Right-Wing Media Still Excited About ACA Lawsuit That Has Been Rejected By Experts And Federal Courts

The D.C. Circuit is expected to rule soon in Halbig v. Burwell, a lawsuit based on a fringe legal theory that could gut the Affordable Care Act (ACA) by eliminating federal exchange tax credits that significantly reduce the cost of private health insurance. Although this lawsuit has already been dismissed by legal experts and judges as meritless, right-wing media continue to misrepresent both the law and consequences surrounding Halbig.

By Meagan Hatcher-Mays
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A Ruling From The D.C. Circuit Court Of Appeals Is Expected Soon In *Halbig v. Burwell*

CBSNews.com: A Ruling Striking Down Subsidies Could "Cripple The Law." As CBS News reported, the legal argument in *Halbig* was first outlined by libertarian blogger Jonathan Adler and the Cato Institute's Michael Cannon, who argue that the ACA counterintuitively prevents the federal government from providing tax credits to consumers who live in states that decline to operate their own health insurance exchange and instead rely on the national version. Without those subsidies, it would be difficult if not impossible for consumers in those states to purchase affordable healthcare in the federal exchanges, rendering them useless:

> [A] three-judge panel from the D.C. Circuit Court of Appeals is expected to hand down a ruling on whether the federal government can give subsidies to Obamacare recipients in states with federally-run health care exchanges. If the appeals court rules in favor of the law's opponents, it could cripple the law. More than half of the states rely on federally-run marketplaces, and were subsidies not available in those states, Obamacare could be too costly for many customers.
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> The case, *Halbig v. Burwell*, rests on how the court system interprets a poorly-worded sentence in the Affordable Care Act.

> Section 1311 of the law says the federal government will give subsidies to eligible consumers who buy insurance from an exchange "established by the State." The *Halbig* suit -- and three other similar cases -- argue that, consequently, subsidies aren't available to customers in the 34 Obamacare exchanges that were established by the federal government.
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> Michael Cannon of the Cato Institute, a libertarian think tank, and Jonathan Adler of Case Western Reserve University School of Law first made the case against the subsidies, arguing that Congress wanted the subsidies to serve as a reward for states that established their own exchanges. Obamacare's "congressional sponsors created incentives for states to implement much of the law and reasonably expected that states would do so," they wrote.
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> However, there's no need to guess congressional intent given the law was passed by Congress four years ago. In fact, seven high-ranking Democrats who helped craft Obamacare, as well as dozens of state lawmakers, filed a brief in the case to explain the true intent of the law.
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> "The purpose of the tax credit provision was to facilitate access to affordable insurance through the Exchanges -- not, as Appellants would have it, to incentivize the establishment of state Exchanges above all else, and certainly not to thwart Congress's fundamental purpose of making insurance affordable for all Americans," they wrote. [CBSNews.com, 7/8/14]

Right-Wing Media Have Repeatedly Hyped The Questionable Legal Theory And Alternate Legislative History Behind *Halbig*

National Review Online: *Halbig* "Attacks the Central Nervous System Of Obamacare." According to NRO's national affairs correspondent John Fund, providing tax credits to ensure affordable health care for all Americans is further evidence of executive overreach on the part of the Obama administration, and "call[s] into question once again Obama's fidelity to the Constitution":

> This coming week, we could see the second-highest court in the land rule that the administration broke the law in enforcing a key provision of Obamacare, calling into question once again Obama's fidelity to the Constitution -- and further endangering his signature program.
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> The case of *Halbig v. Sebelius* (since renamed *Halbig v. Burwell*, for the current HHS secretary) was argued before a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit Court in March. It attacks the central nervous system of Obamacare -- the government exchanges that were set up to subsidize health insurance for low-income consumers. If the Supreme Court ultimately finds that the Obama administration violated the law in doling out those subsidies, it could force a wholesale revision of Obamacare. In January, *The Hill* quoted a key Obamacare supporter as saying that *Halbig* was "probably the most significant existential threat to the Affordable Care Act."
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> President Obama has increasingly exasperated both judges and constitutional scholars with his boasts about going around Congress when it doesn't give him what he wants. "I've got a pen, and I've got a phone," he told reporters before his first Cabinet meeting of 2014, in January. That attitude has prompted his decision to rewrite Obamacare at least 23 times without any involvement of Congress. If Obama's actions in *Halbig* are found unconstitutional, then other parts of Obamacare will become more vulnerable to legal challenge, and Congress will probably have a much bigger say in rewriting or reversing aspects of the law.
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> What would happen if, in 34 states, the subsidies that are flowing through the insurance exchanges set up by the federal government were suddenly declared unconstitutional by the courts? Mass chaos, as predicted by Obamacare defenders? Not likely. ... A favorable ruling in *Halbig* by the Supreme Court might be just the two-by-four needed to get President Obama's attention and make him realize that his pen has run out of enforcement ink. [National Review Online, 7/13/14]

