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Scott Walker's Obamacare Video Kills The Case Against The Law. Gruber's Video Is Irrelevant

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On Wednesday, ThinkProgress reported on a statement by Wisconsin Gov. Scott Walker (R) that runs counter to the central claim of a lawsuit called *King v. Burwell*, which seeks to undermine the Affordable Care Act. Almost immediately, this statement drew comparisons to MIT economist Jonathan Gruber's infamous remarks that have been seized upon by Obamacare's opponents in an effort to bolster this lawsuit. Yet, while both statements obviously have political significance, *King* is a legal case and not a political debate. Under existing law and Supreme Court precedents, Walker's statement has far more legal significance than Gruber's.

Walker and Gruber

The plaintiffs in *King*, which is currently pending before the Supreme Court, claim that the Affordable Care Act only authorizes tax credits to help people pay for their health insurance in states that elected to set up their own Obamacare exchange. Residents of states that elected to have the federal government set up this exchange for them are out of luck, according to the *King* Plaintiffs. Yet, in a 2013 interview, Walker said that "there's no real substantive difference between a federal exchange, or a state exchange" a view that directly contradicts the plaintiffs' central premise in *King*.

Gruber, meanwhile, is an economist who has hyperbolically been described as the "architect" of Obamacare. In reality, according to the Center for American Progress's Neera Tanden, he worked as a consultant for the Department of Health and Human Services providing economic models predicting "the impact of various subsidy levels and rules." In 2012, Gruber gave a talk where he took two conflicting positions. Gruber initially seemed to agree with Walker's position that state and federal exchanges both provide tax credits — "so these health insurance exchanges . . . 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." In the very next paragraph of his talk, however, he warned that "if you're a state and you don't set up an exchange, that means your citizens don't get their tax credits." The *King* plaintiffs quote the second part of this talk (and ignore the first part of it) in their brief.

At Vox, Sarah Kliff argues that Gruber's statement will prove more significant than Walker's to the Supreme Court. "Scott Walker, obviously, was not in Congress helping to write the law," Kliff claims, "and so his words probably won't do much to sway the Supreme Court." Meanwhile, at least according to the *King* plaintiffs, "Gruber was consulting with Congress and the White House during the health law's drafting, and should have a decent sense of what legislators were thinking."

Slate's Betsy Woodruff, meanwhile, quotes one of the leading proponents of the *King* lawsuit's questioning our characterization of Walker's remark, and then somewhat bizarrely offering additional corroborating evidence showing that our characterization of Walker's views is correct. Though the Cato Institute's Michael Cannon describes our original piece on Walker as "lazy, awful, dumb stuff," claiming that we took Walker's remarks out of context, he then offers additional evidence indicating that Walker does indeed disagree with the *King* plaintiffs' reading of the law. Walker, according to Cannon, "is the only Republican governor who refused to establish an exchange but still put forward a proposal that relied on there being subsidies in a federal exchange" (Kliff reported on the details of this plan here). So even if our characterization of Walker's remarks were incorrect, it is clear based on the evidence Cannon himself cites that Walker did not embrace the *King* plaintiffs' reading of the law.

The Significance of Walker's Views

Which brings us to the question of how much Walker's (and Gruber's) statements should matter under the law. Though some judges believe that legislative history — that is, the "documents that are produced by Congress as a bill is introduced, studied and debated" — are relevant to determining how to read a law, statements made after the law is enacted are typically dismissed out of turn by the justices. As the Supreme Court explained in *Heintz v. Jenkins*, a statement by a lawmaker which is made "not during the legislative process, but after the statute became law. . . . is not a statement upon which other legislators might have relied in voting for or against the Act, but it simply represents the views of one informed person on an issue about which others may (or may not) have thought differently."

Normally, courts would treat both Walker and Gruber's statements even more dismissively because neither man was in the legislature during Obamacare's enactment. Walker's statement, however, falls into an exception to this rule that makes it highly relevant to the outcome of *King*. To understand why, it's important to understand fully how the *King* plaintiffs characterize the Affordable Care Act.

The essence of the *King* plaintiffs' reading of the law is that Congress viewed the question of whether state or federal bureaucrats operate each exchange as a matter of such overarching importance that they were willing to deny health care to millions of people — in order to ensure that the people running the exchanges all drew a state paycheck. The plaintiffs argue that the tax credits are part of "a variety of 'carrots' and 'sticks' to induce states to establish Exchanges voluntarily." In essence, they claim, Congress used the threat that a state's citizens could lose access to billions of dollars worth of subsidies in order to coerce the states into setting up their own exchange.

The Constitution places limits on states' power to do this sort of thing, however. When the federal government conditions payment of federal money upon states taking a particular action, those conditions are unconstitutional "if a State is unaware of the conditions or is unable to ascertain what is expected of it." Moreover, the question or whether a state is able to ascertain what strings come attached to the funds is evaluated "from the perspective of a state official who is engaged in the process of deciding whether the State should accept . . . the obligations that go with those funds."

This is why Walker's views hold special significance. Walker, in his own words, "spent nearly two years" studying the differences between state and federal exchanges, and he learned that "there's no real substantive difference between a federal exchange [and] a state exchange." Indeed, as Cannon points out, Walker set up an entire state program premised on the idea that federally-run exchanges are permitted to provide tax credits just like state-run exchanges. Walker's views, in other words, demonstrate that "a state official who is engaged in the process of deciding whether" Wisconsin should set up its own exchange was unable to ascertain the alleged consequences of this decision. Thus, even if the *King* plaintiffs are correct that Obamacare conditions tax credits on a state setting up its own exchange, that condition is unconstitutional.

