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Quick Obamacare High Court Review Has Pitfalls for Justices, GOP

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Democrats don't want to wait for a Texas federal judge to strike down Obamacare for a second time.

They want the Supreme Court to intervene now and decide once and for all the fate of a law millions of people have come to rely on, signaling they see a political advantage to a ruling in the case ahead of the 2020 presidential election even if they lose in court. Major hospital, health insurance, disease research, and patient advocacy groups are also asking the high court to move quickly.

The justices could decide to take the case or let it go back to the Texas federal judge for another review as the U.S. Court of Appeals for the Fifth Circuit ordered.

If the latter happens, a final answer will be delayed. Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas already declared the entire law unconstitutional once before. Health scholars doubt he'll rule differently a second time.

But if the Supreme Court rules this year that Obamacare is unconstitutional, it could have pose major problems for policymakers and elected officials.

Without a replacement plan ready, Republicans would likely see political backlash at the ballot box. About 20 million people are expected to become uninsured, and millions more could be denied coverage for pre-existing conditions, according to estimates from the liberal Washington think tank Urban Institute.

"Expediting the case keeps it urgent as a matter of voter priority," said Sam Halabi, a University of Missouri law school professor.

But the Justice Department and a group of Republican states have urged the court not to rush its review of the federal appeals court decision that left the law in limbo.

"This court should decline petitioners' invitation to politicize this case, particularly in an election year," Robert Henneke, general counsel and litigation director for the Texas Public Policy Foundation, said in a brief.

"Political considerations, such as petitioners' desires to deflect attention away from the current efforts to replace the Affordable Care Act with single-payer Medicare for All, are not exigent circumstances that warrant expedition of this case," he said in the filing about Democrat's proposal to move the country away from a multi-payer health-care system.

Potential for Political Fallout

The Fifth Circuit Dec. 18 sent the case back to O'Connor after agreeing with him that the law's requirement that individuals have health insurance is unconstitutional.

The lower court must decide what, if any, other Obamacare provisions are tied to the individual mandate that also should be tossed. Obamacare supporters say the Fifth Circuit's remand will cause nothing but delay and uncertainty.

The House and a coalition of mostly Democratic states appealed in early January and asked the Supreme Court to fast-track its consideration of the case.

A senior Democratic aide told Bloomberg Law it's unfortunate that Democrats' request for an expedited review has been framed in the context of the election. As long as it's unclear whether Obamacare is constitutional, insurers in that market will hedge, making the system less stable and driving up prices for enrollees.

"Really, our position is that it has nothing to do with the election. It has nothing to do with that aspect of it," the aide said, who spoke on condition of anonymity. "We can't have a circumstance where this entire law is in limbo, could be snatched away at any moment, for two more years."

It's hard for states to plan on whether they will have a health-care exchange as long as the lawsuit is pending, an uncertainty that's "causing insurers to raise premiums or withdraw from the exchanges altogether," the California-led coalition of mostly blue states argued their court filing.

Though Democrats would rather the case not be seen as an electoral tool, the potential fallout can't be ignored.

If the justices agree to review the constitutionality of the Affordable Care Act this term and ultimately decide to toss out the law, "it would be catastrophic for the administration and for every Republican that has voted against protecting pre-existing conditions," the Democratic aide said.

Why Not Wait?

Health law scholars say the justices shouldn't intervene now. "I can't think of a reason that institutionally they would see it in their interest to act any quicker than necessary," Halabi said.

Whether the court hears the case this term or in a couple years from now, it will be a loss either way for Chief Justice John Roberts, who has previously expressed concerns about the public's perception of the court, Halabi said.

"No matter how that decision ends up coming out, it is going to result in criticism of the court for issuing a politicized decision," he said. "I don't see it can issue any judgment without that being the case."

The Supreme Court has already looked at the constitutionality of the law. In a majority ruling written by Roberts in 2012, the court said Congress didn't have the power under the Commerce Clause of the Constitution to force people to buy insurance, but it upheld the mandate as a tax.

If conservatives overturn the law once and for all, Roberts will have paved the way for that decision “by showing them how to set aside the rule of the law to achieve a politically desired outcome,” said Michael Cannon, the libertarian Cato Institute’s director of health policy studies.