But Federal Courts Have Already Rejected The Specious Argument *Halbig* Is Based On

United States District Court For The District Of Columbia: The Plaintiffs' Argument "Runs Counter To [The] Central Purpose Of The ACA." Right-wing media argue that the legislative history of the ACA demonstrates Congress' intent to deny much-needed tax credits to consumers who buy health insurance from the federal exchange that they would have otherwise received if the state had operated its own site. However, the lower court that heard the *Halbig* case before it was appealed ruled that "there is simply no evidence in the statute itself or in the legislative history of any intent by Congress to ensure that states established their own Exchanges" by threatening their citizens with unaffordable health insurance:

> Title I of the ACA is titled "Quality, Affordable Health Care for *All* Americans" (emphasis added). Plaintiffs' proposed construction in this case -- that tax credits are available only for those purchasing insurance from state-run Exchanges -- runs counter to this central purpose of the ACA: to provide affordable health care to virtually all Americans. Such an interpretation would violate the basic rule of statutory construction that a court must interpret a statute in light of its history and purpose.
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> Plaintiffs try to explain away the inconsistency between their proposed construction and the statute's underlying purpose by proposing that Congress had another, equally pressing goal when it passed the ACA: convincing each state to set up its own health insurance Exchange. According to plaintiffs, Congress desperately wanted to keep the federal government out of the business of running any Exchange, and it therefore sought to persuade the states to establish and operate the Exchanges. As an inducement, say plaintiffs, Congress made premium tax credits available only to those states that set up their own Exchanges. According to plaintiffs, "Congress obviously wanted subsidies in every state, but it wanted something else. It wanted the states to run it. And they thought they were getting both because they thought it was a deal nobody could refuse."

> Plaintiffs' theory is tenable only if one accepts that in enacting the ACA, Congress intended to compel states to run their own Exchanges -- or at least to provide such compelling incentives that they would not decline to do so. The problem that plaintiffs confront in pressing this argument is that there is simply no evidence in the statute itself or in the legislative history of any intent by Congress to ensure that states established their own Exchanges. And when counsel for plaintiffs was asked about this at oral argument, he could point to none. Indeed, if anything, the legislative history cuts in the other direction and suggests that Congress intended to provide states with flexibility as to whether or not to establish and operate Exchanges.
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> Nor does plaintiffs' theory make intuitive sense. A state-run Exchange is not an end in and of itself, but rather a mechanism intended to facilitate the purchase of affordable health insurance. And there is evidence throughout the statute of Congress's desire to ensure broad access to affordable health coverage. It makes little sense to assume that Congress sacrificed nationwide availability of the tax credit ... in an attempt to promote state-run Exchanges.
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> In sum, while there is more than one plausible reading of the challenged phrase in Section 36B when viewed in isolation, the cross-referenced sections, the surrounding provisions, and the ACA's structure and purpose all evince Congress's intent to make premium tax credits available on both state-run and federally-facilitated Exchanges. [*Halbig v. Sebelius*, United States District Court for the District of Columbia, 1/15/14]

United States District Court For The Eastern District of Virginia: "There Is No Direct Support In The Legislative History Of The ACA For Plaintiffs' Theory." A different federal court in Virginia heard a nearly identical case challenging the legality of the ACA tax credits. That court agreed with the statutory interpretation of the lower court in *Halbig*, and held that "the text of the ACA and its legislative history evidence congressional intent to ensure broad access to affordable health coverage for all":

> In an attempt to divine Congress's intent, both parties cite to various legislative history materials including, but not limited to, past versions of the ACA, committee reports, reports by the Congressional Budget Office ("CBO") and Joint Committee on Taxation ("JCT"), and finally, even news media. It is firmly established that legislative history is one of the traditional tools of interpretation to be consulted [when interpreting the meaning of a statute].
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> The legislative history of the ACA is long and complex, and many of the past versions of the ACA are not relevant to the current iteration of the ACA. The very structure of the ACA indicates that "the Senate passed a bill that provided 'flexibility' to each state as to whether it would operate the Exchange." The relevant legislative history indicates that Congress did not expect the states to turn down federal funds and fail to create and run their own Exchanges. Instead, Congress assumed that tax credits would be available nationwide because every state would set up its own Exchange.
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> What is clear is that there is no direct support in the legislative history of the ACA for Plaintiffs' theory that Congress intended to condition federal funds on state participation. As previously discussed, had Congress intended to condition tax subsidies it would have needed to provide clear notice. While on the surface, Plaintiffs' plain meaning interpretation of section 36B [of the ACA] has a certain common sense appeal,

the lack of any support in the legislative history of the ACA indicates that it is not a viable theory. The legislative history of the ACA "reveals an intent to grant states the option of establishing their own Exchanges, rather than an intent to coerce or entice states into participating." Further, the text of the ACA and its legislative history evidence congressional intent to ensure broad access to affordable health coverage for all. [*King v. Sebelius*, District Court of the United States, Eastern District of Virginia, 2/18/14]

