SAVING OBAMACARE DID NOT BAKE THE EARTH: APPLYING THE SUPREME COURT'S *KING V. BURWELL* FRAMEWORK TO THE CONFLICTING AMENDMENTS AT THE HEART OF THE EPA'S CLEAN POWER PLAN

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I. INTRODUCTION 232
II. THE SUPREME COURT, EPA, AND THE CPP 236
A. *EPA's Legal Responsibility to Regulate Carbon Emissions from Power Plants* 236
B. *CPP Regulatory Scheme* 237
C. *Statutory Authority for the CPP* 237
III. THE SUPREME COURT'S *KING V. BURWELL* DECISION 241
A. *The Patient Protection and Affordable Care Act* 242
B. *The Court Employs a Three-Step Process to Resolve the Question in Favor of the Government* 243
1. Step One: Eschewing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council* 244
2. Step Two: The Critical Language is Ambiguous 245
3. Step Three: The Broad Structure of the Act Necessitates Finding in Favor of the Government 247
IV. APPLYING THE SUPREME COURT'S *KING* FRAMEWORK TO THE CPP 249
A. *Step One: EPA's Interpretation Deserves* Chevron *Deference* 249
1. This is Not a Question of "Economic and Political Significance" 250
a. The CPP May Be a Question of Economic Significance 250
b. The CPP is Not a Question of Political Significance 252
2. EPA is Best-Equipped to Handle This Question 253
3. The Courts Likely Will Not Jettison *Chevron* Deference in Assessing the 112 Exclusion 254

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B. *Step Two: The Language of Section 111(d) is Ambiguous* 255
C. *Step Three: The Broad Structure of the CAA Likely Necessitates Finding in EPA's Favor* 256
V. CONCLUSION 258

I. INTRODUCTION

During the 2008 Democratic Presidential Primary, then Senator Barack Obama offered three major progressive campaign promises: expanding health care coverage, ending the war in Iraq, and addressing climate change.[1] The first two of these goals were accomplished within President Obama's first term. On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act ("PPACA"),[2] which, through a series of complex reforms, expanded health insurance coverage to millions of Americans.[3] The last U.S. soldiers withdrew from the conflict in I raq on December 18, 2011.[4] These achievements, along with others, have made Obama one of the most significant progressive presidents in American history.[5]

However, the third goal remained elusive. During the first two years of the Obama presidency, the House of Representatives passed an ambitious carbon emissions trading regime to curb

1. Barack Obama, *Remarks After the Final Democratic Primary* (*June 3, 2008*), http://www.presidentialrhetoric.com/campaign2008/obama/06.03.08.html ("Because if we are willing to work for it, and fight for it, and believe in it, then I am absolutely certain that generations from now, we will be able to look back and tell our children that this was the moment when we began to provide care for the sick . . . this was the moment when the rise of the oceans began to slow and our planet began to heal; this was the moment when we ended a war and secured our nation and restored our image as the last, best hope on Earth.").

2. Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES (Mar. 23, 2010), http://www.nytimes.com/2010/03/24/health/policy/24health.html. The PPACA is colloquially known as "Obamacare"; hence the title of this Note. Robert E. Moffit, *Year Six of the Affordable Care Act: Obamacare's Mounting Problems*, HERITAGE FOUND. (Apr. 1, 2016), http://www.heritage.org/research/reports/2016/04/year-six-of-the-affordable-care-act-obamacares-mounting-problems ("The Affordable Care Act (ACA, popularly known as Obamacare). . .").

3. *The Affordable Care Act is Working*, DEP'T OF HEALTH & HUMAN SERVS. (June 24, 2015), http://www.hhs.gov/healthcare/facts-and-features/fact-sheets/aca-is-working/index.html ("Since the passage of the Affordable Care Act five years ago, about 16.4 million uninsured people have gained health coverage.").

4. Joseph Logan, *Last U.S. Troops Leave Iraq, Ending War*, REUTERS (Dec. 18, 2011), http://www.reuters.com/article/us-iraq-withdrawal-idUSTRE7BH03320111218.

5. *See, e.g.*, Paul Krugman, *In Defense of Obama*, ROLLING STONE (Oct. 8, 2014), http://www.rollingstone.com/politics/news/in-defense-of-obama-20141008?page=5; Dylan Matthews, *Barack Obama is Officially One of the Most Consequential Presidents in American History*, VOX (Mar. 23, 2016), http://www.vox.com/2015/6/26/8849925/obama-obamacare-history-presidents ("Barack Obama . . . will be a particularly towering figure in the history of American progressivism," but treating the President's Clean Power Plan ("CPP") as if it was already enforceable).

greenhouse gas emissions that contribute to climate change.[6] But the Senate failed to follow suit.[7] In the wake of the Democratic Party's defeat in the 2010 midterm elections, the White House did not prioritize addressing climate change and no major climate change-related legislation or regulations was enacted in the subsequent two years.[8]

Following the President's reelection in 2012, the administration reprioritized acting on climate change. The president announced his Climate Action Plan ("CAP") on June 25, 2013 to "cut domestic carbon pollution . . . and lead international efforts to address global climate change."[9] At the heart of CAP is the Environmental Protection Agency's ("EPA") Clean Power Plan ("CPP") to regulate carbon emissions from power plants, the largest single source of carbon emissions in the United States.[10] The CPP was published in the Federal Registrar on October 23, 2015.[11] The CPP could cement a strong climate change legacy for the President.[12]

Yet the President's climate legacy—in particular the CPP that is currently being challenged in the D.C. Circuit[13]—may be at risk

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6. Ryan Lizza, *As the World Burns*, NEW YORKER (Oct. 11, 2010), http://www.newyorker.com/magazine/2010/10/11/as-the-world-burns.

7. *Id.* (detailing the failed efforts of the Senate and White House to pass a carbon trading regime in 2009 and 2010).

8. *See* Heather Smith, *Obama's Green Record: Some Small Victories, One Gaping Flop*, GRIST (Dec. 20, 2013), http://grist.org/climate-energy/obamas-green-record-some-small-victories-one-gaping-flop/ ("We now know what pretty much everyone suspected, which was that the Obama administration deliberately delayed implementing environmental regulations in the years before his reelection, on the grounds that it might keep him from winning a second term.").

9. *Fact Sheet: Timeline of Progress Made in President Obama's Climate Action Plan*, ENVTL. & ENERGY STUDY INST. (Aug. 5, 2015), http://www.eesi.org/papers/view/fact-sheet-timeline-progress-of-president-obama-climate-action-plan.

10. *Id.*; *Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plants*, WHITE HOUSE (Aug. 3, 2015), https://www.whitehouse.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards.

11. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereinafter Clean Power Plan].

12. Kristen Meek et al., *6 Ways Obama Can Cement a Legacy on Climate Action*, GREENBIZ (Jan. 14, 2016), https://www.greenbiz.com/article/6-ways-obama-can-cement-legacy-climate-action (listing "Implement the Clean Power Plan" as the first step the President can take to cement his climate legacy). Part of that legacy is the administration's successful push for a strong international agreement to reduce carbon emissions at the United Nations Conference on Climate Change in Paris in December 2015. Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES (Dec. 12, 2015), http://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html. This Note does not focus on the Paris climate agreement.

13. Eric Wolff, *EPA to Lay Out Clean Power Plan Defense for the D.C. Circuit*, POLITICO (Mar. 28, 2016, 10:00 AM), http://www.politico.com/tipsheets/morning-energy/2016/03/pro-morning-energy-wolff-213437. The D.C. Circuit has exclusive jurisdiction amongst Courts of Appeals to hear challenges to national standards promulgated under CAA § 111(d), the section under which the CPP was promulgated. 42 U.S.C. § 7607(b)(1) (2015). The CPP was stayed by the Supreme Court. Adam Liptak & Coral Davenport, *Supreme Court Deals Blow*

because of his other signature domestic achievement—the PPACA.[14] This is because the latest Supreme Court case to hold the PPACA lawful, *King v. Burwell*, eschewed the traditionally deferential *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* framework[15] that could be used to resolve a critical statutory ambiguity[16] in the Clean Air Act ("CAA") in favor of the CPP.[17] Instead, the Supreme Court took a less favorable approach because of the "economic and political significance" of the central question in *King*.[18] As the challenge to the CPP in the D.C. Circuit may also pose a question of "economic and political significance," application

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to Obama's Efforts to Regulate Coal Emissions, N.Y. TIMES (Feb. 9, 2016), http://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html. The D.C. Circuit also took the unusual step of proceeding directly to an en banc review of the CPP. Abby Harvey, *U.S. Court of Appeals Reschedules CPP Oral Arguments*, GHG DAILY MONITOR (May 17, 2016), http://www.exchangemonitor.com/publication/ghg-daily-monitor/u-s-court-appeals-reschedules-cpp-oral-arguments/. This Note does not focus on the implications of the stay for the particular question it seeks to answer—can the EPA's interpretation of § 111(d) survive review under the analysis the court used in its recent health care decision, *King v. Burwell*?—because there is little known about the Court's rationale for issuing the stay. Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, 28 GEO. ENVTL. L. REV. 425, 426 (2016) ("The five Justices who voted for the stay declined even to explain their decision, offering instead only five terse identically worded orders in response to five differently argued applications for a stay.").

