

# **The Times of Trenton (New Jersey)**

## **Court goes way beyond health care**

Dave Helling

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The case names are familiar to almost every American.

Roe v. Wade. Brown v. Board of Education. Marbury v. Madison.

A new citation tomorrow will join the roll call of landmark cases argued before the U.S. Supreme Court: HHS v. Florida.

As the high court begins three days of oral arguments over the constitutionality of the Affordable Care Act -- the sweeping health care overhaul some call Obamacare -- many legal and political experts agree the decision in HHS v. Florida will be among the most important in American history.

"This kind of case only comes along once in a generation," said G. Michael Fenner, a constitutional law professor at Creighton University in Omaha, Neb.

Anticipation is high. Protests for and against the law are expected outside the court, across the street from the Capitol. Seats are at a premium for reporters, lawyers and spectators. Television cameras aren't allowed, but audio will be released daily.

The stakes are enormous.

At issue is the 2010 law that seeks to reform and regulate almost one-fifth of the nation's economy. The law changes the way Americans get health care, the quality of that care and how it's paid for. It affects virtually every business, every family, every individual. It could add trillions to the national debt, or actually save taxpayers money.

And it could define the boundaries between the American people and their national government for the next 100 years.

"The extraordinary power that the federal government claims here is simply incompatible with our founding document," according to a brief filed by 26 states opposing the law. "It is a revolution in the relationship between the central government and the governed."

Supporters of the law call that nonsense. Regulating health care requires broad authority, they have told the court, but the law is fully within constitutional bounds and Supreme Court precedent.

"It's only going to be historic if the court does the wrong thing here and strikes the law down," said Ian Millhiser, a legal expert with the Center for American Progress, a liberal think tank.

So far lower courts have split roughly down the middle between those two views, half rejecting the law or parts of it, the other half endorsing it.

While the court's eventual decision will be important, it may also be complex. It's possible -- some legal observers say even likely -- that the nine justices will uphold part of the law while rejecting other parts, or delay any decision on a technicality. A definitive verdict on the law's constitutionality, some suspect, may be difficult for the court to reach and isn't expected until

June.

The nation's top judges aren't considering the entire 2,700-page law. Instead, they've asked for arguments on just four issues:

Can individuals be required to either purchase health insurance or pay a fine?

The law's requirement that almost everyone buy health insurance or pay a penalty is easily the most unpopular part of the health care reform law. In 2010, Missouri voters overwhelmingly rejected the individual mandate in a non-binding referendum. In a poll this month, the Kaiser Family Foundation said 51 percent of Americans polled think the requirement violates the Constitution.

Only 28 percent think the mandate is constitutional.

But mandate supporters contend that Congress has the power to regulate commerce between the states. Health care, a \$2.7 trillion industry, clearly qualifies as commerce, they argue.

And almost everyone will get sick. That means Congress can reasonably require everyone to buy insurance as part of an overall plan to manage a crucial industry, they maintain.

"I don't think they have the power to tell people to go out and buy hockey pucks or widgets," said Doug Linder, a professor at the University of Missouri-Kansas City law school. "The difference here is that there really is a national interest in having an effective health care program."

In an earlier case, the court ruled that Congress could prevent a farmer from growing wheat, even for his own use, because it would indirectly affect the nation's food supply -- proof, supporters contend, that Congress has wide latitude in regulating behavior consistent with its power to regulate commerce.

But opponents note those laws affect activity. In the health care law, people would be penalized for inactivity, a principle that conservatives argue gives unlimited authority to the government.

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"The Constitution grants Congress limited powers," said Robert Alt, an analyst at the Heritage Foundation, a conservative think tank. "And never before has the failure to make a purchase been construed as a commercial activity."

States, of course, often require residents to buy goods or services -- immunizations, for example, or car insurance. In Massachusetts, residents are required to buy health coverage or pay a penalty.

But some states argue that while they can force residents to purchase goods or services, the federal government cannot.

"What Congress seeks to regulate, or rather force, with the individual mandate is a traditional area of state police power," wrote Missouri Attorney General Chris Koster in opposing the mandate.

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Can Congress require states to either greatly expand their Medicaid programs or drop them entirely?

