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ObamaCare Architect Jonathan Gruber: "If You're A State And You Don't Set Up An Exchange, That Means Your Citizens Don't Get Their Tax Credits"

By: Michael Cannon
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Halbig v. Burwell and *King v. Burwell* are the most important and hotly contested legal challenges involving the Patient Protection and Affordable Care Act, or ObamaCare. (Along with my sometime coauthor Jonathan Adler, I had something to do with those cases happening.) The central issue is whether the PPACA allows the IRS to issue tax credits through health-insurance Exchanges established by the federal government. Said government argues it's implausible that Congress intended to withhold tax credits in states that don't establish Exchanges. On Tuesday, the D.C. Circuit set off a firestorm when it ruled in *Halbig* that the PPACA's language authorizing tax credits "through an Exchange established by the State" cannot be reasonably construed to authorize them in the 36 states with federal Exchanges. On the same day, the Fourth Circuit reached the opposite conclusion in *King*. On Thursday, however, the plaintiffs' interpretation got another boost from an architect of the PPACA named Jonathan Gruber.

The government argued in *Halbig* that the potential for adverse selection makes "it…untenable to suggest that Congress withheld premium tax credits from individuals who live in States with federally-run Exchanges. Congress sought to *reform* the non-group market, not to *destroy* it." The government described as "baseless" the *Halbig* plaintiffs' claim that Congress used the tax credits as an inducement to encourage states to establish and operate Exchanges.

These arguments did not fare well in court. The D.C. Circuit found that the PPACA "encourages" states to establish Exchanges. Moreover, in other parts of the statute—the "CLASS Act" and the law's treatment of U.S. territories, to name two—Congress showed a rather high tolerance for adverse selection, so the fact that a provision created the potential for adverse selection in the Exchanges did not render it implausible. Finally, even as the Fourth Circuit found the plaintiffs' reading of the statute "plausible," implicitly rejecting both of the government's implausibility claims, even as it ultimately ruled for the government.

The plaintiffs' interpretation became even more plausible with the discovery of a January 2012 presentation by Massachusetts Institute of Technology economist Jonathan Gruber. I'll get to why Gruber is significant in a moment. For now, note how he unequivocally agrees with the plaintiffs' interpretation: the PPACA only allows tax credits in states that establish Exchanges. Here's the relevant excerpt:

Questioner: You mentioned the health-information Exchanges for the states, and it is my understanding that if states don't provide them, then the federal government will provide them for the states.

Gruber: Yeah, so these health-insurance Exchanges, you can go on ma.healthconnector.org and see ours in Massachusetts, will be these new shopping places and they'll be the place that people go to get their subsidies for health insurance. In the law, it says if the states don't provide them, the federal backstop will. The federal government has been sort of slow in putting out its backstop, I think partly because they want to sort of squeeze the states to do it. **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.

Here's the video (skip ahead to 31:25):

Gruber doesn't just acknowledge the conditional feature of the PPACA's tax credits. He also supplies a plausible purpose for that feature (there were people in Washington who either wanted to "squeeze the states to do it," or saw the law as directing them to do so). He describes the mechanism by which this provision achieves that purpose (taxpayers will pressure their state officials to create Exchanges so they can receive tax credits). He acknowledges that the conditional nature of the tax credits sits perfectly well alongside the law's requirement that the federal government establish an Exchange within states that do not (providing another refutation of the argument offered by Yale law professor Abbe Gluck that these provisions are somehow in tension). He even explains why the Obama administration might try to ignore this part of the law (the politics of the PPACA "can get ugly," and the lure of tax credits might not be enough to induce states to cooperate).

I couldn't have said it better myself.

Now why should we care about what this one health economist says about this hotly disputed feature of the PPACA? Gruber is not a member of Congress, so this isn't direct evidence that Congress intended to offer tax credits only in state-established Exchanges. (The procedural path the bill took through Congress is dispositive evidence of that.) But he may be the next best thing.

Gruber was an architect of both the PPACA and its Massachusetts precursor, "RomneyCare." In 2009 and 2010, he was a highly paid advisor to the Obama administration during the

congressional debate that produced the PPACA. According to the *New York Times*, "the White House lent him to Capitol Hill to help Congressional staff members draft the specifics of the legislation." Later the above video, Gruber boasts of having written part of the PPACA. He boasts to the *Times*, "I know more about this law than any other economist." He's probably right about that.