14. Jonathan H. Adler, *Could* King v. Burwell *Spell Bad News for the EPA?*, 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/ (discussing how the Supreme Court's decision that kept intact a critical provision of the PPACA in *King v. Burwell* could threaten the lawfulness of the CPP).

15. King v. Burwell, 135 S. Ct. 2480, 2488-89 (2015). A search in Westlaw reveals that *Chevron* has been cited in over 14,000 decisions.

16. It is important to note that petitioners in the D.C. Circuit merits challenge to the CPP argue that the language at issue—§ 111(d) of the CAA, the so-called § 112 exclusion—unambiguously prohibits EPA from promulgating the CPP. Brief of Petitioners on Core Legal Issues at 61, W. Va. v. EPA (D.C. Cir. Feb. 19, 2016) (No. 15-1363) ("The Section 112 Exclusion invalidates the [CPP] irrespective of the Rule's contents."). This Note will establish the language at issue is ambiguous, but first explains the source of the contention that it is not.

17. *See generally* Adler, *supra* note 14; Recent Regulation, *EPA Interprets the Clean Air Act to Allow Regulation of Carbon Dioxide Emissions from Existing Power Plants*, 129 HARV. L. REV. 1152 (2016).

18. *King*, 135 S. Ct. at 2489 ("Whether those credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' . . .").

of the less favorable framework[19] may lead the D.C. Circuit or the Supreme Court, eventually, to invalidate the CPP.[20]

This Note will establish that the approach the Supreme Court used in *King*, applied to the critical statutory ambiguity in the CAA, does not threaten the legality of the CPP. Section II of this Note will provide background information on EPA's obligation to regulate carbon emissions, the regulatory design of the CPP, and the statutory ambiguity in EPA's claimed source of authority for the CPP. Section III of this Note will add to the literature surrounding the Court's decision in *King* by providing a three-step analytical framework through which the Court's decision can be understood.[21] The section will first discuss the statutory interpretation question at play in *King*. Then, it will explore the three steps the Court took to rule in the government's failure: eschewing *Chevron*; determining the critical language is ambiguous; and resolving the ambiguity in a manner that is consistent with the purpose of the PPACA. Section IV will begin by attempting to create some clarity about what courts have meant by the phrase "economic and political significance." It will then pair that analysis with the framework in Section III to show that the CPP can survive review by the courts under the *King* framework because EPA's statutory interpretation at issue in the CPP litigation is more deserving of deference than the government's interpretation in *King* and is consistent with the purpose of the CAA. Section V will offer a conclusion.

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19. Although petitioners in the D.C. Circuit challenge to the CPP have argued that it is a question of "economic and political significance" and thus that *King* is relevant to the court's task, they have not argued for the application of the *King* framework to the § 112 exclusion issue. Brief of Petitioners on Core Legal Issues at 23, W. Va. v. EPA (D.C. Cir. Feb. 19, 2016) (No. 15-1363). The government in response has only argued for the partial application of the *King* framework to the § 112 exclusion issue. Respondent EPA's Initial Brief at 84, W. Va. v. EPA (D.C. Cir. Mar. 28, 2016) (No. 15-1363) (applying the third analytical phase of *King* to the § 112 exclusion issue). Perhaps this is an indication that neither party believes *King* can convince the courts to rule in their favor on the issue. Still, it is worth exploring the outcome of the § 112 exclusion issue under *King*, as there has been speculation that the courts may use *King* to resolve the issue. *See*, *e.g.*, Emily Hammond & Richard J. Pierce, Jr., *Testing the Limits of Administrative Law and the Electric Grid*, 7 GEO. WASH. J. ENERGY & ENVTL. L. 1, 7-19 ("Furthermore, the significance of the CPP is enormous, both politically and economically" and discussing applying *King* to the § 112 exclusion issue); Adler, *supra* note 14 (discussing the implications of *King*'s eschewing of *Chevron* on the § 112 exclusion issue).

20. Recent Regulation, *supra* note 17, at 1159 ("In the end, the fate of the CPP will almost certainly be determined by the Supreme Court.").

21. *See infra* Section III for a discussion of the literature on *King* and why developing a structural tool for understanding the Court's decision is useful.

II. THE SUPREME COURT, EPA, AND THE CPP

This section of the Note will provide information about EPA's legal responsibility to regulate carbon emissions, the CPP's regulatory scheme, and EPA's statutory authority for the CPP. Subsection A will discuss EPA's responsibility to regulate carbon emissions under Supreme Court case law. Subsection B will review how the CPP regulates carbon emissions from power plants, while Subsection C will examine the statutory authority for the CPP.

A. EPA's Legal Responsibility to Regulate Carbon Emissions from Power Plants

In 2007, in *Mass. v. EPA*, the Supreme Court confirmed that EPA has a legal responsibility to regulate greenhouse gases, an air pollutant under the CAA, if it determines that greenhouse gases endanger public health and welfare.[22] In 2009, EPA determined that greenhouse gases are the primary drivers of climate change and may "reasonably be anticipated to endanger public health and welfare."[23] Further, in 2011, the Supreme Court in *Am. Elec. Power Co. v. Conn.* indicated that EPA could regulate carbon emissions through § 111(d) by finding that the CAA, and in particular EPA's authority to regulate carbon emissions under § 111(d), preempted federal public nuisance claims that sought abatement of carbon emissions from power plants.[24] On October 23, 2015, EPA fulfilled its obligation to regulate carbon pollution by publishing a final rule regulating carbon emissions from power plants in the "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," or the CPP.[25]

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22. Mass. v. EPA, 549 U.S. 497, 528 (2007) ("On the merits, the first question is whether . . . the Clean Air Act authorizes EPA to regulate greenhouse gas emissions . . . in the event that it forms a 'judgment' that such emissions contribute to climate change. We have little trouble concluding that it does."). *See also* Hampden Macbeth, *Nuclear Chaos: The Exelon-PHI Merger and What it Means for Nuclear Power in the United States and the EPA's Carbon Emission Rules*, 28 GEO. ENVTL. L. REV. (forthcoming 2016).

23. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) ("The Administrator finds that greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare . . . . The Administrator reached her determination by considering both observed and projected effects of greenhouse gases in the atmosphere, their effect on climate, and the public health and welfare risks associated with such climate change.").

24. Am. Elec. Power Co. v. Conn., 131 S. Ct. 2527, 2537 (2011); William W. Buzbee, *Federalism-Facilitated Regulatory Innovation and Regression in a Time of Environmental Legislative Gridlock*, 28 GEO. ENVTL. L. REV. 451, 467 (2016).

25. Clean Power Plan, 80 Fed. Reg. at 64,662 (Oct. 23, 2015).

B. CPP Regulatory Scheme

The CPP requires states to adopt plans to reduce carbon emissions from power plants.[26] EPA expects the state plans will reduce carbon emissions from power plants 32% below 2005 levels by 2030.[27] The state plans must establish standards of performance that reflect the degree of emissions reductions achievable through an adequately demonstrated Best System of Emission Reduction ("BSER") that considers the cost of such reductions and "non-air quality health and environmental impact and energy requirements."[28] The BSER is based on three "building blocks," which already enjoy widespread use by utilities and states.[29] The first building block is reducing carbon intensity at power plants through heat rate improvements.[30] The second is substituting generation at carbon-intensive affected power plants for generation from less carbon-intensive affected power plants.[31] The third building block is substituting increased generation from new zero-emission sources of renewable energy for generation from fossil fuel-fired power plants.[32]

Complying with the rule is expected to cost the utility industry someplace between $5.1- and $8.4 billion.[33] It is also expected to possibly save households $17 monthly,[34] and have between $25- to $45 billion in climate and health benefits.[35]

C. Statutory Authority for the CPP

In publishing the CPP, EPA claimed it had the authority to regulate carbon emissions from power plants under § 111(d) of the CAA[36]—the statutory provision that the Supreme Court had earlier indicated provided EPA the authority to regulate carbon emissions from power plants.[37] Industry and state challengers to the CPP have

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26. *Id.* at 64,662.
27. *Id.* at 64,665.
28. *Id.* at 64,707.
29. *Id.* at 64,667.
30. *Id.*
31. *Id.*
32. *Id.*
33. Recent Regulation, *supra* note 17, at 1157.
34. PAT KNIGHT & AVI ALLISON, CUTTING ELECTRIC BILLS WITH THE CLEAN POWER PLAN: EPA'S GREENHOUSE GAS REDUCTION POLICY LOWERS HOUSEHOLD BILLS 9 (2016), http://www.synapse-energy.com/sites/default/files/Cutting-Electric-Bills-Presentation.pdf.
35. Clean Power Plan, 80 Fed. Reg. at 64,665.
36. *Id.* at 64,710 ("EPA's authority for this rule is CAA section 111(d).").
37. Am. Elec. Power. Co. v. Conn., 131 S. Ct. 2527, 2537 (2011).

alleged that the CPP is unlawful for many reasons,[38] including that EPA is prohibited from regulating carbon emissions from power plants under § 111(d).[39] This subsection of the Note will discuss the purpose of the CAA, § 111(d)'s place in the CAA, and the language of § 111(d).

