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Key Premise Of Obamacare Lawsuit Contradicted By Email Senate Aide Sent In 2010

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The premise of the latest legal attack on Obamacare has always been shaky. An email that a key Senate staffer wrote in January 2010 would appear to make it even shakier.

Next month, the Supreme Court will hear oral arguments in King v. Burwell, a case about what the text of the Affordable Care Act actually means. The lawsuit, conceived and promoted by longtime Obamacare critics, alleges that Congress intended to make the availability of the Affordable Care Act's financial assistance contingent upon the actions of state officials.

The plaintiffs' argument goes like this: You can get tax credits worth hundreds or even thousands of dollars a year to help buy insurance, but only if the officials in your state have decided to operate an insurance "exchange" -- a special marketplace, with highly regulated policies, for people who don't have access to employer-sponsored plans. If you live in a state where officials have chosen not to operate an exchange, the argument goes, then you're not supposed to get those tax credits. The federal government has built an exchange, but, according to the lawsuit, it can't offer the same financial assistance that the state exchanges do.

If five justices agree with these arguments, the consequences would be devastating. Only in about one-third of the states, plus the District of Columbia, have officials agreed to operate exchanges. In Florida, Ohio, Texas and the rest of the country, state officials have opted not to act. The millions of people in those states now buying deeply discounted Obamacare insurance through healthcare.gov would have to pay substantially more for that coverage. These people are largely working- or middle-class, and many are self-employed or have pre-existing medical conditions. The higher premiums would frequently be prohibitive, forcing many and probably most to give up insurance altogether. The ensuing drop in demand for policies could wreak havoc with insurance markets, forcing some insurers to leave and others to jack up prices, since healthy people in particular would be more likely to forgo insurance.

Why might the Supreme Court unleash such chaos? Because of a few key words in the Affordable Care Act statute -- in particular, a section that authorizes the federal government to distribute tax credits in exchanges "established by the State" without any reference to exchanges run by the federal government. Promoters of the King lawsuit -- such as Michael Cannon, director of health policy studies at the libertarian Cato Institute -- say that passage is there for a reason. According to their interpretation, Congress supposedly wanted use the tax credits as an incentive for states to act, and deliberately wrote a law that would punish states that did not. To bolster their case, the lawsuit's promoters have pulled some pieces of evidence from the historical record -- most famously, comments that MIT economist Jonathan Gruber, a key adviser to officials and lawmakers writing the bill, made in subsequent academic lectures.

Notwithstanding Gruber's comments, which he has said were mistaken, the bulk of evidence seems to suggest that Cannon and his supporters are wrong. Courts traditionally read laws in their entirety, rather than focusing on isolated passages, and other sections of the law suggest that subsidies are supposed to flow in all states. One key provision, for example, authorizes the federal government to create and "establish and operate such Exchange within the Senate" -- and to take "such actions as are necessary to implement such other requirements."

In addition, as Obamacare supporters have noted, the widely understood and supported regulations on insurance company behavior (like forcing insurers to disregard pre-existing conditions) rely heavily on tax credits in order to function. As Samuel Bagenstos, a professor at the University of Michigan Law School, has written, a law that allowed states to opt out of the tax credits, and only the tax credits, would be a law "at war with itself."

Meanwhile, the elected officials and staff who worked on the law have said repeatedly that they always intended for tax credits to be available to people in every state -- regardless of what officials in those states decided about exchanges. Brian Beutler at The New Republic and Greg Sargent at The Washington Post have produced even more evidence, including interviews with Capitol Hill staffers who described how they merged the language of different committee bills -- and how that process produced the terminology at issue in King v. Burwell.

This brings us to the Senate staffer's email, which I found in my own email archive from Jan. 12, 2010. It came to me from John McDonough, who was an adviser to the late Senator Edward Kennedy (D-Mass.) and who worked on the Senate's Health, Education, Labor & Pensions (HELP) Committee.

