies a statutory ambiguity is rewriting rather than interpreting the statute.

In determining whether the ACA is ambiguous on the question presented, Roberts reached beyond the operative text and identified provisions that might lose effect under a plain-meaning interpretation of the phrase “established by the State.”¹³ The plain-meaning rule counsels courts to give “established by the State” and all other provisions exactly the effect Congress gave them—no more, no less.¹⁴ Instead, because a plain-meaning interpretation of “established by the State” would give those other provisions less effect than Roberts imagined Congress would want those provisions to have, he concluded, “the Act may not always use the phrase ‘established by the State’ in its most natural sense.”¹⁵ In that manner, Roberts perverted the presumption against ineffectiveness by misusing it to *create* a supposed ambiguity where in fact Congress had spoken clearly and directly to the question presented.

Roberts again misused the presumption against ineffectiveness when he resolved his manufactured ambiguity. Roberts reasoned that Congress intended to authorize the disputed taxes and subsidies because it was “implausible” that Congress would intend the higher premiums and lower rates of insurance coverage that would result without them.¹⁶ Roberts claim of implausibility is itself implausible. As my coauthor Jonathan Adler and I have explained:

One cannot reasonably argue the plain meaning of Section 36B is *implausible* when even the government and its amici concede that the ACA’s authors supported another bill that also could have destroyed health insurance markets in uncooperative states [in exactly the same manner]...One cannot reasonably argue it is *implausible* that Congress would give states the power to ‘destroy’ coverage for 8.5 million *moderate*-income individuals when it is undisputed that Congress gave and continues to give states the power to destroy coverage for 50 million *low*-income individuals.¹⁷

Moreover, Roberts’ interpretation itself rendered part of the ACA ineffective. Under his interpretation, the phrase “established by the State” becomes a nullity with no effect whatsoever. As Roberts acknowledged, his interpretation tosses aside another venerable canon of statutory interpretation, the canon against surplusage.¹⁸ As Associate Justice Antonin Scalia explained in dissent:

saying that an Exchange established by the Federal Government is “established by the State” goes beyond giving words bizarre meanings; it leaves the limiting phrase “by the State” with no operative effect at all. That is a stark violation of the elementary principle that requires an interpreter “to give effect, if possible, to every clause and word of a statute.”¹⁹

Roberts’ interpretation thus also rendered the ACA ineffective at achieving a clear congressional purpose: encouraging states to operate Exchanges.

The presumption against ineffectiveness provides no support for the Court’s position. That is why the Court had to abuse it.

The Absurd Results Doctrine

Similarly, the absurd-results doctrine provides no support for the Court's position, and indeed the Court did not invoke it.

The absurd-results doctrine permits courts to depart from a literal interpretation of a statute if that interpretation would be manifestly absurd. The Supreme Court has explained that demonstrating an absurdity requires more than just showing a literal interpretation would be harmful. It requires "the most extraordinary showing of contrary intentions" (*Garcia v. United States*, 469 U.S. 70, 75 (1984)). As Justice Scalia explained, "an absurd result" is "a consequence so monstrous, that all mankind would, without hesitation, unite in rejecting the application."²⁰

Not only has there not been an extraordinary showing of contrary intentions, there has been no showing of contrary intentions at all. As noted above, *no one* has produced *any* evidence that *any* member of Congress intended the ACA to do anything other than what the operative text indicates. On the contrary, *all* available evidence shows that Congress was quite willing to risk the harmful consequences that might occur from allowing the ACA's community-rating and guaranteed-issue provisions to take effect in federal-Exchange states without subsidies to hide the cost of such coverage.

Such evidence is abundant.²¹ Yet we need look no further than a vote cast by a member of this subcommittee. On September 17, 2009, as a member of the Senate Committee on Health, Education, Labor, and Pensions, Sen. Sheldon Whitehouse (D-RI) voted to approve an early draft of the ACA called the "Affordable Health Choices Act" (S. 1679).²² As the government and its amici conceded, this HELP bill conditioned Exchange subsidies on state cooperation.²³ Sen. Whitehouse and eleven of his colleagues on the HELP Committee therefore approved legislation that *all sides acknowledge* contained the same feature that Chief Justice Roberts, Ms. Wydra, and Mr. Weiner argue it is implausible to think the ACA's authors would have intended.

The ACA's text, context, legislative history, and indeed Sen. Whitehouse's voting record definitively establish there is nothing remotely absurd about offering Exchange subsidies only in cooperative states, and that that is indeed what the ACA's authors intended.

What happened in *King v. Burwell* is simply that those who initially supported the ACA developed buyer's remorse, so they prevailed upon the Supreme Court to rewrite the statute.

¹ PPACA § 1401(c)(2)(A)(i); 26 U.S.C. § 36B(c)(2)(A)(i).

² 42 U.S.C. § 18031(a).

³ But see *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

⁴ *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), http://www.supremecourt.gov/opinions/14pdf/14-114_qoll.pdf.

⁵ See Michael F. Cannon, "Benefits Of 'King v. Burwell': More Jobs, Higher Incomes & 70 Million Freed From Illegal Taxes," *Forbes.com*, June 24, 2015, <http://www.forbes.com/sites/michaelcannon/2015/06/24/benefits-of->

[king-v-burwell-more-jobs-higher-incomes-70-million-freed-from-illegal-taxes/](http://www.nationalreview.com/article/421723/king-v-burwell-expanded-obamacare-even-more-you-know-michael-cannon); and Michael F. Cannon, “King v. Burwell Expanded Obamacare Even More Than You Know,” *National Review Online*, July 29, 2015, <http://www.nationalreview.com/article/421723/king-v-burwell-expanded-obamacare-even-more-you-know-michael-cannon>.

⁶ Jonathan H. Adler and Michael F. Cannon, “King v. Burwell and the Triumph of Selective Contextualism,” *Cato Supreme Court Review: 2014-2015* (Ilya Shapiro, ed.), October 1, 2015, <http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2015/9/2015-supreme-court-review-chapter-2.pdf>.

⁷ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), at 842-43, <https://www.law.cornell.edu/supremecourt/text/467/837>.

⁸ *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992), <http://caselaw.findlaw.com/us-supreme-court/503/249.html>.

⁹ *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), http://www.supremecourt.gov/opinions/14pdf/14-114_qo11.pdf, at 20.

¹⁰ *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), http://www.supremecourt.gov/opinions/14pdf/14-114_qo11.pdf, at 10.

¹¹ *Farmers’ Bank v. Hale*, 59, N.Y. 53, quoted in Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws, with a Chapter on the Interpretation of Judicial Decisions and the Doctrine of Precedents* (The Lawbook Exchange, Ltd., 2011), at 107.

¹² *King v. Barham*, 8 Barn. & C. 99, quoted in Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws, with a Chapter on the Interpretation of Judicial Decisions and the Doctrine of Precedents* (The Lawbook Exchange, Ltd., 2011), at 107.

¹³ *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), http://www.supremecourt.gov/opinions/14pdf/14-114_qo11.pdf, at 10-11 (citing the ACA’s definition of “qualified individuals” at 42 U.S.C. §18032(f)(1)(A)).

¹⁴ For an explanation of why the ACA’s “qualified individuals” provisions are perfectly harmonious with the plain meaning of “established by the State,” see Brief of Amici Curiae Jonathan H. Adler and Michael F. Cannon, *King v. Burwell*, No. 14-114 (U.S. Dec. 29, 2014), at 17-19, http://object.cato.org/sites/cato.org/files/pubs/pdf/jonathan_h_adler_and_michael_f_cannon_-_brief_1.pdf; and *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), (Scalia, J., dissenting) http://www.supremecourt.gov/opinions/14pdf/14-114_qo11.pdf, at 10-11.

¹⁵ *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), http://www.supremecourt.gov/opinions/14pdf/14-114_qo11.pdf, at 11.

¹⁶ *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), http://www.supremecourt.gov/opinions/14pdf/14-114_qo11.pdf, at 17.

¹⁷ Jonathan H. Adler and Michael F. Cannon, “King v. Burwell and the Triumph of Selective Contextualism,” *Cato Supreme Court Review: 2014-2015* (Ilya Shapiro, ed.), October 1, 2015, at 63-67, <http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2015/9/2015-supreme-court-review-chapter-2.pdf>.

¹⁸ *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), http://www.supremecourt.gov/opinions/14pdf/14-114_qo11.pdf, at 14 (“rigorous application of the canon does not seem a particularly useful guide to a fair construction of the statute.”).

¹⁹ *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), (Scalia, J., dissenting) http://www.supremecourt.gov/opinions/14pdf/14-114_qo11.pdf, at 4-5.

²⁰ *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), (Scalia, J., dissenting) http://www.supremecourt.gov/opinions/14pdf/14-114_qo11.pdf, at 17, quoting *Sturges v. Crowninshield*,

4 Wheat. 122, 202 (1819) (Marshall, C. J.), at 203, internal quotation marks omitted.

²¹ Jonathan H. Adler and Michael F. Cannon, “*King v. Burwell* and the Triumph of Selective Contextualism,” *Cato Supreme Court Review: 2014-2015* (Ilya Shapiro, ed.), October 1, 2015, at 63-67, <http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2015/9/2015-supreme-court-review-chapter-2.pdf>.

²² Affordable Health Choices Act, S. 1679, 111th Cong. (2009); Bill Summary & Status, 111th Congress, S. 1697, Thomas, library of Congress, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN01679:@@L&summ2=m&>).

²³ Brief for the Respondents, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114) (“[T]he Senate HELP Committee bill made tax credits conditional on state action in certain respects.”); Brief of Amici Curiae Members of Congress & State Legislatures, *Halbig v. Sebelius*, 758 F.3d 390 (D.C. Cir. 2014) (No. 14-5018), (“[I]f a state chose not to adopt specified insurance reform provisions and make state and local government employers subject to specified provisions of the statute, ‘the residents of such State shall not be eligible for credits.’”); Timothy Jost, Health Insurance Exchanges in Health Care Reform Legal and Policy Issues, Washington & Lee Public Legal Studies Research Paper Series (Oct. 23, 2009) (describing the HELP bill: “A state’s residents will only become eligible for federal premium subsidies...if the state provides health insurance for its state and local government employees.”).

Questions for the Record from Sen. Coons

June 4, 2015, Hearing of the Senate Judiciary Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts

1. What evidence are you aware of to support the claim that IRS and/or Treasury concluded that the §36B rule was contrary to the ACA, but issued the rule because the administration directed them to?

As you are aware, the Patient Protection and Affordable Care Act (ACA) authorizes refundable “premium assistance tax credits” to certain taxpayers who enroll in coverage “through an Exchange established by the State,”¹ much as it conditioned the renewal of Exchange start-up grants on states taking steps to establish Exchanges and implement other parts of the law,² and conditioned continued federal Medicaid grants on states expanding Medicaid eligibility.³ The Exchange subsidies trigger tax penalties under the ACA’s individual mandate and employer mandate. The plaintiffs in *King v. Burwell* challenged an Internal Revenue Service regulation implementing those taxes and subsidies in the 38 states that refused or otherwise failed to establish Exchanges.

In a 6-3 ruling issued on June 25, 2015, the Supreme Court held the IRS did not have the authority to issue the challenged regulation. Instead, the Court itself interpreted the ACA not only to permit, but to require the IRS to issue “premium assistance tax credits” in states that failed to establish Exchanges.⁴ The Court’s ruling expanded the reach of the ACA’s individual and employer mandates beyond what the Court acknowledged the plain meaning of the operative text allowed. As a result, *King v. Burwell* is subjecting to taxation as many as 100 million individuals and employers whom Congress had expressly exempted.⁵

The finality of the Court’s ruling in *King v. Burwell* does not make that ruling any less incorrect. Jonathan Adler and I examine the flaws in the *King* ruling in the attached article.⁶

The IRS Has Withheld Evidence on How It Developed the Challenge Rule

As I discussed in my written an oral testimony, we know precious little about how the IRS and Treasury developed their interpretation of Section 36B, because the agencies have repeatedly stonewalled congressional oversight, to the point of ignoring congressional subpoenas and refusing to appear before congressional oversight hearings, including a hearing by this subcommittee.

What evidence is available comes thanks to the persistence of House investigators whom Treasury allowed to review early drafts of the IRS rule—but without the ability to make copies or even to take notes on what they saw.

Those investigators found that early drafts of the challenged regulation included the statutory requirement that tax-credit recipients must be enrolled “through an Exchange established by the State.” Yet around the same time a Treasury official learned about this

provision of Section 36B, the IRS dropped that statutory requirement from its draft regulations.⁷ The disappearance of that statutory language shows:

- Treasury and IRS officials knew the ACA denied them the authority to issue tax credits , and dramatically curtailed the IRS’s ability to impose the individual and employer mandates, in states that failed to establish Exchanges.
- All of the government’s legal arguments—up to and including the argument that first appeared in its Supreme Court brief that “an Exchange established by the State” was a statutory “term of art” that actually meant “an Exchange established by the State or federal government”—were post-hoc rationalizations for its attempt to do what *it knew* Congress expressly forbade it to do. If the phrase “an Exchange established by the State” were somehow a term of art that authorized tax credits in federal Exchanges as well, there would have been no reason to drop it from the implementing regulations.

I hope that, as Sens. Blumenthal and Whitehouse suggested during this hearing, the subcommittee will again invite the Treasury and IRS witnesses to appear at a hearing to explain how they devised this rule.⁸

Now that *King v. Burwell* has resolved this issue, the agencies cannot use pending litigation as an excuse not to appear. Since the Court has ruled the question presented in *King* was never one for Treasury or IRS to resolve, the agencies can no longer protect their internal deliberations by claiming executive privilege.

2. If the statute can only be read one way, how do you explain that two of three district court judges, four of six court of appeals judges, the IRS, the Solicitor General, leading academic experts on statutory interpretation, 22 states and the District of Columbia, the American Heart Association, the American Hospital Association, the American Cancer Society, America's Health Insurance Plans, the Democratic sponsors of the legislation, Senator Snowe, Republican and Democratic staff, and federalism scholars all read it differently?