The purpose of the CAA is to protect public health and welfare.[40] Section 111 plays a gap-filling role in the CAA's comprehensive air pollution control scheme for protecting public health and welfare:[41] criteria pollutants are regulated through §§ 108-110; hazardous air pollutants are regulated through §112; and all other pollutants are regulated through § 111.[42] Section 111(b) regulates new stationary sources that emit other air pollutants that may "reasonably be anticipated to endanger public health or welfare," while § 111(d) regulates the same pollutants from existing stationary sources.[43] The pre-1990 version of the CAA reflected § 111(d)'s gap filling role: § 111(d) regulation applied to "any air pollutant . . . for which air quality criteria have not been issued or which is not included on a list published under section [108(a)] or [112(b)*(1)(A)*]."[44] Section 111(d) regulated pollutants that were neither criteria pollutants, nor hazardous air pollutants.[45]

In 1990, Congress amended the CAA by making a series of changes to § 112, which necessitated amending the reference to § 112 in § 111(d).[46] During Congressional consideration of the Clean Air Act Amendments of 1990, two amendments—one by the House and one by the Senate—modifying the reference to § 112 in § 111(d) were passed by both Houses of Congress and signed into law by

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38. These arguments include that the rule "transgresses Section 111," abrogates authority granted to the states by the CAA, and unconstitutionally commanders and coerces states to adopt federal energy policy. Brief of Petitioners on Core Legal Issues at 29-60, W. Va. v. EPA (D.C. Cir. 2016) (No. 15-1363). This Note will not explore these arguments.

39. *Id.* at 61 ("The Section 112 Exclusion invalidates the Rule irrespective of the Rule's contents. . . . [T]he Exclusion prohibits EPA from employing section 111(d) to regulate a source category that is already regulated under section 112.").

40. 42 U.S.C. § 7401(b)(1) (2012) ("The purposes of this subchapter are—(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population . . . .").

41. Clean Power Plan, 80 Fed. Reg. at 64,711 ("Together . . . sections 108-110, . . . section 112, and . . . section 111 constitute a comprehensive scheme to regulate air pollutants with 'no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare.'" (quoting S. REP. NO. 91-1196, at 20 (1970)).

42. *Id.* at 64,711.

43. *Id.* (quoting 42 U.S.C. § 7411(b)(1)(A) (2012)).

44. Clean Power Plan, 80 Fed. Reg. at 64,711 (emphasis added).

45. *Id.*

46. Avi Zevin, *Dueling Amendments: The Applicability of Section 111(d) of the Clean Air Act to Greenhouse Gases* 7 (Inst. for Pol'y Integrity, Working Paper No. 2014/5, 2014), http://policyintegrity.org/files/publications/2014-5_Zevin.pdf.

the president.[47] The House amendment was included in the United States Code, and was also included in the Statutes at Large.[48] Section 111(d) in the United States Code states:

> The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any *air pollutant (i)* for which air quality criteria have not been issued or *which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412* of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance.[49]

The italicized language is the critical language because it appears to prohibit the regulation of an air pollutant that is emitted from a source category which is regulated under § 112.[50] This so-called § 112 exclusion provision in the United States Code would then prohibit EPA from regulating carbon emissions—an air pollutant—from power plants under § 111(d) because power plants—a source category—are regulated under § 112.[51] The CPP would then be unlawful.

However, the Senate amendment, which was included in the Statutes at Large[52] and was labeled as a conforming amendment,[53] modified the pre-1990 version of the CAA by substituting "section 112(b)" for "section 112(b)(1)."[54] Section 111(d) thus remains a gap-filling provision, commanding EPA to establish standards for "any existing source for any air pollutant . . . which is not included on a list published under [108(a)] or [112(b)]."[55] As carbon dioxide is

47. *Id.* at 4.

48. Clean Power Plan, 80 Fed. Reg. at 64,712 ("[T]hat the U.S. Code only reflects the House amendment does not change the fact that both amendments were signed into law as part of the 1990 Amendments, as shown in the Statutes at Large.").

49. 42 U.S.C. § 7411(d) (2012) (emphasis added).

50. Zevin, *supra* note 46, at 3.

51. *Id.* at 4.

52. *Id.*

53. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 302, 104 Stat. 2399, 2574.

54. *Id.*

55. Clean Power Plan, 80 Fed. Reg. at 64,713.

not a § 108 criteria pollutant[56] and is not listed as a hazardous air pollutant under § 112(b),[57] the Senate amendment would require EPA to regulate carbon emissions—an air pollutant—from power plants—an existing source—not listed under § 108(a) or § 112(b).[58] This would make the CPP's regulation of carbon emissions from existing power plants lawful.[59]

It is the conflict between these two amendments—a statutory ambiguity—that the courts might seek to resolve through the application of *King*, if certain preconditions that are discussed in Section III are met, and may prove a stumbling block for the CPP.[60] Application of *Chevron* to this conflict would likely prove helpful to EPA because it directs courts to uphold—defer to—a "reasonable agency interpretation" in the face of statutory ambiguity.[61] This framework is one in which EPA and/or its interpretation is likely, though not guaranteed, to prevail.[62] Meanwhile application of *King* to this question would make the analysis less certain[63] as it eliminates the deference afforded to agencies under *Chevron*,[64] leaving the fate of the statutory interpretation, and thus the rule itself, in

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56. *Criteria Air Pollutants*, ENVTL. PROT. AGENCY, https://www.epa.gov/criteria-air-pollutants (last visited Nov. 26, 2016) (listing the six criteria pollutants as particulate matter, photochemical oxidants and ground-level ozone, carbon monoxide, sulfur oxides, nitrogen oxides, and lead).

57. 42 U.S.C. § 7412(b) (2012).

58. *See* Clean Power Plan, 80 Fed. Reg. at 64,712.

59. *Id.* ("[T]he Section 112 Exclusion resulting from the Senate amendment . . . would not preclude CAA section 111(d) regulation of CO2 emissions from power plants . . . ."). EPA fulfilled the requirement that it regulate pollutants from existing power plants when new power plants are regulated under § 111(b) by publishing regulations for carbon emissions from new power plants under § 111(b) along with its § 111(d) carbon regulations. *Id.* at 64,665.

60. Recent Regulation, *supra* note 17, at 1156 (citing Adler, *supra* note 14).

61. Michael Burger et al., *Legal Pathways to Reducing Greenhouse Gas Emissions Under Section 115 of the Clean Air Act*, 28 GEO. ENVTL. L. REV. 359, 372 n.45 (2016) ("Regardless, the *Chevron* doctrine remains the go-to framework for analysis, directing courts to uphold reasonable agency interpretation in instances where the statute is silent or ambiguous.").

62. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1089-91 (2008) (an empirical study of all 1014 Supreme Court cases between *Chevron* in 1984 and *Hamdan* in 2006 in which an agency statutory interpretation was at issue found that, while *Chevron* was not applied frequently in such cases, that when it was it was associated with high agency win rates). *See also* Hammond & Pierce, *supra* note 19, at 6 n.84 ("Studies of affirmance rates under the *Chevron* doctrine show agency win rates ranging from about sixty-four percent to about eighty-one percent." (citing Richard J. Pierce, Jr., *What Do Studies of Judicial Review of Agency Action Mean?*, 63 ADMIN. L. REV. 77, 84 (2011)).

63. *See* Adler, *supra* note 14 (describing the effect of the *King* decision on the CPP's § 111(d) interpretation as "mak[ing] things more complicated for the Environmental Protection Agency. . . . Yet the Court's treatment of the *Chevron* doctrine—in particular its conclusion that no deference was owed to the IRS on the question of whether the PPACA authorizes tax credits in federal exchanges—could make EPA sweat.").

64. Vanessa Johnson et al., *King v. Burwell: The Supreme Court's Missed Opportunity to Cure What Ails* Chevron, 42 J. LEGIS. 1, 33 (2016) (describing the Supreme Court's aim in *King* as "eliminating the deference to the agency").

the hands of the courts.[65] As the *King* outcome—upholding the PPACA—itself illustrates, eschewing the familiar *Chevron* framework does not guarantee that EPA's interpretation of § 111(d) and the CPP will be rejected, but it could provide a pathway for the courts to do so.

III. THE SUPREME COURT'S *KING V. BURWELL* DECISION

King is considered one of a trio of recent cases, which also includes *Mich. v. EPA* and *Util. Air Regulatory Grp. v. EPA*, dealing with agency statutory interpretation[66] and a class of cases that involve Supreme Court review of agency statutory interpretation that pose a question of "economic and political significance."[67] *King*, however, is fundamentally different than the other cases. The other cases analyzed the agency statutory interpretation within the *Chevron* framework.[68] *King*, in an unusual move, refused to apply *Chevron*, even though the Court acknowledged the case was *Chevron*-eligible,[69] partially because of the "economic and political significance" of the question.