The timing of McDonough's email is as important as the source. Jan. 12, 2010, was a Tuesday. At that point, House and Senate leaders and their advisers were meeting at the White House and on Capitol Hill, negotiating over the differences between the two chambers' bills. The day before, I had appeared on NPR's "Fresh Air" and fielded a question about whether the Senate's bill allowed states to opt out of creating exchanges or the law's other insurance reforms.

A day after admitting on the air that I wasn't sure, and stumbling through an answer, I sought out McDonough for clarification. I also pressed him on whether Ben Nelson, the cantankerous former Democratic senator from Nebraska who was advocating for more state control, had demanded such changes.

McDonough has given me permission to share our brief email conversation, which took place "on background." Here it is:

On the surface, this may seem like a muddled, fairly banal set of messages between reporter and source. Seen through the lens of the case coming before the Supreme Court, however, it provides a clue as to legislative intent -- perhaps an important clue.

Confronted with arguments that Congress would never have passed a statute that might undermine itself, Cannon and other supporters of the King lawsuit have argued that the exchange provision was supposed to work just like the law's Medicaid provision. In other words, the exchange tax credits would be like something out of "The Godfather": an offer that states simply couldn't refuse. In this telling, Obamacare's authors supposedly never anticipated that states would turn down the tax credits.

"Congress did try to coerce states with the loss of billions of dollars of federal Medicaid grants," Cannon and his frequent collaborator, Case Western University law Professor Jonathan Adler, wrote at the website of the journal Health Affairs in 2012. "It stands to reason that the same Congress would do the same thing with regard to tax credits and Exchanges." Cannon and Adler made a similar argument in a 2013 paper they wrote for the journal Health Matrix: "Having created an enormous incentive for states to establish Exchanges, it likely never occurred to some of the Act's authors that states would refuse."

But it did occur to McDonough, from the look of things. In the email copied above, he draws an explicit contrast between Medicaid (which, he thinks, states would never realistically turn down) and the exchanges (which, he concedes, they might).

To Nicholas Bagley, a University of Michigan law professor who worked on two amicus briefs opposing the lawsuit, that contrast is telling. "[McDonough] knew full well Congress couldn't force the states to participate in Medicaid," Bagley told me. "What he meant was that the stakes were too high for that to be a realistic option. But the very next thing he says is that opting out of the exchanges was a realistic option. On the plaintiffs' theory, how could that possibly be? Just as no state could have been expected to opt out of Medicaid, so too no state could have been expected to opt out of the exchanges if billions of dollars were on the line."

"If the plaintiffs were right," Bagley went on, "McDonough would've said 'no' to both questions. The fact that he didn't is powerful evidence that Congress never meant to threaten the states into establishing exchanges."

Cannon, for his part, didn't immediately offer a response to McDonough's email, which I also shared with him.

McDonough's email would appear to be consistent with yet another email that yet another Capitol Hill staffer -- Debbie Curtis, chief of staff to then-Rep. Pete Stark (D-Calif.) -- wrote to me three days later, on Friday, Jan. 15, 2010. By that point, it was apparent that the Senate's version of the exchange was going to prevail. As news filtered out, I asked Curtis, who was also among the small number of aides working directly on legislation, what she thought about the result. In an email I've published previously, Curtis assured me that there was really no difference between the two plans.

"I really think the exchange thing is a red herring," she wrote. "When you remove the perception, our bills have always been pretty similar. They said state first, some sort of fall back second. Ours said state's can opt out otherwise national plan…."

These emails don't prove that Obamacare's authors intended to make subsidies available in all states. But to believe Congress intended otherwise, you also have to believe that both Curtis and McDonough, who cared deeply about expanding coverage and were among a tiny circle of staffers hashing out legislative language, understood that some states might not build exchanges and didn't care that people in those states would lose out on insurance. You also have to believe they are lying, or at least stricken with amnesia about congressional intent, since they have said publicly that the premise of the lawsuit is false. And you have to believe the same thing about all of the other officials and advisers who have expressed identical sentiments.

Of course, the issue isn't whether you or I believe those things. It's whether five justices of the Supreme Court do. The outcome of this case -- and the well-being of millions of Americans -- depends on it.