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Obamacare Gains Unlikely Allies in Conservative Lawyers

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The courtroom fight to save Obamacare gained an unlikely ally—conservatives who don't like the law but want to preserve Congress's intent to let it live without a penalty provision for those without insurance.

A handful of Republicans are bucking their party, asking a federal appellate court to keep the Affordable Care Act in place. They argue a Texas judge's decision to strike the entire law is so egregious that it needs to be reversed. The case tests when courts can invalidate an entire law over a single provision, and it's splitting some Republicans

“The stakes are whether we're going to have a judiciary that adheres to established rules or one where they can rule however they want based on what their political preferences are,” said Michael Cannon, director of health policy studies at the Cato Institute, a libertarian think tank in Washington, D.C.

The Justice Department joined 20 Republican states arguing the Affordable Care Act is unconstitutional. At the same time, a growing number of conservatives are pushing back and fighting for the law even though they hate it as policy. They argue the district court was wrong to throw out the statute on one provision.

After Congress dropped the tax penalty for failing to buy health insurance down to zero in 2017, a coalition of red states, led by Texas, sued. Without a penalty, they argued, the mandate to buy insurance is unconstitutional and therefore so is the rest of the law. In an extraordinary step, a federal district court judge in Texas agreed. A coalition of 17 Democratic states, led by California, then appealed.

Bucking the Party

Republican attorneys general in Montana and Ohio are going against their party, urging the U.S. Court of Appeals for the Fifth Circuit in a joint friend-of-the-court [brief](#) not to eviscerate the health care law.

Ohio Attorney General Dave Yost still isn't a fan of the Affordable Care Act, but he said this fight isn't about his policy views.

“It's about the law, and the trial court just got this wrong,” he said in an interview. “Our argument in the Fifth Circuit just points out that in this case we don't have to guess at what Congress meant or would have done because they zeroed out the individual mandate and left the rest of the act. They clearly intended it to stand alone.”

If the lower court's decision is upheld, it could set a precedent for future courts to follow and threaten to upend laws when a single provision is found to be invalid.

Like Yost, Cannon is no fan of Obamacare, but he said a judicial system that ignores the rule of law to achieve a desired political outcome is "scarier than the Affordable Care Act."

Teaming Up

Adversaries on the health care law and Obamacare supporters teamed up to argue in a brief the district court judge failed to follow settled legal principles, which required him to look at what Congress intended when it zeroed out the penalty 2017.

They say Judge Reed O'Connor, on the U.S. District Court for the Northern District of Texas, erroneously focused on the intent of Congress in 2010 when the ACA first passed. At the time, lawmakers said there had to be a tax penalty in place for the system to function otherwise some people would choose to forego health insurance. But in 2017, Congress decided to drop that fine down to zero and leave the rest of the law in place.

That's as it should be, the brief by conservative and liberal legal scholars said. Congress can modify an earlier statute.

Two of the authors on the brief—Jonathan Adler, a professor at Case Western Reserve University School of Law, and Abbe Gluck, a professor at Yale Law School—disagree about the ACA. But agree O'Connor was wrong to rule the penalty can't be severed from the law.

"The hoped for value in a brief like ours is to show the judges this is not about what team you're on," Adler said in an interview. "There are clear, established principles of law that cut across political ideological divisions."

"I make the argument that I want to get rid of the Affordable Care Act because I want there to be better health care, but not like this," Cato's Cannon agreed. "They are throwing the rule book out the window."

A Party Divided

"Republicans are largely fractured over this," said Joshua Blackman, an associate professor of law at the South Texas College of Law in Houston.

If the Fifth Circuit were to hold the ACA unconstitutional, it would be a boon to Democrats in an election season if Republicans don't have a replacement, Blackman reasoned. An estimated 20 million people are expected to lose insurance if the law is struck down, according to a March analysis from Urban Institute, a Washington, D.C.-based research organization.

"I have to think most Republicans realize this," Blackman said.

Safety in Numbers

Longtime supporters of the law, meanwhile, are happy to have conservatives' support.

"I'm not surprised a number of thoughtful conservatives have said, 'Wait a minute. This this just nuts,'" Walter Dellinger, a Washington lawyer and professor emeritus at Duke Law School, said. "They know when the 2017 Congress reduced the tax penalty to zero, they had absolutely no intention of invalidating the entire Affordable Care Act."

The bipartisan support could make it easier for appeals court judges, particularly those on the right, to reverse the O'Connor's ruling.

“The case is no longer politicized in the same way the other Affordable Care Act challenges have been,” Gluck said. “You are no longer a traitor to Republicans if you issue a decision that allows the statute to stand.”

The case is Texas v. USA, 5th Cir., No. 19-10011, amicus briefs filed 4/1/19.