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65. Jody Freeman, *The* Chevron *Sidestep: Professor Freeman on King v. Burwell*, HARV. ENVTL. L. PROGRAM, http://environment.law.harvard.edu/2015/06/the-chevron-sidestep/ (last visited Nov. 26, 2016) (describing the Court's rejection of *Chevron* deference in *King* as possibly limiting the "power of both executive branch and independent agencies to interpret the statues they administer"); Cass R. Sunstein, *The Catch in the Obamacare Opinion*, BLOOMBERG VIEW (June 25, 2015, 12:48 PM), http://www.bloombergview.com/articles/2015-06-25/the-catch-in-the-obamacare-opinion (describing the Court's decision in *King* as asserting for itself the role of "'determin[ing] the correct reading'" of ambiguous legislation in declining to apply *Chevron*).

66. *See* Hammond & Pierce, *supra* note 19 (discussing *King*, *Mich.*, and *Util. Air Regulatory Grp.* in the context of the § 112 exclusion issue); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. (forthcoming 2017) (introducing author's discussion of *King*, *Mich.*, and *Util. Air Regulatory Grp.* by stating: "[w]ith three recent decisions, the Supreme Court has embraced a new trio of canons of statutory interpretation").

67. King v. Burwell, 135 S. Ct. 2480, 2489 (2015). *King* pulled the "economic and political significance" phrase from *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014), which quoted *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

68. Mich. v. EPA, 135 S. Ct. 2699, 2701 (2015) (holding EPA's interpretation unreasonable under *Chevron*); *Util. Air Regulatory Grp.*, 134 S. Ct. at 2432 (holding EPA's interpretation permissible under *Chevron*); *FDA v. Brown & Williamson*, 529 U.S. at 123 (declining to defer to FDA's interpretation under *Chevron* because of the economic and political significance of the question presented); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 247 (2006) (concluding that *Brown & Williamson* was decided at Step One of *Chevron*).

69. *King*, 135 S. Ct. at 2488 ("When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*."); Heinzerling, *supra* note 66 ("The *King v. Burwell* canon is also new. The Court had, in the *Chevron* era, never before put the C*hevron* framework entirely to the side in the circumstances presented in *King*: an interpretation of a statute deemed ambiguous, arrived at after notice-and-comment rulemaking, by the agency charged by statute with making rules to implement the provision interpreted.").

Consequently, this section, while mindful of *King*'s placement in this cluster and class of cases, will focus extensively on the Court's analysis in *King* because of the novelty of the Court's approach to the statutory interpretation and the lack of scholarship structurally framing the Court's decision. Subsection A will provide background information necessary for understanding the question at the heart of the case. Subsection B will offer a framework for understanding how the Court resolved the central question.

A. The Patient Protection and Affordable Care Act

The PPACA ("the Act") is a comprehensive health insurance reform statute that is intended to increase Americans' access to health care insurance, including the uninsured.[70] It is based on three major reform pillars.[71] First, the Act requires that each health insurance provider "accept every . . . individual in the State that applies" for health insurance coverage.[72] Second, it requires individuals to have insurance "coverage or pay a penalty."[73] Third, the Act endeavors to make health insurance more affordable by providing tax credits to low-income individuals in order to purchase insurance.[74]

In addition to the three reform pillars, the PPACA also establishes "exchanges" in each state in which health insurance purchasers can compare and shop for insurance plans.[75] The interaction between the tax credits and the exchanges was the central question in *King*.[76] Under the PPACA, a state can establish an exchange or, if it chooses not to do so, the Department of Health and Human Services ("HHS") will "establish and operate such [e]xchange within the State"[77] under § 1321. The amount of the tax credit for each individual taxpayer is partly dependent on whether the taxpayer enrolls in an insurance plan[78] through "an

70. Arthur Nussbaum, *Can Congress Make You Buy Health Insurance? The Affordable Care Act, National Health Care Reform, and the Constitutionality of the Individual Mandate*, 50 DUQ. L. REV. 411, 413 (2012).

71. *King*, 135 S. Ct. at 2486.

72. *Id.* (quoting 42 U.S.C. § 300gg-1(a)).

73. Alicia Ouellette, *Health Reform and the Supreme Court: The ACA Survives the Battle of the Broccoli and Fortifies Itself Against Future Fatal Attack*, 76 ALB. L. REV. 87, 91 (2013).

74. *King*, 135 S. Ct. at 2487.

75. *Id.*

76. *Id.* ("The issue in this case is whether the Act's tax credits are available in States that have a Federal [e]xchange rather than a State [e]xchange.").

77. *Id.* (quoting 42 U.S.C. § 18041(c)(1) (2015)).

78. *Id.*

[e]xchange *established by the State* under [§] 1311 of the" Act.[79] In 2012, the Internal Revenue Service ("IRS") issued a rule that made tax credits available on exchanges established by both states and those established by HHS.[80] The *King* petitioners did not want to have to purchase insurance and challenged the IRS's rule, arguing that the language of the PPACA restricts the use of the tax credits to state-established exchanges and cannot be extended to HHS-run exchanges.[81] Extension of the tax credits to federal exchanges would have required petitioners to purchase health insurance with the tax credits.[82] The Court granted certiorari to determine whether the IRS's extension of the use of tax credits to HHS-run exchanges was lawful.[83]

B. The Court Employs a Three-Step Process to Resolve the Question in Favor of the Government

In the year since the Court decided *King*, there has been a proliferation of commentary and scholarship on the Court's decision.[84] But this commentary and scholarship, while analyzing

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79. 26 U.S.C. § 36B(b) (2015) (emphasis added).

80. Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (codified at 26 C.F.R. pts. 1 and 602) ("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 [e]xchange . . . and the Federally-facilitated [e]xchange.").

81. *See King*, 135 S. Ct. at 2487.

82. *Id.* at 2488. Petitioners were four Virginia residents, which had a federal exchange, and would have received tax credits under the IRS's rule. *Id.* at 2487-88. This would have brought the cost of buying insurance for the individuals under the income threshold and thus would have required them to either buy health insurance or pay a penalty to IRS. *Id.* at 2488.

83. *Id.* at 2488.

84. *See generally* Jonathan H. Adler & Michael F. Cannon, King v. Burwell *and the Triumph of Selective Contextualism*, 2015 CATO SUP. CT. REV. 35 (reviewing, criticizing, and assessing the significance of *King*); Emily Hammond, *Deference for Interesting Times,* 28 GEO. ENVTL. L. REV. 441 (2016) (discussing *King* in the context of shifting deference norms); Hammond & Pierce Jr., *supra* note 19 (applying *King* to statutory interpretation issues in the CPP); Recent Regulation, *supra* note 17 (reviewing how *King* may have influenced EPA's interpretation of CAA provisions in the final version of the CPP); Heinzerling, *supra* note 66 (describing *King* as one of a trio of cases that asserts greater power for the courts in assessing questions of statutory interpretation); Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56 (assessing *King*'s impact on *Chevron* deference and what it means for tax law); Johnson et al., *supra* note 64 (arguing that the Court should have applied *Chevron* to the question in *King* and that it missed an opportunity to "fix the flaws" in *Chevron*); Matthew A. Melone, King v. Burwell *and the* Chevron *Doctrine: Did the Court Invite Judicial Activism?*, 64 U. KAN. L. REV. 663 (2016) (discussing *King* in critiquing the Court's deference jurisprudence); Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2d 407, 408 (2015) (placing *King* in a trio of recent cases that "calls for consideration of non-textual factors when determining how much clarity is required for a text to be clear"); Adler, *supra* note 14 (questioning whether *King* may pose an obstacle to EPA's interpretation of the conflicting § 111(d) amendments); Freeman, *supra* note 65 (describing

many different aspects of the Court's decision, has not produced an easy to use structure for understanding how the Court reached its decision[85] that can be applied to *King*-like statutory interpretation questions in the future. This subsection proposes a three-step framework for understanding how the *King* Court resolved the case's central question in the government's favor.

1. Step One: Eschewing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*

The Court began its analysis of whether the PPACA provides for the use of tax credits on federally-run exchanges by noting that "[w]hen analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*."[86] *Chevron* involves asking whether the statute is ambiguous and if so whether the agency's interpretation is reasonable.[87] Citing *Food and Drug Admin. v. Brown & Williamson*, the Court stated that the *Chevron* framework is based on the premise "that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[88] It went on further: "[i]n extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[89]

The Court said this was one of those cases because two preconditions had been met.[90] First, the question of whether tax credits could be used on federal exchanges was a question of "economic and political significance" central to the statutory scheme because the tax credits were one of the PPACA's significant reforms, involved "billions of dollars" in annual spending, and affected the "price of health insurance for millions of people."[91] The Court found that had

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the Court's eschewing of *Chevron* in *King* as the *Chevron* sidestep); Sunstein, *supra* note 65 (comparing the eschewing of *Chevron* to the Court's decision in *Marbury v. Madison*).

85. *See, e.g.*, Adler & Cannon, *supra* note 84 (discussing the content of the three steps in the framework this Note develops, but not in those terms or in the order presented in this Note); Hammond, *supra* note 84 (focusing only on this Note's Step One); Hickman, *supra* note 84 (focusing on the content of this Note's Step One); Melone, *supra* note 84 (discussing the content of the three steps of this Note's framework, but without providing any structure for comprehending how the Court reached its decision); Re, *supra* note 84 (focusing on what this Note discusses at Step Two); Freeman, *supra* note 65 (focusing on this Note's Step One); Sunstein, *supra* note 64 (focusing on this Note's Step One).

