



Inside the Anti-Obamacare Carnival Libertarian foes of the health care law are celebrating big victories—and have more Champagne to pop.

By: David Weigel
July 27, 2014

The stilt walker was the first clue that something strange had come to Washington. A few long blocks from the Capitol, with the dome in full view, a colorless midsize tent was ringed by circus performers, waving and beckoning tourists into something-or-other. It was Wednesday evening, and the street traffic was sparse, but a few tourists made it in, where they signed in with one of a dozen red-shirted, iPad-wielding libertarian millennials.

Then they were in—they'd made it to the Creepy Carnival. This was the big summer project of Generation Opportunity, the youth outreach group funded by at least \$5 million from the Koch network to tamp down under-30 enrollment in health care exchanges. Over the fall and winter, they'd worked tailgates and raffled off iPads. Now, after weeks of promo, they'd find out if free food and circus games could be as popular as free beer. Perfect timing, too: The D.C. Circuit had just ruled their way the day before, arguing that Obamacare subsidies (which made health care plans affordable for middle- and lower-income people) were illegal in states that did not set up their own health care exchanges.

After a good-size crowd had found the tent, Generation Opportunity's president, Evan Feinberg, took his place onstage. A tightrope-walking blade juggler took a respectful break behind him, straddling and listening, as Feinberg laid out the manifesto.

"Young Americans have been asked to pay as much as three times as much for their health care to get nothing out of it—to pay for an older, sicker generation's health care," said Feinberg. "To pay for an intrusive bureaucracy that we can't trust."

The crowd, ostensibly, was learning about this through games administered by confused carnies. Under-30s who played the test-your-strength game were handed a plastic hammer that couldn't work right. A haunted hospital took them into a dimly lit health care future of cockroach-infested rooms, skeletons in waiting rooms, and a literal "death panel" that denied treatment before its bored-looking members (including "Creepy Uncle Sam," the hydrocephalic viral star of GenOpp's videos) took a lunch break. On the way out—before signing another GenOpp signup form—gawkers had to walk past a hall of "government health care" outrages, from the Tuskegee experiment to military lobotomies.

But outside, Feinberg was cheerfully proclaiming victory over Obamacare. “When the administration spent hundreds of millions of dollars trying to convince us to sign up—of taxpayer money, mind you—we didn’t sign up,” he said. “They needed 40 percent of us; only 27 percent of young Americans thought it was worthwhile to do so. And that was when we were forced, with a penalty, to sign up.”

Did the crowd buy it? Unclear. One family that I followed and chatted with grabbed some free food and watched an acrobat before splitting, telling me that they were happily covered by the breadwinner’s job at a security company. A group of Air Force contractors who were taking a break told me that they were already against the law—it might cut into their Tricare one day—before they walked past the free cotton candy.

But the Carnival will go on tour anyway, and Generation Opportunity is going to be with us for a while. In a month of legal setbacks for the Affordable Care Act, libertarian foes of the law have celebrated and pressed their advantage. They are years into a sophisticated campaign of debating and gaslighting, aimed at making Obamacare unworkable through citizen boycotts and legal victories.

It’s been going well. Conservatives and libertarians—Americans for Prosperity, the Cato Institute—campaigned to stop states from setting up health care exchanges. After the 2012 Supreme Court decisions that allowed states to opt out of Medicaid expansion, the critics made sure that Republican-run states took the get-out-of-expansion-free card.

And this week, after months of derision and disbelief, libertarians claimed the D.C. Circuit victory with the *Halbig* decision. A case that had begun when a South Carolina attorney noticed that the ACA referred to subsidies going to exchanges “established by a State”—not by the federal government, whose exchange ended up serving most of the people who got new insurance in late 2013 and early 2014—was picked up by libertarian attorneys at the Cato Institute, the Competitive Enterprise Institute, and the American Enterprise Institute. They’d won, and that had allowed even more sowing of doubt about a law that liberals thought they’d built a wall around.

Not quite. Generation Opportunity is embracing the chance to portray the law as illegal and killable. “I was working on the Senate Health, Education, Labor and Pensions Committee when the law was passed,” Feinberg said after his short speech, after Republican Rep. Paul Gosar took the stage to praise the event. “Quite clearly the intention of these subsidies was to get states to set up their own exchanges.” The decision, he said, is “one more thing that’s going to make it hard for the law to be successful. But the law was doomed for failure.”

The Carnival ran until 9 p.m., until it could be packed up for the tour. The next night, the Competitive Enterprise Institute threw a much smaller and more exclusive party in its downtown Washington office. Over appetizers and drinks (courtesy of the Distilled Spirits Council), victorious lawyers and policy analysts kibitzed about how far *Halbig* could go. CEI had played a role in finding and rallying plaintiffs, but there was plenty of credit to share.

As the clock struck 7, three of the happy warriors were brought together to give short speeches on what they won. First up was CEI's Sam Kazman, the libertarian group's counsel, who read from the part of the *Halbig* transcript in which a judge mocked the government's insistence that the state/subsidies provision was merely a typo.

"They admitted that our case was only slightly less persuasive than that of the government," said Kazman. "It's a close call. It's nice for them to admit it."

Kazman ran through a list of unsung heroes, from interns to the attorneys who spotted the hole in the law. The case, he said, matters for "the whole notion of the rule of law and separation of powers. When you have an administration that's set on expanding the regulatory state to infinity and beyond, it's never been more important to judicially restrict the ability of agencies to rewrite the law."

Up next was Thomas Miller, a CEI graduate and current AEI scholar, who told a joke he'd been forwarded about a man pouring his heart out at confession.

"He tells the priest, 'Last night, I beat the crap out of an Obamacare supporter,' " said Miller. "The priest says, 'I'm here to talk about your sins, not your community services.' "

The crowd of a couple of dozen libertarians broke into I-can't-believe-he-said-that laughter. "We don't take that approach here!" said Miller. "We just beat them in court. We're ready to forgive them for their sins if they're ready to move on to the hybrid health care system that people really want."

Up next was Michael Cannon, the Cato Institute scholar who wrote countless words in print and speeches to turn *Halbig* from daydream to reality. He remembered putting his first research paper online and declaring "OK, world: Change!" He paid tribute to the lawyers who actually changed it. Then he made a little fun of the media for asking him how he felt about winning. That was never the point.

"But someone did ask me, on the scale of 1 to 10, 1 being the day Obamacare passed and 10 being the day Obamacare is repealed, how did I feel?" said Cannon. "It took me a while to come up with an answer. Negative one. We have a president who thinks he can rewrite the law himself. That's much worse than just Obamacare."

Cannon was not pessimistic. There were plenty of libertarian lawyers and sensible judges who will hear the case. CEI's president, Lawson Bader, raised a glass and promised that there's "Champagne to be uncorked in the near future."