

***King v. Burwell:* Desperately Seeking Ambiguity in Clear Statutory Text**

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—Colleen M. Grogan

Abstract Does the Patient Protection and Affordable Care Act (ACA) of 2010 authorize tax credits within the thirty-six states that failed to establish health insurance exchanges? That is the question presented in *Pruitt v. Burwell*, *Halbig v. Burwell*, *King v. Burwell*, and *Indiana v. IRS*. The plaintiffs argue that the statute is clear and forecloses any possibility of tax credits in federal exchanges. The government argues that the statute plainly authorizes tax credits in federal exchanges, or is at least ambiguous on the question. Mere disagreement is not evidence of ambiguity. Reaching the truth requires wading deep into each side's arguments. Whether the relevant text is viewed in isolation or in its full statutory context, the ACA authorizes tax credits only in exchanges established by the states.

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Introduction

Section 1311 of the Patient Protection and Affordable Care Act (ACA) directs states to establish health insurance exchanges, and section 1321 directs the federal government to establish exchanges within states that fail to do so (Patient Protection and Affordable Care Act of 2010, 26 U.S.C. (2010)). Confounding expectations, thirty-six states failed to establish exchanges.

Section 1401 offers “premium-assistance tax credits” to individuals who meet certain requirements, including a requirement that they enroll in health insurance—quoting the statute—“through an Exchange established by the State under section 1311” (26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i)). But does the act authorize tax credits within the thirty-six states that *failed* to establish exchanges? That is the question presented in *Pruitt v. Burwell*, *Halbig v. Burwell*, *King v. Burwell*, and *Indiana v. IRS*.

The Internal Revenue Service (IRS) initially recognized the requirement that tax-credit recipients must enroll through an exchange “established by the State” (Committee on Oversight and Government Reform 2014). Nevertheless, in January 2014, it began issuing tax credits through both state-established and federal exchanges.

These “tax credits” take the form of payments from the IRS to insurance companies and also trigger penalties under the act’s individual and employer mandates. In the thirty-six federal exchange states, therefore, the IRS’s reinterpretation has resulted in the Treasury sending billions of dollars to insurers on behalf of 5 million federal exchange enrollees (Burke, Misra, and Sheingold 2014) and subjecting more than 57 million individuals and employers to those penalties (Cannon 2014), neither of which would have occurred if the IRS followed the statute’s plain text and its initial draft regulations.

The plaintiffs in *Pruitt*, *Halbig*, *King*, and *Indiana* have challenged the final IRS regulation (U.S. Department of the Treasury, Internal Revenue Service, Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012) (final rule)) purporting to authorize tax credits in states with federal exchanges. They argue that the rule is contrary to the clear language of the ACA and subjects them to penalties without statutory authorization.

Once dismissed as “screwy . . . nutty . . . [and] stupid” (quoted in Eichelberger 2013), the plaintiffs’ arguments have been validated in and

out of court.¹ At the district court level, the plaintiffs won in *Pruitt* and lost in *Halbig* and *King*.² At the appellate level, they have won in *Halbig* and lost in *King*. At press time, two of three standing opinions found for the plaintiffs.³ The Supreme Court has granted certiorari in the third, *King v. Burwell*, with oral arguments to take place on March 4, 2015. A ruling is expected to issue by June.

The stakes in this litigation are whether the act's exchange provisions, like its Medicaid provisions, are workable without state buy-in. Were the stakes not so high, the plaintiffs' claims would be uncontroversial. The text of the ACA is clear. And while existing legal doctrines permit agencies to depart from clear statutory language in rare cases, none of those doctrines can rescue the IRS's statutory misconstruction.

This article (1) demonstrates that the statutory requirement that tax-credit recipients enroll "through an Exchange established by the State" is clear; (2) examines whether the IRS rule can be upheld under either the "absurd results" or "scrivener's error" doctrines; (3) considers the government's claim that the act plainly deems federal exchanges to be "established by the State"; and (4) examines whether the IRS rule is eligible for "*Chevron* deference."

The Text Is Plain

Sections 1401 and 1321 demonstrate that the requirement that tax-credit recipients enroll "through an Exchange established by the State" is clear and part of a larger scheme designed to induce states to implement multiple provisions of the act.

The Tax-Credit Eligibility Rules

Section 1401 specifies that premium-assistance tax credits are available through only one type of exchange: "an Exchange established by the State."

1. Jonathan Gruber, the ACA's architect, once described the plaintiffs' claims as "screwy . . . nutty . . . [and] stupid." Shortly after the D.C. Circuit ruled for the *Halbig* plaintiffs, multiple recordings from 2012 surfaced of Gruber (2012) telling audiences: "If you're a state and you don't set up an exchange, that means your citizens don't get their tax credits."

