



DC: No surrender: Conservatives open new legal challenge to Obamacare

By Kathryn Watson

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ALEXANDRIA—Having lost the fight to kill Obamacare in Congress and the Supreme Court, conservatives have opened a new front on the Patient Protection and Affordable Care Act — raising questions about the federal government’s ability and legal authority to set up the state health benefits exchanges the Obama administration sees as critical to the controversial health care law.

They say they’ll take the health care law to court — and they’ll kill it.

Their case will focus on a few missing, critical words in the health care law. While the Affordable Care Act allows state-run exchanges to offer the tax credits and assess the penalties integral to the smooth functioning of Obamacare, there’s no similar language authorizing the feds to perform the same function.

The critics say that missing language explains a last-minute IRS rule change in May — a revision they say is illegal, and is designed to collect cash for federal exchanges that are otherwise unfunded.

“It’s called taxation without representation,” Michael Cannon, director of health policy studies at the free-markets, limited-government Cato Institute, told a conference audience Tuesday in Washington, D.C. “It’s called taxation without congressional authorization.”

Under the law, a health insurance exchange operates as a virtual marketplace in which people can purchase coverage from government-vetted insurers.

The exchanges will cost money to run, and these conservative critics say the law is clear: only state-run exchanges can collect the cash and disburse the tax credits that are supposed to put the “affordable” in the administration’s Affordable Care Act.

But as many as 30 states, according to Health and Human Services Secretary Kathleen Sebelius' own estimates, have said they may refuse to set up state exchanges. That would leave the federal government to establish the exchanges — without the revenue to operate them.

“There is no funding in Obamacare for a federal exchange — none,” Cannon told his audience.

Cannon and his colleague, Jonathan Adler, a professor at Case Western Reserve University School of Law in Cleveland, wrote in an extensive paper that the IRS tried to correct that shortcoming in the law when it announced after 6 p.m. on a Friday night in May that tax credits and revenue can be funneled through federal exchanges, too. Cannon and Adler say that circumvents congressional authority.

Even with the cash collected by the IRS in the form of penalties assessed on non-compliant individuals and companies over the sheer existence of those tax credits — the federal government will be forced into massive deficit spending to operate the exchanges, said Cannon and Adler.

The Congressional Budget Office estimated that, in the unlikely scenario that no states create exchanges, the operation of federal exchanges could cost the government \$1 trillion or more over the next decade, offset by roughly only \$172 billion collected from penalties.

“On balance, this rule is a large net tax increase,” Adler and Cannon argued in their August testimony before the U.S. House Committee on Oversight and Reform. “For every \$2 of unauthorized tax reduction, it imposes \$1 of unauthorized taxes on employers, and commits taxpayers to pay for \$8 of unauthorized subsidies to private insurance companies.”

States that create their own exchanges will likely have to rely on deficit spending, too, as the federal government provides only start-up, not operating costs, said Adler. But Congress authorized deficit spending for state exchanges, he added.

Adler and Cannon argue that, if the IRS rule is eliminated through the courts, Congress or another IRS administrative her IRS administrative rule change, then states could opt out of the health care law with no penalties and make the law, essentially, void.

As far as the language of the law goes, Cannon thinks he's on solid footing.

“Either it's intentional — in which case, it's the law — or it's a mistake, in which case, it's (still) the law,” he said.

But critics of the conservative challenge say it has no legal weight, that federal exchanges were always meant to manage tax credits and revenues, and that the May IRS rule change is merely a clarification.

“I think they ignore the history of the bill, they ignore the structure of the bill, and they pick on a couple of particular phrases of the legislation, and say that's the only language in the legislation that matters,” Timothy Jost, a law professor at Washington and Lee University in Virginia and the most vocal opponent of the conservatives' position, told Virginia Watchdog.

Jost said the it “never occurred to anybody” that federal exchanges wouldn’t be able to issue tax credits. He predicted that courts would defer to the IRS on its decision.

“They’ve come up with an interesting legal argument here,” said Jost. “They’ve convinced a few tea party legislators that there’s something there. But if it ever gets to court, the courts aren’t going to have too much trouble with this.”

Kevin Outterson, an associate health law professor at Boston University, spoke along similar lines.

“This isn’t the language that I would have drafted, but it’s clear as a bell what Congress intended,” he said, adding that such a critique would never arise in a “normal political environment.”

Is this merely a political stunt?

“Yes,” said Jost. “Michael Cannon is a friend of mine and we have friendly debates about this, but I really do think it’s time to get on with the job of reforming our health care system and stop this legal quibbling.”

Critics of Adler and Cannon say no business or individual could file a lawsuit earlier than 2014, once the penalties are in place, because of the Tax Anti-Injunction Act, which bars suits to restrain taxes before they’re even levied. But Adler said he thinks the act won’t apply here, in the same way the Supreme Court justices in spring oral arguments over the health care case decided they could move forward with the case even though the penalties hadn’t come into play.

Cannon said Congress and the IRS could also role back the IRS rule and block the tax credits through his and Adler’s interpretation.

But whatever happens, Adler said this hiccup in the law illustrates a greater point.

“This is a massive piece of legislation that people did not spend the time to understand how the pieces fit together,” he told Virginia Watchdog. “My own view is, that’s not a responsible way to legislate. And this is but one example of many things I think will be found in the law as people try to implement it.”