

# POLITICO

## The Flip-Flopping Architect of the ACA

By: Michael Cannon

July 28, 2014

Last week, the D.C. Circuit ruled that the Obama administration has been implementing Obamacare illegally. Days later, a video featuring the law's chief architect confirmed the court's ruling and raised questions about whether administration officials knew they were breaking the law all along.

Jonathan Gruber is the MIT economist who helped congressional Democrats write the Patient Protection and Affordable Care Act in 2009. He has been sharply critical of *Halbig v. Burwell*, a lawsuit alleging the Obama administration is illegally subsidizing health insurance for 5 million Americans in the 36 states with exchanges established by the federal government. The PPACA offers those subsidies to only those who enroll through an exchange "established by the State." (Disclosure: I helped lay the groundwork for *Halbig* and three similar lawsuits.)

The administration's supporters have called those lawsuits an "existential threat" to the PPACA. They're right. Without those subsidies, exchange enrollees in two-thirds of the country would face the full cost of Obamacare coverage. The resulting backlash would force Congress to reopen the law.

The administration's defenders responded to the *Halbig* case by insisting that Congress never intended to withhold subsidies from residents of states that did not establish exchanges. Like the Obama administration, Gruber told the D.C. Circuit that this idea is "implausible." The D.C. Circuit disagreed when it ruled for the plaintiffs last Tuesday.

Gruber then became part of the story on Thursday when a video surfaced in which he espouses the very interpretation of the law he now publicly derides as "screwy," "nutty" and "stupid." In 2012, Gruber told an audience: "If you're a state and you don't set up an exchange, that means your citizens don't get their tax credits."

The administration's "implausibility" argument was itself always implausible. Even the 4th Circuit rejected it when it ruled in favor of the government (in *King v. Burwell*) on the same day the D.C. Circuit ruled for the plaintiffs. The Gruber video demolishes that argument.

Gruber's stature and role in writing the PPACA are critical here. One of the nation's top health economists, he helped craft and implement a nearly identical law in Massachusetts. He was a paid adviser to the Obama administration in 2009 and 2010. The New York Times reports, "the

White House lent him to Capitol Hill to help Congressional staff members draft the specifics of the legislation.”

Gruber was so heavily involved in writing the PPACA that when he boasts, “I know more about this law than any other economist” — and that he even wrote part of the bill himself — everyone believes him. When the chief architect of the PPACA admits it withholds tax credits in uncooperative states, that establishes that the plaintiffs’ interpretation of the statute in *Halbig* was not only plausible but that it had currency among the law’s authors.

And it is precisely because of Gruber’s intellect and profound familiarity with the PPACA that his attempts to explain away his past statements are not credible.

Gruber’s first attempt was, in essence, “Dude, I flaked.” He said his comments were the verbal equivalent of a “typo” — a “speak-o,” as he called it. Then another recording from 2012 emerged in which Gruber said exactly the same thing to a different audience. This was not a “speak-o.” It was part of a presentation Gruber had given multiple times.

His second explanation was a little more technical but equally implausible. Gruber wondered if maybe he had been thinking the reason residents of states that don’t establish exchanges would not receive tax credits is because the federal government might not have its fallback exchanges up and running in time.

Yet elsewhere in the first video, Gruber said the federal government was slow-walking its exchanges to “squeeze” the states into establishing exchanges themselves. So even under this theory, he is confirming it is plausible that federal officials would withhold tax credits in uncooperative states in order to spur states to action. Moreover, he also noted that the tax credits might not be enough to spur states to action — without ever suggesting residents of those states would receive tax credits through a federal exchange anyway.

Back in January 2012, before anyone knew 36 states would refuse to establish an exchange, Gruber understood and had no problem with what the law says. When it became apparent that two-thirds of the states would not establish exchanges, and that this language therefore threatened the PPACA’s survival, Gruber changed his tune.

The problem with his explanations is that Jonathan Gruber doesn’t “flake.” He knows this law in and out. He knew what his words meant, with all their implications, when he spoke them. He knew the feature he was describing essentially gave each state a veto over the PPACA’s exchange subsidies, employer mandate and to a large extent its individual mandate. He knew that could lead to adverse selection. To claim Gruber didn’t know what he was saying is as absurd as saying a conductor might fail to notice that the brass section suddenly stopped playing.

Supporters of the Obama administration have downplayed Gruber’s comments because he is not a member of Congress. Nevertheless, he played a larger role in writing the PPACA, and knows more about it than most members of Congress. Gruber’s comments raise questions about whether this (correct) interpretation of the law was also understood by the members of Congress and administration officials Gruber advised.

They also corroborate other evidence showing that the administration was aware it was breaking the law all along. Last year, seven career Treasury and IRS officials told congressional investigators that they knew the PPACA did not authorize them to issue tax credits in federal exchanges, and that their regulations had originally confined tax credits to exchanges “established by the State.” At the direction of their political-appointee superiors, however, they dropped that language and announced that tax credits would be available through exchanges established by the federal government as well.

Further investigation is in order, and should proceed with all deliberate speed so as to inform the courts that will consider the appeals of these rulings.

*-Michael Cannon is director of health policy studies at the Cato Institute.*