86. *King*, 135 S. Ct. at 2488.

87. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

88. *King*, 135 S. Ct. at 2488 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

89. *Id.* at 2488-89 (quoting *Brown & Williamson*, 529 U.S. at 159).

90. *Id.* at 2489.

91. *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160). For a discussion of what the courts mean by "economic and political significance," see *infra* Section IV.A.1. For an estimate of the economic impact of the tax credits at issue in *King*, see *infra* notes 142, 152.

Congress intended to assign this question to an agency, it would have expressly done so.[92] Second, it was "especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS."[93]

King Step One might best be summarized as: should *Chevron* apply?

2. Step Two: The Critical Language is Ambiguous

Proceeding to the second phase of its analysis, the Court said it was instead its responsibility to determine the correct reading of "an [e]xchange *established by the State* under [§] 1311 of the" Act.[94] If the statutory language is clear, the Court must enforce its terms.[95] However, if the text is ambiguous, the Court will turn to Step Three—analyzing the broader structure of the Act—to determine the meaning of the language.[96] In determining whether the language is plain, courts "must read the words 'in their context and with a view to their place in the overall statutory scheme.'"[97]

Turning to the language in question, the Court employed a textualist approach,[98] breaking it down into three elements that must be satisfied if an individual is to use tax credits to acquire insurance on an exchange.[99] Those elements are: (1) an individual must enroll through "an exchange"; (2) the exchange must be "established by the State"; and (3) the exchange must be established under § 1311 of the Act.[100] The Court noted that all the parties agreed that a federally-run exchange qualified as "an [e]xchange."[101]

On the critical question of whether a federal exchange satisfies the second element of being "established by the State," the Court continued to use a textualist approach in importing the statute's definitions of key words to determine if a plain meaning reading of

92. *King*, 135 S. Ct. at 2489.

93. *Id.*

94. *Id.* ("It is instead our task to determine the correct reading of Section 36B.").

95. *Id.*

96. *Id.* at 2492 ("Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B.").

97. *Id.* at 2489 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

98. FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 24 (2009) ("Textualism 'does not admit of a simple definition, but in practice is associated with the basic proposition that judges must seek and abide by the public meaning of the enacted text, understood in context.'" (quoting John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005))).

99. *King*, 135 S. Ct. at 2489.

100. *Id.*

101. *Id.*

the text was consistent with Congressional intent in passing the legislation.[102] The Court noted that it might seem that a federal exchange could not fulfill the "established by the State" element because the statute's definition of "State" does not mention the federal government.[103] But read in context and "with a view to [its] place in the overall statutory scheme" the meaning of the phrase was not so clear.[104] Section 1311 states that all exchanges "shall make available qualified health plans to qualified individuals"[105] and "qualified individuals" are defined in the statute as individuals who "reside in the State that established the [e]xchange."[106] However, there would be no "qualified individuals" on federal exchanges if the phrase "the State that established the [e]xchange" was given "its most natural meaning" and yet the text of PPACA expects that there will be qualified individuals on every exchange, which would not be the case if federally-run exchanges could not enroll individuals.[107] Consequently, the phrase "established by the State" did not possess its natural meaning in context.[108] On the third element, the Court used much of the same approach as it did in the second element[109] in finding that a federal exchange, because of context and statutory scheme, may be considered established under § 1311 of the Act.[110] Importing the PPACA's definition of "exchange," meaning an "[e]xchange established under [§ 131]1," to § 1321 suggests that § 1321, authorizing HHS to establish an exchange, authorizes it to do so under § 1311 as otherwise the federal exchange "would not be an [e]xchange at all."[111]

In the final analysis of the Court's second analytical phase, the phrase "an [e]xhange established by the State under § 1311" was ambiguous.[112] It was possible to construct multiple meanings of the

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102. *See* KATHARINE CLARK & MATTHEW CONNOLLY, A GUIDE TO READING, INTERPRETING AND APPLYING STATUTES 3 (2006), https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf (listing the use of statutory definitions as a form of plain meaning statutory interpretation); CROSS, *supra* note 98, at 25 ("The classical textualist approach to statutory interpretation takes the words of the text and attempts to discern their 'plain meaning.'").

103. *King*, 135 S. Ct. at 2490. The Act defines "State" to mean "each of the 50 states and the District of Columbia." *Id.*

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

105. 42 U.S.C. § 18031(d)(2)(A).

106. *Id.* § 18032(f)(1)(A)(ii).

107. *King*, 135 S. Ct. at 2490.

108. *Id.*

109. *See supra* note 102.

110. *King*, 135 S. Ct. at 2490-91.

111. *Id.* at 2490-91.

112. *Id.* at 2491.

language—it could be limited to state exchanges, but it could also refer to all exchanges, including federal exchanges, for the reasons discussed above.[113] Furthermore, several references in the PPACA to the ambiguous language would not make sense if the tax credits were not available on federal exchanges.[114] The Court brushed aside the suggestion that it employ the canon against surplusage to find that the words "established by the State" would be unnecessary if they were given the meaning petitioners preferred.[115] The "inartful drafting" of the PPACA meant that "rigorous application of the canon" would not provide a "fair construction of the statute."[116]

Step Two requires asking if it is possible to construct multiple meanings from the contested language? If it is, then the analysis proceeds to Step Three. If the language is clear, it must be enforced as written.

3. Step Three: The Broad Structure of the Act Necessitates Finding in Favor of the Government

Finding the text ambiguous, the Court employed purposivism[117] and used materials cited in briefs to resolve the statutory ambiguity in the third phase of its decision. The Court said that a provision that is ambiguous is "often clarified" by aid of the rest of the broader statutory scheme because "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law"[118] and the Court "cannot interpret federal statutes to negate their own stated purposes."[119]

The Court noted that in a state that establishes its own exchange the Act's reform pillars would work together to expand health insurance coverage by ensuring everyone could get coverage; incentivizing individuals to get insurance, rather than paying a penalty; and ensuring insurance would be more affordable through

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113. *Id.* ("The upshot of all this is that the phrase 'an Exchange established by the State under [§ 1311]' is properly viewed as ambiguous. The phrase may be limited in its reach to State [e]xchanges. But it is also possible that the phrase refers to *all* Exchanges—both state and federal—at least for the purposes of the tax credits.").

114. *Id.* at 2491-92.

115. *Id.* at 2492.

116. *Id.*

117. CROSS, *supra* note 98, at 60 ("The broader search for general legislative purpose sometimes goes by the term 'purposivism.' . . . Each statute should be fitted into the broad legal landscape in order to best effectuate the purpose of the enacting Congress").

118. *King*, 135 S. Ct. at 2492 (quoting United Sav. Ass'n of Tex. v. Timbers of Inwood Forests Assocs., 484 U.S. 365, 371 (1988)).

119. *Id.* (quoting New York State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 419-20 (1973)).

the tax credits.[120] However, the petitioners' interpretation of the ambiguous language would mean that the tax credits would not be available in states with a federal exchange.[121] Because the requirement to purchase insurance is tied to an individual's income, many individuals without the aid of the tax credits would not be required to purchase insurance.[122] The Court stated without tax credits, and with a limited requirement to purchase insurance, individual insurance markets in states with federally-run exchanges could, pulling language from the government's brief,[123] enter a "death spiral."[124] The Court cited studies, discussed in the government's brief[125] and *amici curiae*'s briefs,[126] which predicted premiums could increase between 35- to 47% and enrollment could decline by approximately seventy percent in states with federal exchanges.[127] Citing an *amici curiae* brief of economists, the Court said premiums would also rise for those outside the exchanges because the PPACA's first reform pillar "requires insurers to treat the entire individual market as a single risk pool."[128] Considering the impact petitioners' interpretation would have on health insurance markets, the Court said: "[i]t is implausible that Congress meant the Act to operate

120. *Id.* at 2493.

121. *Id.* ("Under petitioners' reading . . . one of the Act's three major reforms—the tax credits—would not apply.").

122. *Id.* ("So without the tax credits, the coverage requirement would apply to fewer individuals. . . . [A] *lot* fewer.").

123. Brief for Respondents at *15, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114), 2015 WL 349885, at *15 (describing the impact of tax credits being unavailable in some states: "The denial of tax credits and the resulting loss of customers would thus have disastrous consequences for the insurance markets in the affected States, which would remain subject to the Act's nondiscrimination rules but without the safeguards Congress deemed essential to preventing death spirals.").

124. *King*, S. Ct. 135 at 2493.

125. Brief for Respondents at *37, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114), 2015 WL 349885, at *37 (citing EVAN SALTZMAN & CHRISTINE EIBNER, THE EFFECT OF ELIMINATING THE ACA'S TAX CREDITS IN FEDERALLY FACILITATED MARKETPLACES 5-6 (Jan. 2015)).