Preliminarily, this question assumes facts not in evidence. I am familiar with the comments made by all the individuals and organizations mentioned. Many of the individuals mentioned here did not “read [the statute] differently.” Most spoke not to the statute Congress *enacted*, but to their misunderstanding of what supporters of the Patient Protection and Affordable Care Act (ACA) *intended* to enact. These are two different things. In every such instance, the operative text of the ACA, as well as its legislative history, contradicts their misunderstanding of Congress’ intent. For example, Sens. Olympia Snowe (R-ME) and Jeff Bingaman (D-NM) expressed disbelief that members of Congress would intend to withhold health-insurance subsidies in uncooperative states. Yet it is a matter of record that both senators voted to do exactly that.⁹ There is no evidence that these individuals read the statute differently than I do, or read the statute at all.

As for those who actually read the statute, yet still maintain that it authorizes what it plainly prohibits, I cannot read their minds. Generally speaking, ideology or the desire for political gain will often lead people to reach conclusions that are at odds with the facts, or even to say things they know not to be true.¹⁰ At the same time, I too am human, and I am susceptible to the same sort of self-delusion. Thus, I try to avoid error by sticking to the facts.

The facts show that Congress plainly limited the disputed taxes to states that establish Exchanges, and that this is what the authors of the ACA intended—even if many members of Congress were not aware of this provision, and even if some of them may have opposed it. What happened in *King v. Burwell* is simply that those who initially supported the ACA developed buyer’s remorse, so they prevailed upon the Supreme Court to rewrite the statute.

¹ PPACA § 1401(c)(2)(A)(i); 26 U.S.C. § 36B(c)(2)(A)(i).

² 42 U.S.C. § 18031(a).

³ But see *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

⁴ *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015), http://www.supremecourt.gov/opinions/14pdf/14-114_qol1.pdf.

⁵ See Michael F. Cannon, “Benefits Of ‘King v. Burwell’: More Jobs, Higher Incomes & 70 Million Freed From Illegal Taxes,” *Forbes.com*, June 24, 2015, <http://www.forbes.com/sites/michaelcannon/2015/06/24/benefits-of-king-v-burwell-more-jobs-higher-incomes-70-million-freed-from-illegal-taxes/>; and Michael F. Cannon, “King v. Burwell Expanded Obamacare Even More Than You Know,” *National Review Online*, July 29, 2015, <http://www.nationalreview.com/article/421723/king-v-burwell-expanded-obamacare-even-more-you-know-michael-cannon>.

⁶ Jonathan H. Adler and Michael F. Cannon, “*King v. Burwell* and the Triumph of Selective Contextualism,” *Cato Supreme Court Review: 2014-2015* (Ilya Shapiro, ed.), October 1, 2015, <http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2015/9/2015-supreme-court-review-chapter-2.pdf>.

⁷ For more, see the House investigators’ report: Staff of H. Comm. on Oversight and Gov’t Reform, 113th Cong., Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law’s Taxes and Subsidies (Comm. Print 2014), <http://oversight.house.gov/wp-content/uploads/2014/02/IRS-Rule-OGR-WM-Staff-Report-Final1.pdf>.

⁸ See Michael F. Cannon, “Time for the IRS to Come Clean,” *TheHill.com*, September 30, 2015, <http://thehill.com/blogs/congress-blog/healthcare/255348-time-for-the-irs-to-come-clean> (“At the empty-chair hearing, Blumenthal said, ‘I would strongly urge that this committee revisit the potential testimony from these witnesses on another occasion.’ Sen. Sheldon Whitehouse (D-R.I.) agreed, ‘The chairman should consider having the [missing] witnesses return. I think it could be a constructive hearing.’”); “Ted Cruz Presides Over Health Care Law Subsidies Hearing,” *Pinnacle Politics*, June 4, 2015, <http://pinnaclepolitics.com/content/ted-cruz-presides-over-health-care-law-subsidies-hearing>; and “Senators Grill Empty Chairs,” *Politico.com*, June 4, 2015, <http://www.politico.com/video/2015/06/senators-grill-empty-chairs-000309>.

⁹ See, e.g., Michael F. Cannon, “NYT Shows No One Buys Government’s ‘Term of Art’ Argument in *King v. Burwell*,” *National Review Online Bench Memos*, May 26, 2015, <http://www.nationalreview.com/bench-memos/418893/nyt-shows-no-one-buys-governments-term-art-argument-king-v-burwell-michael-cannon>.

¹⁰ See, e.g., Angie Drobnic Holan, “Lie of the Year: ‘If you like your health care plan, you can keep it,’” *PolitiFact.com*, December 12th, 2013, <http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it/>.

King v. Burwell and the Triumph of Selective Contextualism

Jonathan H. Adler and Michael F. Cannon*

*I am altering the deal. Pray I don't alter it any further.*¹

Introduction

King v. Burwell presented the question of whether the Patient Protection and Affordable Care Act of 2010 (ACA) authorizes the Internal Revenue Service to issue tax credits for the purchase of health insurance through exchanges established by the federal government. The *King* plaintiffs alleged an IRS rule purporting to authorize tax credits in federal exchanges was unlawful because the text of the ACA expressly authorizes tax credits only in exchanges “established by the State.” Led by Chief Justice John Roberts, the Supreme Court conceded the plain meaning of the operative text, and that Congress defined “State” to exclude the federal government. The Court nevertheless disagreed with the plaintiffs, explaining that “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.”² Voting 6–3, the Court effectively rewrote the

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¹ *Star Wars: Episode V - The Empire Strikes Back* (Lucasfilm 1980).

² *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015).

statutory text in order to ensure the ACA would “improve health insurance markets, not . . . destroy them.”³

King was the Supreme Court’s third ACA case in four years. In 2012, the Court upheld the constitutionality of the act in *National Federation of Independent Business v. Sebelius*, but only after rejecting a Commerce Clause justification for the individual mandate (construing it instead to be a use of the taxing power) and eliminating the requirement that states must implement the ACA’s Medicaid expansion in order to keep receiving federal Medicaid grants.⁴ Then, in 2014, in *Hobby Lobby Stores v. Burwell*, the Court concluded the Obama administration had failed to accommodate religious objections to the so-called “contraception mandate” as required under the federal Religious Freedom Restoration Act.⁵

NFIB saved the ACA, but left the statute scarred. *Hobby Lobby* rebuked the Department of Health and Human Services’ implementation of the new law. By comparison, 2015’s *King v. Burwell* was a resounding victory for the Obama administration. This third trip to One First Street was the charm.

While portions of the Court’s *King* opinion may constrain agency interpretive authority in future cases, the opinion green-lighted the administration’s efforts to implement the ACA without regard for the limitations contained in the ACA’s text.⁶ Even if the Court did not accept the specific arguments offered by the solicitor general, it gave

³ *Id.* at 2496.

⁴ 132 S. Ct. 2566 (2012). On *NFIB* see David B. Rivkin, Jr., Lee A. Casey, and Andrew M. Grossman, *NFIB v. Sebelius and the Triumph of Fig-Leaf Federalism*, 2011–2012 *Cato Sup. Ct. Rev.* 31 (2012); James F. Blumstein, *Enforcing Limits on the Affordable Care Act’s Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011–2012 *Cato Sup. Ct. Rev.* 67 (2012).

⁵ 134 S. Ct. 2751 (2014). See Richard A. Epstein, *The Defeat of the Contraceptive Mandate in Hobby Lobby: Right Results, Wrong Reasons*, 2013–2014 *Cato Sup. Ct. Rev.* 35 (2014). See also *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014) (mem.). This order generated opinions, but was not a decision on the merits after oral argument.

⁶ This result is particularly troubling given the administration’s pattern of modifying the meaning of the ACA in the course of implementing it. See Brief of Amici Curiae Cato Institute and Prof. Josh Blackman in Support of Petitioners, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114); see also Jonathan H. Adler, *The Ad Hoc Implementation and Enforcement of Health Care Reform*, in *Liberty’s Nemesis* (D. Reuter & J. Yoo, eds., forthcoming); Grace-Marie Turner, *51 Changes to ObamaCare . . . So Far*, Galen Institute (June 9, 2015), <http://www.galen.org/newsletters/changes-to-obamacare-so-far>.

the Obama administration nearly everything it wanted. The Court expanded the ACA beyond what its congressional supporters ever had the votes to enact. It just had to disregard portions of the ACA's text and selectively consider statutory structure and context to do it.

This article proceeds as follows. Part I demonstrates, via the ACA's unique legislative history, how having states operate the law's exchanges was an indispensable purpose of the act. The ACA literally would not have become law if the federal government were given primary responsibility for operating exchanges. Part II explains how the statutory language at issue in *King* is clear, unambiguous, and serves that congressional purpose—even if some ACA supporters did not know about or approve of that language. Part III discusses how and why the IRS departed from the plain meaning of that language, and the academic and legal challenges that followed. Part IV gives an overview of the Supreme Court's *King* decision. Part V shows how the majority misused statutory context to find the ACA is ambiguous. Part VI shows the Court's claim that it is "implausible" that Congress intended that language is demonstrably false. Part VII discusses the significance of the Court's decision not to apply the *Chevron* deference-to-agencies doctrine in *King*. Part VIII connects Chief Justice Roberts's approach to *King* to his "saving constructions" in *NFIB v. Sebelius*, which together have produced a law that is now materially different from Congress's plan. Part IX offers concluding thoughts.

I. State-Run Exchanges: An Essential Part of Congress's Plan

After 100 years marked by more failures than successes, advocates of universal health insurance coverage were heartened when a wave election in 2008 gave Democrats control of the presidency and both chambers of Congress. Crucially, one Republican senator's subsequent party switch also gave Democrats a 60-seat, filibuster-proof majority in the U.S. Senate that lasted from July 2009 until January 2010.⁷ The House passed its health care bill in November 2009.⁸ The Senate followed suit, passing the ACA—the merged product of

⁷ This history is recounted in Jonathan H. Adler & Michael F. Cannon, Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA, 23 Health Matrix 119, 124–26 (2013); see also Brief of Amici Curiae Jonathan H. Adler & Michael F. Cannon, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114).

⁸ Affordable Health Care for America Act, H.R. 3962, 111th Cong. (2009).

health care bills passed by the Senate Health, Education, Labor, and Pensions (HELP) Committee and the Senate Finance Committee—on December 24, 2009. The ACA passed the Senate by a vote of 60–39, overcoming a GOP filibuster without a vote to spare.

The ACA's authors never intended it to become the final bill.⁹ Their goal was simply to marshal 60 votes behind something they could later merge with the House bill. A special-election upset put an end to such hopes. In January 2010, Massachusetts voters elected Republican Scott Brown to fill the Senate seat vacated by the death of Sen. Edward M. Kennedy (D-MA). Brown's victory put an end to the Senate Democrats' filibuster-proof majority. At that moment, the ACA became the only health care bill that could become law, because neither a House-Senate compromise nor any other bill could overcome a GOP filibuster.

Whatever the ACA's shortcomings, if Democrats wanted comprehensive health care legislation, it would have to be the ACA, because voters had blocked them from enacting anything more expansive. Despite serious reservations,¹⁰ House Democrats approved the ACA as-is, making only minor changes through the budget reconciliation process, and sent it to the president's desk. One of those reservations would prove significant.

The ACA employed the basic framework House and Senate Democrats had agreed upon before the legislative process began: Medicaid coverage for everyone below a given poverty threshold and heavily regulated private health insurance for everyone else. The latter regulations banned discrimination on the basis of pre-existing conditions, and then, to combat the resulting instability, both required individuals to obtain coverage (an individual mandate) and subsidized premiums for low- and moderate-income households. Economists liken this scheme to a three-legged stool because it has the quality that without each of those three elements in place, the scheme collapses.

⁹ Timothy S. Jost, *Yes, the Federal Exchange Can Offer Premium Tax Credits*, Health Reform Watch Blog (Sept. 11, 2011), <http://www.healthreformwatch.com/2011/09/11/yes-the-federal-exchange-can-offer-premium-tax-credits> ("No one intended the current ACA to become the final law. It was the Senate bill, enacted after the House bill, which was to go through conference before the final [bill] was enacted.").

¹⁰ See Harold Pollack, 47 (Now 51) *Health Policy Experts (Including Me) Say "Sign the Senate Bill,"* *The New Republic* (Jan. 22, 2010).

The ACA differed from the House bill in at least one significant respect: it gave states primary responsibility for administering its health-insurance “Exchanges,” allowing the federal government to operate exchanges only where states failed to do so themselves.¹¹ The House bill created a single, nationwide exchange administered by the federal government.

Whatever substantive reasons individual Senate Democrats may have had for preferring state-run exchanges—for example, local control, deflecting criticisms that the ACA was a federal takeover of health care¹²—what matters for our present purposes is that state-run exchanges were an absolute political necessity. Key Democratic senators threatened not to support a final bill unless states operated the exchanges.¹³ All other ACA supporters had no choice but to relent. Defeating a GOP filibuster required 60 votes, and Senate

¹¹ See U.S. Rep. Doggett: Settling for Second-Rate Health Care Doesn’t Serve Texans, My Harlingen News (Jan. 11, 2010), <http://www.myharlingennews.com/?p=6426> (letter from 11 House Democrats to President Obama and House Speaker Nancy Pelosi expressing concern about the ACA and “states with indifferent state leadership that are unwilling or unable to administer and properly regulate a health insurance marketplace”); see also Terry Gross, Next Up: Turning Two Health Care Bills into One, Fresh Air (WBUR News) (Jan. 12, 2010), <http://www.wbur.org/npr/122483567> (“GROSS: So getting to the exchanges, in the House bill, it’s a national insurance exchange. In the Senate bill, it’s state-oriented . . . Mr. COHN: Absolutely, and this is a very important difference that frankly has gotten little attention.”). See also Julie Rovner, House, Senate View Health Exchanges Differently, NPR (Jan. 12, 2010), <http://www.npr.org/templates/story/story.php?storyId=122476051>.

¹² Senate Democratic Policy Comm., Fact Check: Responding to Opponents of Health Insurance Reform (Sept. 21, 2009), <http://dpc.senate.gov/reform/reform-factcheck-092109.pdf> (“There is no government takeover or control of health care in *any* senate health insurance reform legislation. . . . *All* the health insurance exchanges, which will create choice and competition for Americans’ business in health care, are run by states” (emphasis added)).