Legal Experts And Drafters Of The Law Are Also Highly Skeptical Of The Merits Of *Halbig*

Washington And Lee Law Professor Timothy Jost: "Courts Won't Void The Affordable Care Act Over Semantics." As health law expert Professor Jost explained, the idea that the legislators who drafted the ACA to finally bring affordable health insurance within reach of most Americans would "plant a secret bomb in the heart of the statute ... to bring down the law" is far-fetched. According to Jost, "courts do not read statutes by cherry-picking single phrases to defeat the entire purpose of laws," no matter how much right-wing media wish it were so:

> The theory of these suits seems to be that the drafters of the ACA planted a secret bomb in the heart of the statute. It was so secret that it was never mentioned in any of the voluminous debates or hearings on the act. Indeed, not even the heads of the House and Senate committees in charge of the legislation knew of it, as they have stated in briefs filed in the courts. It was, rather, hidden deep in the statute for someone someday to find and use to bring down the law and the protections it offers to uninsured Americans.
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> The imaginary secret bomb is this: The subsection of the ACA dealing with computing the amount of the insurance-premium tax credits, which make premiums affordable to lower- and middle-income Americans, offers those credits to individuals enrolled "through an exchange established by the state." But two-thirds of the states have not set up their own health-insurance exchanges and are served by the federal exchange instead. The Internal Revenue Service issued a rule authorizing the federal exchange to issue tax credits, but ACA opponents argue that's illegal.
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> Fortunately, courts do not read statutes by cherry-picking single phrases to defeat the entire purpose of laws. As Supreme Court Justice Antonin Scalia noted in an opinion issued last month, courts must bear 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." If one views the totality of the ACA -- its purpose and its other provisions -- it's clear that tax credits are available in the federal exchange.
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> The Affordable Care Act was meant to "provide affordable ... coverage choices for all Americans." A key section says, "Each state shall ... establish an ... Exchange," but another section provides that if a state "elects" not to establish the "required Exchange," the secretary of health and human services must "establish and operate such Exchange." These sections both require states to establish exchanges and allow them not to do so.

> Congress gave the IRS the responsibility to resolve such contradictions, and the IRS adopted the only reasonable approach. If a state does not create the "required Exchange," HHS steps into its shoes and sets up "such Exchange." The law, in other words, requires the federal government to create the "Exchange established by the state," with the same authorities and responsibilities as state exchanges, including offering premium tax credits. [*The Washington Post*, 7/9/14]

Constitutional Law Professor Samuel Bagenstos: "The Rearguard Effort to Undermine Obamacare Is Deeply Flawed As A Matter Of Law." Professor Bagenstos has also questioned the wisdom of the legal arguments in *Halbig*, and has explained that without the tax credits, it would be nearly impossible to achieve the ACA's "goal of expanded, affordable health coverage":

> The IRS's interpretation of the ACA to extend premium subsidies to participants in both state- and federally-operated exchanges thus seems to me not merely a permissible one but also the most plausible reading of the statutory text. Nor is there any reason to think that Congress would have intended to treat participants in state- and federally-operated exchanges differently for purposes of obtaining the subsidies. In both state- and federally-operated exchanges, the subsidies serve the same crucial role in achieving the statute's goal of expanded, affordable health coverage. If you take the subsidies away from participants in either sort of exchange, the law's protections are likely to unravel in the same way.
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> Whatever its value to conservative activists and those who wish to relitigate *NFIB* [the Supreme Court case that found the "individual mandate" of the ACA constitutional] and the election, the rearguard effort to undermine Obamacare is deeply flawed as a matter of law. [Balkinization Blog, 11/27/12, via *Media Matters*]

Health Care Expert Jonathan Gruber: *Halbig* Argument Is "Screwy Interpretation" Of The ACA. According to Gruber, who helped draft both the ACA as well as the health care law in Massachusetts it was modeled after, the legal argument advanced by Cannon and Adler is "essentially unprecedented":

> 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."
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> Gruber and Jost both say the interpretation conservatives are peddling has nothing to do with congressional intent. There is language scattered throughout the bill, Jost says, that refers to state-established exchanges, but as a whole, it's obvious that the law treats state and federal exchanges equally. "If you don't know anything about reading statutes, you assume that the way courts do it is by taking a sentence here and a sentence there," he says. "But if you look at it in context, the whole statute hangs together." If Cannon's interpretation is right, Jost says, it would mean that Congress wrote "the law to set up

federal exchanges and then said they can't do anything." [*Mother Jones*, 1/24/13, via *Media Matters*]