I don't mean to overstate the importance of this revelation. Gruber acknowledging this feature of the law is not direct evidence of congressional intent. But Gruber is probably the most influential private citizen/government contractor involved in that legislative process. He was in the room with the people who crafted this bill. There may be videos of *them* talking about this feature too. (I wouldn't know; I only researched congressional statements made pre-enactment.) At a minimum, however, with the D.C. Circuit *and* the Fourth Circuit *and* now Jonathan Gruber lining up against the idea that it is implausible that Congress could have meant what it said, we can dispense with that argument once and for all.

Gruber Changed His Story

Interestingly, Gruber changed his story around the same time it seemed this provision might imperil the statute he had worked so hard to craft, enact, and protect.

Just one year later—after the IRS issued a final rule purporting to authorize tax credits in federal Exchanges, after Jonathan Adler and I published our research on this issue, and after people started filing lawsuits challenging that final rule—Gruber was singing a different tune. Here's what he told *Mother Jones* in January 2013:

But probably the most widely touted reason given for why obstinate Republican governors will be able to take Obamacare down is a legal theory pushed by [libertarian] scholars like Michael Cannon, the health policy director at the libertarian Cato Institute. It goes like this: Congress only intended the subsidies and tax credits that help consumers buy health insurance to be available through state-created, not federally created, exchanges. If these benefits aren't available in states with federally run exchanges, the argument goes, then other key components of the law, like the requirement that employers offer health insurance, and that most people must buy insurance, also fall apart in those states.

Jonathan Gruber, who helped write former presidential candidate Mitt Romney's Massachusetts health care law as well as the Affordable Care Act, calls this theory **a "screwy interpretation" of the law. "It's nutty. It's stupid," he says.** And beyond that, "it's essentially unprecedented in our democracy. This was law democratically enacted, challenged in the Supreme Court, and passed the test, and now [Republicans] are trying again. They're desperate."

That prompted my Cato Institute colleagues and me to produce the following video, in which I offered to debate these provisions of the law with Gruber and anyone else who felt up to the challenge.

If my interpretation of the law were so screwy, nutty, and stupid, it should have been a slam dunk for the most knowledgeable economist ever on such matters. But he never answered the call.

That same month, Gruber and I testified opposite each other in Florida. He told Florida legislators there was no reason for them to establish an Exchange for 2014.

In early 2014, Gruber joined, and produced economic projections for, *amicus* briefs filed in *Halbig* and *King* by dozens of economists in support of the government. (Click here for my critique.) According to those briefs, Gruber now believes, "It is absurd to argue that Congress set up a federally-run Exchange while simultaneously denying participants the subsidies necessary to make the Exchange functional." Why?

Appellants [i.e., the plaintiffs] posit that Congress purposely dangled the "carrot" of affordable health insurance for low-income families and individuals in front of states to encourage states to establish exchanges. In Appellants' conception, the "stick" of having to "explain to their voters that they had deprived them of billions of dollars by failing to establish an Exchange" would so frighten state officials that eventually, every state would create an Exchange and, consequently, uninsured Americans nationwide would become eligible for premium subsidies… That account…is implausible and indeed irreconcilable with the ACA's structure and purpose.

And yet, that's exactly how Gruber described it would work in 2012.

Finally, we have Gruber's performance on *Hardball with Chris Matthews*, where Gruber avers, "It is unambiguous this is a typo"—indicating he doesn't know what a typo is—and claiming Congress "had no intention of excluding the federal states. And why would they?" Also, "It's just simply a typo, and it's really criminal that this has even made it as far as it has."

Gruber was squarely on the plaintiffs' side of this question back in 2012. Now he is squarely — angrily! — on the government's side.

I'll let him explain his change of heart. But one last observation. Gruber really does have one of the greatest empirical minds in health economics. When he's not wearing his advocacy hat, I pretty much take what he says as gospel. So when he claims this or that economic dynamic makes it implausible that Congress meant what it said, I guarantee he was aware of all those factors back in 2012. To claim he wasn't, now *that* would be implausible.

-Michael F. Cannon is the Cato Institute's director of health policy studies.