¹³ On the Record (Fox News broadcast, Apr. 13, 2010), <http://www.foxnews.com/story/2010/04/14/sen-ben-nelson-his-side-cornhusker-kickback.html> (“I had requirements. The requirements were no government run plan, no federal exchange, national exchange, and adequate language to deal with abortion. Those were requirements.”). See also Patrick O’Connor & Carrie Brown, Nancy Pelosi’s Uphill Health Bill Battle, Politico, Jan. 9, 2010 (“Two key moderates—Sen. Ben Nelson (D-Neb.) and Sen. Joe Lieberman (I-Conn.)—have favored the state-based exchanges over national exchanges.”); Reed Abelson, Proposals Clash on States’ Roles in Health Plans, N.Y. Times, Jan. 13, 2010 (“Senator Ben Nelson, Democrat of Nebraska, is a former governor, state insurance commissioner and insurance executive who strongly favors the state approach. His support is considered critical to the passage of any health care bill.”).

Democrats had no votes to spare. Following Scott Brown's election, no other bill could have cleared Congress. The ACA *would not have passed* without a system of state-run exchanges. This was not only a distinct part of Congress's plan, but indeed a *sine qua non* of the ACA.

This congressional purpose was neither hidden nor its existence in dispute. Democrats in both chambers emphasized the ACA's exchanges would be state-run. They scarcely mentioned the possibility of federal exchanges.¹⁴ Shortly after enactment, HHS Secretary Kathleen Sebelius testified, "I think it will very much be a State-based program."¹⁵ President Obama predicted, "by 2014, each state will set up what we're calling a health insurance exchange."¹⁶ They did not foresee that 34 states would refuse.

II. Clear Language that Serves a Congressional Purpose

The ACA's text reflects Congress's preference for state-run exchanges. Section 1311 directs, "Each State shall . . . establish an . . . Exchange."¹⁷ Like the Finance and HELP bills, the ACA authorized unlimited start-up funds for state-run exchanges.¹⁸ To provide an incentive for states to establish exchanges, it conditioned renewal of those grants on states making progress toward establishing an exchange and implementing other parts of the act.¹⁹ Like the Finance and HELP bills, it provided no start-up funding for federal exchanges.²⁰

¹⁴ See Adler & Cannon, *supra* note 7, at 148–50 (reviewing discussion of exchanges in the Congressional Record).

¹⁵ Departments of Labor, Health & Human Services, Education, & Related Agencies Appropriations for 2011: Hearing Before a Subcomm. on Appropriations, House of Representatives, 111th Cong. 171 (Apr. 21, 2010) (statement of Kathleen Sebelius, Sec'y, Dep't of Health & Hum. Servs.).

¹⁶ Remarks on Health Insurance Reform in Portland, Maine, 2010 Daily Comp. Pres. Doc. 220 (Apr. 1, 2010).

¹⁷ 42 U.S.C. § 18031(b)(1).

¹⁸ *Id.* § 18031(a).

¹⁹ *Id.*

²⁰ In the Health Care and Education Reconciliation Act of 2010, Congress did appropriate \$1 billion "for Federal administrative expenses to carry out [the ACA]." Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1005, 124 Stat. 1029 (2010); but see J. Lester Feder, HHS May Have to Get 'Creative' on Exchange, *Politico* (Aug. 16, 2011), <http://www.politico.com/news/stories/081161513.html> ("The general pot of money that the ACA makes available for implementation is surprisingly

The statutory language at issue in *King* likewise serves Congress's purpose of encouraging states to establish exchanges. Section 1401 of the ACA created a new Internal Revenue Code Section 36B, which authorizes refundable "premium-assistance tax credits" for "applicable taxpayers" who meet certain criteria. One criterion is that recipients enroll in coverage "through an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act."²¹

Notably, Section 36B's tax-credit eligibility rules bear no mention of exchanges established by the federal government. Indeed, "established by the State under Section 1311" twice distinguishes state-established exchanges from federal exchanges, authority for which appears in Section 1321.²² The eligibility rules contain no language broadly authorizing credits through "an[y]" exchange, as the ACA does with small-business tax credits.²³ Instead, Section 36B's tax-credit eligibility rules are tightly, even artfully worded. Every reference to exchanges is to "an Exchange established by the State under section 1311." That requirement appears twice explicitly and seven more times by cross-reference.²⁴ Section 36B plainly authorizes tax credits solely through state-established exchanges,²⁵ a condition that serves Congress's purpose of encouraging state-run exchanges by creating an incentive for states to establish them.

small, given that it is ushering in a series of new regulations covering a sector that accounts for a major chunk of the American economy. It only appropriates \$1 billion for all federal administrative costs. 'Everyone expects that billion dollars not to be adequate,' said Edwin Park of the Center on Budget and Policy Priorities[.]'. In other words, (1) the ACA became law with zero funding for federal exchanges, (2) Congress only later added a general implementation fund that *could* be used for federal exchanges, but (3) that fund was insufficient to fund responsibilities HHS was expected to undertake, much less federal exchanges.

²¹ PPACA § 1401(c)(2)(A)(i); 26 U.S.C. § 36B(c)(2)(A)(i).

²² PPACA § 1321(c); 42 U.S.C. § 18041(c).

²³ PPACA § 1421(b)(1); 26 U.S.C. § 45R(a)(1).

²⁴ See 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i) (direct language); 26 U.S.C. § 36B(b)(3)(B), (b)(3)(B)(i), (b)(3)(C), (b)(3)(D), (b)(3)(E), (c)(2)(A)(ii), (e)(A) (cross-references).

²⁵ Congressional Research Service, Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act, Congressional Distribution Memorandum (Jul. 23, 2012) ("[A] strictly textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS's authority to issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a state-established exchange.").

The broader context of the ACA supports the plain meaning of Section 36B. As noted above, Section 1311 creates a parallel financial incentive for states to establish exchanges.²⁶ The act explicitly defines the District of Columbia as a “State,” bringing a D.C.-established exchange within the meaning of “an Exchange established by the State.”²⁷ It explicitly treats any U.S. territory that establishes a compliant exchange as a “State.”²⁸ The House and HELP bills contained language explicitly creating full equivalence between exchanges established by states and those established by HHS.²⁹ Yet Congress rejected those bills in favor of the ACA, which includes no language defining federal exchanges as having been “established by the State,” or otherwise making federal exchanges equivalent to state-established exchanges for purposes of Section 36B.

Remarkably, there is no discussion of the status of tax credits in federal exchanges in the *Congressional Record*, contemporaneous media reports, or known communications among the ACA’s drafters and supporters. The only exception of which we are aware supports the plain meaning of Section 36B. In January 2010, all 11 House Democrats from Texas complained that, as in other federal programs that condition benefits on state cooperation, residents of states that fail to establish exchanges would not receive “any benefit” from the ACA, and “will be left no better off than before Congress acted.”³⁰

There are several reasons for the lack of publicly available contemporaneous discussion of this issue.³¹ Due to the ACA’s peculiar his-

²⁶ 42 U.S.C. § 18031(a).

²⁷ 42 U.S.C. § 18024(d).

²⁸ 42 U.S.C. § 18043(a)(1).

²⁹ See Adler & Cannon, *supra* note 7, at 158–59.

³⁰ See *supra* note 11.

³¹ Contemporaneous emails, notes, memoranda, and other documents generated by the ACA’s drafters, legislative counsel, and House negotiators in 2009 and 2010 presumably would include at least some discussion of this issue. Unfortunately, congressional Democrats have not made those records available, and the individuals responsible for drafting 36B have not discussed the issue publicly. See Robert Pear, *Four Words That Imperil Health Care Law Were All a Mistake, Writers Now Say*, N.Y. Times, May 25, 2015, available at <http://www.nytimes.com/2015/05/26/us/politics/contested-words-in-affordable-care-act-may-have-been-left-by-mistake.html> (“The words were written by professional drafters—skilled nonpartisan lawyers—from the office of the Senate legislative counsel, then James W. Fransen . . . The language of the Finance Committee bill was written largely by Mr. Fransen and a tax expert, Mark J. Mathiesen

tory, there was never a conference report. “Congress wrote key parts of the Act behind closed doors,” the *King* majority wrote, “rather than through the traditional legislative process.”³² The public debate was dominated by hot-button issues like a “public option” and abortion funding.³³ A general consensus that all states would establish exchanges made this restriction uninteresting. The fact that nobody expected the ACA to become the final law made it unimportant.

Nevertheless, the limited legislative history that exists suggests this feature was deliberate. The “established by the State” requirement originated in the first draft of the Senate Finance Committee’s bill, appearing once explicitly and five more times by cross-reference. It survived multiple revisions throughout the drafting process, including revisions to the adjacent cross-reference.³⁴ There is no evidence whatsoever that Senate Democrats even considered altering the meaning of that requirement. Instead, under the supervision of Senate leaders and White House officials, drafters inserted *additional* mentions of this requirement—a second explicit mention and two more cross-references to it—shortly before the ACA went to the Senate floor.³⁵

. . . Mr. Fransen did not respond to a message seeking comment, and other attempts to reach him were not successful.” Note that this passage contradicts the article’s title; Section 36B’s writers did not comment.)

³² King, 135 S. Ct. at 2492 (internal quotation marks omitted).

³³ See Gross, *supra* note 11 (noting that exchanges were “not a hot-button issue like abortion or the public option.”).

³⁴ Compare, e.g., S. 1796, 111th Cong. (2009), § 1205, proposing 26 U.S.C. § 36B(b)(2)(A)(i) (“and which were enrolled in through an exchange established by the State under subpart B of title XXII of the Social Security Act” (emphasis added)), with PPACA § 1401, creating 26 U.S.C. § 36B(b)(2)(A) (“and which were enrolled in through an Exchange established by the State under [section] 1311 of the Patient Protection and Affordable Care Act” (emphasis added)).

³⁵ Compare America’s Healthy Future Act of 2009, S. 1796, 111th Cong. (2009), § 1205, proposing 26 U.S.C. § 36B(c)(2)(A)(i) (limiting credits to those “covered by a qualified health benefits plan described in subsection (b)(2)(A)(i),” a cross-reference to plans “enrolled in through an exchange established by the State” (emphasis added)), with PPACA § 1401, 26 U.S.C. § 36B(c)(2)(A)(i) (“covered by a qualified health plan described in subsection (b)(2)(A) that was enrolled in through an Exchange established by the State under section 1311” (emphasis added)). See, e.g., David M. Herszenhorn & Robert Pear, White House Team Joins Talks on Health Care Bill, *N.Y. Times* (Oct. 15, 2009), <http://www.nytimes.com/2009/10/15/health/policy/15health.html>; Perry Bacon Jr., Small Group Now Leads Closed Negotiations on Health-Care Bill, *Wash. Post* (Oct.

Other legislation proposed by the ACA's authors contained similar provisions. The HELP bill—as the government and its amici conceded—created the same three-legged stool yet conditioned exchange subsidies on states implementing that bill's employer mandate.³⁶ Those who drafted and supported this bill were willing to cut off exchange subsidies in intransigent states.

As this history indicates, ACA supporters actively considered conditioning tax credits on state cooperation, and were willing to tolerate the instability that would result from imposing community-rating price controls without offering premium subsidies, in order to serve their purpose of getting states to implement the new federal program.

III. The Road to *King*

Government officials and independent analysts were aware of Section 36B's limitations on tax-credit eligibility when constitutional challenges to the act were still before lower courts. In late 2010, employee-benefits attorney Thomas Christina made a presentation at the American Enterprise Institute highlighting the fact that the ACA authorizes tax credits for those who enroll "through an Exchange established by the State under section 1311," but not for those who enroll through federal exchanges.³⁷ One of us heard Christina's presentation in early 2011 while researching federal-state relations under the ACA versus other approaches to "cooperative federalism." The resulting paper, discussing the limitation on tax credits in Section

18, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/17/AR2009101701810.html>.

³⁶ Brief for the Respondents, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114) ("[T]he Senate HELP Committee bill made tax credits conditional on state action in certain respects."); Brief of Amici Curiae Members of Congress & State Legislatures, *Halbig v. Sebelius*, 758 F.3d 390 (D.C. Cir. 2014) (No. 14-5018), ("[I]f a state chose not to adopt specified insurance reform provisions and make state and local government employers subject to specified provisions of the statute, 'the residents of such State shall not be eligible for credits.'"); Timothy Jost, Health Insurance Exchanges in Health Care Reform Legal and Policy Issues, Washington & Lee Public Legal Studies Research Paper Series (Oct. 23, 2009) (describing the HELP bill: "A state's residents will only become eligible for federal premium subsidies...if the state provides health insurance for its state and local government employees.").

³⁷ Thomas Christina, What to Look for Beyond the Individual Mandate (And How to Look for It), *Am. Enter. Inst.* (Dec. 6, 2010).

1401 among other aspects of the ACA, was presented at a health law conference that spring.³⁸ None of the numerous health law experts and government officials in attendance, including the Kansas Insurance Commissioner,³⁹ raised any objection to the plain-meaning interpretation of Section 36B.

According to a later congressional investigation, a Treasury official overseeing ACA implementation became aware of this feature of the act in March 2011 via media coverage of Christina's presentation.⁴⁰ This discovery concerned IRS officials. Soon thereafter, the IRS dropped the statutory requirement that tax-credit recipients must enroll "through an Exchange established by the State" from their draft regulations.⁴¹

The IRS's decision to focus more closely on this question was no doubt motivated by growing resistance to ACA implementation in dozens of states.⁴² A wave election in 2010 swept into office many state governors and legislators opposed to implementing the law.⁴³ If states could block tax credits by refusing to establish exchanges, they could expose the full cost of exchange coverage to enrollees, which could affect the act's popularity and viability. Despite the potential

³⁸ See Jonathan H. Adler, Cooperation, Commandeering or Crowding Out? Federal Intervention and State Choices in Health Care Policy, 20 *Kans. J. L. & Pub. Pol'y* 199 (2011).

³⁹ See Sandy Praeger, A View from the Insurance Commissioner on Health Care Reform, 20 *Kan. J.L. & Pub. Pol'y* 186 (2011).

⁴⁰ See Staff of H. Comm. on Oversight and Gov't Reform, 113th Cong., Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies (Comm. Print 2014), <http://oversight.house.gov/wp-content/uploads/2014/02/IRS-Rule-OGR-WM-Staff-Report-Final1.pdf> [hereinafter Oversight Report]; Thomas D. Edmondson, Opponents of New Federal Health Care Law Wage Constitutional War in Courts, *Daily Tax Report*, Bloomberg BNA (Jan. 4, 2011), <http://object.cato.org/sites/cato.org/files/articles/bna-dtr-article.pdf>.

