

# Bloomberg Tax

## Obamacare Stakes Rise at High Court as Election Dooms Easy Fix

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- Trump administration seeks to topple long-opposed health law
- Prospect of divided government may leave court with last word

Democrats' failure to secure a Senate majority in last week's election has heightened the importance of Tuesday's Supreme Court showdown over the Affordable Care Act, increasing the chances the court will get the final word on a law that provides health insurance to 20 million people.

President Donald Trump's administration is joining Republican-led states in challenging the law, known as Obamacare, which the GOP has been trying to wipe out since it was enacted in 2010. They're banking on the court's strengthened conservative majority with new Justice Amy Coney Barrett.

With health care accounting for a sixth of the U.S. economy, the stakes were massive even before the election made Democrat Joe Biden the president-elect while leaving Republicans favored to retain control of the Senate. Now the prospect of a divided government could leave Democrats without the ability to override a ruling invalidating the law.

"If Biden had won the presidency and Democrats had taken the Senate, there was a good chance that Democrats would adopt a fix to put the Affordable Care Act back on its feet," said Nicholas Bagley, a health-law expert who teaches at the University of Michigan Law School. "But that kind of fix is really off the table if Republicans control the Senate."

Advocates for patients, doctors, hospitals and insurance companies are urging the court to uphold the law, warning of chaos should the measure be invalidated in the midst of a pandemic. The challenge jeopardizes the health care of more than 135 million Americans with pre-existing conditions, including those who have had Covid-19, according to estimates from the liberal Center for American Progress.

"If the Supreme Court invalidates the entire ACA, and the Democrats do not take the Senate, it absolutely imperils the health and economic well-being of millions of Americans," said Jaime Santos, a Washington lawyer who filed a brief on behalf of more than 80 advocacy groups, led by the National Women's Law Center.

Control of the Senate is likely to depend on two Jan. 5 runoff elections in Georgia. After Tuesday's election the Senate stands at 48-48, with Republicans leading as yet uncalled races in North Carolina and Alaska.

Unless Democrats win both Georgia races, Biden could see his health-care agenda stymied by a narrow Republican majority in the Senate. Republicans got more votes than Democrats in both races last week but no candidate received the necessary majority to avoid the runoff.

### **Roberts and Kavanaugh**

The Supreme Court fight centers on ACA's so-called individual mandate to acquire insurance. The Supreme Court upheld the provision in 2012 when Chief Justice John Roberts said it was a legitimate use of Congress's taxing power, because it included a penalty on people who lacked policies.

When Republicans took control of Congress and the White House in 2017, they zeroed-out the tax penalty, leaving the mandate with no practical consequences. The Trump administration and states led by Texas now say the mandate must be struck down because it no longer qualifies as a tax.

And they say the mandate is so integral to the law, even without any penalty, the rest of the ACA can't stand without it.

That argument could face an uphill fight, even with the court's 6-3 conservative majority. Roberts and Justice Brett Kavanaugh have expressed reluctance to toss out an entire statute just because one part is unconstitutional. In a ruling this year on the federal robocall ban, Kavanaugh said the court should "sever" the unconstitutional provision as long as the rest of the statute can fully operate on its own.

"Constitutional litigation is not a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute," Kavanaugh [wrote](#).

Roberts has twice voted to uphold core parts of the law, in 2012 and in a 2015 ruling that backed crucial tax credits in the law.

Nor is Barrett a sure bet to void the entire law, although she has criticized Roberts's reasoning in the previous rulings. At her Senate confirmation hearing last month, Barrett said that "the presumption is always in favor of severability."

### **Sweeping Law**

The Affordable Care Act, signed into law by President Barack Obama, was a sweeping health-care overhaul. It expanded the Medicaid program for the poor, provided consumers with subsidies, created marketplaces to shop for insurance policies, required insurers to cover people with pre-existing conditions, and let children stay on their parents' policies until age 26.

Even some who oppose Obamacare say it would be a stretch for the court to strike it down. Michael Cannon, director of health policy studies at the libertarian Cato Institute, says the

lawsuit is meritless because the 18 states and two people challenging the law haven't suffered any injury that gives them a right to sue.

Cannon said he views the law as unconstitutional and would like to see it invalidated. "But you don't throw out the rulebook in order to do that," he said. "The goal here is not just to have a win on health policy or to spite John Roberts."

With the Trump administration refusing to defend the law, that task has fallen to the Democratic-controlled House and 20 states, led by California. Their list of supporters includes all 47 Democratic and independent U.S. senators.

### **No Republicans**

In contrast, not a single Republican member of Congress filed a brief backing the Texas-led challenge.

"It's not just that they are not supporting it, they are opposing it because it's politically harmful," said Josh Blackman, a constitutional law professor at the South Texas College of Law in Houston. "No one wants the ACA killed at this point."

Blackman, who supports the litigation challenging the law and wrote a book on the 2012 case, says he doubts there will be any votes on the Supreme Court to strike it down entirely.

Whatever the chances the law will be invalidated, they rose when Barrett replaced the late Justice Ruth Bader Ginsburg, who was one of two justices to back every aspect of the law in 2012. Ginsburg's death on Sept. 18 meant the court no longer had all five justices who voted to uphold the individual mandate in 2012.

Even a small chance the law would fall has supporters nervous.

"I don't think the Supreme Court is going to pull the trigger here, but I can't tell you that for sure," Bagley said. "It would be such a calamity if it did. And I say that, independent of whether you support or oppose the Affordable Care Act. Just the chaos that a decision like that would sow is something that we normally try to avoid."