126. *See, e.g.*, Brief for Amici Curie Asian & Pacific Islander Am. Health Forum et al. at *28 n.55, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114), 2015 WL 350368, at *28 n.55 (same). In all, eight *amici curiae* briefs cited SALTZMAN & EIBNER, *supra* note 125. *See also* Brief of HCA Inc. as Amicus Curiae in Support of Respondent at *20 n.14, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114), 2015 WL 365002, *20 n.14 (citing LINDA J. BLUMBERG ET AL., URBAN INSTITUTE, THE IMPLICATIONS OF A SUPREME COURT FINDING FOR THE PLAINTIFF IN KING V. BURWELL: 8.2 MILLION MORE UNINSURED AND 35% HIGHER PREMIUMS 6-7 & fig.1 (2015)). In all, fifteen *amici curiae* briefs cited BLUMBERG ET AL.

127. *King*, 135 S. Ct. at 2493-94.

128. *Id.* at 2494 ("Because the Act requires insurers to treat the entire individual market as a single risk pool, . . . premiums outside the [e]xchange would rise along with those inside the [e]xchange." (citing Brief for Amici Curiae for Bipartisan Economic Scholars in Support of Respondents at *11-12, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114), 2015 WL 393821).

in this manner . . . Congress meant for [the tax credits and insurance purchasing requirement] to apply in every State . . . ."[129]

Ultimately, the Court concluded that the critical ambiguous provision in the PPACA allowed tax credits to be used on any exchange because doing so was consistent with what it saw as Congress's plan to "improve health insurance markets," not ruin them.[130] Under those circumstances, the Court "[i]f at all possible . . . must interpret the Act in a way that is *consistent* with the former, and avoids the latter."[131]

King Step Three can best be summarized as: how can the language be best interpreted in the context of the broader structure and intent of the underlying legislation?

IV. APPLYING THE SUPREME COURT'S *KING* FRAMEWORK TO THE CPP

This section of the Note will assess how the courts might interpret the § 112 exclusionary language in § 111(d) of the CAA, which is critical to determining the lawfulness of the CPP. Subsection A will examine how the courts will assess this question at *King* Step One; Subsection B will do the same for Step Two; and Subsection C will do the same for Step Three. Woven throughout these analyses will be a discussion of possible counterarguments to each subsection's analysis.

A. Step One: EPA's Interpretation Deserves Chevron *Deference*

This subsection will explore the two pre-conditions that lead the Court to eschew *Chevron* deference in the first phase of its analysis in *King*. First, the subsection will examine why the question here is not one of "economic and political significance." Second, it will establish that the ambiguous statutory language at issue in the CPP is the sort of question that EPA is best equipped to handle. Lastly, the subsection will conclude by bringing these two analytical strains together to show that EPA is likely to receive *Chevron* deference on the § 112 exclusion issue.

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129. *King*, 135 S. Ct. at 2494.
130. *Id.* at 2496.
131. *Id.* (emphasis added).

1. This is Not a Question of "Economic and Political Significance"

The courts have provided limited guidance about what constitutes "economic and political significance,"[132] or what qualifies as a "major question" or an "important" issue,[133] such that *Chevron* deference should not apply at *King* Step One. This subsection will attempt to shed light on what is meant by the phrase "economic and political significance" by examining Supreme Court and D.C. Circuit cases in which the courts stated there was a question of "economic and political significance." It will also incorporate, where possible,[134] scholarship on the "economic and political significance" aspects of these cases. This subsection will first discuss the economic part of "economic and political significance" to establish that the § 112 exclusion is at most maybe a question of "economic significance." Then, the following subsection will explore the political component of "economic and political significance" to show that the § 111(d) issue is not a question of "political significance."

a. The CPP May Be a Question of Economic Significance

It is unclear what qualifies as an "economic[ally] significan[t]" question. Most decisions that have found a question of "economic and political significance" have not mentioned specific dollar figures that make the case one of "economic significance." For example, *Brown & Williamson*, which the Court in *King* cited as the source of the "economic significance" language, did not mention

132. David Gamage, *Forward—*King v. Burwell *Symposium: Comments on the Commentaries (and on Some Elephants in the Room)*, 2015 PEPP. L. REV. 1, 5 ("It is perhaps regrettable that the *King v. Burwell* decision did not better clarify what constitutes a question of 'deep economic and political significance' for the purpose of *Chevron* deference."); Heizerling, *supra* note 66 ("judgments about economic and political importance are subjective and unpredictable").

133. This "economic and political significance" line of cases is sometimes referred to as the "major questions" or "important issue" canon. The scholarship surrounding this canon has also recognized that the Court has not elucidated when the canon is applicable. Austin Schlick & Michael Steffen, *Should Courts Defer the Least When It Matters the Most*?, 44:3 MD. B.J. 12, 14 (2011) ("As two legal scholars have put it, the notion is 'that courts should force Congress to speak clearly if it intends to delegate regulatory authority over major political and economic questions.' The proposed 'major questions canon' is inherently subjective and difficult to apply: a 'major question,' after all, is in the eye of the beholder."); Sunstein, *supra* note 68, at 245 ("the distinction between major questions and non-major ones lacks a metric").

134. Unfortunately, much of the scholarship on this canon merely identifies it or acknowledges that it is hard to determine when it applies, but does not attempt to provide insight into when it might apply. *See* Hammond, *supra* note 84, at 443 (identifying the "important issue" canon); *see generally* Sunstein, *supra* note 68 (noting it is hard to distinguish between major and non-major questions, but then focusing on what the canon might mean for *Chevron* and administrative law). So this subsection only includes limited reference to scholarship on what qualifies as "economic and political significance."

the financial impact of the regulation at issue despite claiming that it was a question of "economic . . . magnitude."[135] Even the cases that discuss actual dollar amounts sufficient to be a question of "economic significance" are not clear about when the economic impact of the issue at hand crosses the threshold into being a question of "economic significance." *King* itself only mentioned "billions of dollars" in annual spending.[136] *Loving v. Internal Revenue Serv.*, which involved a question about the validity of tax preparation industry regulations, mentioned the "multi-billion dollar tax-preparation industry" in determining the question was one of "economic significance."[137] Similarly, in *Util. Air Regulatory Grp.*, which involved a rule that tailored permitting requirements for carbon emissions to large sources, the Supreme Court said the rule that would increase administrative costs for one regulatory program from $12 million to $1.5 billion was a question of "economic significance."[138] But the Court also noted that the rule would increase the administrative costs for another regulatory program from $62 million to $21 billion.[139] The Court did not state whether $1.5 billion or $21 billion was sufficient to make it a question of "economic significance." It is difficult to know based on the estimated economic impact of a regulation whether it will present a question of "economic significance."

In the wake of this uncertainty, some scholarship has questioned whether the § 112 exclusion issue rises to the level of the economic impact of the question in *King*.[140] The compliance cost of the CPP for the utility industry is between only $5.1 and $8.4 billion[141] as compared to the higher price tag for the PPACA tax credits.[142] Additionally, "no reading of section 111(d) would have as significant an effect" on the CAA "as a contrary reading" would have had on the PPACA, potentially sending the health insurance markets into a "death spiral."[143] This suggests that the § 112 exclusion and the CPP does not pose a question of "economic significance."

However, arguments can be made that the § 112 exclusion is a question of "economic significance." While the CPP compliance costs may not total nearly as much as the spending attached to the tax

135. FDA. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

136. *King*, 135 S. Ct. at 2489.

137. Loving v. IRS, 742 F.3d 1013, 1021 (D.C. Cir. 2014).

138. Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2443-44 (2014).

139. *Id.* at 2443.

140. Recent Regulation, *supra* note 17, at 1156-57.

141. *Id.*

142. Joel Zinberg, *One Easy Obamacare Fix*, U.S. NEWS & WORLD REP. (Apr. 19, 2015, 2:00 PM), http://www.usnews.com/opinion/economic-intelligence/2015/08/19/obamacare-tax-credit-confusion-is-easily-fixable (indicating that in 2014, over $15 billion in PPACA health insurance tax credits were paid out).

143. Recent Regulation, *supra* note 17, at 1157.

credits in *King*, the question here may cross the vague "billions of dollars" or "multi-billion dollar" threshold that the courts thought made the questions one of "economic significance" in *King* and *Loving*. The CPP compliance costs would clear what might have been the $1.5 billion threshold in *Util. Air Regulatory Grp.* Further, if the courts decide to view this question from a broader perspective, the CPP is expected to have between $25- and $45 billion in climate and health benefits. This sort of wide angle view on the impact of the CPP would then place the CPP's economic impact in excess of the possibly higher $21 billion threshold in *Util. Air Regulatory Grp.* that the Court found presented a question of "economic significance."