⁴¹ See Oversight Report, *supra* note 40, at 17.

⁴² See David K. Jones, Katharine W. V. Bradley and Jonathan Oberlander, Pascal's Wager: Health Insurance Exchanges, Obamacare, and the Republican Dilemma, 39 *J. Health Pol., Pol'y & L.* 97, 130 (2014) ("The pervasive resistance to Obamacare was so strong that many states decided to cede control of the exchanges to the federal government.").

⁴³ See *id.*; see also Brendan Nyhan, The Effects of Health Care Reform in 2010 and Beyond, *Brendan-Nyhan.com* (Mar. 8, 2012), <http://www.brendan-nyhan.com/blog/2012/03/the-effects-of-health-care-reform-in-2010-and-beyond.html> ("Democratic incumbents who voted yes [on the PPACA] performed significantly worse than those who did not.").

for unlimited start-up funds and other entreaties by HHS, 34 states ultimately refused to establish exchanges.

After consultations with HHS, on August 17, 2011, the IRS proposed a regulation providing “a taxpayer is eligible for the credit . . . through an Exchange established under section 1311 *or* 1321 of the Affordable Care Act”—that is, without regard for whether the exchange was established by a state or the federal government.⁴⁴ Though IRS officials had discussed whether this approach was permissible under Section 36B, the *Federal Register* notice included no mention of the contrary statutory language, much less any basis for the IRS’s departure from it.⁴⁵ Nevertheless, many noticed and raised objections to the proposed rule.⁴⁶

The IRS did not heed these concerns. On May 23, 2012, it promulgated a final regulation purporting to authorize tax credits in exchanges established by HHS under Section 1321.⁴⁷ The rule circumvented the statutory text by (1) declaring eligible taxpayers could obtain a tax credit if a qualifying insurance plan was purchased on “an Exchange”⁴⁸ and then (2) adopting a definition of “Exchange” that HHS had promulgated (in coordination with the IRS) that

⁴⁴ U.S. Dep’t of the Treasury, IRS, Health Insurance Premium Tax Credit, Fed. Reg. 76 (Aug. 17, 2011) (proposed rule), at 50934 (emphasis added).

⁴⁵ See Oversight Report, *supra* note 40; Lisa Rein, Six Words Might Decide the Fate of Obamacare at the Supreme Court, Wash. Post, Mar. 1, 2014, http://www.washingtonpost.com/politics/why-six-words-might-hold-the-fate-of-obamacare-before-the-supreme-court/2015/03/01/437c2836-bd39-11e4-b274-e5209a3bc9a9_story.html.

⁴⁶ See, e.g., David Hogberg, Oops! No Obamacare Tax Credit Via Federal Exchanges?, Inv. Bus. Daily, Sept. 7, 2011, <http://news.investors.com/090711-584085-oops-no-obamacare-tax-credit-via-federal-exchanges-.htm>; Jonathan H. Adler & Michael F. Cannon, Another ObamaCare Glitch, Wall Street J., Nov. 16, 2011, available at <http://online.wsj.com/article/SB10001424052970203687504577006322431330662.html>; see also Rep. David Phil Roe, U.S. House of Reps., Letter to Douglas Shulman, Comm’r, IRS (Nov. 4, 2011), http://roe.house.gov/UploadedFiles/Letter_to_IRS_Commissioner_regarding_tax_credits_under_PPACA_-_11.03.11.pdf; Sen. Orrin G. Hatch, U.S. Senate, Letter to Timothy Geithner, Treasury Sec’y, and Douglas Shulman, Comm’r, IRS (Dec. 1, 2011), http://www.cato.org/sites/cato.org/files/documents/12.1.11_premium_credit_letter_to_geithner_and_shulman.pdf.

⁴⁷ 77 Fed. Reg. 30378 (2012).

⁴⁸ 26 CFR § 1.36B–2 (2013).

purported to create full equivalence between state-established and federal exchanges.⁴⁹

The IRS acknowledged opposition to its interpretation, yet offered no more than a single conclusory paragraph in response, lacking any reference to relevant statutory text or other legal authority for its action:

The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.⁵⁰

The IRS purported to rely on the “relevant legislative history,” yet cited no legislative history to support the rule, perhaps because no such legislative history exists. This bears emphasis: to this day, neither the government, nor the Supreme Court, nor anyone else has identified even a single contemporaneous statement of any kind asserting that the ACA authorizes, or that its supporters intended for it to authorize, tax credits in federal exchanges.

The IRS rule created two types of legally cognizable injuries. First, the ACA’s employer mandate penalizes large employers if one or more employees are eligible for or receive a tax credit under Section 36B.⁵¹ By offering tax credits in non-establishing states, the IRS rule injures employers in those states by exposing them to penalties. Second, the individual mandate penalizes taxpayers who do not obtain coverage, but only if coverage is “affordable.”⁵² By offering tax credits in non-establishing states, the IRS rule makes coverage “afford-

⁴⁹ 45 CFR § 155.20 (2013) (defining “Exchange” as “an Exchange serving the individual market . . . regardless of whether the Exchange is established and operated by a State . . . or by HHS.”).

⁵⁰ U.S. Dep’t of the Treasury, IRS, Health Insurance Premium Tax Credit, 77 Fed. Reg. 30, 377 (May 23, 2012) (final rule).

⁵¹ 26 U.S.C. § 4980H.

⁵² 26 U.S.C. § 5001A(e)(1).

able” for millions of taxpayers, and thus exposes them to penalties from which they would otherwise be exempt.

Injured parties soon began challenging the IRS rule in federal court. In September 2012, the state of Oklahoma became the first plaintiff, claiming injury as an employer (*Oklahoma v. Burwell*). In May 2013, a group of employers and individuals from multiple states filed a second challenge (*Halbig v. Burwell*). In September 2013, four Virginia residents challenged the rule (*King v. Burwell*). In October 2013, the state of Indiana and dozens of Indiana school districts filed a fourth challenge (*Indiana v. IRS*).

At district court, the government prevailed in *Halbig* and *King*, while the challengers prevailed in *Oklahoma*.⁵³ On July 22, 2014, panels of the D.C. Circuit (*Halbig*) and the Fourth Circuit (*King*) issued conflicting rulings for and against the challengers, respectively, within hours of each other. In *Halbig*, the full D.C. Circuit granted the government’s request for *en banc* review. The *King* plaintiffs appealed their loss to the Supreme Court, which granted certiorari in November 2014.

IV. The Court’s *King* Ruling

The Supreme Court sided with the federal government, though not on the grounds urged by the solicitor general or most commentators. The chief justice’s opinion for the Court was joined by Justice Anthony Kennedy and the Court’s four “liberal” justices—Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan—none of whom concurred separately. The Court’s arch-textualist, Justice Antonin Scalia, authored a sharp, and at times caustic and sarcastic, dissent, joined by Justices Clarence Thomas and Samuel Alito.

Chief Justice Roberts explained that while Section 36B may appear clear, it was actually “ambiguous” when viewed in a broader context.⁵⁴ In the ordinary case, a finding of ambiguity would trigger deference to the implementing agency under the *Chevron* doctrine.⁵⁵

⁵³ *Halbig v. Sebelius*, 27 F. Supp. 3d 1 (D.D.C. 2014); *King v. Sebelius*, 997 F. Supp. 2d 415 (E.D. Va. 2014); *Oklahoma v. Burwell*, No. 6:11-cv-00030 (E.D. Okla. Sept. 30, 2014).

⁵⁴ *King*, 135 S. Ct. at 2490–91.

⁵⁵ See *Chevron USA v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

King was not an ordinary case, however.⁵⁶ Rather than defer to the IRS's interpretation, the Court resolved the ambiguity itself. Turning again to the broader statutory context, and the potential effects of enforcing Section 36B as written, the Court concluded that the ACA should be read to authorize tax credits in federal exchanges. Though the text of Section 36B authorizes tax credits for insurance purchased on exchanges "established by the State under section 1311," this language will henceforth be read to authorize tax credits for insurance purchased on exchanges established by states under Section 1311 or by the federal government under Section 1321.

Roberts's primary rationale was that a "fair construction" of the statute requires more than giving meaning to discrete phrases—and cannot be constrained by the semantic meaning of ordinary terms, or even statutorily defined terms, such as "State." The chief justice wrote that it is the Court's job to avoid, "if at all possible," an interpretation that would undermine the ACA's goal of improving health insurance markets—such as an interpretation that, when combined with the intervening decisions of dozens of states not to establish exchanges, could create a "death spiral" of increasing costs and declining coverage.⁵⁷ Therefore the statutory language was to be stretched so as to conform to "what we see as Congress's plan."⁵⁸ If that required ignoring some portions of the text, or subverting another purpose of the statute, so be it. The chief justice decided where the Court should go and was determined not to let the text get in the way.⁵⁹ But to make it work, the Court's majority would have to find

⁵⁶ King, 135 S. Ct. at 2488–89 ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000))).

⁵⁷ King, 135 S. Ct. at 2496.

⁵⁸ *Id.*

⁵⁹ As commentators have noted, the chief justice has been similarly aggressive and creative in his interpretation of other statutes. See, e.g., *Nw. Austin Mun. Utility Dist. No. One v. Holder* ("NAMUDNO"), 557 U.S. 193 (2009), Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 Sup Ct. Rev. 181, 182 (2009) ("[I]n *NAMUDNO*, the Court applied the [constitutional avoidance] canon to adopt an implausible reading of a statute that appeared contrary to textual analysis, congressional intent, and administrative action."); *Bond v. United States*, 134 S. Ct. 2077 (2014); Nicholas Quinn Rosenkranz, *Bond v. United States: Concurring in the Judgment*, 2013–2014 Cato Sup. Ct. Rev. 285, 287 (2014) ("[Roberts' opinion is] an object lesson in dodgy statutory interpretation.").

a way to dispense with “the most natural reading” of the relevant statutory provisions.⁶⁰

Before looking at what the majority did, it is worth noting which arguments the Court did *not* adopt. It did not accept the primary arguments offered by the solicitor general. It did not accept that “established by the State” was a “statutory term of art,”⁶¹ nor did it claim the text clearly compelled its result, as the government also urged. Indeed, not a single justice adopted those arguments. To the contrary, the Court claimed the relevant text was ambiguous. While some critics maintained the plaintiffs’ arguments were frivolous or absurd, not a single justice expressed this view in an opinion.⁶² According to Chief Justice Roberts’s opinion for the Court, the plaintiffs’ “arguments about the plain meaning of Section 36B are strong.”⁶³

Though the Court claimed to be following “Congress’s plan,” it did not rely much on traditional sources of legislative history to determine Congress’s unstated purpose, and was quite selective in the sources of legislative history it did cite. Nor did the Court take the suggestion offered by some commentators that it should rely upon the scoring of the ACA by the Congressional Budget Office⁶⁴ or *ex*

⁶⁰ King, 135 S. Ct. at 2495.

⁶¹ See Brief for the Respondents at 20–25, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114).

⁶² Many commentators were quite dismissive of arguments against the IRS rule. One prominent critic called them “screwy,” “nutty,” and “stupid” (Erika Eichelberger, *Conservatives Insist Obamacare Is on Its Deathbed*, Mother Jones (Jan. 24, 2013), <http://www.motherjones.com/print/214256>). Others charged that the litigation was “frivolous” (Harold Pollack, *If the Latest Obamacare Lawsuit Succeeds, Obamacare Is in Big Trouble*, Wash. Post, Feb. 3, 2014, <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/02/03/if-the-latest-obamacare-lawsuit-succeeds-obamacare-is-in-big-trouble/>); that it was “a conspicuously weak case that should never have reached the Supreme Court”; that it was “obvious” the ACA authorizes those provisions in federal exchanges; or that *King* was nothing but a “trolling exercise” (Harold Pollack, *The Greatest Trolling Exercise in the History of Health Policy Is Over*, Politico (blog) (June 25, 2015), <http://www.politico.com/magazine/story/2015/06/health-care-supreme-court-king-burwell-119446.html>). Not all commentators took this position, however. See Sarah Kliff, *The Accidental Case Against Obamacare*, Vox.com (May 26, 2015) (“When I read prominent people saying this case was frivolous, I winced a bit,” says Nicholas Bagley, an assistant law professor at the University of Michigan who has written extensively on the *King* challenge. ‘This is a serious lawsuit.’”).

⁶³ King, 135 S. Ct. at 2495.

⁶⁴ See, e.g., Abbe Gluck, *The “CBO Canon” and the Debate over Tax Credits on Federally Operated Health Insurance Exchanges*, Balkinization (July 10, 2012), <http://>

post comments offered by legislators and staff to explain the inconvenient wording of the relevant provisions.⁶⁵ Though the Court admitted the ACA was the result of “inartful drafting,”⁶⁶ it did not claim the relevant language was a scrivener’s error.

Some thought the Court might rely upon federalism principles to side with the government, out of a concern that conditioning tax credits on state cooperation would be unduly coercive.⁶⁷ Several amici raised federalism concerns of various stripes,⁶⁸ and Justice Kennedy seemed amenable to such an approach at oral argument.⁶⁹

balkin.blogspot.com/2012/07/cbo-canon-and-debate-over-tax-credits.html; Dylan Scott, BOOM: The Historic Proof Obamacare Foes Are Dead Wrong on Subsidies, Talking Points Memo (Aug. 1, 2014), <http://talkingpointsmemo.com/dc/obamacare-halbig-cbo-scores>. For an explanation of why the CBO score did not actually establish the correctness of the government’s position see David Ziff, TPM’s Halbig/PPACA “BOOM” Goes Boom, Ziff Blog (Aug. 1, 2014), <https://ziffblog.wordpress.com/2014/08/01/tpms-halbigppaca-boom-goes-boom>.

