On Wednesday, March 4, 2015, the Supreme Court of the United States will hear argument in *King v. Burwell*, a case involving premium tax credits under the Affordable Care Act (ACA). Among its many provisions, the ACA includes one that authorizes a refundable federal income tax credit to assist low-income taxpayers to pay for health coverage obtained through a health insurance marketplace (referred to as an “Exchange”) established by a state under ACA § 1311. The only issue before the Court in *King* is the validity of a Treasury regulation implementing the premium tax credit provision of the ACA.

The issue of whether the challenged regulation is valid arises because the ACA includes two provisions for establishing an Exchange. The first is ACA § 1311, which deals with an Exchange established by a state. The second is ACA § 1321, which deals with an Exchange established by Secretary of Health and Human Services (“HHS”). The challenged regulation permits premium tax credits under specified circumstances without regard to whether coverage was obtained through a state-established Exchange or an HHS-established Exchange. Although the ACA includes hundreds of individual provisions, only one of them authorizes premium tax credits. If that provision is interpreted literally, it prohibits premium tax credits based on coverage obtained through a section 1321 Exchange.

The Narrow Legal Issue in *King*

Lawsuits like *King* challenging the validity of agency regulations are commonplace and typically routine occurrences in the federal courts. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court established a two-step method for federal courts to follow in cases like this, and that method has not changed significantly over the course of the past 30 years. Nonetheless, *King* has generated widespread interest. One columnist has called *King* “the most serious challenge to the Affordable Care Act since the justices found it constitutional more than two years ago.” Another news site referred to a parallel case, *Halbig v. Burwell*, as “arguably the Affordable Care Act’s greatest existential threat since the Supreme Court case decided in 2012.”

Whether the reality lives up to the predictions remains to be seen. However, it seems that the Supreme Court considers *King* more important than the typical case challenging the validity of an agency regulation. One hour and 15 minutes of argument time per side has been scheduled for Wednesday, rather than the typical 30 minutes per side scheduled in well over 95 percent of Supreme Court arguments. For those interested in following the argument, here is a guide to the basic issues and some of the topics that the Justices might raise in questions for the advocates.

*The Petitioners’ Primary Argument*
The petitioner's main argument is based on the first step of the analysis required under the Chevron decision. Under Chevron step 1, a regulation is invalid if the plain meaning of the statute it purports to interpret directly addresses the same question that the regulation does, and the answer provided by the regulation is inconsistent with the answer provided by the statute. The petitioners argue that a Chevron step 1 analysis ends the controversy in their favor based on the plain meaning of the ACA.

In support of their position, the petitioners first note that only one section of the ACA, section 1401, mentions premium tax credits. Section 1401 added a new section 36B to the Internal Revenue Code. Taken literally, section 36B limits the availability of premium tax credits to circumstances in which the taxpayer or a spouse or dependent obtains coverage "through an Exchange established by a State under section 1311 of the Patient Protection and Affordable Care Act." Section 36B also includes a formula to calculate the amount of the premium tax credit, and that formula always results in zero unless the coverage is obtained "through an Exchange established by a State under section 1311 of the Patient Protection and Affordable Care Act."

Thus, the petitioners conclude that the challenged regulation is invalid on its face because it purports to allow what the statutory language forbids. Moreover, the petitioners urge that there is no ambiguity in the operative provision of the statutory language, and therefore no basis in law for the challenged regulation.

The Government's Primary Defenses

The government has advanced several inter-related arguments to preserve the challenged regulation from the petitioners' Chevron step 1 analysis. Each of the arguments focuses on the goal of expanding the number of individuals with insurance coverage. The government notes that 36 of the 50 states are served by HealthCare.gov and that striking down the challenged regulation would deprive residents of those states of premium tax credits that already have been advanced to help pay for part of their coverage. The backdrop for each of the government's specific arguments is that Congress could not have intended such a result.