EPA's treatment of the § 112 exclusion (and by extension the CPP) may pose a question of "economic significance."

b. The CPP is Not a Question of Political Significance

Courts have also not clearly articulated what they mean by the phrase "political significance." Reading between the lines of *King*, *Brown & Williamson*, and *Loving*, it seems that the courts believe that an agency claiming a new regulatory power or a regulation that has a significant impact on a large number of Americans can pose a question of "political significance." In *Loving*, the D.C Circuit, reviewing IRS's statutory interpretation, found it to pose a question of "political significance" as IRS "would be empowered for the first time to regulate hundreds of thousands of individuals . . . ."[144] *Loving* also illustrates how the courts' political analysis is often influenced by economic concerns because the quotation in the preceding sentence continues: ". . . in the multi-billion dollar tax-preparation industry."[145] Similarly, Sunstein, in discussing the political prong of the Court's analysis in *Brown & Williamson*, believed it was satisfied when it involved interpreting an ambiguous provision "in a way that would massively alter the preexisting statutory scheme."[146] While in *King*, the Court offered an alternative rationale for why the question was political—it "affect[ed] the price of health insurance for millions of people," as it involved billions of dollars of annual spending.[147]

The § 111(d) issue is not one of "political significance." EPA is not claiming a new regulatory power by regulating air pollutants

144. Loving v. IRS, 742 F.3d 1013, 1021 (D.C. Cir. 2014).
145. *Id.*
146. Sunstein, *supra* note 68, at 244.
147. King v. Burwell, 135 S. Ct. 2480, 2489 (2000).

through § 111(d) as it has done several times in the past.[148] Additionally, while electricity use is ubiquitous in America,[149] and thus the CPP will affect more than the "millions of people" in *King*, the impact will not be as significant as the requirement to purchase insurance in *King*. Households are expected to save $17 monthly from lower electricity bills as a result of the CPP.[150] But this falls far short of the "economic significance" of the PPACA that requires Americans to spend hundreds or thousands of their own dollars or those of the government's[151] to purchase insurance, or pay hefty penalties for failing to purchase insurance.[152]

2. EPA is Best-Equipped to Handle This Question

The § 112 exclusion issue, unlike the issue in *King*, is a question for EPA. Congress specifically authorized EPA "to prescribe such regulations . . . as are necessary" under the CAA[153] and courts have recognized that Congress has designated EPA as particularly well-suited "to serve as [the] primary regulator" of carbon emissions.[154] Consequently, it is likely that the courts will find that Congress assigned this statutory interpretation question with implications for carbon emissions regulations to EPA and that EPA's interpretation will qualify for *Chevron* treatment.

But Jonathan Adler believes that this question is one of legislative process, not regulatory design, significantly weakening

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148. *See* Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 61 Fed. Reg. 9905 (Mar. 12, 1996) (codified at 40 C.F.R. pts. 51, 52, and 60); Kraft Pulp Mills; Final Guideline Document; Availability, 44 Fed. Reg. 29,828 (May 22, 1979); Emission Guideline for Sulfuric Acid Mist, 42 Fed. Reg. 55,796 (Oct. 18, 1977) (codified at 40 C.F.R. pt. 60); Phosphate Fertilizer Plants; Final Guideline Document; Availability, 42 Fed. Reg. 12,022 (Mar. 1, 1977).

149. *Access to Electricity (% of Population)*, http://data.worldbank.org/indicator/EG.ELC.ACCS.ZS (last visited Nov. 26, 2016) (listing U.S. electricity percentage as 100%).

150. *See* KNIGHT & ALLISON, *supra* note 34, at 9.

151. I.e., the tax credits.

152. *See* Dan Munro, *Average Cost of Obamacare 'Silver' Plan - $328 Per Month*, FORBES (Sept. 29, 2013, 10:35 AM), http://www.forbes.com/sites/danmunro/2013/09/29/average-cost-of-obamacare-silver-plan-328-per-month/ (detailing the cost of the mid-tier health insurance plan under the PPACA as $328 a month); Grace-Marie Turner, *How Much is the Obamacare Mandate Going to Cost You*, FORBES (July 24, 2012, 10:28 AM), http://www.forbes.com/sites/gracemarieturner/2012/07/24/how-much-is-the-obamacare-mandate-going-to-cost-you/ (noting that the penalty for failing to purchase health insurance for lowest income taxpayers under the PPACA will be $695 in 2016; but that the penalty scales up to $2,085 for higher income families).

153. 42 U.S.C. § 7601 (2015).

154. Recent Regulation, *supra* note 17, at 1157 n.48 (quoting Am. Elec. Power. Co. v. Conn., 131 S. Ct. 2527, 2539 (2011)).

the case for applying *Chevron* deference.[155] This argument is unconvincing because, in the face of ambiguity stemming from two diametrically opposed amendments,[156] this is not a question of legislative process. Instead it is one of how to best interpret the amendments in the context of the CAA.[157] Under this circumstance, the courts have acknowledged, even pre-*Chevron*, EPA's expertise in interpreting the CAA and thus EPA is likely to be afforded deference on this question.[158]

3. The Courts Likely Will Not Jettison *Chevron* Deference in Assessing the Section 112 Exclusion

Ultimately, the CPP should receive *Chevron* deference for its interpretation of the ambiguous § 112 exclusion provision. The strongest argument for this is that this is the type of question that EPA is meant to resolve—and consequently receive *Chevron* deference on—because it requires EPA expertise in interpreting the CAA and designing a carbon regulatory regime. Moreover, this is at most possibly a question of "economic significance," but certainly not one of "political significance." It is not "political[ly] signifcan[t]" because EPA is not exercising a new regulatory authority in acting under § 111(d) and it will not have a significant financial impact on Americans. It is unlikely that the courts will decline to apply *Chevron* deference when the "economic and political

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155. *See* Adler, *supra* note 14 ("It's one thing to defer to the EPA over technical matters concerning pollution control, but quite another to defer to the EPA on legislative process . . . .").

156. Both the U. S. Code and case law, despite petitioners' contention otherwise, are clear that where the United States Code and Statutes at Large conflict, the latter must be given control. 1 U.S.C. § 112 (2015) ("The United States Statutes at Large shall be legal evidence of laws . . . ."); Stephan v. United States, 319 U.S. 423, 426 (1943) ("[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent."); Five Flags Pipe Line Co. v. Dep't of Transp., 854 F.2d 1438, 1440 (D.C. Cir. 1988) ("[W]here the language of the Statutes at Large conflicts with the language in the United States Code that has not been enacted into positive law, the language of the Statues at Large controls."). This means that the courts must attempt to give effect to both the House and Senate amendment as both are in the Statutes at Large, creating ambiguity. *See* Clean Power Plan, 80 Fed. Reg. at 64,711-12; *see infra* Section IV.B.

157. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842-43 (1984) (once it has been determined that the statutory language is ambiguous, the next step is statutory interpretation: "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

158. Union Elec. Co. v. EPA, 427 U.S. 246, 256 (1976) ("We have previously accorded great deference to the Administrator's construction of the Clean Air Act."); Nat. Res. Def. Council v. EPA, 655 F.2d 318, 326 n.14 (D.C. Cir. 1981) ("We are aware that EPA's interpretation of the Clean Air Act on matters open to reasonable differences of opinion are entitled to deference.").

significance" of the CPP is not immediately clear and EPA has the expertise to resolve the statutory ambiguity.

B. Step Two: The Language of Section 111(d) is Ambiguous

If the courts do decide that the § 112 exclusion question is one of "economic and political significance," it is likely that the analysis will proceed to Step Three of this Note's proposed framework because the language of §111(d) is ambiguous. The language is not clear. The courts must attempt to give effect to two versions of the § 112 exclusion provision[159]—one of which would require EPA to regulate carbon emissions from existing power plans under § 111(d) and the other which would prohibit EPA from regulating carbon emissions from existing power plants under § 111(d). The courts cannot attempt to break down the language into its component parts to closely scrutinize the text of the provision, as the Court did in Step Two in *King*, because there is not even an agreement about what it says.[160] The inapplicability of a close textual reading to the question here only further suggests that the courts will decline to use the *King* framework to resolve the § 112 exclusion issue.

If, for some reason, the courts decide to determine § 111(d)'s meaning by inserting both amendments into the language, as a Step Two textualist reading would require, it would only demonstrate the uselessness of the *King* approach to this question. A working paper attempted to "effectuate both provisions" in the same text and found that doing so was "impossible" because once one of the amendments was inserted into the pre-1990 version of the CAA, the words that the second amendment says should be struck do not exist.[161] For example, the paper attempted to first insert the Senate amendment and then the House amendment into the text:

> Alternatively, one could start with [the Senate amendment]. Section 111(d) would read, as described above, "(1) The Administrator shall prescribe regulations . . . for any existing source for any air pollutant (i)… which is not included on a list published under section [1]08(a) or ~~[1]12(b)(1)(A)~~ **112(b)**. . . . " Trying to then codify [the House amendment's] direction to "strik[e] 'or 112(b)(1)(A)' and insert[] 'or emitted

159. *See* last sentence of *supra* note 156.

160. Adler, *supra* note 14 ("Put another way, the question is not about how to interpret Section 111, but what Section 111 actually says.").

