

The Oregonian

Oregon lawmakers could easily dodge Supreme Court ruling on federal exchange, expert says

By Nick Budnick - 12/29/14

A prominent opponent of the Affordable Care Act says that unlike many other states, Oregon can easily sidestep a Supreme Court challenge he helped engineer.

[Michael Cannon](#), director of health policy studies for the libertarian-leaning Cato Institute, has for years been laying the groundwork for a legal challenge that the U.S. Supreme Court will hear in March.

On Nov. 7, the U.S. Supreme Court agreed to hear the case, called [King v. Burwell](#), which argues that the federal law prohibits states using the federal health exchange, HealthCare.Gov, from awarding tax credits that can significantly reduce insurance premiums.

The Court's move is significant because on Oct. 1, Oregon began using HealthCare.gov after the Cover Oregon technology project failed spectacularly at producing a working website.

So does state officials' decision to use the federal exchange now put Oregonians' tax credits at risk?

Cover Oregon officials say the state's [legal position is safe](#), but Cannon disagrees—for now.

With some minor legislative tweaks, though, "Oregon could solve that problem with relatively little pain," he said.

Cannon studied law but is not a lawyer. Still, his analysis is relevant because his writings provided the intellectual underpinnings of the King v. Burwell case. And it's very timely, as many legal observers have suggested states explore backup plans in case the subsidy challenge succeeds.

To understand the legalities of *King v. Burwell*—and why Cannon thinks a simple fix would spare Oregon --you need to focus on a four-word phrase repeated several times in the law. It says tax credits will only be awarded by exchanges "established by the state."

Cannon and the plaintiffs in the case argue the wording means only homegrown state exchanges can offer tax credits and other subsidies. They say Congress was trying to leverage states into building their own exchanges.

Federal officials and other ACA supporters don't agree. They say a literal interpretation makes no sense in the broader context of the law.

But nobody really knows, and this Supreme Court has proven itself highly unpredictable.

If the legal challenge succeeds, just 13 states and Washington, D.C. would seem to keep their subsidies. They have built their own homegrown exchange.

But Oregon's situation is unusual. The state did indeed establish the bureaucracy to operate an exchange—which is why Oregon officials claim the state needn't worry about the Supreme Court. It's just that the state is using the federal exchange instead, they say.

Cannon doesn't agree—he points to a section of the law that suggests Oregon is not fulfilling the requirements of a state exchange. Specifically, while it is allowed to contract with another entity to provide an exchange website, it is not allowed to contract with the federal government and still comply with the law, he said.

However, all Oregon needs to do to get around a ruling against federal exchange tax credits is tweak its relationship with Healthcare.gov, he said.

Specifically, the state exchange would need to contract with a third-party considered eligible under the law – such as a nonprofit or the state Medicaid agency – which in turn could subcontract with the federal exchange.

Cannon called it a "plausible scenario which I don't particularly like, but which I think is legal, is that Oregon would be able to contract with an entity that could then subcontract with Healthcare.gov. And that would solve all the problems that I just mentioned."

The same option is available to other states, except that they would have to pass a new law, approve a new funding source for the exchange, and do several other things. In most states, Republicans control either one branch of the Legislature or the Governor's office, making that a major obstacle, Cannon said.

In Oregon, "they had this political fight, they passed the legislation, they created the board and they funded the exchange -- which is really the sticky wicket in most cases. They did it with a premium tax," Cannon said. "So they don't have to go through all of that after a King ruling. The 36 states that did not establish exchanges would -- and that's a big hurdle."

Another issue is whether tax credits would be lost retroactively to the beginning of 2015 if the challenge succeeds. Cannon admits it's hard to say.

"This is such an unusual case it's hard to predict how the Supreme Court might decide to resolve it," he said. "I don't know how the Supreme Court is going to rule."

Already, more than 67,000 Oregonians enrolled using the federal exchange as of Dec. 21. Many of those are expected to receive the sort of tax credits the Supreme Court case will rule on.

The Oregon Legislature is taking up a bill in February to dissolve Cover Oregon and place its functions under state agencies. Some lawmakers have already asked about the Supreme Court challenge and how it should affect their deliberations.