

Oklahoma Versus Obamacare

Will a Sooner State suit strike down the law's key provision?

By: Jillian Kay Melchior - DECEMBER 5, 2012

The first legal challenges to Obamacare rested on constitutional principles, but a new effort out of Oklahoma goes after the cogs that make the law function. State attorney general Scott Pruitt is trying to block the Internal Revenue Service from imposing fees on employers and individuals who don't comply with the law's mandates. In doing so, he may create a way for other states to fight back against the federal government's top-down management of health care. If the suit succeeds, the law will not be invalidated, but if enough states choose to opt out, the resulting lack of funds could make Obamacare's financial structure untenable.

"This is a very important case," Pruitt tells NATIONAL REVIEW ONLINE. "This is a challenge to the implementation of the Affordable Care Act (ACA), and it matters."

Yesterday the federal government filed a motion to dismiss Pruitt's case, challenging Oklahoma's standing and also citing the Anti-Injunction Act, which prevents people from suing to avoid paying their taxes. The next step is for Pruitt to file a response, which is due December 31.

Oklahoma's legal argument is complex, a logical train that derives from the convoluted provisions of the law. The implications are worth the effort it takes to understand them, though it certainly takes some determination. Here we go.

Point one: The ACA offers tax credits and subsidies to individuals and companies that buy insurance through a state-run exchange — *if* their state has set up such an exchange. Point two: The federal government establishes exchanges for states that do not set up their own. Point three: The section of the ACA that establishes these credits and subsidies says they are authorized only for exchanges "established by a state." (Michael Cannon of the Cato Institute and Jonathan Adler of Case Western Reserve University Law School first noticed this provision of the ACA; the law's defenders say it is a minor drafting error that courts will and should overlook.) Point four: The ACA also imposes fines and penalties on individuals who do not buy health insurance, and on businesses that do not buy it for their employees. (Insurance under Obamacare will be significantly more expensive than regular insurance, which is why they have to pay you to buy it and fine you if you don't.)

Now we get to point five, which is the real crux of the argument: The ACA specifies that these fines or penalties apply only to individuals or companies that are eligible to receive the tax credits and subsidies. Conclusion: If a state chooses not to set up an exchange of its own, residents of that state are not eligible to receive tax credits or subsidies for buying insurance, so there can also be no fines or penalties for *not* buying insurance,

even if there is a federally run exchange in the state. In other words, the individual and employer mandates are nullified in that state.

That head-spinning argument has been publicized primarily by Cannon and Adler, and it's been taken up by Pruitt, who was born in Lexington, Ky., but is evidently a Wild West, independent Oklahoman at heart.

Pruitt is not only a veteran of the state legislature but also a former co-owner of the Oklahoma City RedHawks, the state's Triple-A baseball team. A trustee for the Southern Baptist Theological Seminary, he's also a man of principle. His state bio claims that "establishing and respecting the Rule of Law" — note, capital R, capital L — "is a hallmark of Attorney General Pruitt's administration." He also expresses his desire to be a leader in the "cause of restoring limited government and the proper balance of power between the states and the federal government."

The Obamacare challenge seems to encapsulate all these principles, and as fate would have it, Pruitt was in position to be a trailblazer. Because Oklahoma's original constitutional challenge to the health law was stayed in anticipation of the Supreme Court decision, the state was procedurally permitted to amend the suit after the ruling, which allowed it to act faster than other states in challenging the ACA's implementation. On September 19, Pruitt filed his amended case, claiming the federal government had acted beyond Congress's intent in its effort to impose penalties in states with federally facilitated exchanges.

For Oklahoma, the issue boils down not only to states' rights and the rule of law but also, more simply, to economic competitiveness.

The ACA is costly for those who do not comply with its mandates. Businesses with more than 49 full-time employees that fail to provide health insurance can be charged \$2,000 per worker, with the first 30 exempted. That means a company with 50 full-time workers would pay \$40,000 a year in penalties. Individuals also face steep and increasing fees. Starting next year, uninsured adults would pay a \$95 fee. By 2016, that rises to at least \$695.

So if Oklahoma (and the other 19 states likely to end up with federally facilitated exchanges) could offer a refuge from these penalties by refusing to set up an exchange, they would have a significant economic advantage over the remaining 31 states, says Jonathan Small, the fiscal-policy director of the Oklahoma Council of Public Affairs.

Until a court rules on Oklahoma's case, though, businesses are uncertain about how the law will be implemented. That deters them from expanding or hiring. Pruitt says he's trying to get these businesses the answers they need.

"There are many, in both the private and public sector, that are trying to wrestle with implementation," Pruitt says. "I think that the private sector wants clarity. . . . It creates great confusion, great angst."

The IRS was aware last year of the potential legal problems of imposing penalties in states with federally facilitated exchanges. Regardless, it finalized a rule on May 23, 2012,

that allows incentives to be enforced and penalties to be collected in both state and federal exchanges. According to Pruitt, that’s “arbitrary and capricious.”

“Congress intended that there be cooperative federalism between the federal and state governments,” the attorney general says. Lawmakers “wanted the states to make a decision. They provided an incentive for the states to make an exchange, and that was through the tax credits. The IRS has disregarded that through the passage of this rule. They have disregarded cooperative federalism, and they have taken away the benefits of the decision Oklahoma made.”

If Congress wants to apply incentives and fees to both state and federal exchanges, it should change the law, Pruitt says. Until then, Oklahoma will challenge the federal government, claiming it has acted beyond what Congress authorized it to do.

“They do not have the power to do that which they did,” Pruitt says. “They cannot adopt this rule assessing the employer mandate in all states irrespective of whether they have [a federal or state exchange]. . . . We simply want the IRS, the HHS, [and] those entities that are responsible for implementing the law to do so consistently with the plain language of the statute.”

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