The tax subsidies provided under the Affordable Care Act to pay for health insurance are, of course, the subject of significant press coverage since dueling federal appeals courts came to different conclusions about who receives them this week. The D.C. Circuit Court of Appeals held, in a 2-1 decision called *Harbig v. Burwell*, that an Internal Revenue Service regulation extending the tax subsidies to taxpayers who purchase insurance from the federally-operated exchange (which covers 36 states) violated the plain language of the ACA. The Fourth Circuit Court of Appeals came to the opposite conclusion. The U.S. Department of Justice is likely to seek full court review (called "en banc review") of the D.C. Circuit case, which may well reverse the 3 judge panel that struck the IRS regulation down. And the issue could ultimately end up in the Supreme Court.

I'm hardly an expert on the ACA. But I disagree with two prominent commentators, Cass Sunstein of Harvard Law School (formerly the Director of the Office of Management and Budget) and Jonathan Adler of Case Western Law School, who think that that the Supreme Court's recent greenhouse gas rules case, *Utility Air Regulatory Group v. EPA*, undermines the government's position in the ACA tax subsidy case. In fact, at least some of Justice Scalia's reasoning in the UARG case, in my view, supports the government's position in the

ACA case. Here's why.

Both *Halbig* and *UARG* involve agency interpretations of statutory language. In *Halbig*, the IRS had to decide whether language that seemingly limits tax credits for buying health insurance only to residents of states that established their own exchanges should be interpreted to extend to residents of states that do not have their own exchanges but are instead covered by an exchange set up by the federal government. Opponents of the ACA filed suit against the IRS's determination that the overall context of the ACA supported extending the tax credits to insurance buyers in all states, not just those covered by a state exchange, even when the plain language of the statute seemed to suggest otherwise. In *UARG*, EPA had to determine how to apply permitting provisions of the Clean Act to greenhouse gas emitters. The provisions, known as the Prevention of Significant Deterioration (PSD) provisions, require permits for the construction of "major emitting facilities" that emit "air pollutants" if they emit 250 tons or more per year of any "air pollutant". The problem for EPA is that, although the 250 ton per year limit makes sense in the context of conventional pollutants like lead, ozone and carbon monoxide, it makes less sense for GHGs, which are emitted at much higher levels. Staying absolutely true to the statutory language would potentially sweep thousands of small companies and apartment buildings into EPA's permitting system. EPA decided instead first to go after big emitters of GHGs that already had to get permits because they also emitted other air pollutants, then to go after big emitters of GHGs that were not otherwise required to get permits, (those emitting more than 100,000 tons per year) and to gradually phase in smaller sources even though the plain language of the statute says that new facilities are those emitting 250 tons per year or more of any air pollutant. EPA called this rule the "Tailoring rule."

You can see the parallels between the two cases: two federal agencies trying to make sense of statutory language that didn't make complete sense given the problems they were facing. Without the tax subsidies, many commentators believe that the entire structure of the ACA would fall apart (for an explanation *see here).* From a legal perspective, supporters of the ACA and the tax subsidy regulation argued that the determination of whether the IRS rule should be upheld turns not just on the specific language of the provision discussing the tax subsidy but on the context and structure of the entire act. For excellent arguments about why *Halbig* is wrongly decided, *see* (here, here, and here). Opponents, by contrast, argued that the plain meaning of the statute, which discusses tax subsidies in the context of exchanges "established by the State," limits the subsidies to residents of consumers buying insurance from state, not federal, exchanges. For a clear and forceful exposition of this view *see* here. In *UARG*, opponents of applying the Clean Air Act permitting provisions to new sources argued that it simply didn't make sense to apply what appears to be the plain

language of the statute — requiring permits of major emitters (250 tons per year or more) of air pollutants — to relatively small emitters of greenhouse gases. Instead, suggested the opponents, EPA should look to the overall structure and purpose of the Act and refuse to extend the permitting provisions to sources that emit only greenhouse gases. EPA, by contrast, said that it was compelled by the plain language of the statute to require permits of any new source that emitted 250 tons per year or more of greenhouse gases but that it would only bring in small sources gradually, starting first with those facilities that already require permits because they emit other air pollutants and next with large facilities emitting more than 100,000 tons of greenhouse gases.

