



If Obamacare is overturned, a Case Western law professor gets the credit

By [Stephen Koff, Plain Dealer Washington Bureau Chief](#)

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WASHINGTON – If the law known as Obamacare gets struck down in the latest court challenge, the victors will thank a Hudson resident and Case Western Reserve University law professor who discovered what the law's critics say is a major flaw.

Jonathan Adler, 44, says he didn't even appreciate initially how significant his discovery might be. He thought it was an interesting bit of legal arcana, worthy of scholarship. But his analysis of the Affordable Care Act, or ACA, has led to four pending cases in federal courts, two likely to be decided within months, that offer ACA opponents their best chance of gutting the law.

Oral arguments were heard in one of the cases, in U.S. District Court in Washington, DC, on Tuesday.

Adler, a case law professor since 2001, pored over the ACA after it passed in 2010 and found this: Congress created a system for providing tax subsidies and penalties in order to give incentives for people to buy health insurance or for employers to provide it. States were supposed to create new agencies that would offer online insurance-shopping options, and states would tie into a federal tax system to dole out the subsidies and assess the penalties.

But the ACA made clear, Adler says, that the subsidies were to be used in these new state marketplaces, or "exchanges." There is no record, he says, that shows Congress directed the subsidies to what has since evolved: a large, federally run, health-policy shopping exchange. When the subsidies are mentioned in the law, Adler says, it is always and only in the context of state exchanges.

Congress did provide for the creation of a federal exchange, but as a backup, Adler says.

Things haven't worked out that way. When the law was put into practice, [27 states](#), including Ohio, said they did not want to start their own exchanges or partner with the federal government for a jointly run exchange. They are using the federal system instead, forgoing federal grants that

would have helped them establish their own. According to the Pew Research Center, that means that means nearly 60 percent of Americans who lack insurance live in states that refused to have their own exchanges.

Based on the law, Adler says, the Internal Revenue Service has no legal authority to give tax subsidies to people enrolling in the federal exchange. The IRS wrote a regulation as if it has that right, but Adler says the ACA never empowered it to do so.

Although this particular issue involves the signature law of President Barack Obama's White House, there have been legal parallels with the desires of other administrations, including President George W. Bush's, on environmental and other matters, Adler says.

"In none of these areas does that authorize the administrative agencies to rewrite the laws altogether," Adler said in a telephone interview this morning with The Plain Dealer. "They've got to go back to Congress."

This may sound like a novel theory for the policy and law blogs, some of which Adler participates in. He initially used his research for a [paper](#) that he presented at a legal conference at the University of Kansas in February of 2011.

But then a friend and influential health-policy analyst, Michael Cannon at the libertarian-leaning Cato Institute, a Washington think tank, told Adler that he was onto something big -- something that could profoundly affect Obamacare.

Without the tax subsidies, the ACA cannot work. Its central tenet is insuring nearly every American, but health insurance would be too expensive for many people without the subsidies.

Cannon and most conservatives say the ACA represents a massive government overreach. And so Adler and Cannon teamed up and spent more time on the issue, publishing an [op-ed](#) in the Wall Street Journal and an influential [paper](#) in Health Matrix, a journal of law and medicine. They wrote more columns and made appearances, not only to gatherings of policy wonks but also before members of Congress.

And their work is now at the center of four court cases. Besides the one on Washington, DC, others are pending in Virginia, Oklahoma and Indiana.

The Obama administration tried to get the case in Washington, DC, dismissed but failed. Critics of the Adler-Cannon work say they are focusing too narrowly on individual sections of the law and fail to take into account congressional intent.

Timothy Jost, a Washington and Lee University law professor and authority on health law, said in 2012 that the "legislative history of the ACA establishes that Congress understood that premium tax credits would be available through both federal and state exchanges." Jost [wrote](#) in the Health Affairs Blog that the nonpartisan Congressional Budget Office also assumed that subsidies would be available on all exchanges, state and federal.

Adler disagrees and says the CBO was focused on its assumptions that every state would have an exchange. Furthermore, he contends, the CBO's assumptions "can't trump the law." (For those interested in getting more deeply into the weeds, Adler and Cannon responded to Jost's analysis with [their own](#) Health Affairs Blog piece.)

Adler acknowledges that some Democrats might have wanted subsidies to be awarded broadly on the federal exchange. But that's not how the rushed legislation worked, and that's not the way laws work, either, he says.

"I'm a firm believer that the laws we have are the ones Congress actually enacts, not the ones that we wish we had or we wish that Congress had enacted differently," Adler said.

Furthermore, he said, "no one has found" that a member of Congress specifically made a case for providing subsidies on the federal exchange when the law was being worked out. The subsidies, he said, are always mentioned in the context of state exchanges.

"It was somewhat surprising that we didn't find such contrary evidence," he said.

Democrats and many pundits say the Adler-Cannon argument and its related legal cases are long shots. But the argument represents the current legal tack and best chance that critics have to unravel the ACA. The judge in the Washington, DC case, Paul Friedman, has suggested he will try to rule within months

Adler, who was in Washington and watched part of the oral arguments Tuesday, says his legal rationale is strong, but he has studied courts long enough to know not to assume victory.

"As far as what's going to happen next, it's hard to predict," he said.

"As I teach my students in administrative law, courts are always reluctant to strike down decisions made by administrative agencies."