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An Obamacare Architect Said Something In 2012 That Could Unravel The Law

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One of the key architects of the Affordable Care Act made little-noticed comments in 2012 that could provide the law's conservative challengers a major boost in the most high-profile ongoing challenge to undo it.

Earlier this week, the D.C. Circuit Court of Appeals, considered the second-most powerful court in the U.S., threw out an IRS regulation that helps the federal government hand out key subsidies under the Affordable Care Act. The court sided with plaintiffs, who argued the law specifically only allows states that run their own exchanges to provide subsidies to help lower-income people buy health insurance.

Supporters of the law have called the challenge unserious. But conservatives who support the plaintiffs in the case — *Halbig v. Burwell* — say one of the men that makes their case is Jonathan Gruber, the MIT economist who was one of the authors of the Massachusetts health law that served as the model for Obamacare.

Late Thursday night, comments from Gruber in 2012 were unearthed by the Competitive Enterprise Institute's Ryan Radia. During a 2012 question-and-answer session following a lecture, he made the same basic argument about the point of the lawsuit.

Here's the key portion of Gruber's comments (emphasis added):

> **I think what’s important to remember politically about this, is if you’re a state and you don’t set up an Exchange, that means your citizens don’t get their tax credits. But your citizens still pay the taxes that support this bill. So you’re essentially saying to your citizens, you’re going to pay all the taxes to help all the other states in the country.** I hope that’s a blatant enough political reality that states will get their act together and realize there are billions of dollars at stake here in setting up these Exchanges, and that they’ll do it. But you know, once again, the politics can get ugly around this.

At issue in the Halbig case and others making their way through the federal court system is whether Congress authorized the federal government to give out subsidies. It's a big deal, since 36 states' healthcare exchanges run at least partly through the federal government. The theory presented by the challengers posits the federal government wanted to pressure states into setting up their own exchanges by refusing them subsidies if they did not.

In the 2012 clip, Gruber seems to be suggesting Congress intended subsidies to run only through state exchanges.

"I couldn't have said it better myself!" Michael Cannon, the director of health policy at the Cato Institute and one of the key architects of the Halbig lawsuit, told Business Insider in an interview on Friday.

Jonathan Adler, a law professor at Case Western Reserve University in Ohio and another conservative legal scholar behind the challenge, told Business Insider that Gruber's comments "just show how knowledgeable folks would understand statutory text when there was no pressure to reach 'right' answer."

For his part, Gruber on Friday called his 2012 comments a "mistake" and a "speak-o" — the spoken-word version of a typo. When Business Insider reached out for comment, he said he was busy running a conference but forwarded along an email he had sent to The New Republic's Jonathan Cohn.

Here it is, in part:

> I honestly don’t remember why I said that. I was speaking off-the-cuff. It was just a mistake. People make mistakes. Congress made a mistake drafting the law and I made a mistake talking about it.
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> During this era, at this time, the federal government was trying to encourage as many states as possible to set up their exchanges.
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> At this time, there was also substantial uncertainty about whether the federal backstop would be ready on time for 2014. I might have been thinking that if the federal backstop wasn't ready by 2014, and states hadn't set up their own exchange, there was a risk that citizens couldn't get the tax credits right away.
>
> But there was never any intention to literally withhold money, to withhold tax credits, from the states that didn’t take that step. That’s clear in the intent of the law and if you talk to anybody who worked on the law. My subsequent statement was just a speak-o— you know, like a typo.
>
> There are few people who worked as closely with Obama administration and Congress as I did, and at no point was it ever even implied that there’d be differential tax credits based on whether the states set up their own exchange. And that was the basis of all the

> modeling I did, and that was the basis of any sensible analysis of this law that’s been done by any expert, left and right.
>
> I didn’t assume every state would set up its own exchanges but I assumed that subsidies would be available in every state. It was never contemplated by anybody who modeled or worked on this law that availability of subsides would be conditional of who ran the exchanges.

But later on Friday, the conservative site Breitbart unearthed a second, perhaps more damning clip in which Gruber openly acknowledged states could "undercut the law" by revolting and not setting up their own exchanges.

However, he said he was "enough of a believer in democracy" to hope that voters would eventually vote out politicians who rejected hundreds of millions of dollars in federal-government support through tax credits as subsidies.

Cannon told Business Insider it's clear that Gruber changed his tune when he, like many other supporters of the law, realized it could become a political nightmare.

"He allows us to knock down this talking point that we keep hearing from members of the administration," Cannon said. "Which is that it's implausible that Congress intended this. Gruber went around *telling people* that this is how the statute works.

"And this was at a time when that language did not present any kind of threat, because everyone assumed that most or all states were going to establish exchanges. Gruber changed his story around the time that language became politically problematic."