Newsweek

The Case That Could Topple Obamacare

By: Pema Levy- December 17, 2013

Obamacare may have its problems, including more bugs than you can find in the cornfields of Nebraska, but its legal worries were meant to end after the Supreme Court upheld the individual mandate, the heart of the Affordable Care Act.

Now, as the technologists charged with making healthcare.gov work report progress, lawyers are re-entering the fray. A little-heard of challenge currently making its way through the court system may represent opponents' last best hope of, as they are fond of saying, driving a stake through the heart of the law.

It all started in 2011, when Jonathan H. Adler, a conservative law professor at Case Western Reserve University in Ohio, shot an email to his friend Michael Cannon, a health policy expert at the libertarian Cato Institute in Washington, D.C. Adler thought he had spotted an error in Obamacare that could unravel a significant portion of the law.

At issue are the federal subsidies for individuals buying insurance in their state's health care exchanges. The law stipulates that those subsidies should be allotted for plans purchased "through an Exchange *established by the State under Section 1311*" (italics added), a reference to the section of the law that establishes state-run exchanges.

Adler wondered: Did the law provide subsidies for only state-run exchanges and not federal ones? The law requires that the federal government step in to create an exchange when a state declines to do so. But does it fail to give subsidies to the residents of those states?

It may seem like a small problem, but if true, it spells disaster for the Affordable Care Act. Without subsidies, health care on the individual market becomes unaffordable. Without an affordable option, the individual and employer mandates disappear. In other words, the entire law could come crashing down in the 36 states that have opted not to run their own exchanges.

Since its passage in March 2010, the Obama administration has set about implementing the law by making the subsidies, in the form of premium assistance tax credits, available in every exchange no matter who was running it. The Internal Revenue Service, which oversees this piece of the law, finalized a rule allowing subsidies in every state in May 2012.

Meanwhile, Adler and Cannon recorded their finding in a *Wall Street Journal* op-ed in November 2011. The IRS was acting against the plain language of the law, they argued. As Cannon tells it, the duo then decided to do more research, which led them to believe that this was not, as they had called it in the

Journal, a “glitch.” Instead, they argue Congress intentionally decided to withhold subsidies from federal exchanges.

Constitutionally, the federal government cannot order states to create the exchanges, so Adler and Cannon contend that Democratic lawmakers intentionally withheld premium assistance to strong arm states into implementing their own exchanges. Though this is not explicitly stated in the law, Cannon and Adler point to a handful of comments that they argue infer subsidies were intended for state-run exchanges – but there is no explicit evidence. Now that 36 states decided not to create their own exchange, Cannon and Adler maintain that the IRS is not carrying out the letter of the law.

“President Obama is trying to do the exact opposite of what the law says,” Cannon said.

The two drafted a paper in the first half of 2012 on their findings, but didn’t publish because they thought the Supreme Court might overturn the whole thing anyway. When the court largely upheld the law, the two published their paper in July 2012. Over a year later, there are now four cases challenging the subsidies in federally-run exchanges. One of them, Halbig v. Sebelius, was argued in D.C. district court this month by premier conservative litigator Michael Carvin.

“This is literally the simplest case I’ve ever had in 30 years of practicing law,” Carvin said at a Cato event this summer. “No one but a lawyer could seriously stand up here and tell you that north means south, black means white and state means federal. And all you need to do is read the statute and know that that is what the law is.”

Carvin may be confident, but critics have variously called Cannon and Adler’s theory “preposterous,” “screwy” and a “Republican fantasy.”

“I think it’s a case without merit,” said Sara Rosenbaum, a health care expert at George Washington University. “The plaintiffs have seized on a few words in a statute, they’ve taken the words completely out of context, and they have ignored numerous other parts of the statute that make their interpretation of the law basically senseless.”

Defenders of the law argue that the phrase “established by the State under section 1311” does not exclude federally-run marketplaces. Their legal argument is simple: the law defines an “Exchange” as established by the state, then orders the federal government to establish the exact same exchange, denoted as “such Exchange,” if a state fails to act. In other words, it authorizes the government to act as the state and set up an exchange as it is defined in section 1311. Whether a particular section of the law references an “Exchange” or an “Exchange established by the state” is the same thing as referring to the law variously as the “Affordable Care Act” and “Obamacare,” two terms with identical meaning, because a federally-run exchange is, for the purposes of the law, the same as a state-run exchange.

“[T]here is nothing extraordinary about the Secretary acting for, or stepping into the shoes of, or standing in for, or representing, the State,” former Justice Department lawyer Rob Weiner wrote in an amicus brief in Carvin’s case. “This type of legal substitution happens all the time.”

The law's opponents don't buy this explanation, but it's judges whose opinions ultimately matter. D.C. District Judge Paul L. Friedman could weigh in at any time, kicking the case up to the D.C. Circuit Court of Appeals and then, potentially, the Supreme Court. Carvin and his team are hoping the D.C. court will rule quickly because on January 1, coverage under the exchanges begins. After January 1, 2014, rulings in these suits could create chaos, halting subsidies that are already being handed out.

Supporters of the law are even more confident in taking on the second part of Cannon and Adler's thesis: That Congress purposefully decided to withhold subsidies from individuals in federally-run exchanges, thereby allowing Republican state officials to single-handedly void the law in their states.

"To believe their argument, you have to believe that [top Democratic Senators] Harry Reid and Chuck Schumer and Patty Murray and Max Baucus got together off the Senate floor one day and said, 'I know what we'll do to convince these states that they should set up exchanges: We'll give them the power to completely destroy at least the exchange portion of Obamacare in their states,'" said Simon Lazarus, senior counsel at the left-leaning Constitutional Accountability Center who has taken a leading role in repudiating Cannon's work. "People think a lot of things of those individuals, but dumb is not one of them."

Lazarus, who watched the oral arguments in Washington this month, said Carvin spent a considerable amount of time on the issue of congressional purpose because "the text argument just doesn't get him across the finish line," as he put it. "They need this purpose argument. They can't just get away with saying there was a glitch in the statute."

Under longstanding Supreme Court precedent, agencies have broad authority to implement laws according to their reading of the statute. So it is not enough for opponents of Obamacare to prove there are ambiguities in the statute. To win, Carvin must convince the court that the meaning of the text is beyond doubt.

Cannon, Adler and Carvin argue that Congress uses the carrot-and-stick approach all the time to induce states to enact programs they cannot simply require them to enact, the most famous example being Medicaid, which states administer in order to receive funding.

But Team Obamacare has a convincing rejoinder to this point: If you are going to condition tax credits on participation, why would you not make this explicit?

"A threat can't be kept secret," Lazarus said at the Cato event. "By its very nature, a threat must be communicated. There is no such thing as a stealth threat."

And there is no evidence states intended to decline billions in subsidies when they decided not to set up exchanges. "You can't find any evidence that any of them debated the fact that if they opted out it would cost their residents all of their premium assistance," Rosenbaum said.

Opponents may dismiss the conservative argument as a joke, but no one is laughing at the risk the case poses for the health care law. That's a lesson they learned the hard way. During the first challenge to

Obamacare, liberals scoffed at the legal arguments created to undo the law, only to see the law nearly toppled by the Supreme Court.

“I think you have to take every case seriously,” Rosenbaum said. “You have to take courts very seriously.”