The New York Times

In Four-Word Phrase, Challenger Spied Health Care Law's Vulnerability

By Adam Liptak

March 2, 2015

WASHINGTON — The first lawsuits challenging the Affordable Care Act were still in the early stages, but conservative lawyers were already working on a backup plan in December 2010 if the first line of attack failed.

It was Thomas M. Christina, an employment benefits lawyer from Greenville, S.C., who found a new vulnerability in the sprawling law. "I noticed something peculiar about the tax credit," he told a gathering of strategists at the American Enterprise Institute.

With a rudimentary PowerPoint presentation, Mr. Christina sketched a new line of argument. He pointed to four previously unnoticed words in the health care law, enacted nine months earlier. They seemed to say that its tax-credit subsidies were limited to people living where an insurance marketplace, known as an exchange, had been "established by the state."

The Supreme Court will hear arguments on the implications of Mr. Christina's theory on Wednesday. If a majority of the justices accepts it, more than six million Americans could lose health care coverage and insurance markets could collapse in about three dozen states where the federal government runs the exchanges, imperiling the health care law itself.

This is the first threat to President Obama's signature legislative achievement to come before the Supreme Court since it upheld a crucial provision in 2012, by a 5-to-4 vote. Mr. Christina said he hesitated to take too much credit for the current case, King v. Burwell, No. 14-114. "People think of interesting ideas all the time," he said in an interview. "This one happened to be an interesting idea that came at an opportune time."

The timing of his discovery figures in the case, which will turn on the meaning of the phrase he identified in 2010. The justices must decide whether Congress intended it to forbid the government to provide subsidies in states without their own exchanges.

Supporters of the law note that Mr. Christina did not discover the phrase until well after the law's enactment, suggesting that Congress had been unaware of the possibility that people in states that opted not to run their own exchanges would be ineligible for tax subsidies.

"Petitioners are now telling the justices that Congress deliberately withheld subsidies to force states to establish exchanges," said Doug Kendall, president of the Constitutional Accountability Center. "The fact that it took nine months from passage of the A.C.A. for even its most vitriolic opponents to discover this 'feature' of the act is evidence enough that this is a baldfaced lie."

The law's defenders add that other provisions in the act, along with its structure and purpose, make clear that it called for subsidies in all 50 states. They add that the subsidies, which are intended to reduce premiums for low- and middle-income people, are vital to the economic underpinnings of the law.

Opponents of the subsidies say it is the text of the law that matters, not what individual lawmakers knew or believed.

"It is extremely doubtful that any senators read the entire bill at the time, and even more doubtful that all but a few senators were even aware of how the exchanges were structured," said Josh Blackman, a law professor at South Texas College of Law who has filed a brief supporting the plaintiffs.

"When you have such a large bill, that changes so many aspects of our society, that no one bothered to read, discerning a single legislative intent is elusive," he continued. "To this, the challengers reply that the text provides the best indication of what Congress meant — the majority voted on it."

Some of the conservative strategists at the 2010 Washington gathering were firebrands, like Michael S. Greve, now a law professor at George Mason University, who exhorted the audience to destroy the health care law. The measure "has to be killed as a matter of political hygiene," he said. "I do not care how this is done, whether it's dismembered, whether we drive a stake through its heart, whether we tar and feather it and drive it out of town, whether we strangle it."

But Mr. Christina, 59, is soft-spoken and deliberate, with a cautious manner. A Harvard law graduate, he worked in the Justice Department in the Reagan administration and then joined Covington & Burling, a major Washington law firm, where he became fascinated by employment benefits law, which concerns pensions, 401(k) plans and other workplace programs.

"I thought to myself, 'Wow, I did not know there was an area of the law that was so interesting,' " he said. "And the great thing is, very few people thought it was interesting."

He said he had discovered the language about subsidies while poring over the law's hundreds of pages and trying to master its intricacies so that he could advise his clients at Ogletree Deakins, a labor and employment firm. "I wasn't looking for holes in the law," he said.

Back in 2010, Mr. Christina thought the subsidies were unconstitutional, reasoning that they would coerce every state to set up exchanges. That was an echo of a successful challenge to the law's Medicaid expansion, which would prevail at the Supreme Court in 2012 by a 7-to-2 vote.

"Resistance is futile," Mr. Christina said at the 2010 Washington conference, referring to state officials. "You can't get re-elected if you turn down free money that would otherwise have been paid as tax credits to your citizens."

Robert N. Weiner, a former Justice Department official who oversaw the defense of the law before the court in 2012, said the notion that it was meant to force the states to create exchanges was a curious one. "There is no indication," he said, "that anyone in Congress thought they were making a threat."

Mr. Christina did not anticipate that the Internal Revenue Service would in August 2011 propose and in May 2012 adopt regulations interpreting the law to allow subsidies in all 50 states, including those where the federal government ran the exchanges.

By then, two conservative scholars — Jonathan Adler, a law professor at Case Western Reserve University, and Michael Cannon, director of health policy studies at the Cato Institute — were reshaping Mr. Christina's idea. They said the proposed I.R.S. regulation was at odds with what Congress had authorized the administration to do.

In November 2011, Professor Adler and Mr. Cannon published an opinion article in The Wall Street Journal titled "Another Obamacare Glitch."

"The text of the law is perfectly clear," they wrote. "Without congressional authorization, the I.R.S. lacks the power to dispense tax credits or spend money."

In a recent interview, Professor Adler said he and Mr. Cannon developed the central argument of the case before the court. "We were the first ones to lay it all out," he said.

The Competitive Enterprise Institute, a libertarian advocacy and litigation group in Washington, recruited plaintiffs and provided financing for two similar lawsuits, filing one in the District of Columbia in May 2013 and the other in Virginia in September 2013.

In March 2014, at the argument of one of the cases before a federal appeals court in Washington, Judge Thomas B. Griffith examined the history of the challengers' theory. "Is anyone making this point before Professors Adler and Cannon come up with it?" he asked.

Michael Carvin, the plaintiffs' lawyer, responded by pointing to a 2009 article by Timothy S. Jost, a law professor at Washington and Lee University and a supporter of the health care law.

He had written about the possibility of using tax subsidies in order to encourage states to set up exchanges.

In July, Judge Griffith wrote the majority opinion for a divided three-judge panel of the court, ruling that only people in states that run their own exchanges are eligible for subsidies. In dissent, Judge Harry T. Edwards said the case was a "not-so-veiled attempt to gut" the health care law. He said the challengers had cited a "single piece of evidence" — Professor Jost's article — to "support their claim that Congress intended to restrict subsidies to state-run exchanges."

"There is no evidence," Judge Edwards wrote, "that anyone in Congress read, cited or relied on this article."

Professor Jost agreed. "It's humiliating," he said in an interview.

The same day the appeals court in Washington issued its decision, the United States Court of Appeals for the Fourth Circuit, in Richmond, Va., ruled against the plaintiffs. That is the case the Supreme Court will consider on Wednesday.

Two days after the dueling decisions, conservatives seized on another comment. Jonathan Gruber, a former health care adviser to the Obama administration, had been recorded at a January 2012 conference saying 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 recording was posted on The Volokh Conspiracy, a legal blog. Sam Kazman, the general counsel of the Competitive Enterprise Institute, said the remarks confirmed the theory behind the lawsuits.

"I think we were responsible not for discovering it," he said of the remarks, "but for viralizing it."

For his part, Mr. Christina said there were valuable features to the law even though he was opposed to parts of it. He added that the issue at the heart of the Supreme Court case was straightforward.

"I don't think," he said, "that there is any ambiguity about what the statute says."