⁶⁵ See, e.g., Robert Pear, Four Words, *supra* note 31 (“The answer, from interviews with more than two dozen Democrats and Republicans involved in writing the law, is that the words were a product of shifting politics and a sloppy merging of different versions. Some described the words as ‘inadvertent,’ ‘inartful’ or ‘a drafting error.’ But none supported the contention of the plaintiffs, who are from Virginia.”); but see text accompanying note 31, *supra*. Doug Kendall, Carvin’s Cornhusker Quandry in King, Huffington Post (Jan. 30, 2015), http://www.huffingtonpost.com/doug-kendall/carvins-cornhusker-quanda_b_6581690.html (quoting Senator Nelson as saying, “I always believed that tax credits should be available in all 50 states regardless of who built the exchange, and the final law also reflects that belief as well.” (emphasis in original)); but see Michael F. Cannon, King v. Burwell: In 2013, Nelson Admitted He Didn’t Know If ACA Offered Subsidies in Fed. Exchanges, Forbes.com (Feb. 10, 2015), <http://www.forbes.com/sites/michaelcannon/2015/02/10/king-v-burwell-in-2013-nelson-admitted-he-didnt-know-if-aca-offered-subsidies-in-fed-exchanges/> (“In other words, if we want to know what Nelson *actually* intended to become law, asking Ben Nelson is not an option. Our only option is to read the bill.”).

⁶⁶ King, 135 S. Ct. at 2492.

⁶⁷ See, e.g., David G. Savage, Obamacare Defense Is Tailored for Key Supreme Court Justices, L.A. Times, Feb. 26, 2015, available at <http://www.latimes.com/business/healthcare/la-na-court-health-argument-20150226-story.html>.

⁶⁸ See Brief of the Commonwealth of Virginia, et al., as Amici Curiae in Support of Affirmance, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114); Brief for Professor Thomas W. Merrill, et al., as Amici Curiae Supporting Respondents, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114); Brief of Amici Curiae Jewish Alliance for Law & Social Action (JALSA), et al., in Support of Respondents, King v. Burwell, 135 S. Ct. 2480 (2015) (No 14-114).

⁶⁹ Transcript of Oral argument at 16, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114) (“JUSTICE KENNEDY: Let me say that from the standpoint of the dynam-

Yet there was no mention of federalism in the Court's opinion. If such concerns did influence the justices, they did not see the need to mention them.

Perhaps tellingly, the Court openly adopted a non-textualist approach to interpreting the ACA. As Professor Abbe Gluck observed, "*King* is one of the only major text-oriented statutory interpretation decisions in recent memory in which the majority opinion barely includes a single canon of interpretation."⁷⁰ Moreover, the chief justice's opinion expressly rejects some interpretive canons that textualists hold dear. As Gluck noted, "This is not Antonin Scalia's textualism"⁷¹—a point Justice Scalia's dissent made clear. Instead, the Court adopted a "fair construction" of the statute over the plain meaning of relevant provisions and congressionally provided definitions.⁷²

The problem with the Court's "fair construction" is that it considered only those parts of the statute that, once isolated, could be used to cast doubt on the intentionality of Section 36B, while it dismissed, disregarded, or distorted other provisions that completely dispel those doubts. If this is a "fair construction," it is one that elevates judicial construction over legislative action.⁷³

V. Desperately Seeking Ambiguity

Chief Justice Roberts went to extraordinary lengths to find the act ambiguous. He conceded "the most natural reading of the pertinent statutory phrase"⁷⁴ is that tax credits are available "only" through

ics of Federalism, it does seem to me that there is something very powerful to the point that if your argument is accepted, the States are being told either create your own Exchange, or we'll send your insurance market into a death spiral.").

⁷⁰ Abbe Gluck, Congress Has a "Plan" and the Court Can Understand It—The Court rises to the challenge of statutory complexity in *King v. Burwell*, SCOTUSBlog (June 26, 2015), <http://www.scotusblog.com/2015/06/symposium-congress-has-a-plan-and-the-court-can-understand-it-the-court-rises-to-the-challenge-of-statutory-complexity-in-king-v-burwell>.

⁷¹ *Id.*

⁷² *King*, 135 S. Ct. at 2492.

⁷³ See Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 57 (2012) (noting that for a court to find legislative purpose "in the absence of a clear indication in the text is to provide the judge's answer rather than the text's answer to the question").

⁷⁴ *King*, 135 S. Ct. at 2495.

“an Exchange established by the State under [Section 1311].”⁷⁵ He implicitly conceded the ACA is otherwise silent on the question presented: the Court failed to identify even a single piece of statutory text or scrap of legislative history in which any member of Congress claimed the ACA *would* offer tax credits in federal exchanges. That should have resolved the matter.⁷⁶ Nevertheless, Roberts still managed to find the operative text ambiguous “when read in context.”⁷⁷

There was no disagreement among the justices that statutory structure, design, and context are useful in *resolving* latent ambiguities in statutory provisions.⁷⁸ As Justice Scalia counseled in dissent, “Statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision.”⁷⁹ Yet the majority not only used statutory context to *resolve* ambiguity, but to *create* the ambiguity in the first place. Worse, the majority considered text selectively and adopted inconsistent presumptions about the applicability of statutory provisions bearing on the question. Though Roberts conceded that “established by the State” is clear on its face and the *only* statutory text that speaks directly to the question presented, by the time he was done, he rendered that provision not only ambiguous but meaningless. It was as if the majority was determined to shoehorn inconvenient statutory text into a preconceived narrative of how the statute should operate. After all, as Roberts explained, the statute *must* be read this way “if at all possible.”

The Court’s judgment ultimately rested on a conclusion that the relevant text was “ambiguous”—or could at least be read as such in context. But what was ambiguous? Not the word “State,” given that Congress took pains to define this term to exclude federal

⁷⁵ *Id.* at 2489.

⁷⁶ See *Brown & Williamson*, 529 U.S. at 133 (noting that contextual interpretation must yield to an “insuperable textual barrier”); *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others . . . courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last.” (citations omitted)).

⁷⁷ *Id.* at 2490.

⁷⁸ See *id.* at 2492 (noting the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme” (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))); *id.* at 2502 (Scalia, J., dissenting).

⁷⁹ See *King*, 135 S. Ct. at 2502. (Scalia, J., dissenting).

exchanges.⁸⁰ Perhaps “establish” is ambiguous, but not in a way that muddies whether it is the state or HHS that is doing the establishing.

Consider in more detail the analysis underlying the majority’s conclusion that the statute is “properly viewed as ambiguous” on the question of whether it authorizes tax credits in federal exchanges.⁸¹ As the Court accepted, “the most natural reading of the pertinent statutory phrase”⁸² is that the ACA authorizes tax credits “only” through “an Exchange established by the State under [Section 1311].”⁸³ Under this language, for tax credits to issue, “three things must be true: First, the individual must enroll in an insurance plan through ‘an Exchange.’ Second, that Exchange must be ‘established by the State.’ And third, that Exchange must be established ‘under [Section 1311].’”⁸⁴

The first requirement, that tax credits are only available for the purchase of insurance through “an Exchange,” is uncontroversial, as is the proposition that both state and federal exchanges satisfy this initial requirement, even though limiting tax credits to exchange-based insurance purchases limits their availability and potentially undermines the legislative purpose of subsidizing insurance.⁸⁵ Section 1321 requires the HHS secretary to “establish” an exchange in any state that fails to do so (or otherwise fails to comply with relevant ACA requirements) and indicates that this exchange should be the practical equivalent of the exchange for which it substitutes. Federal and state exchanges may be “established by different sovereigns,”⁸⁶ the Court wrote, but both enable consumers to engage in comparison shopping and facilitate government regulation of health insurance offerings.⁸⁷

⁸⁰ See 42 U.S.C. § 18024(d).

⁸¹ King, 135 S. Ct. at 2491.

⁸² *Id.* at 2495.

⁸³ *Id.* at 2489.

⁸⁴ *Id.*

⁸⁵ Actually, the government has ignored this tax-credit eligibility requirement as well. Ricardo Alonso-Zaldivar, Health Law Fix for State-Run Websites, Assoc. Press, Feb. 28, 2014 (“HHS said state residents who were unable to sign up because of technical problems may still get federal tax credits if they bought private insurance outside of the new online insurance exchanges.”).

⁸⁶ King, 135 S. Ct. at 2489.

⁸⁷ See Max Baucus, Reforming America’s Health Care System: A Call to Action, S. Fin. Comm., Nov. 12, 2008, at 17 (“The Exchange would be an independent entity, the primary purpose of which would be to organize affordable health insurance options,

Next the Court turned to the phrase “established by the State.” This language would seem to be clear and unambiguous. Any member of Congress who had bothered to read the relevant provisions would have understood what it meant.⁸⁸ As Chief Justice Roberts conceded, “it might seem that a Federal Exchange cannot fulfill this requirement.”⁸⁹ Lest there be any doubt, as the majority conceded, the ACA defines “State” in a manner “that does not include the Federal Government.”⁹⁰

Despite the plain meaning of “established by the State,” despite the statutory definition of “State,” despite the consistent (and conventional) usage of the word “establish” throughout the statute, and despite the majority’s acknowledgement that the plaintiffs offered “the most natural reading of the pertinent statutory phrase,” the majority asserted that “when read in context, ‘with a view to [its] place in the overall statutory scheme,’ the meaning of that phrase ‘established by the State’ is not so clear.”⁹¹ Other provisions of the statute, the majority wrote, “suggest that the Act may not always use the phrase ‘established by the State’ in its most natural sense.”⁹²

The Court cites just one statutory provision, found in Section 1312, to substantiate its claim that other provisions of the ACA “suggest” that “established by the State” “may not” mean what it says. Yet not only does that provision not contradict or other undermine

create understandable, comparable information about those options, and develop a standard application for enrollment in a chosen plan” (emphasis added)); Praeger, *supra* note 39, at 190 (“The main purpose of the exchanges will be to facilitate the comparison and purchase of coverage by individuals and small businesses.”); see also Michael F. Cannon, *ObamaCare’s Exchanges Perform More than a Dozen Functions Besides Issuing Subsidies* (Updated), *Cato@Liberty*, (June 27, 2014), <http://www.cato.org/blog/obamacares-exchanges-perform-more-dozen-other-functions-besides-issuing-subsidies>.

⁸⁸ Note, however, that not all may have read the statute. For example, Senator Max Baucus, one of the ACA’s chief architects, remarked that it would be a “waste [of his] time to read every page of the bill,” since it’s “statutory language,” and that’s what “experts” are for. Jordan Fabian, *Key Senate Democrat Suggests that He Didn’t Read Entire Healthcare Reform Bill*, *The Hill* (Aug. 25, 2010), <http://thehill.com/blogs/blog-briefing-room/news/115749-sen-baucus-suggests-he-did-not-read-entire-health-bill>.

⁸⁹ King, 135 S. Ct. at 2489–90.

⁹⁰ *Id.* at 2490.

⁹¹ *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

⁹² *Id.*

a straightforward interpretation of “established by the State,” it does not even utilize that phrase.

Section 1312 defines “qualified individuals,” in relevant part, as those who “reside[] in the State that established the Exchange.”⁹³ The majority thinks this casts doubt on the plain meaning of “established by the State.” Why? If the Court were to interpret such language as drawing distinctions between state-established and federal exchanges, the majority reasoned, then “there would be *no* ‘qualified individuals’ on Federal Exchanges.”⁹⁴ Federal exchanges would therefore not be able to meet several requirements the act imposes with respect to qualified individuals. For example, explains Chief Justice Roberts, “the Act requires all Exchanges to ‘make available qualified health plans to qualified individuals’—something an Exchange could not do if there were no such individuals.”⁹⁵

The majority’s argument fails on three levels. First, as Justice Scalia notes in dissent, it would be perfectly reasonable for Congress to create a category of enrollees that is unique to state-established exchanges:

Imagine that a university sends around a bulletin reminding every professor to take the “interests of graduate students” into account when setting office hours, but that some professors teach only undergraduates. Would anybody reason that the bulletin implicitly presupposes that every professor has “graduate students,” so that “graduate students” must really mean “graduate or undergraduate students”? Surely not. Just as one naturally reads instructions about graduate students to be inapplicable to the extent a particular professor has no such students, so too would one naturally read instructions about qualified individuals to be inapplicable to the extent a particular Exchange has no such individuals.⁹⁶

The majority responds that Congress would have had no reason to detail requirements related to “qualified individuals” if there were to be no qualified individuals in federal exchanges. Yet such reasons abound, both in the ACA and its legislative history. Sections

⁹³ 42 U.S.C. § 18032(f)(1)(A).

⁹⁴ King, 135 S. Ct. at 2490.

⁹⁵ *Id.*

⁹⁶ King, 135 S. Ct. at 2501 (Scalia, J., dissenting).

1311, 1321, and other provisions make clear that many Senate Democrats feared that states might not implement the ACA as well or as faithfully as the secretary would. The ACA therefore provides wide discretion to the secretary, while states get detailed instructions.⁹⁷ There is thus nothing about the “qualified individuals” definition that casts doubt on the meaning of “established by the State.” Any anomalies the majority identifies flow not from the text, but from the majority’s atextual assumptions about Congress’s plan.

Second, context further shows that the “qualified individuals” definition casts no doubt on what Congress meant by “established by the State,” and instead supports the plain meaning of that phrase. There is a *reason* why Section 1312 defines “qualified individuals” in terms of “the State that established the Exchange.” In Sections 1311, 1312, and 1313, Congress is speaking to states. Those sections direct states to establish exchanges and detail related requirements. Section 1312 defines “qualified individuals” in terms of “the State that established the Exchange” because the whole point of these sections is that Congress is presuming that states *will* establish exchanges.

Context also shows the “qualified individuals” definition still has applicability to federal exchanges, despite the fact that they are not established by states. In the very next section, Section 1321, Congress drops the presumption that each state will establish an exchange, and explains what the secretary “shall” do if states fail to establish exchanges. Section 1321 directs the secretary to “issue regulations setting standards for meeting the requirements under this title,” which encompasses regulations for both state-established and federal exchanges, and to implement “such . . . requirements” if a state fails to do so. That is, if Sections 1311, 1312, or 1313 impose requirements on state-established exchanges that would be inappropriate in the case of a federal exchange, Section 1321 authorizes the secretary to issue and enforce a parallel requirement. In this case, it authorizes the HHS secretary to develop a “qualified individuals” definition appropriate to federal exchanges—that is, that qualified individuals must reside in the state “within” which “the Secretary . . . establish[es]” an Exchange.⁹⁸ The only ambiguity that exists is whether the ACA *requires* the secretary to develop a “qualified individuals” definition

⁹⁷ See PPACA § 1321; 42 U.S.C. § 18041.

⁹⁸ See *id.* at (a), (c).

for federal exchanges or (per Justice Scalia) merely *authorizes* her to do so. In neither case does Section 1321's "qualified individuals" definition cast doubt on the meaning of "established by the State."

