



Even Conservatives Want The Courts To Ignore Trump On Obamacare

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They hate the Affordable Care Act, but they also want no part of this latest lawsuit.

Conservatives are begging the federal courts to uphold Obamacare.

Yes, that sounds weird. And it's very different from what happened during a pair of previous legal challenges to the Affordable Care Act. In those cases, conservatives across the country were all in on the effort to strike down the 2010 health care law — filing briefs, writing op-eds and giving interviews to anybody in the media who would listen.

Now there's a new lawsuit from 20 Republican state officials who say that the entire program must go because of one, supposedly unconstitutional, provision. It prevailed in federal district court late last year, setting up a hearing before the U.S. Court of Appeals for the 5th Circuit and, depending on the outcome there, in the U.S. Supreme Court — maybe just before the 2020 election, maybe just after.

President Donald Trump is rooting for the case to succeed, even though an estimated 20 million people would lose insurance and, as usual, he doesn't have a replacement plan. At his behest, the Justice Department last week formally informed the 5th Circuit that it, too, wants the whole law to come off the books.

But outside the White House and beyond his most ardent supporters on Capitol Hill, conservatives think that would be nuts — either because they genuinely think the merits of the case are so weak or because they fear the political effects for Republicans could be devastating, or both.

Whatever their rationale, they are making their feelings known and, in the process, supplying conservative judges with arguments that can stop the lawsuit in its tracks.

The case is called Texas vs. Azar, and Monday was the 5th Circuit's deadline for parties opposing the Republican states' lawsuit to file "friend of the court" briefs. Mostly they were the kind of briefs you would expect — from groups like the American Cancer Society and AARP, warning about the devastation to patients; and from organizations like the Federation of American Hospitals and Blue Cross Blue Shield Association, predicting disruptions to the industry.

But this round of briefs included one from the attorneys general of Montana and Ohio, Timothy Fox and Dave Yost. They are conservative Republicans from states with lots of conservative voters, and in their brief they make an especially conservative legal argument.

The underlying premise of Texas vs. Azar is that the Affordable Care Act's "individual mandate," which imposed a financial penalty on people who didn't obtain insurance, has become

unconstitutional because the 2017 tax cut reduced the penalty to zero. Because Congress in 2010 thought the mandate was an essential piece of the Affordable Care Act, the lawsuit says, the courts must throw out the entire law.

U.S. District Judge Reed O'Connor ruled in favor of the lawsuit, but his decision has drawn strong criticism — even from conservative experts who think it makes no sense to cite congressional intent about the mandate from 2010 when, in 2017, Congress clearly felt differently.

“There is more at stake here than the future of the Affordable Care Act.” Timothy Fox and Dave Yost, GOP attorneys general from Montana and Ohio, urging the courts not to invalidate the health care law

Fox and Yost agree with that. But in their brief, they go further, arguing that the framers of the Constitution never intended to give judges such sweeping powers to invalidate laws, even though modern-day judges do that sort of thing frequently.

“There is more at stake here than the future of the Affordable Care Act,” Fox and Yost write. “The real issue in this case is power — and, in particular, the limits of judicial power.”

This invocation of original intent is important, legal experts said Tuesday, because it typically appeals only to right-wing judges, and the 5th Circuit, based in New Orleans, happens to have quite a few of those. Eleven of its 16 active judges were appointed by Republican presidents, and that includes five appointed just in the last few years by Trump.

The case will go before a three-member panel, chosen at random, although it could potentially get a subsequent en banc hearing before all of the active judges, with a possible Supreme Court hearing after that.

Whatever the case's precise trajectory, the law's fate will inevitably come down to some extremely conservative jurists — including, potentially, some sympathetic to the extremely conservative worldview Fox and Yost lay out in their brief.

“They are saying that it's not the prerogative of a federal district court just to completely rewrite or jettison laws — the courts should focus on making as narrow a decision as possible,” Timothy Jost, professor emeritus at Washington and Lee University and longtime defender of the law, told HuffPost. “It gives the conservatives a way to rule against this. Even if the panel ends up with three Trump appointees, it gives them a very strong escape route, if they want to claim the originalists' approach.”

Jonathan Adler, a Case Western University law professor and frequent critic of the Affordable Care Act, wrote at the Volokh Conspiracy blog that the attorneys general “brief does a particularly good job of explaining why self-described judicial conservatives should object to the decision below.”

“We all agree that the decision ... is unmoored from law or contemporary doctrine.” Jonathan Adler, Case Western law professor, on his joint brief critical of the district court ruling against the Affordable Care Act.

Adler actually signed a separate brief, an updated version of one that he wrote with three other law professors: the University of Michigan's Nick Bagley, Yale's Abbe Gluck and George Mason's Ilya Somin.

The new version, like the last one, notes that the four had fought each other on previous lawsuits over the Affordable Care Act but are united in their belief that Texas vs. Azar is fundamentally unsound because of how it interprets — or misinterprets — congressional intent.

“The four of us do not agree on much, particularly where the Affordable Care Act is concerned,” Adler, who was an architect of the last lawsuit against the health care law, wrote. “But we all agree that the decision ... is unmoored from law or contemporary doctrine.”

Monday's briefs raised additional arguments that might appeal to conservative judges — like challenging whether the federal courts have jurisdiction to decide this sort of case or whether the plaintiffs have “standing” to file such a lawsuit. A reversal of O'Connor's decision on either grounds would allow judges to avoid ruling on the merits of the Affordable Care Act while stopping the lawsuit from going forward.

And it's not just lawyers urging the courts to reject this case.

After the Justice Department notified the 5th Circuit of its support for striking the entire law, a Wall Street Journal editorial warned Republicans against “pursuing a legal strategy that is likely to fail and could blow up politically.”

It was the second editorial the Journal published trashing the case. The first came in December, days after the U.S. District Court decision and just weeks after House Republicans lost their majority in an election where health care was a dominant issue.

Perhaps the most surprising broadside against O'Connor's ruling appeared in another conservative outlet, the New York Post editorial page. In an op-ed, Michael Cannon, a libertarian health care expert at the Cato Institute, wrote that “Texas v. Azar has so many problems, O'Connor should have immediately tossed the case out of court.”

Cannon is not just a critic of the Affordable Care Act, he's also been one of its most relentless adversaries. He's testified before state lawmakers, urging them not to implement the law's features and, along with Adler, helped to craft the last big lawsuit. At one point, Cannon went so far as to establish what he called the “Anti-Universal Coverage Club.”

In the Post op-ed, he described seething at past Supreme Court decisions upholding the Affordable Care Act, even though that's what he's now hoping the court will do. “Two wrongs don't make a right,” he wrote.