

TN congressmen say missing word in health law may give states an out

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WASHINGTON — The Supreme Court ruling may be out, but two Tennessee members of Congress contend crucial legal questions concerning the health-care reform law remain.

Because the high court's ruling on the Affordable Care Act still was pending at the time, a bill that Reps. Scott DesJarlais, R-Jasper, and Phil Roe, R-Johnson City, introduced in late June didn't get much attention initially.

But now it is, as critics of the health law continue to recoil in shock over Chief Justice John Roberts' decision to side with the court's liberal wing to uphold the law and its individual mandate.

DesJarlais and Roe, with backing from several legal scholars, argue that the Patient Protection and Affordable Care Act has a one-word omission that may go down as one of the biggest scrivener mistakes of all time.

But supporters of the health-care law say their point is way overblown.

The fuss relates to health-care exchanges, the systems envisioned for every state through which insurance [companies](#) would compete to market health insurance policies to those who don't have coverage through their employer or other means, such as Medicaid, the military or veterans' programs.

The law provides that the federal government will establish exchanges in states that don't set up their own.

A key to making the exchanges work is the awarding of tax credits and subsidies to many of those who will buy policies through them. In addition, firms are supposed to pay taxes of thousands of dollars per employee if they don't offer their own policies and force workers to rely on the exchanges.

DesJarlais and Roe point to a section of the law, as passed by Congress in March 2010, that authorizes tax credits and subsidies related to "state" health-care exchanges but says nothing in regard to "federal" exchanges.

That's of consequence because many states, especially in the South, are balking at the idea of a state-established exchange. If the Internal Revenue Service lacks authority to impose taxes and grant credits and subsidies related to federal exchanges, then states wouldn't have to accept those, either.

"In this case, there was a clear omission," DesJarlais said in an interview.

The IRS issued regulatory language in May that attempts to make it clear the tax provisions relate to either state or federal exchanges.

'Dangerous precedent'

But DesJarlais and Roe contend the regulatory language amounts to an executive branch attempt to fulfill a legislative task that Congress should handle. Their bill would prevent the IRS from getting around the problem with regulatory language.

"We don't want to set a dangerous precedent," DesJarlais said, adding the House Government Reform and Oversight Committee is expected to hold a hearing on the issue before Congress leaves for its August break. DesJarlais sits on the panel.

Among the legal scholars who agree with the two Tennessee members is James F. Blumenstein of the Vanderbilt [University](#) Law School.

“It’s not a close call,” Blumenstein said in an interview. “There will be a (legal) challenge.”

But the Center on Budget and Policy Priorities this week released a paper saying the law has many sections that make it clear the Secretary of Health and Human Services has the authority to take “such actions as are necessary” to implement the Affordable Care Act and that all exchanges — state and federal — are required to report to federal officials any tax credits or other subsidies awarded.

Also, when DesJarlais first explored the issue in late 2011, IRS Commissioner Douglas H. Shulman wrote to him: “The statute includes language that indicates that individuals are eligible for the tax credits whether they are enrolled through a State-based Exchange or a Federally-facilitated exchange.”

With health-care reforms not scheduled to be fully implemented until 2014, the conservative blogosphere already is speculating about which group or combination of groups might file a legal challenge on this point.

In addition, DesJarlais and Roe got more help in arguing their point this month from Jonathan H. Adler of the Case Western Reserve University Law [School](#) and Michael F. Cannon of the Cato Institute, a libertarian think tank in Washington.

The IRS, they wrote in a 70-page paper published by the Case Western Law School, is offering “a supposed fix that is actually an effort to rewrite the law and provide for something that Congress never enacted.”

Contact Paul C. Barton at pbarton@gannett.com