The health care law greatly expanded Medicaid, a state-federal program that provides health coverage for the poor. The expansion -- which included making more people eligible for

Medicaid -- is a key part of the effort to make sure all Americans have access to health care.

But many states have complained that the expansion will eventually cost them billions of dollars they don't have. They've argued the law unconstitutionally coerces them to either pay for something they can't afford or drop out of Medicaid, leaving the poor uncovered.

"The Affordable Care Act threatens states with the loss of every penny of federal funding literally billions of dollars each year -- if they do not capitulate to Congress' steep new demands," Kansas and more than 20 other states told the court in earlier filings. "There is no plausible argument that a state could afford to turn down such a massive federal inducement."

In general, lower courts have not agreed. Several judges have pointed out that states' participation in Medicaid is voluntary. And, in an earlier case, the court said Congress could properly coerce states into raising the drinking age by threatening to withhold some federal highway funds.

The claim of coercion is a political argument, not a legal one, the government has told the court.

Is the fine for not buying insurance a penalty or a tax?

During the initial challenges to the law, the government said the fines paid by people not getting health insurance are taxes. Federal law broadly prohibits someone from challenging a tax in court until the tax is actually paid -- and the penalty for non-compliance with the mandate won't take effect until 2014.

But opponents argue the fine is really a penalty, so lawsuits can be brought now. "Taxes and penalties are not interchangeable," said a brief filed by the libertarian **Cato Institute**.

The government has generally moved away from its position that lawsuits against the ACA should be thrown out on this technicality. Supreme Court justices, though, could use this issue as a way to avoid the deeper disagreements in the case -- delaying a decision until after this year's elections.

If one or more parts of the law are unconstitutional, must the entire law be discarded?

It may sound like an obscure legal theory, but in fact the argument over what's called "severability" may be the most important of all.

Opponents of the health care law maintain its parts are all inextricably linked: If the individual mandate is unconstitutional, they argue, the whole law should be thrown out.

The government, however, insists that even if that part of the law falls, many of the other parts -- state run health insurance exchanges, for example -- should remain in place. At the same time, the government concedes the mandate is linked with the law's requirement that insurance companies cover everyone.

But the severability argument could provide a way for some Supreme Court justices to overthrow the mandate without discarding the entire law, a possible path to compromise. The range of potential opinions in the case is wide. Nine justices, facing four different questions, could potentially invalidate parts of the law, none of it, all of it, or some combination.

As a result, the court's decision expected in June could be a judicial muddle, with no clear ruling on whether the law can stand.

Most legal experts don't expect that to happen. They think Chief Justice John Roberts, with an eye toward history, understands the need for clarity on one of the most divisive political issues of the early 21st century.

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Convincing his fellow judges may be another matter.

"Herding cats is an overused analogy, but these are pretty independent people," professor Fenner said.

Roberts, of course, famously said judges are like umpires, calling balls and strikes but not making the rules. And conservatives often point out that judges should interpret the law and not make it, an arguably difficult stance to take while throwing out a law passed by Congress and signed by the president.

On the other hand, one of the court's most famous cases -- Marbury v. Madison -- firmly established the right of the high court to decide the constitutionality of laws.

"It is emphatically the duty of the Judicial Department to say what the law is," Chief Justice John Marshall wrote in 1803.

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Regardless, political leaders in both parties expect the health care law to remain an issue in the fall campaign, no matter what the court decides, in part because President Barack Obama claims the law as his biggest achievement.

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Still, polls show a relatively small but consistent majority of Americans opposes the law.

"This is not just the signature achievement of the first, and hopefully last, Obama administration," said former Missouri GOP chairman Woody Cozad. "It is what he lives to do b?& this is what he believes in."

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Meanwhile, some parts of the law already have taken effect, further complicating the politics of the decision. And Mitt Romney -- the likely Republican presidential nominee -- helped pass a health care law with an individual mandate while he was governor in Massachusetts.

Indeed, while the long argument over health care will likely take a historic turn in June, when the Supreme Court is expected to make up its mind, it probably won't be the final word.

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"However the court rules, they're not going to make good health care policy. That's not what is before the court," the Heritage Foundation's Alt said.

"Congress is very likely to have a mess on its hands."

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