The Washington Post

Trump's quest to end the Affordable Care Act arrives at Supreme Court

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November 9, 2020

The latest legal challenge to the Affordable Care Act comes Tuesday before a reconstituted Supreme Court, during a pandemic, in a rapidly changing political environment.

All of those factors are likely to play a role when Republican-led states and the Trump administration ask the justices to find a key provision unconstitutional. And if that's the case, Republicans say, the entire law must fall, even if it endangers the health-care coverage of more than 20 million Americans during the country's gravest health crisis in a century.

The 2010 law is known as Obamacare because it is President Barack Obama's chief domestic achievement. But the late Justice Antonin Scalia once sarcastically said it should be called "SCOTUScare," after the high court rescued it from challenges in 2012 and 2015.

It faces a far more conservative court Tuesday. Justice Ruth Bader Ginsburg, in the majority during both previous cases, has been replaced by President Trump's nominee, Justice Amy Coney Barrett, a Scalia protege who criticized those decisions when she was a law professor.

Democrats who challenged Barrett's nomination turned her confirmation hearings last month into a tutorial about the horrors they say await Americans who could lose their health care with an adverse ruling in the case, *California v. Texas*.

But advocates across the ideological spectrum, even those who opposed the Affordable Care Act in the past, say this is the law's weakest challenge and the court will have to agree to three contested issues to reach Trump's goal of sinking the program.

"I was heavily involved in the (2012) challenge to Obamacare's constitutionality, arguing that the entire law had to be invalidated," said Ilya Shapiro of the libertarian Cato Institute. "*California v. Texas* is a different case, however."

Even if challengers hit the trifecta, it would most likely be President-elect Joe Biden, who made the campaign pledge to expand the ACA rather than end it, in place to fix any deficiencies the court may find.

With the race for both of Georgia's Senate seats headed for a runoff election, it remains to be seen whether Democrats will realize their hopes of controlling both houses of Congress when the court's decision comes down sometime next year. But there is little evidence that Republican senators want the law to expire without having in place another program that would provide the ACA's most popular aspects, such as allowing young adults to remain on their parents' insurance plans or providing coverage for those with preexisting medical conditions.

Unlike previous Supreme Court challenges, not a single Republican senator filed an amicus brief supporting the red states or the Trump administration.

Tuesday's case poses three questions: Do the challengers — two individuals and 18 states led by Texas — have legal standing to bring the case? Did changes made by Congress in 2017 render unconstitutional the ACA's requirement for individuals to buy insurance? And if so, can the rest of the law be separated out, or must it fall in its entirety?

Lower courts have answered the first two questions yes, but the third — the most important — has not been resolved.

California Attorney General Xavier Becerra (D), who leads a coalition of 20 states and the District of Columbia defending the law along with the House of Representatives, said on Monday that he was optimistic.

"We've always been confident the Affordable Care Act has worked, has saved lives, is indispensable and is the way America will be in the 21st century," he said in a conference call Monday. "We believe there are nine justices who connect the dots and see how important this is."

The individual mandate once was seen as the law's linchpin, a buy-in necessary to the goals of preventing insurers from denying coverage based on preexisting conditions and providing the subsidies that would make insurance affordable.

It was also what saved the law in its initial challenge at the Supreme Court. Chief Justice John G. Roberts Jr. said the penalty for not buying insurance could be construed as a tax, and thus the law was constitutional under Congress's taxing power.

When the Republican-controlled Congress failed to kill the ACA in 2017, it did what it thought was the next best thing: It reduced to zero the penalty for not complying with the mandate.

Texas and other red states seized on that to say it could no longer be seen as a tax — it raises no revenue — and the court's 2012 reason for upholding the law was gone.

"The ACA contains an unconstitutional command that can no longer be saved as a tax," Texas argues.

But those defending the law say that's too clever. For one thing, if the penalty for not complying with the mandate is zero, the plaintiffs and the states are not harmed and thus lack the essential ingredient for bringing a lawsuit.

Because the 2017 Congress left the mandate on the books, and simply zeroed out the formerly income-based penalty, it could be revised as a tax at any time, with a solution as simple as setting the penalty at $1.

But even allowing that the challengers have standing to bring a lawsuit, and that the mandate can no longer be saved as a tax, the question becomes, in nonlegal terms: So what?

Texas and the Trump administration, to slightly different degrees, say all or most of the law must fall. The 2010 Congress said the mandate was essential to the law working, and the Supreme Court agreed.

But the defenders say it is the last revision of the law, made in 2017, that is the most important. Congress intended for the law to carry on even without a penalty for individual compliance. The court's standard is that Congress's intent is the most important consideration for the court when deciding whether a law can be severed from its unconstitutional portion.

Barrett said as much at her confirmation hearing. "The presumption is always in favor of severability," she said, as Senate Judiciary Committee Chairman Lindsey O. Graham (R-S.C.) practically invited her to say how the court might uphold the law.

"So I want every conservative in the nation to listen to what she just said," Graham said. "The doctrine of severability presumes, and its goal is, to preserve the statute if that is possible."

In both previous challenges at the Supreme Court, Justices Clarence Thomas and Samuel A. Alito Jr. voted with the challengers. In the first case, they said the law could not be saved from what they saw as its constitutional flaws.

But last term, the court in two cases embraced the concept that when the court finds an unconstitutional element in a statute, it must look carefully at whether the rest of it can be severed and remain in place.

Roberts wrote one such opinion, and Justice Brett M. Kavanaugh, one of Trump's two other appointees to the court, wrote the other.

"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.