

NEW REPUBLIC

The Obamacare Subsidy Challenge is Built on Fox News Soundbites

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The discovery that several, and perhaps all, of the plaintiffs asking the Supreme Court to void Obamacare subsidies in 34 states don't have standing to sue the government may not ultimately suffice to see the case dismissed. But it has served the nearly as important purpose of alerting the press to the stakes, brazenness, and ethical dubiousness of the challenge. And, perhaps, to the fact that it leans for support not on a clear historical record, or broad expert consensus, but on the kinds of cliched signifiers you might expect to hear on a Fox News Obamacare panel.

For instance, to combat the impression that the standing problems stem from a legal argument that only appeals to unreliable kooks and zealots, one of the King architects now lays these difficulties at the feet of the IRS. "They don't want to get audited," Cato Institute's Michael Cannon told USA Today, "and this administration has a history of using the IRS for ideological purposes."

Cannon's claim, though baseless, is aimed at the right's collective lizard brain, designed to excuse the case's public relations problems, which are inherent, as a consequence of the Obama administration's political thuggery.

That Cannon is defending his case by nodding like a Fox News bobblehead to an unrelated pseudo scandal is not anomalous. In both the media and in their briefs to the Supreme Court, the law's challengers have papered over weaknesses in their historical and legal arguments with conservative bromides familiar to talk radio consumers, Fox News viewers, and recipients of anti-Obamacare talking points.

This kind of conservative *argumentum ad reptilis*, has a track record with at least one conservative on the Supreme Court. During oral arguments in the constitutional challenge to the Affordable Care Act three years ago, Antonin Scalia made reference *sua sponte* to the "Cornhusker Kickback"—a special deal for Nebraska in the Senate health care bill that became a metaphor on Fox News for the ACA's corrupted legislative process, and was thus made national.

But to those of us outside of the conservative information bubble, it speaks to two themes that define challenge itself: that it is built on a false history, and that it poses a de facto test to the cohesiveness of conservative movement infrastructure. Can a case built on an informational foundation that's rejected everywhere outside the movement stand on the strength of the right's intellectual and professional networks? Is the apparent internal consistency of a story and

argument that only conservatives believe enough to carry the day in the Supreme Court, when the stakes are this high?

Standing aside, King faces so many historical questions precisely *because* it is built on a fabricated history. The challengers assert without evidence that Congress intentionally and reasonably placed an enormous condition on the ACA's insurance subsidies, then never told anyone about it, and then backtracked when conservative activists convinced a bunch of states not to set up their own exchanges.

Just as Cannon turned to a conservative soundbite to explain the challengers' difficulty finding plaintiffs, all of the obvious holes in this theory of intent can be answered with a different Fox News headline.

Why didn't anyone with a stake in the law notice the extraordinary threat buried in the law, if it was included by design? The petitioner's brief explains, "the Act's incentive function was well understood by, among others, Jonathan Gruber, a leading ACA architect and HHS consultant who helped draft the legislation."

Why didn't Congress debate this dangerous incentive, rather than toss it in and, in so doing, place so many of the law's key functions in tension with each other? Michael Carvin, the petitioners' lawyer, explained in a reply brief by paraphrasing a decontextualized Nancy Pelosi quote that every conservative media consumer knows by heart. "It is a fool's errand to search for a construction that eliminates any conceivable tension in every part of this gargantuan law—one that Congress was told, infamously, that it had to pass to find out its content."

Pelosi wasn't referring to the public when she said, "you have to pass the bill to find out what is in it"; she was explaining that the law's benefits will only become popular once people experience them. But here that's beside the point. On the right, this Pelosi quote is an all-purpose mic-drop. It allows conservatives to project any intention they want on to Obama and the Democrats who voted for the Affordable Care Act, and they thus deploy it whenever they face skepticism that Congress would plant seeds of destruction into such a historic piece of legislation.

To a similar end, Jonathan Adler, another King architect, has explained away the fact that a supposedly unambiguous threat to the states was so widely misconstrued with the following non-sequitur:

@brianbeutler @mfcannon you mean like "if you like out you can keep it"? 1/2

— Jonathan H. Adler (@jadler1969) January 23, 2015

The problem with Obama's promise that people who liked their plans could keep them wasn't that it was misconstrued. It's that it was construed correctly—and then proved to be untrue. Obama and the ACA suffered severe political damage for this broken promise a year and a half ago, and on the right it has served as a powerful tool for undermining the law's legitimacy.

But this broken promise has about as little to do with the question of the subsidies as Benghazi does. Indeed, considering how nakedly the law's opponents use these memes to insulate their legal challenge from criticism, it's almost surprising that in their briefs, the first letters in each paragraph don't comprise a Benghazi acrostic.