Thus it is not true that giving the phrase "established by the State" its plain meaning would mean there would be no qualified individuals in federal exchanges. Context shows that Congress covered that contingency. Unfortunately, the Court only looked to part of the context—the part that supported its preconceived understanding of "Congress's plan."

Third, even if one were to conclude that the provisions relating to "qualified individuals" created an anomaly, this does not "suggest," let alone demonstrate, that other language used in other parts of the statute is ambiguous. The majority's reliance on the "qualified individual" provision on this point is even more curious given the majority's refusal to consider the operation of the phrase "established by the State" in other parts of the ACA. "Because the other provisions cited by the dissent are not at issue here," the majority meekly explains in a footnote, "we do not address them."⁹⁹ The majority did not even address the reference to exchanges "established by the State" in Section 1311, despite that section's obvious relevance to the question at hand.¹⁰⁰ So much for considering the statute as a whole.

When the majority turns to consider whether an exchange established by the federal government as required under Section 1321 could qualify as an exchange established "under Section 1311," it takes further liberties with the statutory text. Here, the majority claims that the statutory definition of an "Exchange" forces the conclusion that Section 1321 "authorizes the Secretary to establish an Exchange under Section [1311], not (or not only) under Section [1321]."¹⁰¹ The relevant text does nothing of the kind.

The linchpin of the majority's argument here is the statutory definition of "Exchange" provided for in ACA Section 1563: "The term 'Exchange' means an American Health Benefit Exchange established under section 1311 of the Patient Protection and Affordable Care

⁹⁹ King, 135 S. Ct. at 2493 n.3.

¹⁰⁰ 42 U.S.C. § 18031(f)(3) ("AUTHORITY TO CONTRACT.—(A) IN GENERAL.—A State may elect to authorize an Exchange *established by the State* under this section to enter into an agreement with an eligible entity to carry out 1 or more responsibilities of the Exchange." (emphasis added)). See *infra* note 112 and accompanying text.

¹⁰¹ King, 135 S. Ct. at 2490–91.

Act.”¹⁰² According to the majority, “every time the Act uses the word ‘Exchange,’ the definitional provision *requires* that we substitute the phrase ‘Exchange established under section [1311].’”¹⁰³ The statute flatly contradicts this claim.

Section 1563 adds that definition of “Exchange” to the Public Health Service Act to conform that statute to the ACA. Section 1551 then conforms the ACA to the PHSA by circuitously importing that and other PHSA definitions back into the ACA. Contrary to the majority opinion, however, Section 1551 expressly provides that PHSA definitions are *not* to be applied “every time” the relevant terms are mentioned in the ACA. Section 1551 provides that PHSA definitions “shall apply” to the ACA “unless specifically provided for otherwise.”¹⁰⁴ With respect to federal exchanges, the ACA specifically provides that they are established under Section 1321.¹⁰⁵ Thus the PHSA definition that exchanges are “established under Section 1311” does not apply. The majority’s claim that the ACA “requires” the Court to insert this definition of “Exchange” into Section 1321 is simply false. The majority erases the distinction between Section 1311 exchanges and Section 1321 exchanges only by ignoring Congress’s express instructions. After it cavalierly interprets a universal definition of “State” to be conditional, the majority then interprets a conditional definition of “Exchange” to be universal—all in the name of “what we see as Congress’s plan.”

Having sufficiently tampered with two statutory definitions, the majority then proceeds to claim that federal exchanges established under Section 1321 are also established under Section 1311. “All of the requirements that an Exchange must meet are in Section [1311],” the majority asserts.¹⁰⁶ Therefore, a federal exchange must be “established under Section 1311” or else “literally none of the Act’s requirements would apply to them.”¹⁰⁷ Again, the statute flatly contradicts the majority’s claims.

¹⁰² 42 U.S.C. § 300gg-91(d)(21).

¹⁰³ King, 135 S. Ct. at 2491 (emphasis added).

¹⁰⁴ PPACA § 1551.

¹⁰⁵ 42 U.S.C. § 18041(c)(1). See also 45 CFR § 155.20 (2013) (“*Federally-facilitated Exchange* means an Exchange established and operated within a State by the Secretary under section 1321(c)(1) of the Affordable Care Act.”).

¹⁰⁶ King, 135 S. Ct. at 2491.

¹⁰⁷ *Id.*

It is not true that “all of the requirements” for exchanges are contained in Section 1311. Sections 1312 and 1313 also impose requirements on exchanges.¹⁰⁸ The reconciliation amendments imposed reporting requirements on exchanges codified in Section 36B of the Internal Revenue Code—the provisions created by Section 1401—and those requirements *distinguished* between Section 1311 and Section 1321 exchanges.¹⁰⁹ Section 1321 imposes requirements on exchanges when it obligates the HHS secretary to “issue regulations setting standards” for exchanges to meet “the requirements under this *title*” (that is, not just Section 1311), and further authorizes the secretary to impose “such *other* requirements as the Secretary determines appropriate” (that is, beyond what the ACA itself requires).¹¹⁰

Indeed, far from conflating state-run and federal exchanges, Section 1321 draws a bright line between the two. It authorizes the secretary to write rules for both Section 1311 exchanges and Section 1321 exchanges, which remain distinct. This authority includes the ability to write separate rules for federal exchanges in cases where the rules for state-established exchanges would make no sense.

The majority’s selective contextualism creates anomalies that exist nowhere under a plain-meaning interpretation of Section 36B and the act’s broader context. For example, the ACA prohibits the use of federal funds for the operating expenses of Section 1311 exchanges.¹¹¹ Under a plain-meaning interpretation, where Section 1311 and 1321 exchanges are distinct, this poses no problems. Section 1321 authorizes the secretary to draft a parallel rule appropriate to federally administered exchanges (for example, that they may use federal funds, but must be self-sufficient). If the majority were correct that federal exchanges *are* Section 1311 exchanges, however, it would create the anomaly that federal exchanges must somehow operate with no federal funds. Likewise, Section 1311 grants states the power to choose whether “an Exchange established by the State” may contract out certain exchange functions. If the majority were correct that federal exchanges are “established by the State under Section 1311,” it would create an anomaly where states that did not

¹⁰⁸ See, e.g., 42 U.S.C. § 18032(d)(4), § 18033(a)(1).

¹⁰⁹ 26 U.S.C. § 36B(f)(3).

¹¹⁰ 42 U.S.C. § 18041(a), (c) (emphasis added).

¹¹¹ 42 U.S.C. § 18031(d)(5).

establish exchanges could dictate whether a federal agency may contract with outside entities.¹¹² The majority's selective contextualism creates such anomalies by ignoring these and other provisions that reveal Congress's actual plan to be quite different from what the majority imagines.

True to form, the majority does devote attention to a part of Section 1321 that, once isolated, it uses to cast doubt on the clear line Section 36B draws between state-established and federal exchanges. To support its conclusion that the phrase "Exchange established by the State under Section [1311]" could refer to "all Exchanges—both State and Federal—at least for purposes of the tax credits," it points to Section 1321's instructions to the HHS secretary.¹¹³ This provision provides that should a state fail to create the "required Exchange," the secretary shall "establish and operate such Exchange within the State."¹¹⁴

According to the majority, "by using the words 'such Exchange,' the Act indicates that State and Federal Exchanges should be the same."¹¹⁵ The majority is correct in that this language indicates the exchange established by the secretary should perform the same general functions as those established by states under Section 1311. Section 1321 anticipates this by expressly authorizing the secretary to adopt regulations providing that HHS exchanges will operate like state exchanges. Yet this is not enough to fulfill the requirements of Section 36B, as the relevant language speaks both to the type of exchange in which tax credits are to be available, as well as the sovereign that has established it.¹¹⁶ So even if "such Exchange" could be read to make a Section 1321 exchange legally equivalent to a Section 1311 exchange, it is still not an exchange "established by the State."

This understanding is confirmed by consideration of other relevant provisions of the statute. Section 1323 provides that when a U.S. territory creates "such an Exchange," the territory "shall be treated

¹¹² 42 U.S.C. § 18031(f)(3). See *supra* note 100.

¹¹³ King, 135 S. Ct. at 2491.

¹¹⁴ 42 U.S.C. § 18041 (c).

¹¹⁵ King, 135 S. Ct. at 2491.

¹¹⁶ See *id.* at 2489–90 ("State and Federal Exchanges are established by different sovereigns"); see also *Halbig v. Burwell*, 758 F.3d 390, 400 (D.C. Cir. 2014) ("[S]ubsidies also turn on a third attribute of Exchanges: who established them.").

as a State.”¹¹⁷ The fact that Congress considered it necessary to insert that explicit equivalence language shows that Congress did not consider the word “such” to have the meaning the majority claims. Similarly, when Congress sought to create full equivalence between actions undertaken by the federal and state governments it did so explicitly. Section 1322, for instance, conditions recognition of an organization as a “qualified nonprofit health insurance issuer,” in part, on the state adopting insurance market reforms or “the Secretary ha[ving] implemented [the reforms] for the State.”¹¹⁸ Congress knew full well how to authorize the federal government to stand in the state’s shoes. It did not do so here. The phrase “such Exchange” may indicate that federal exchanges have the same intrinsic characteristics as a state-established exchange, but tax-credit eligibility hinges on the extrinsic characteristic of *which* sovereign established the exchange.

The majority seeks further support for its conclusion that the relevant language is ambiguous by pointing to “several provisions that assume tax credits will be available on both State and Federal Exchanges.”¹¹⁹ Yet the first two provisions the majority cites in support of this proposition are taken from Section 1311—the very section that instructs states to create exchanges in the first place. That Section 1311 includes provisions that assume tax credits will be available in Section 1311 exchanges is hardly surprising given that Section 1401 provides tax credits in exchanges “established by the State under Section 1311.” These provisions lend no support for the majority’s position. At best, they beg the question.

The majority also points to Section 36B’s requirements that both state and federal exchanges report information on health insurance purchases, including information about any tax credits provided.”¹²⁰ In the majority’s view it “would make little sense” to require reporting on tax credits were such credits not available in federal exchanges.¹²¹ Yet even under the majority’s interpretation, these reporting requirements apply to instances where tax credits are not available.

¹¹⁷ 42 U.S.C. § 18043(a)(1).

¹¹⁸ 42 U.S.C. § 18042(c)(6).

¹¹⁹ King, 135 S. Ct. at 2491.

¹²⁰ 26 U.S.C. § 36B(f)(3).

¹²¹ King, 135 S. Ct. at 2492.

This requirement obligates all exchanges to report information on all enrollees, yet not all those who purchase insurance on exchanges are eligible for tax credits due to income or other characteristics. Further, as the D.C. Circuit noted in *Halbig*, “even if credits are unavailable on federal Exchanges, reporting by those Exchanges still serves the purpose of enforcing the individual mandate—a point the IRS, in fact, acknowledged.”¹²²

Having walked through “Exchange established by the State under Section [1311],” the majority now concludes that this phrase “is properly viewed as ambiguous.”¹²³ Yet the majority’s tortured path came at the expense of plain language and Congress’s express commands. That’s not all. In his dissent, Justice Scalia summarized some of the other steps the majority took in its quest to find ambiguity:

To mention just the highlights, the Court’s interpretation clashes with a statutory definition, renders words inoperative in at least seven separate provisions of the Act, overlooks the contrast between provisions that say “Exchange” and those that say “Exchange established by the State,” gives the same phrase one meaning for purposes of tax credits but an entirely different meaning for other purposes, and (let us not forget) contradicts the ordinary meaning of the words Congress used. On the other side of the ledger, the Court has come up with nothing more than a general provision that turns out to be controlled by a specific one, a handful of clauses that are consistent with either understanding of establishment by the State, and a resemblance between the tax-credit provision and the rest of the Tax Code. If that is all it takes to make something ambiguous, everything is ambiguous.¹²⁴

Indeed.

VI. A Most Plausible Implausibility

Having concluded that the relevant statutory text is “ambiguous,” the majority turns “to the broader structure of the Act to determine the meaning of Section 36B.”¹²⁵ Rather than consider the text of

¹²² 758 F. 3d. at 403.

¹²³ *King*, 135 S. Ct. at 2491.

¹²⁴ *Id.* at 2502–03 (Scalia, J., dissenting).

¹²⁵ *Id.* at 2492.

the ACA, however, the majority focused instead on the “statutory scheme”—the aforementioned three-legged stool—and concluded that tax credits simply must be available in federal exchanges. Otherwise, the act would threaten to “destabilize” the individual insurance market in any state that failed to establish its own exchange. The idea that Congress would allow such a result, the majority reasoned, was “implausible.”¹²⁶ Section 36B’s tax credits “are necessary for Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.”¹²⁷

The majority hangs its resolution of this purported ambiguity upon its assumption that Congress would not have enacted a provision that threatened to undermine its goal of expanding health insurance coverage. More specifically, the majority concluded that Congress would not have imposed costly restrictions on health insurance providers, such as community-rated premiums, without also imposing mandates and providing subsidies to stabilize markets. However reasonable this assumption may seem in the abstract, the ACA’s legislative history flatly contradicts it. The ACA’s leading advocates considered, supported, and in some cases enacted provisions that would undermine the very coverage expansions the majority claims Congress would never undermine. While the majority assumes ACA supporters would not support community rating without also providing for subsidies and a mandate to combat the resulting instability, they did exactly that, over and over again, including where the Court claimed Congress wouldn’t.

Both the ACA and the House bill created a long-term-care entitlement program called the Community Living Assistance Services and Supports (CLASS) Act. Each bill imposed community-rated premiums *and* an explicit prohibition on subsidies that might reduce the resulting instability.¹²⁸ ACA supporters enacted these provisions

¹²⁶ *Id.* at 2493–94.

¹²⁷ *Id.* at 2496.

¹²⁸ 42 U.S.C. § 30011-7(b) (“No taxpayer funds shall be used for payment of benefits under a CLASS Independent Benefit Plan. For purposes of this subsection, the term ‘taxpayer funds’ means any Federal funds from a source other than premium.”). Richard S. Foster, Ctr. for Medicare & Medicaid Servs., *Estimated Financial Effects of the “America’s Affordable Health Choices Act of 2009”* (H.R. 3962), as Passed by the House on November 7, 2009 (2009), at 10.

despite repeated warnings that “voluntary, unsubsidized, and non-underwritten insurance programs such as CLASS face a significant risk of failure as a result of adverse selection by participants.”¹²⁹ The CLASS Act promptly collapsed, and Congress repealed it.¹³⁰ According to Chief Justice Roberts, the CLASS Act doesn’t count because it is “a comparatively minor program” and not part of “the general health insurance program—the very heart of the Act.”¹³¹ Again, so much for reading the statute as a whole.