2. The district court has heard oral arguments in *Indiana v. IRS*, but is holding the case in abeyance pending Supreme Court consideration of *King v. Burwell*.

3. The full D.C. Circuit had agreed to reconsider the *Halbig* ruling en banc, a move that technically vacates the original panel's judgment, though not its opinion (D.C. Cir. R. 35(d)). Oral arguments were to be held December 17, 2014, yet the court is holding *Halbig* in abeyance pending the Supreme Court's resolution of *King v. Burwell*.

This requirement is not “a few isolated words” (Ruling on Cross-Motions for Summary Judgment, *Halbig v. Sebelius*, No. 13-623 (D.D.C. Jan. 15, 2014)). The ACA’s authors imposed it twice explicitly and reinforced it seven times by cross-reference. When the act describes the people who qualify for credits, the health plans to which credits may be applied, and the premiums used to calculate the credit amount; when it requires recipients to pay their portion of the premium; and when it describes the rating areas in which to find those people, plans, and premiums, it specifies that all these things are found or occur exclusively in “an Exchange established by the State.”

The tax-credit eligibility rules never mention federal exchanges or ever use broad language that would encompass federal exchanges (e.g., “an Exchange”), as appears elsewhere in the act.

A Coherent Scheme to Induce State Cooperation

Section 1321 further conditions those tax credits on states implementing other parts of the act. That section lists various “requirements,” including “the establishment and operation of Exchanges” and the act’s community-rating rules (42 U.S.C. § 18041(a)(1)). It then provides that states may “elect[]” to adopt those requirements into state law (42 U.S.C. § 18041(b)).

Section 1321(c) explains that the consequence of “failure to establish Exchange or implement requirements” is that “the Secretary shall . . . establish and operate such Exchange within the State and the Secretary shall take such actions as are necessary to implement such other requirements” (42 U.S.C. § 18041(c)). Failure to comply with *any* of these requirements therefore results in an exchange established *by the federal government*, which precludes the issuance of tax credits. If section 1321’s purpose were simply to direct the federal government to perform tasks that states failed to perform, it would direct the secretary to establish exchanges only when states failed to establish them. Instead, Congress imposed a federal exchange in the manner of a penalty for any failure to comply with the requirements listed in section 1321.

Additional Evidence

Further evidence, including legislative history, supports the plain meaning of the ACA’s tax-credit eligibility provisions. The act’s authors added language limiting tax credits to “an Exchange established by the State,”

and language clarifying that requirement, multiple times and at multiple stages of the legislative process, including under the supervision of Senate leaders and White House officials. This eligibility requirement survived multiple rounds of revisions, including revisions to the cross-references attached to it. The reconciliation bill made several amendments to section 1401, yet left this requirement undisturbed (Brief of Amici Curiae Jonathan H. Adler and Michael F. Cannon, *King v. Burwell*, No. 14-114 (U.S. Dec. 29, 2014)).

In January 2010, all eleven House Democrats in the Texas delegation interpreted the ACA's exchange provisions as categorically denying "any benefit" to residents of states that failed to establish exchanges (Rep. Lloyd Doggett et al., letter to President Barack Obama, January 11, 2010). They voted for it anyway.

Neither a Drafting Error nor Absurd

Many defenders of the IRS claim that this requirement was a drafting error that would produce absurd results if followed literally. The Supreme Court has held that agencies may ignore "scrivener's errors," but only in "unusual" cases where there is "overwhelming evidence" showing that Congress could not have intended what the statute says (*U.S. National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439, 462 (1993)). Similarly, the Court has held that agencies may ignore plain meaning where it would produce an absurd result (*United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)). But, again, this requires a "most extraordinary showing" that the statute cannot mean what it says (*Garcia v. United States*, 469 U.S. 70, 75 (1984)).

The disputed text may or may not be good policy. But the ACA's congressional supporters offered far too many similar proposals to claim that Congress could not possibly have meant to enact it.

The ACA works largely by creating financial incentives to induce states to implement its provisions. Section 1311 gave the secretary unlimited authority to issue start-up grants to states establishing exchanges. The act requires states to maintain their Medicaid eligibility levels, a costly requirement, until they establish exchanges (ACA § 2001(B)(2)). Until the Supreme Court set it aside, one infamous provision of the act conditioned all federal Medicaid grants on states implementing the act's Medicaid expansion. In 2009 even Senate Republicans proposed offering subsidies only in states that established exchanges (*Patients' Choice Act of 2009*, S. 1099, 111th Cong. (2009)).