161. Zevin, *supra* note 46, at 14-15.

> from a source category which is regulated under section 112'" is equally impossible, as 112(b)(1)(A) is not part of the provision as amended.[162]

This exercise illustrates that the courts will not attempt to determine the meaning of the § 112 exclusion by effectuating both amendments in the same base text because doing so cannot answer Step Two's ultimate question: is it possible to interpret the language, in its context, in such a way that there are multiple meanings?[163] A textualist approach cannot answer Step Two's ultimate question because it produces an unworkable and unusable text. As the *King* Court's textualist approach is incapable of helping the courts determine if the statutory language is ambiguous at Step Two, the courts will either decide that the *King* framework is a poor vehicle to resolving the § 112 exclusion question altogether, or, if the courts insist on employing *King*, conduct a slimmed down Step Two analysis and determine that the two amendments are facially ambiguous.[164]

C. Step Three: The Broad Structure of the CAA Likely Necessitates Finding in EPA's Favor

If the courts apply *King*, the tools the Court used in its third analytical phase will likely require that the courts find in EPA's favor on the § 112 exclusion issue. Employing purposivism, the courts will look to the broader structure of the CAA to clarify the ambiguous language, ensuring that the interpretation they ultimately adopt does not "negate [the CAA's] own stated purpose."[165] The purpose of the CAA is to comprehensively regulate air pollutants in order to protect public health and welfare.[166]

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162. *Id.* at 15. Zevin continues by trying to effectuate as much of the amendments as possible, and ultimately finds a way to do so. *Id.* But he himself does not think the manner he accomplishes it in is based on reasoning or logic. *Id.* at 15-16 ("However, in order to get to this reading, one has to decide to follow [the House amendment's] direction to strike, but, for some reason, ignore [the Senate amendment's] direction to strike. . . . Following only the direction to strike as far as one can, inserting language regardless can allow the inclusion of both provisions into the law, but only at the expense of nonsensical law."). Additionally, there is nothing in *King* Step Two that would sanction such a move as doing so is not based on the context or structure of the CAA. Consequently, this subsection will not analyze whether attempting to effectuate as much of both amendments as possible could help the courts reach a conclusion at Step Two about whether the § 112 exclusion is ambiguous.

163. *See supra* note 113. If it is possible to give multiple meanings to the language, then the language is ambiguous and the analysis proceeds to Step Three. *See supra* note 96.

164. *See* first paragraph of *supra* Section IV.B.

165. King v. Burwell, 135 S. Ct. 2480, 2493 (2015) (quoting New York State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 419-20 (1973)).

166. 42 U.S.C. § 7401(b)(1).

But the interpretation of § 111(d) that industry and state challengers of the CPP favor would negate the purpose of the CAA because, as the government articulates in its reply brief in the D.C. Circuit merits challenge, it would strip § 111(d) of nearly all of its effect.[167] The CAA would no longer be a comprehensive statute as non-criteria and non-hazardous air pollutants of any kind from existing sources could no longer be regulated by EPA, if that source was regulated under § 112. Section 111(d) would no longer play its gap filling role, which, as the government points out by citing to *King*, "cannot be squared with the Act's scheme"[168] to protect public health and welfare.

Further, prohibiting the regulation of carbon emissions from existing power plants, as opponents' reading of the § 112 exclusion would require, would threaten public health and welfare. Environmental intervenors[169] in the D.C. Circuit merits challenge have explained the impacts of climate change: "Higher temperatures worsen deadly heatwaves, promote the spread of insect-borne diseases, intensify storms and flooding that cause death and injury and enormous property damage, and deepen droughts that threaten crops and water supplies."[170] Public health *amici curiae* have also extensively detailed the significant public health consequences of failing to address climate change.[171] The courts will likely find in EPA's favor at this step because EPA's interpretation of § 111(d) would avoid negating the CAA by allowing carbon emissions, which pose a significant threat to humans and their welfare by causing climate change, to proceed unmitigated.

A possible counterargument to this analysis of *King* Step Three is that there are other ways for EPA to regulate carbon emissions under the CAA that could fulfill the CAA's purpose of promoting public health and welfare by addressing climate change. For example, Michael Burger and others have argued that EPA could regulate carbon emissions through § 115, which provides for the regulation of air pollution that has an international

167. Respondent EPA's Initial Brief at 78, W. Va. v. EPA (D.C. Cir. Mar. 28, 2016) (No. 15-1363) ("Petitioners' interpretation of Section 111(d) . . . would strip that provision of nearly all effect . . . .").

168. *Id.* at 84 (citing *King*, 135 S. Ct. at 2492).

169. Similar to the *amici curiae* in *King* arguing a finding that tax credits could not be used on federally-run exchanges would have devastating effects for health insurance markets.

170. Initial Brief of Intervenor Environmental and Public Health Organizations at 1, W. Va. v. EPA (D.C. Cir. Mar. 29, 2016) (No. 15-1363).

171. *See generally* Brief of the Am. Thoracic Soc'y et al., W. Va. v. EPA (D.C. Cir. Mar. 29, 2016) (No. 15-1363) (detailing the public health consequences of carbon emissions-induced climate change and arguing that resolving the § 112 exclusion issue in favor of EPA is consistent with the CAA's purpose of protecting human health).

component.[172] Thus the CPP opponents' interpretation of § 111(d) need not negate the CAA's public health purpose because the CPP's public health benefits could still be delivered through another provision of the CAA. But the Supreme Court in *King* was asking not only if an interpretation would negate the statute's purpose, but if the adopted interpretation was "consistent" with the statute's purpose.[173] Viewed through this prism, EPA's interpretation of § 111(d) is consistent with the CAA's purpose to protect public health and welfare by reining in the carbon emissions that intervenors and *amici curiae* have established will have devastating impacts for humanity. Further, as discussed above, challengers' interpretation of the § 112 exclusion would prohibit § 111(d) from fulfilling its critical gap filling role that is essential to protecting public health and welfare. Ultimately, the courts will reject this counterargument—and find in favor of EPA on its interpretation of § 111(d)—because it is not consistent with the CAA's purpose of protecting public health and welfare.

V. CONCLUSION

There are many different issues in the litigation involving the President's Clean Power Plan ("CPP"), but one of the issues that seemed most likely to threaten its lawfulness was two amendments in the 1990 Clean Air Act Amendments. Some scholars were concerned in the wake of the Supreme Court's decision in *King v. Burwell* that it might provide a framework for engaging with the two amendments that could invalidate the CPP. However, the Supreme Court decision that kept intact President Obama's signature domestic legislative achievement—health insurance reform—should not threaten his signature domestic regulatory achievement: regulation of the carbon emissions that contribute to climate change.

This Note has offered a three-step framework for understanding the Court's decision in *King* and applying it going forward. The *King* Court sought to resolve a statutory interpretation question about the availability of tax credits on federally-run health care exchanges. First, at Step One, the Court decided that the IRS's interpretation of the statutory language should not receive *Chevron* deference because the question was of "economic and political significance" and because IRS lacked expertise in crafting health

172. *See generally* Burger et al., *supra* note 61 (arguing that EPA could regulate carbon emissions through § 115 of the CAA).

173. *King*, 135 S. Ct. at 2496 (2015) ("Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is *consistent* with the former, and avoids the later.") (emphasis added).

insurance policy. Second, the Court determined that the statutory language was ambiguous by looking at the language in its context and the overall structure of the Patient Protection and Affordable Care Act ("PPACA"). Third, having determined the language was ambiguous and that the petitioners' desired outcome would negate the purpose of the PPACA, the Court adopted the IRS's interpretation of the statutory language because doing so ensured that the Act would function as intended. Tax credits for purchasing health insurance are now available on federally-run exchanges.

The framework the Court used in *King* may prove detrimental to future administrations' interpretation of statutory language as it asserts the courts' power to determine the law.[174] But the courts are unlikely to employ it to hold the CPP unlawful by finding that the House's amendment to § 111(d) prohibits EPA from regulating carbon emissions from existing power plants under that provision. First, the courts are unlikely to decline to apply *Chevron*. The question here is likely not a question of "economic and political significance" because its economic significance is not immediately obvious as that of the tax credits in *King* and it is not politically significant because EPA is not exercising a new regulatory authority or significantly impacting a large number of Americans. Further, interpreting the CAA and developing carbon emissions regulations are the type of agency actions that require EPA's expertise. However, if the courts decline to provide EPA *Chevron* deference on its interpretation of the § 112 exclusion provision, the courts' analysis will proceed to Step Three of the *King* framework because the exclusion provision is ambiguous. At Step Three, the courts will likely find that the broader structure and purpose of the CAA necessitates embracing EPA's understanding of the exclusionary provision, which requires that EPA regulate carbon emissions from existing power plants under § 111(d). Otherwise the petitioners' interpretation will defeat the CAA's stated goal of protecting public health and welfare through comprehensively regulating air pollution.

President Obama will leave office knowing that his signature domestic legislative achievement should not prohibit the realization of his signature domestic regulatory achievement—at least on the narrow § 111(d) issue. Consequently, he will likely have fulfilled his three major progressive campaign pledges—expanding access to health care, ending the war in Iraq, and addressing climate change.

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174. Heinzerling, *supra* note 66 (describing the effect of *King* as: "the Court took interpretative power from an administrative agency, power that would normally have been the agency's . . . under *Chevron*, and kept it for itself."); Sunstein, *supra* note 65 (discussing *King*: "it is also a strong assertion of the court's, and not the executive branch's, ultimate power to say what the law is").