That objection cannot be raised against Congress’s imposition of the ACA’s prohibitions on pre-existing-condition exclusions and discrimination based on health status with respect to children. In the market for child-only health insurance policies, the ACA imposed these measures beginning September 23, 2010—more than *three years* before it provided subsidies or imposed a purchase mandate.¹³² Those markets either constricted or completely collapsed in two-thirds of the states.¹³³ These facts belie the majority’s claims that Congress deemed all three legs of the stool “should take effect on the same day—January 1, 2014,”¹³⁴ and that ACA supporters subordinated *everything* to their desire “to avoid adverse selection in the health insurance markets.”¹³⁵

Moreover, in developing the ACA, Congress indisputably considered provisions that would condition tax credits and other subsidies for the purchase of insurance on state cooperation, and advanced legislation that could force exchanges to operate without the benefit of premium subsidies. The HELP bill, for example, withheld premium subsidies in any state that refused to implement that bill’s employer

¹²⁹ *Id.* at 11. See also Am. Academy of Actuaries, Critical Issues in Health Reform: Community Living Assistance Service and Supports Act (CLASS) (2009).

¹³⁰ American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 642, 126 Stat. 2313, 2358 (2013) (repealing the CLASS Act).

¹³¹ King, 135 S. Ct. at 2494 n.4.

¹³² Pub. L. 111-148, § 1255 (“the provisions of [42 U.S.C. 300gg-3] (as amended by section 1201), as they apply to enrollees who are under 19 years of age, shall become effective for plan years beginning on or after the date that is 6 months after the date of enactment of this Act”).

¹³³ S. Comm. on Health, Educ., Labor & Pensions, 112th Cong., Ranking Member Rep. Enzi: Health Care Reform Law’s Impact on Child-Only Health Insurance Policies 5 (Aug. 2, 2011).

¹³⁴ King, 135 S. Ct. at 2487.

¹³⁵ *Id.* at 2494 n.4 (emphasis in original).

mandate. The result, in non-cooperating states, would have been exchanges selling health insurance subject to even more destabilizing community-rating price controls than the ACA imposes, but without any subsidies to rescue those markets. All 12 HELP Committee Democrats, a group that included several of the ACA's authors, voted in favor of that bill and that provision. One cannot reasonably argue the plain meaning of Section 36B is *implausible* when even the government and its amici concede that the ACA's authors supported another bill that also could have destroyed health insurance markets in uncooperative states.¹³⁶ And yet, to determine what ACA supporters were thinking, the Court relied on testimony delivered by a non-member of Congress to the HELP Committee, and *ignored* legislation produced *by* the HELP Committee—that is, by a dozen of the ACA's authors and supporters—that dispositively shows ACA supporters accepted conditioning exchange subsidies on state cooperation.¹³⁷

Similarly, the Finance bill conditioned small-business tax credits on states implementing that bill's community-rating price controls.¹³⁸ Senate Democrats dropped these provisions from the Finance and HELP bills at the same time they reinforced the Finance provisions conditioning tax credits on states establishing exchanges.

Congress was willing to risk even more destruction with the ACA's Medicaid expansion. As the ACA was originally drafted, state refusal to expand Medicaid would result in the loss of health insurance subsidies for the most vulnerable segments of society. Even after the Court severed the Medicaid expansion from traditional Medicaid in *NFIB*, it remains the case that a state's refusal to accept the expansion exposes the poorest of the working poor to higher health insurance

¹³⁶ See *supra* note 36.

¹³⁷ King, 135 S. Ct. at 2486. See also Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States, Hearing Before the Committee on the Judiciary, U.S. Senate, 109th Cong., First Session, S. HRG. 109–158, (Sept. 12–15, 2005) (explaining the use of legislative history to resolve textual ambiguities “requires a certain sensitivity All legislative history is not created equal.”).

¹³⁸ See S. 1796, 111th Cong. (2009), § 1221(a), proposing 26 U.S.C. § 45R(c)(2) (“STATE FAILURE TO ADOPT INSURANCE RATING REFORMS. — No credit shall be determined under this section . . . for any month of coverage before the first month the State establishing the exchange has in effect the insurance rating reforms”); S. Rep. No. 111-89, at 48 (2009), <http://www.gpo.gov/fdsys/pkg/CRPT-111srpt89/pdf/CRPT-111srpt89.pdf> (“If a State has not yet adopted the reformed rating rules, qualifying small business employers in the State are not eligible to receive the credit.”).

costs in the individual market, while depriving them of tax credits to subsidize insurance purchases. This is because Section 36B requires individuals to earn at least 100 percent of the federal poverty line to be eligible for subsidies.¹³⁹ It also remains the case that a state's refusal to participate in traditional Medicaid would eliminate subsidies for the poorest of the poor. One cannot reasonably argue it is *implausible* that Congress would give states the power to "destroy" coverage for 8.5 million *moderate*-income individuals when it is undisputed that Congress gave and continues to give states the power to destroy coverage for 50 million *low*-income individuals.

Chief Justice Roberts's conclusion that it is "implausible" that Congress could have intended Section 36B to work as written is simply false. ACA supporters offered too many similar proposals to claim Congress could not have meant what it said in Section 36B.¹⁴⁰

Beyond the health care context, Congress often enacts laws that rely upon state cooperation, and that risk severe adverse consequences should states fail to comply. It often enacts statutes with conflicting goals; the ACA contains conflicting goals in its very title. It often enacts legislation that undermines its stated goals or upsets the expectations of individual legislators.¹⁴¹ Environmental law is replete with such examples, including pollution-control laws that increase pollution¹⁴² and species-conservation laws that undermine species conservation.¹⁴³ It is indisputable that portions of the ACA undermine other stated goals and produce results that some

¹³⁹ See King, 135 S. Ct. at 2495 (quoting definition of "applicable taxpayer" eligible for tax credits).

¹⁴⁰ See Brief of Amici Curiae Jonathan H. Adler and Michael F. Cannon at 22–28, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114).

¹⁴¹ See generally, Steven M. Gillon, *That's Not What We Meant to Do: Reform and Its Unintended Consequences in the Twentieth Century* (2000).

¹⁴² One of the best-known examples is documented in Bruce Ackerman & William Hassler, *Clean Coal, Dirty Air: Or How the Clean Air Act Became a Multibillion-Dollar Bail-Out for High-Sulfur Coal Producers* (1981); see also Jonathan H. Adler, *Clean Fuels, Dirty Air*, in *Environmental Politics: Public Costs, Private Rewards* (1992).

¹⁴³ See, e.g., Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 B.C. L. Rev. (2008); Jonathan H. Adler, *Introduction to Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* (Jonathan H. Adler, ed., 2011).

supporters failed to anticipate, such as when the law threw millions out of their existing insurance plans.¹⁴⁴

What is unique about the ACA was not that Congress passed a law with conflicting goals, or that the law threatened to withhold valuable benefits and impose a more punitive regulatory structure on non-cooperating states, but that so many states refused to cooperate. Moreover, as the large number of state amici supporting the *King* petitioners illustrates, many states preferred that deal to the one the majority offers them.¹⁴⁵

Ironically, the Court's reliance upon its predetermined sense of "Congress's plan" may doom one of Congress's goals. As the *New York Times* noted just after the decision was released, *King* may have "killed state-based exchanges."¹⁴⁶ This is because, absent the threat of losing tax credits, the ACA offers states minimal inducement for the difficult and thankless task of creating and operating exchanges.¹⁴⁷ The idea that Congress conditioned tax credits on state cooperation, under the assumption that most (if not all) states would fall quickly into line, is more plausible than the idea Congress enacted a law encouraging federal exchanges in every state. Indeed, some senators

¹⁴⁴ See Angie Drobnic Holan, Lie of the Year: 'If You Like Your Health Care Plan, You Can Keep It,' PolitiFact (Dec. 12, 2013, 4:44 PM). This example, in particular, shows that many who supported the ACA in Congress either did not understand the law for which they voted, or were willing to deliberately misrepresent it in order to ensure its passage. Either way, the frequency with which members of Congress and the president were willing to say "if you like your health insurance plan, you can keep it" should illustrate the danger of relying upon "Congress's plan" when it is not embodied in the text of the statute at issue.

¹⁴⁵ See, e.g., Brief of Amici Curiae Indiana and 39 Indiana Public School Corporations, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114); Brief of Amici Curiae Oklahoma, et al., *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114).

¹⁴⁶ See Margot Sanger-Katz, *Obamacare Ruling May Have Just Killed State-Based Exchanges*, *The Upshot*, N.Y. Times, June 25, 2015, available at <http://www.nytimes.com/2015/06/26/upshot/obamacare-ruling-may-have-just-killed-state-based-exchanges.html?abt=0002&abg=0>.

¹⁴⁷ Ricardo Alonso-Zaldivar, *High Costs Plague Some State-Run Health Insurance Markets*, Associated Press (Jul. 27, 2015) ("Now that the Supreme Court has ruled the Obama administration can keep subsidizing premiums in all 50 states through HealthCare.gov, no longer is there a downside for states turning to Washington . . . The pendulum probably will swing toward a greater federal role in the next couple of years, said Jim Wadleigh, director of Connecticut's Access Health.").

who voted for the ACA made clear that was an option they would not support. And yet that is the law *King* gives us.¹⁴⁸

VII. *Chevron's Domain vs. King's Dominion*

As noted above, the Court's *King* opinion rests on its conclusion that the relevant statutory language, when read in context, is ambiguous. Under normal circumstances, this would mean the government wins under step two of the *Chevron* doctrine, which provides that when a statute is ambiguous, courts should defer to the interpretation of the implementing agency. Not here. Instead, the chief justice explained, resolving the ambiguity was the job of the Court because the underlying question—whether tax credits are available for the purchase of health insurance in federally established exchanges—was sufficiently “extraordinary,” and of such “deep economic and political significance,” that it should not be left to an administrative agency, particularly one (like the IRS) lacking “expertise in crafting health insurance policy of this sort.”¹⁴⁹ This meant that it was up to the Court to resolve the ambiguity it had discovered in the ACA, in this case by molding the relevant language to conform to the Court's understanding of Congress's plan.

There was precedent for the Court's refusal to apply *Chevron* deference. The Supreme Court similarly refused to defer to the Food and Drug Administration on whether tobacco could be regulated under the Food, Drug, and Cosmetic Act¹⁵⁰ and the Environmental Protection Agency on whether greenhouse gases constituted “pollutants” under the Clean Air Act.¹⁵¹ The chief justice had also urged a narrow conception of *Chevron's* domain in *City of Arlington v. Federal Communications Commission*, though in dissent.¹⁵²

¹⁴⁸ See Marc Levy, Penn. Withdraws Its Healthcare Marketplace Plan After Supreme Court Ruling, *Insurance Journal* (June 26, 2015), <http://www.insurancejournal.com/news/east/2015/06/26/373202.htm>; Randall Chase, Delaware Opts Against Setting Up State Health Insurance Exchange, *Insurance Journal* (Aug. 10, 2015), <http://www.insurancejournal.com/news/east/2015/08/10/378007.htm> (“The court's ruling upholding the subsidies in all states—not just those operating their own exchanges—was a major factor”).

¹⁴⁹ *King*, 135 S. Ct. at 2489 (citation omitted).

¹⁵⁰ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

¹⁵¹ *Massachusetts v. EPA*, 549 U.S. 497, 528–32 (2007).

¹⁵² *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting).

The rationale for refusing to apply *Chevron* deference in such cases is that such deference is only appropriate where Congress would have wanted the implementing agency to exercise such authority. That is, agencies get *Chevron* deference when a statute is ambiguous and it is reasonable to believe Congress meant to delegate interpretive authority to the agency. Based on his *City of Arlington* dissent, it seems that the chief justice is committed to this principle. Whether a consistent majority of the Court concurs is an open question.¹⁵³

The chief justice was unwilling to presume Congress had delegated the IRS authority to construe provisions of the Internal Revenue Code, because Congress had failed to expressly delegate such authority. Yet he had little difficulty presuming that Congress had authorized the payment of billions of dollars in refundable tax credits, not to mention the resulting penalties, without expressly providing so. Such authorization was to be found, if at all, in Congress's unstated "plan." What makes this inconsistency all the more striking is the Court's failure to engage with the precedents expressly counseling against assuming that Congress authorizes expenditures or tax benefits obliquely.¹⁵⁴

Electing not to apply *Chevron* in *King* also allowed the majority to sidestep the fact that the IRS had never provided much of an explanation for its rule. As noted above, the IRS offered no more than a cursory and conclusory justification for its interpretation of Section 36B, failing to provide any substantive response to critical public comments on the proposed rule. Compared with the sort of legal analysis that typically accompanies important rulemakings of this type, the IRS's concise statement was utterly lacking. Under the

¹⁵³ The same may be true of Justice Kennedy, who authored *Gonzales v. Oregon*, 546 U.S. 243 (2006) (holding that the Attorney General's interpretation of "legitimate medical purpose" under the Controlled Substance Act did not merit *Chevron* deference). Justices Ginsburg, Kagan, and Sotomayor joined Justice Scalia's broad application of *Chevron* deference in *City of Arlington v. FCC* and Justice Breyer concurred in the result. Of those joining the *King* majority, only Justice Kennedy joined Chief Justice Roberts's dissent.

¹⁵⁴ See, e.g., *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988) (citing "the settled principle that exemptions from taxation are not to be implied; they must be unambiguously proved"); see also *Yazoo & Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 183 (1889) (holding that tax credits and the like "must be expressed in clear and unambiguous terms").

traditional standards of judicial review of agency action, it is hard to see how what the IRS did could constitute reasoned decisionmaking.