Some argue that it is implausible that Congress would impose the act's community-rating price controls without guaranteeing subsidies and mandates to mitigate the resulting adverse selection. Yet many of the act's authors concede that in 2009 they advanced another bill that imposed even stricter community rating but still withheld exchange subsidies in uncooperative states (Brief of Amicus Curiae Members of Congress and State Legislatures, *King v. Sebelius*, No. 14-1158 (4th Cir. Mar. 20, 2014); Affordable Health Choices Act of 2009, S. 1679, 111th Cong. (2009)). Amici for the government concede that the ACA imposes community rating with weak subsidies and no mandate in US territories (Brief of Amicus Curiae for Economic Scholars in Support of Appellee, *King v. Sebelius*, No. 14-1158 (4th Cir. Mar. 21, 2014)). Finally, the act also imposed community rating with neither subsidies nor a mandate in both the CLASS Act and the market for child-only coverage.

The Government's Stalking-Horse Argument: The Text Plainly Does Authorize Credits in Federal Exchanges

Interestingly, the government has never invoked the scrivener's-error or absurd-results doctrines itself. Instead, as clever lawyers can always do with a complex, intricate statute, the government mines the ACA's two thousand pages for provisions to which it can ascribe odd interpretations and emerges arguing that when read in context, the act plainly *does* authorize credits in federal exchanges. Yet no amount of clever lawyering can reconcile this theory with the statute.

"Such Exchange"

The government argues that when section 1321 says that "the Secretary shall . . . establish and operate such Exchange within the State," the phrase "such Exchange" indicates that a federal exchange is the same exchange that the state would have created—that is, an exchange "established by the State." In doing so, the government ignores this passage's subject and verb, which tell us that it is *the secretary*, not the state, who establishes federal exchanges. Moreover, section 1323 provides that when a US territory creates "such an Exchange," the territory "shall be treated as a State" (42 U.S.C. 18043(a)(1)). 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 government claims. 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 who established the exchange.

The government further argues that the federal government “steps into the State’s shoes” when establishing an exchange (Brief for the Appellees, *Halbig v. Burwell*, No. 14-5018 (D.C. Cir. Nov. 3, 2014) (en banc)). These claims have no basis in the statute. Section 1321 is clear: the secretary establishes an exchange “within” the state—not on its behalf, or in its name, or in its shoes.

“A System of Nested Provisions”

Alternatively, the government argues, the ACA contains “a system of nested provisions that, when you walk through them, lead to the conclusion that” the statute considers a federal exchange to have been “established by the State” in which it operates (Oral Arguments Transcript, *Halbig v. Sebelius* (D.C. Cir. Mar. 25, 2014)). First, the government claims that various ancillary provisions circuitously define federal exchanges—which are actually established under section 1321—as having been established under section 1311. Next, it claims that when section 1311(d)(1) says that “an Exchange shall be a governmental agency or nonprofit entity that is established by a State,” that provision defines any exchange established under section 1311 as having been “established by a State.”

The plain text of the act squarely forecloses this theory. Section 1311(d)(1) is not a definition. The act twice describes that provision as a “requirement.” Its purpose is clear on its face and becomes even clearer when we read it in context: “Each State shall . . . establish an American Health Benefit Exchange . . . that . . . meets the requirement[] [that] [a]n Exchange shall be a governmental agency or nonprofit entity that is established by a State” (ACA § 1311(b)(1), (d)(1)). This provision does not define anything as having been established by anyone. It prevents for-profit exchanges by requiring state-established exchanges to be either governmental agencies or nonprofits.

Interpreting section 1311(d)(1) as a definition turns the provision on its head. If this passage defines federal exchanges as having been established by a state, then it must also define for-profit exchanges as governmental agencies or nonprofit entities. The government’s interpretation would thus allow exactly what Congress designed this provision to prevent.

The Government's Strategy: Create the Appearance of Ambiguity

The government is likely just pushing those stalking-horse arguments to create the appearance of ambiguity, in the hope that courts will grant “*Chevron* deference” to the IRS rule. To determine whether an agency’s interpretation of a statute is reasonable under the *Chevron* doctrine and thus entitled to deference, courts must first determine whether the statute as a whole speaks clearly to the precise question at issue. If the statute is clear, the agency must implement the statute according to its plain meaning. If the statute is ambiguous on that precise question, the court must ask whether Congress delegated authority to resolve such ambiguities to the agency and whether the agency’s interpretation is arbitrary, capricious, or contrary to law. The IRS rule fails every step of the *Chevron* test.

Chevron Step One

Chevron Step One is not an invitation for agencies to create ambiguity in an otherwise clear statute. As noted above, the tax-credit eligibility rules are clear, and the rest of the ACA is fully consistent with their plain meaning.