Two members of the *Halbig* court agreed with opponents of the ACA that the plain language of the tax subsidy provisions invalidates the IRS rule extending tax subsidies to consumers in states covered by the federal exchange. A majority of the U.S. Supreme Court in *UARG* agreed with opponents of extending the permitting provisions of the Clean Air Act to all sources of greenhouse gases (though in a huge victory for EPA, the Court held that the permitting provisions could reasonably be applied to new sources that already have to get permits because they emit other air pollutants, a holding that covers 83 percent of emissions from stationary sources). Adler and Sunstein each argue that the reasoning in the *UARG* case supports the holding in *Halbig.* Here's why. In striking down the rules that tailored the permitting by first requiring permits only for sources emitting more than 100,000 tons per year, Justice Scalia said that

> An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.

Scalia also wrote that

> The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.

That language is, indeed, powerful and seemingly problematic for the government's position that the language applying the tax credit subsidy to exchanges created by a state should also include the federal exchange. But the Scalia reasoning in *UARG* is actually far more

complicated than the quotes above suggest. To explain will take some further description of Scalia's opinion.

The reason that EPA applied the permitting provisions of the Clean Air Act to new stationary sources begins with *Massachusetts v. EPA*. *Mass v. EPA* determined that greenhouse gases are "air pollutants" under the Clean Air Act. The Court also directed EPA to determine whether GHGs, as air pollutants, endanger public health and welfare when emitted by mobile sources. EPA made such a determination and then issued regulations restricting greenhouse gas emissions from various mobile sources. Once EPA did so, it then determined that it was required to apply the permitting section at issue in *UARG* to new sources as I described above. Why? Because the language of the permitting section says two things. First, it says that any new "major emitting facility" must get a permit if it has "the potential to emit 250 tons per year of any air pollutant." Second, it instructs major emitting facilities to install "best available control technology" for "each pollutant subject to regulation under" the Act. Because, as a result of *Mass v. EPA*, EPA began regulating greenhouse gases from mobile sources as air pollutants under the Act, it believed the plain language of the permitting provision required it to issue the rules at stake in the *UARG* case.

But Justice Scalia said that even though air pollutant is defined extremely broadly in the Clean Air Act, (an air pollutant is "any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air" CAA §7602(g)) and even though the Court said that greenhouse gases are air pollutants, and even though air pollutants are therefore regulated under the Act doesn't mean that EPA can't define air pollutants in a different, narrower way for purposes of applying the permitting provision. Although the statute seemingly on its face requires EPA's interpretation, Justice Scalia said that EPA could (indeed should) read the statutory language in the permitting section in a way that is consistent with the overall statutory scheme contained in the Clean Air Act. As a result, EPA should have interpreted the plain language of the statute to exclude sources that only emit greenhouse gases, not to include them. His reasoning is worth quoting at length:

> To be sure, Congress's profligate use of "air pollutant" where what is meant is obviously narrower than the Act- wide definition is not conducive to clarity. One ordinarily assumes "'that identical words used in different parts of the same act are intended to have the same meaning.'" Environmental Defense v. Duke Energy Corp., 549 U. S. 561, 574 (2007). In this respect (as in countless others), the Act is far from a chef d'oeuvre of legislative draftsman- ship. But we, and EPA, must

> do our best, bearing in mind the "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" FDA v. Brown & Williamson Tobacco Corp., 529 U. S. 120, 133 (2000). As we reiterated the same day we decided Massachusetts, the presumption of consistent usage "'readily yields' " to context, and a statutory term—even one defined in the statute—"may take on distinct characters from association with distinct statutory objects calling for different implementation strategies."

In other words, context matters. Words can mean different things depending upon the context in which they are used. The words must be read "with a view to their place in the overall statutory scheme." That is language that, in my opinion, is extremely supportive of the Administration's view that the tax subsidies contained in the ACA should be extended to all consumers, not just those to covered under state exchanges.

To be sure, the UARG case involves a case in which the Court is directing the agency to regulate less expansively by extending the Act under its purview to fewer rather than more sources. The ACA tax subsidy cases involve the opposite, extending the ACA's coverage to more rather than fewer purchasers of insurance. Nevertheless, the proposition that UARG is a case that helps the opponents of the ACA more than its supporters seems to me to be way less obvious than Sunstein and Adler suggest.