In other words, the IRS expanded its power by doing the opposite of what the ACA says, provided no justification until forced to do so by Congress and the courts, for years thereafter offered a constantly shifting series of post-hoc rationalizations, and still got away with it. The solicitor general's claim that "established by the State" was an undefined statutory term of art, for example, made its first appearance in the government's merits brief before the Supreme Court, years after the IRS rule was finalized. By assuming the role of final interpreter for itself, the Court was able to uphold the substance of the IRS rule without passing judgment on the IRS's manifestly unreasonable rulemaking.¹⁵⁵

While this approach to *Chevron* did not come at the expense of the administration's preferred outcome in *King*, it may hamper other administrative initiatives in the future. As commentators have already noted, this aspect of the *King* decision gives opponents of agency action a new arrow for their legal quivers.¹⁵⁶ When confronted with particularly ambitious agency interpretations, challengers can argue the question at issue should not be left to the agency—and the higher the stakes, the more compelling this argument will be. One example of where *King* could affect other agencies is the Environmental

¹⁵⁵ This also enabled the Court to avoid confronting the "fundamental rule of administrative law" that courts "must judge the propriety" of agency actions "solely by the grounds invoked by the agency." See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). As the *Chenery* Court explained, courts have no warrant for substituting their arguments for those offered by the agency:

If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Id. at 196.

¹⁵⁶ See Chris Walker, What *King v. Burwell* Means for Administrative Law, Notice & Comment, *Yale J. Reg.* (June 25, 2015), <http://www.yalejreg.com/blog/what-king-v-burwell-means-for-administrative-law-by-chris-walker>; The Obamacare Sidestep: Professor Freedman on *King v. Burwell*, Environmental Law Program (June 2015), <http://environment.law.harvard.edu/2015/06/the-chevron-sidestep/>; Cass R. Sunstein, The Catch in the Obamacare Opinion, Bloomberg View (June 25, 2015), <http://www.bloombergvew.com/articles/2015-06-25/the-catch-in-the-obamacare-opinion>.

Protection Agency's Clean Power Plan.¹⁵⁷ So while many in the Obama administration cheered the outcome in *King*, the Court's rationale may have given officials in some agencies something to worry about. Then again, it remains to be seen whether there really are five consistent votes on the Court for this approach.

VIII. Altering the Deal

King was not the first time that the chief justice would stretch the ACA's text in service of his notion of how the statute should read. Roberts's opinion in *NFIB* adopted multiple saving constructions of the statutory text so as to overcome potential constitutional infirmities. The result, as in *King*, was a statute quite different from the one Congress actually enacted.

One of the most controversial aspects of the ACA is the so-called "individual mandate"—a requirement that individuals obtain qualifying health insurance or pay a penalty. Roberts's controlling opinion in *NFIB* found the individual mandate as written—a command imposed under Congress's power to regulate interstate commerce—to be unconstitutional.¹⁵⁸ Roberts nevertheless declined to invalidate the provision because he concluded that the assessment for noncompliance could be characterized as a "tax" and therefore justified as a use of Congress's taxing power.¹⁵⁹ That Congress termed the assessment a penalty instead of a tax—and that the ACA's supporters repeatedly disclaimed that the penalty was a "tax" because it would not have passed otherwise—was not enough to let the plain text of the law guide Roberts's understanding.

Nor did it matter that this interpretation could constrain the individual mandate's operation in the future: Roberts concluded that the assessment could be considered a tax rather than a penalty because the amount was significantly less than the cost of buying coverage, and therefore was not large enough to coerce individuals into purchasing health insurance.¹⁶⁰ But that means that the mandate will be

¹⁵⁷ See Jonathan H. Adler, *Could King v. Burwell Spell Bad News for the EPA?, The Volokh Conspiracy*, Wash. Post (July 3, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/03/could-king-v-burwell-spell-bad-news-for-the-epa/>.

¹⁵⁸ *NFIB*, 132 S. Ct. 2566, 2600–01 (2012).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2595–96.

less effective in fulfilling its stated purpose of preventing adverse selection.¹⁶¹ If the assessment is significantly less than the cost of purchasing qualifying health insurance, many uninsured individuals will lack a sufficient incentive to purchase insurance before they are sick. The logical response to this problem would be to increase the assessment, but Roberts's *NFIB* opinion limits Congress's ability to do so because—at some unknown amount—a higher assessment ceases to be a constitutional tax and becomes an unconstitutional penalty.¹⁶² This may have made sense to the chief justice at the time, but it is hard to square with either the statutory text or the statutory purpose he described in *King*.¹⁶³

Roberts also took liberties with the ACA's text in upholding the Medicaid expansion. Like six of his colleagues, the chief justice concluded that it was unconstitutional for Congress to condition a state's receipt of all Medicaid funding on acceptance of the ACA's Medicaid expansion.¹⁶⁴ Leveraging longstanding state participation in the Medicaid program, and reliance upon significant federal support, was impermissibly coercive.

Rather than invalidate the Medicaid expansion in its entirety, however—let alone the ACA as a whole—the chief justice opted to rewrite the relevant ACA provisions to separate the old Medicaid program from the new. Although Congress had constructed the Medicaid expansion as an extension of the existing program by simply including the expansion among the conditions imposed on receipt of all Medicaid funds, the chief justice concluded that these were in fact two separate programs that states could consider separately. The relevant statutory language was effectively replicated, with one version continuing to set conditions on receipt of old Medicaid funds and another version incorporating the conditions of the Medicaid expansion. Here again, the chief justice's opinion adopted an interpretation of the ACA at odds with the relevant statutory language in the

¹⁶¹ King, 135 S. Ct. at 2486 (“Congress adopted a coverage requirement to ‘minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.’” (citing 42 U. S. C. § 18091(2)(I))).

¹⁶² See Randy E. Barnett, No Small Feat: Who Won the Health Care Case (and Why Did so Many Law Professors Miss the Boat)?, 65 Fla. L. Rev. 1331, 1339 (2013).

¹⁶³ Cf. King, 135 S. Ct. at 2485–87.

¹⁶⁴ *NFIB*, 132 S. Ct. at 2601–07.

name of a never-expressed congressional plan. Again, Roberts adopted an interpretation that undermined the purpose of the relevant provisions; since *NFIB*, dozens of states have declined to implement the ACA's Medicaid expansion—which the ACA's supporters clearly sought to ensure in all 50 states.¹⁶⁵ By decoupling the Medicaid expansion from the continued receipt of traditional Medicaid funding, the chief justice made it much easier for states to refuse to participate in the expansion.¹⁶⁶

In *NFIB* the chief justice took liberties with the statutory text, even at the expense of statutory purpose, to prevent the ACA's constitutional infirmities from dooming the statute. In *King*, he took liberties with the text to prevent the ACA's political and operational infirmities from frustrating "Congress's plan." In so doing, the chief justice revealed that his willingness to stretch statutory text is not confined to cases of constitutional avoidance, and that providing a statute that "works" is as much a job for the courts as it is for Congress.

There is no indication in the statute or its legislative history that it was part of Congress's plan to enact an inflexible tax rather than a flexible penalty; or to offer states a choice of either implementing the Medicaid expansion or preserving the status quo ante; or to make tax credits available in federal exchanges. The only "plan" that makes sense of Roberts's saving constructions is a desire to prevent the ACA's constitutional, political, and operational infirmities from threatening its survival.

¹⁶⁵ PPACA proponents emphasized that the Medicaid expansion was not a new program, but a change to the existing Medicaid program, which every state had implemented. See Brief of Senate Majority Leader Harry Reid, House Democratic Leader Nancy Pelosi, and Congressional Leaders and Leaders of Committees of Relevant Jurisdiction as Amici Curiae in Support of Respondents (Medicaid) at 6, *NFIB v. Sebelius*, 132 S. Ct. 2566, (2012) (No. 11-400). This is the only way to understand the purpose of the minimum income requirement for tax credit eligibility. See 26 U.S.C. § 36B.

¹⁶⁶ See Noam N. Levey, *Court's Decision Could Widen Medicaid Gap*, L.A. Times, June 29, 2012, available at <http://articles.latimes.com/2012/jun/29/nation/lana-court-impact-20120629>; Stacey Butterfield, *Changes to Medicaid Divide States, Doctors, ACP Internist* (2013), <http://www.acpinternist.org/archives/2013/10/medicaid.htm> (quoting Sara Wilensky as saying "the toughest thing about Medicaid expansion, post-Supreme Court decision, is that what was supposed to be uniform across the country is now being decided on a state-by-state basis."). As of July 20, 2015, 19 states had refused to expand Medicaid under the PPACA.

IX. Conclusion

Whether the members of Congress who supported the ACA were aware of it or not, “the most natural reading of the pertinent statutory phrase” shows they voted to present states with a choice. States could either create health insurance exchanges, in which case eligible citizens would receive tax credits, and many individuals and employers who failed to purchase coverage would face penalties, or states could choose not to create exchanges, in which case residents would receive no subsidies, but face fewer penalties. Like the choice Congress presented states via the Medicaid expansion, this choice was stark. No doubt few in Congress anticipated states would act like “separate and independent sovereigns” and “defend their prerogatives by adopting the simple expedient of not yielding to federal blandishments.”¹⁶⁷ What makes the ACA unique is not that it offered states this sort of choice, but that a majority of states chose not to cooperate.

Chief Justice Roberts framed the Court’s *King* ruling as a service to “democracy.” “[I]n every case,” he wrote, the Court “must respect the role of the Legislature, and take care not to undo what it has done.”¹⁶⁸ Yet that is precisely what the majority did. By elevating an unexpressed congressional plan over the plan Congress expressly laid out in statute, the majority altered the deal Congress offered states. Indeed, the Court went to great lengths to do so.

Reaching its conception of Congress’s plan required the majority to change the meaning of “established by the State” from its natural or plain meaning; to change the meaning of that phrase in some parts of the statute but not others; to treat a universal definition as conditional, and a conditional definition as universal; to conclude that Congress would allow adverse selection in long-term-care insurance, but not health insurance; to ignore that Congress indeed tolerated significant adverse selection in health insurance; to isolate select statutory text for the purpose of casting doubt on the operative text; to ignore all other text and context that eliminate such doubts; to rely on legislative history that supported its understanding of Congress’s plan, but ignore legislative history that supports the plain

¹⁶⁷ NFIB, 132 S. Ct. 2566, 2603 (2012) (internal quotation marks omitted).

¹⁶⁸ *King*, 135 S. Ct. at 2496.

meaning; and to make broad assumptions about the way Congress legislates that are contrary to what we actually observe.

If it is “possible” to interpret “established by the State” to mean “established by the State or federal government,” are there any provisions of the ACA that cannot be rewritten to fulfill “what we see as Congress’s plan”? The ACA explicitly denies tax credits to those who purchase coverage outside of an exchange, to many dependents who do not have access to “affordable” employer coverage,¹⁶⁹ and even to those with incomes below 100 percent of the poverty line, many of whom aren’t eligible for Medicaid. If “Congress’s plan” is simply to “improve health insurance markets,” should those limitations on tax-credit eligibility stand in the way? Should the IRS disregard all ACA provisions that limit eligibility for tax credits? Will the Court ratify those revisions of the statute?

These questions are not academic. The IRS has already expanded eligibility for tax credits to certain undocumented immigrants, individuals below 100 percent of the poverty line, and others in direct contravention of the clear limits imposed by Section 36B.¹⁷⁰ Is pretending that 99 percent is greater than 100 percent also part of Congress’s plan? Those tax credits will trigger penalties against employers. Must those employers also pay taxes from which the ACA clearly exempts them?

The only answer the majority provides—the only limitation it envisions on the judicial power to override plain text in the service of “what we see as Congress’s plan”—is what is “at all possible.” That stands in stark contrast to the rule laid out by five of the six justices in the *King* majority just one year earlier:

[T]his Court does not revise legislation...just because the text as written creates an apparent anomaly as to some subject it does not address. Truth be told, such anomalies often arise from statutes...Rejecting a similar argument that a statutory anomaly...made “not a whit of sense,” we explained in one recent case that “Congress wrote the statute it wrote”—

¹⁶⁹ Tricia Brooks, *The Family Glitch*, Health Affairs, Nov. 10, 2014, available at http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=129 (“Some low-to-moderate-income families may be locked out of receiving financial assistance to purchase health coverage through the Marketplaces.”).

¹⁷⁰ See, e.g., Andy S. Grewal, *Lurking Challenges to the ACA Tax Credit Regulations*, Bloomberg BNA Tax Insights, 98 DTR J-1 (May 2015).

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meaning, a statute going so far and no further. . . . This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that...Congress “must have intended” something broader.¹⁷¹

It is also not much of a limitation. If judges may deprive select words of all meaning, construe select phrases to mean their opposite, ignore Congress’s express instructions, and treat text, context, legislative history, and a statute’s competing purposes as buffets from which they may select only the items that serve “what we see as Congress’s plan,” then judges will find very little is impossible. It remains to be seen whether this approach to statutory interpretation will be applied across the board, or is limited to the law “[w]e should start calling . . . SCOTUSCare.”¹⁷²

The Court’s decision to disregard Congress’s express plan has deprived states of a power Congress granted them, and that many states were eager to use. It has altered the balance of power between the federal government and the states. It has reduced democratic accountability for the ACA, and perhaps other acts of Congress. It has subjected tens of millions of employers and individuals to penalties from which the ACA plainly exempts them.¹⁷³ And it creates uncertainty about whether citizens can trust that federal statutes mean what they say.¹⁷⁴

¹⁷¹ *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2033–34 (2014) (internal citations omitted).

¹⁷² *King*, 135 S. Ct. at 2507 (Scalia, J., dissenting); see also *id.* at 2497 (“[N]ormal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.”). Cf. Ilya Shapiro, *Scalia’s Obamacare Argument Is Stronger Than Roberts’*, CNN.com, June 26, 2015, <http://www.cnn.com/2015/06/26/opinions/shapiro-supreme-court-obamacare> (“Scalia renamed the law at issue ‘SCOTUScare,’ but really it deserves the moniker RobertsCare.”).

¹⁷³ See Michael F. Cannon, *Benefits Of ‘King v. Burwell’: More Jobs, Higher Incomes & 70 Million Freed From Illegal Taxes*, *Forbes.com* (June 24, 2015); Michael F. Cannon, *King v. Burwell Expanded Obamacare Even More Than You Know*, *National Review Online* (July 29, 2015).

¹⁷⁴ See *Star Wars* *supra* note 1 (“This deal is getting worse all the time.”); see also *Robot Chicken: Star Wars Episode II* (Adult Swim broadcast, Nov. 16, 2008), https://youtu.be/WpE_xMRiCLE (illustrating the perils of *post hoc* deal alterations).