Walker, it should be noted, is hardly alone among Republican governors in his belief that "there's no real substantive difference between a federal exchange [and] a state exchange." Nebraska Gov. Dave Heineman (R) said that "[o]n the key issues, there is no real operational difference between a federal exchange and a state exchange." Former Virginia Gov. Bob McDonnell (R) explained that his state would opt for a federally-run exchange because there was no evidence of any "clear benefits of a state run exchange to our citizens." A Supreme Court brief filed by the governors or attorneys general of 24 states explained that the Obamacare "can only operate in the manner that Congress intended" if the tax credits are "intact."

The law's staunchest opponents in the states, in other words, including two dozen officials who were actively trying to destroy the Affordable Care Act, were "unable to ascertain" that they could thwart one of the law's central provisions if they refused to set up a state-run exchange. The *King* plaintiffs' reading of the law is unconstitutional.

Congress and Contracts

One caveat to this observation is that the Supreme Court has historically limited conditional grant programs under a slightly different set of circumstances than the plaintiffs allege in *King*. Typically, when Congress conditions a federal grant on states taking a particular action, they offer to give money to the *state*. This, for example, is how Medicaid works. The federal government offers money to the states that each state can use to provide health care to low-income individuals, but states that accept the money must comply with certain conditions.

The *King* plaintiffs, by contrast, claim that Obamacare offers money to *third parties*, but only if the state where those third parties reside agrees to comply with certain conditions. Nevertheless, this is a distinction that the *King* plaintiffs should not be able to make, according to Yale Law Professor Abbe Gluck. The *King* plaintiffs, "frame their whole case on" the idea that the law uses

"carrots and sticks" to goad states to set up their own exchanges, just like Medicaid uses a similar approach to coax the states into setting up health programs for their low-income residents. Obamacare's opponents, Gluck asserts, "can't have their cake and eat it too." That is, they "can't say it looks like Medicaid where it is relevant to [their argument]," but it that doesn't look like Medicaid "when it comes to Scott Walker's comments."

The Supreme Court's own decisions support the view that federal grants to states should not be treated differently than federal grants to third parties. In *Pennhurst State School and Hospital v. Halderman*, a seminal Supreme Court decision laying out the limits of federal conditional grant programs, the Court explained that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed condition," adding that "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"

In a 2008 article published in the *Duke Law Journal*, University of Michigan Law Professor Samuel Bagenstos explains why this contract metaphor is relevant to *King*. The requirement that Congress speak clearly when it imposes conditions upon a federal grant stems, at least in part, from "the principle that ambiguous terms in contracts are construed against their drafters." If Ali drafts a contract where he agrees to pay Bob to paint his house, any ambiguities in that contract will be read in the light least favorable to Ali and most favorable to Bob. Similarly, if Ali drafts a contract where he agrees to pay Bob's brother if Bob paints his house, the ambiguous terms in the contract will also be construed against Bob even though Bob does not receive any actual money from Ali.

Under the Supreme Court's precedents, the same rule should apply to Congress. If Congress drafts legislation that may or may not be read impose conditions upon the states, it will be construed in favor of the states — that is, it will be construed *not* to place any obligations on the states. Moreover, this rule should apply regardless of whether Congress offers to give money to the state or to a third party — for the same reason that ordinary contract law applies to Ali regardless of whether he is expected to pay Bob or Bob's brother.

Law Is Not Politics — Or, At Least, It Shouldn't Be

So, to summarize the somewhat complicated legal explanation for why Walker's comments matter, in most cases, a non-lawmaker's post-enactment statements about a law would be ignored by the Supreme Court. A special rule applies, however, when the state official's statement informs the question of whether a law conditions federal spending on state action. In this case, Walker was one of many Republican state officials who, despite their desire to destroy Obamacare, read the law exactly the same way President Obama reads it — to guarantee tax credits in all 50 states. That alone is sufficient reason for the Supreme Court to reject the plaintiffs' arguments in *King*.

None of this means, of course, that Walker's comments will inflict the same political damage on Republicans that Gruber's inflicted on Obamacare supporters. As Woodruff quips, "Gruber has been a slow-motion car accident for the ACA's defenders," and this car wreck has been bolstered

by a conservative media infrastructure eager to help take down Obama's chief accomplishment. According to the liberal media watchdog group Media Matters, Fox News devoted at least 57 segments to a video of Gruber that could be used to score political points against Obamacare in a single week. No media outlet has devoted even a fraction of this amount of time to Walker's video.

Nor does it mean that the justices themselves will rely on Walker's statements in their opinion — or even that Walker's views will make a difference in the outcome of the case. The plainitiffs' arguments in *King* are extraordinarily weak, even setting aside the question of whether they read the law in an unconstitutional way. The sort of justice who is inclined to side with these plaintiffs anyway may be so consumed by motivated reasoning that no amount of evidence or citations to legal sources could convince them to change their mind.

But none of that changes the fact that the Supreme Court of the United States is supposed to be above politics. And it is not supposed to base its decisions upon how many times a once-obscure economist is mocked by Bill O'Reilly. If the highest Court in the land follows its own decisions, it will hold that tax credits are available in all 50 states.