Section 1401’s Information-Reporting Requirements. The government argues that a reporting requirement in section 1401 indicates that Congress intended to offer credits in federal exchanges and therefore creates ambiguity about Congress’s intent.

Section 1401 requires exchanges to report information related to enrollees’ tax-credit eligibility to the Treasury secretary. It imposes this requirement on state-established and federal exchanges, mentioning each separately (sec. 1401, IRC § 36B(f)(3)). There would be no reason to impose this requirement on federal exchanges, the government argues, unless Congress intended to offer credits there.

On the contrary, the D.C. Circuit found that “even if credits are unavailable on federal Exchanges, reporting by those Exchanges still serves the purpose of enforcing the individual mandate—a point the IRS, in fact, acknowledged” (*Halbig v. Burwell*, No. 14-5018 (D.C. Cir. Jul. 22, 2014)). Thus there is no tension between those provisions. Moreover, referring to federal exchanges separately supports the plain meaning of “established by the State” because it shows that Congress recognized federal exchanges as distinct.

“Qualified Individuals.” The government argues that the phrase “established by the State” cannot be interpreted literally because section 1312 says that “qualified individuals” must “reside[] in the State that established the Exchange” (42 U.S.C. § 18032(f)(1)(A)(ii)). “If an HHS[US Department of Health and Human Services]-created Exchange does not count as established by the State it is in, there would be no individuals ‘qualified’ to purchase coverage in the 34 states with HHS-created Exchanges” (Halbig v. Burwell, No. 14-5018 (D.C. Cir. Jul. 22, 2014) (J. Edwards, dissenting)). This absurd result, the government claims, creates ambiguity about the meaning of that phrase.

When read in context rather than isolation, though, this requirement supports the plain meaning of “established by the State.” Section 1312 defines “qualified individuals” in terms of “the State that established the Exchange” because in sections 1311, 1312, and 1313 Congress is speaking to the states, directing them to establish exchanges, detailing related requirements, and *presuming that states will cooperate*. In the very next section, section 1321, Congress drops that presumption and explains what happens when states fail to establish an exchange. Up to that point, this requirement imposed on “qualified individuals” makes perfect literal sense. After that point, the requirement still has meaning because section 1321 directs the secretary to implement “such” a requirement for federal exchanges—that is, that “qualified individuals” must reside in the state “within” which “the Secretary . . . establish[es]” an exchange (ACA § 1321(a), (c)).

“Maintenance of Effort.” The government argues that it would be “dis-harmonious” to interpret “established by the State” literally, because section 2001 requires states to maintain their prior Medicaid eligibility levels until “an Exchange established by the State . . . is fully operational” (42 U.S.C. § 1396a(gg)(1)), and a literal interpretation would impose this costly requirement indefinitely. Such a provision is not disharmonious in a statute that pushed the practice of offering such financial inducements to states “pas[t] the point at which pressure turns into compulsion” (NFIB, 132 S. Ct. at 2604 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937))).

Moreover, the government’s interpretation leads to anomalous and even absurd results when applied throughout the statute. Here, it would condition a state’s freedom to alter its Medicaid eligibility rules on *federal* action (i.e., whether the federal government establishes an operational

exchange). Elsewhere, it would allow *states* to decide whether *federal* exchanges may contract out certain responsibilities (42 U.S.C. § 18031(f)(3)(A)) and would condition a state's eligibility for Medicaid grants on whether the *state* can control the *federal* government (i.e., whether the state can ensure that the federal government has set up a secure interface between the federal exchange and state agencies) (42 U.S.C. § 1396w-3(b)(1)(D)).

Chevron Step Two

Even if the statute were ambiguous, there is no evidence Congress sought to delegate to the IRS authority to determine where tax credits will be issued.⁴

The Supreme Court has repeatedly warned executive agencies that “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes” (*Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). Put differently, Congress does not override plain text and delegate discretionary authority to tax, borrow, and spend hundreds of billions of dollars per year via “a system of nested provisions” hidden within a statute. Moreover, in claiming that the relevant provisions are ambiguous, the government effectively concedes that Congress was comfortable with denying tax credits in nonestablishing states, for if the statute is ambiguous, the IRS (and a future administration) retains the authority to make that choice.

Conclusion

The ACA is not a model of legislative drafting. Nonetheless, the act's tax-credit eligibility provisions are crystal clear. Section 1401 authorizes tax credits only for insurance purchased through an exchange “established by the State.” If the administration or other health care reform advocates are uncomfortable with this result, it must be fixed by Congress rather than by administrative fiat.

4. For reasons we explain elsewhere, the IRS rule is also arbitrary, capricious, and contrary to law (Adler and Cannon 2013).

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