The government argues that the petitioners' challenge to the Treasury regulation is based on too narrow a reading of the language of section 36B of the Internal Revenue Code. According to the government, taking context into account leads to a very different interpretation of the phrase "an Exchange established by a State under section 1311 of the Patient Protection and Affordable Care Act." In particular, the government notes that the literal language of section 1311 requires a state to establish an Exchange and that section 1321 requires the HHS to establish "such Exchange" in a state if the state has not elected to establish its own Exchange or has not created an Exchange as quickly as HHS considered necessary. The government argues that the phrase "such Exchange" refers to an Exchange established by a state under section 1311 or to an Exchange that has all of the same characteristics as an Exchange established by a state under section 1311. Read in the context of section 1321 of the ACA, the government states that every Exchange meets Code § 36B's description of the type of Exchange relevant to premium tax credits.

The government reaches a similar conclusion with a somewhat different argument. That argument begins with the observation that Congress is free to define statutory terms so that it has a technical or specialized meaning rather than the meaning it would have if interpreted literally. One example of a phrase that means something other than what its literal terms suggest is a "term of art." A phrase that has taken on a technical or specialized meaning among practitioners of an art is a classic case of a "term of art." The government argues that the phrase "an Exchange established by a
State under section 1311 of the Patient Protection and Affordable Care Act” is a “statutory term of art.” Building on that assertion, the government argues that one of two things must be true: (a) the phrase “an Exchange established by a State under section 1311 of the Patient Protection and Affordable Care Act” in Code §36B refers to an Exchange established by a state under section 1311 and an Exchange established by the HHS under section 1321, or (b) the phrase “an Exchange established by a State under section 1311 of the Patient Protection and Affordable Care Act” is ambiguous. If the first of these propositions is true, the regulation must be upheld because it is consistent with Code §36B. If instead the second of these propositions is true, the regulation passes muster under Chevron step 1 and must be upheld if it is a reasonable construction of the statute even though other, more reasonable constructions are possible.

The government’s third main argument is based on a concept of respecting a balance between state and federal governments. The government contends that Congress is required to give the states clear and explicit notice of the consequences of failing to participate in a cooperative federal-state program. When a requirement of this kind is applied to the facts of King, section 36B cannot be interpreted according to its plain meaning, as the petitioners ask the Court to do. The government believes that the ACA did not explain clearly enough to each state that if it declined to create its own Exchange under section 1311 of the ACA, the residents of the state would not be eligible for premium tax credits.

Conclusions?

Predicting what the Supreme Court will decide in any case before it is a perilous task. Moreover, predicting the ultimate outcome of the issue in a case like King entails a special risk. There are no Constitutional issues for the Court to rule on in King, which means that the last word on the availability of premium tax credits might be spoken through the ordinary process of federal legislation. Even so, the Court’s concerns and possible direction may become clearer after the completion of oral arguments on Wednesday.

Beyond that, the Supreme Court is not expected to issue a decision in King until close to the last day of the current term. The Supreme Court’s order disposing of the case—referred to as its “mandate”—is not issued until at least 25 days after the decision is announced, and the Court has discretion to withhold its mandate beyond that minimum period. In practice, this means that an adverse outcome for the government may have a somewhat delayed impact. However, rather than attempting to anticipate the substance of the Court’s decision, employers should continue their ongoing ACA compliance efforts and await further official guidance before suspending or modifying those efforts in reliance on King.

Tom Christina is a shareholder in the Greenville office of Ogletree Deakins. He authored an amicus brief in King v. Burwell on behalf of George Mason University Professor of Law Jeremy Rabkin, supporting the petitioners and urging reversal of the judgment in the Fourth Circuit. On December 6, 2010, Mr. Christina participated in a panel discussion at the American Enterprise Institute regarding alternative litigation challenges to the Affordable Care Act. It has been reported that he was the first lawyer to speak publicly about the potential significance of the statutory language at issue in King v. Burwell.