

The Volokh Conspiracy

Georgia Fact-Check Fail

By Jonathan H. Adler – 12/6/12

The election may be over, but [the work of “fact-checkers”](#) continues. Last week, Politifact-Georgia waded into the debate over whether states should create health insurance exchanges with a [fact check](#) of my [occasional co-author](#) Michael Cannon of the Cato Institute. Specifically, Politifact evaluated the claim, made in [this article](#), that:

operating an Obamacare exchange would be illegal in 14 states. Alabama, Arizona, Georgia, Idaho, Indiana, Kansas, Louisiana, Missouri, Montana, Ohio, Oklahoma, Tennessee, Utah, and Virginia have enacted either statutes or constitutional amendments (or both) forbidding state employees to participate in an essential exchange function: implementing Obamacare’s individual and employer mandates.

Politifact rated this claim as “false” because “federal law supersedes state law.” As the headline reiterated: “Experts say federal law trumps state law on ‘Obamacare exchange’ claim.” It’s certainly true that “federal law supersedes state law,” but it’s also irrelevant to the claim that state law precludes employees in these states from creating exchanges. Under the Supremacy Clause, validly enacted federal laws trump inconsistent state laws, but federal law cannot compel state officials to implement federal law. As the Supreme Court has made clear in numerous cases, and reiterated in *NFIB v. Sebelius*, the federal government may not commandeer state officials to implement a federal program. Therefore, federal law does not – indeed, cannot – compel Georgia (or any other state) to create a health insurance exchange and does not preempt a state law that prohibits state officials from doing so. Moreover, when asked, the one legal expert Politifact consulted told me she did not claim otherwise. More importantly, Cannon never claimed the federal government could not create an exchange in Georgia under federal law. Nonetheless, Politifact rated Cannon’s claim as “false.”

When challenged on the accuracy of the “fact check,” the author of the item, Eric Sturgus, wrote back:

It would have been helpful to us if Mr. Cannon had explained himself and provided any research he thought would have been useful during the reporting process. But he refused, citing a prior boycott of PolitiFact.

Mr. Cannon might have been trying to argue that state workers in places like Georgia are not compelled to participate in creating health care exchanges. But that argument is severely hampered by his beginning statement that “operating an Obamacare exchange would be illegal in 14 states.” It’s clearly not illegal. Had he omitted that phrase, he might have gotten a better rating on the Truth-O-Meter.

This response is quite disingenuous. Re-read the quote under examination above. Cannon did not “try” to argue “state workers in places like Georgia are not compelled to participate in creating health care exchanges.” He made that exact point in the second sentence of the quote under examination, when he noted state law “*forbid[s] state employees*” from implementing the federal law — the sentence conveniently omitted from Mr. Stirgus’s e-mail. In case there was any doubt, the whole point of [the article](#) from which the quote was taken was that states should not create health insurance exchanges and, in this very same article, Cannon noted that if states don’t create exchanges they will “default[] to a federal exchange.” So not only did Cannon not claim the state laws precluded the federal government from creating or operating an exchange, he actually noted that state failure to create an exchange could result in a federal exchange within the state. And as if that were not enough, in the original fact-check Stirgus cited from an e-mail Cannon sent to one of Stirgus’s colleagues at the *Atlanta Journal-Constitution* [walking through](#) his explanation of why Georgia law precluded Georgia’s creation of a health insurance exchange under the PPACA. Stirgus conveniently omitted mention of this too. It’s almost as if Stirgus was trying punish Cannon for [refusing to cooperate](#) in his fact check, but no professional journalist would do something like that when purporting to conduct a neutral “fact check.”

If Politifact had wanted to evaluate the substance Cannon’s actual claim, it would have considered the text of the Georgia law and analyzed whether it would, in fact, preclude state employees from implementing a health insurance exchange. It didn’t need a further response from Cannon to do this, as the basis of his claim was abundantly clear. I think Cannon [makes a compelling case](#) as the Georgia law prohibits even “indirect” implementation of health care mandates and state-run exchanges provide the trigger for enforcement of the employer mandate, but I am not an expert on Georgia law. At the very least it would seem that this claim is a debatable legal proposition. Yet Politifact never considered this issue. Down in Georgia, this is apparently what passes for a “fact check.”