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Ruling could redefine federal power; Court to decide fate of health law

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WASHINGTON Thursday's highly anticipated Supreme Court ruling on President Obama's signature domestic achievement, a vast expansion of health coverage, will probably energize the 2012 presidential race and may reroute the American health care economy. But perhaps even more far reaching is the court's opportunity to redefine the scope of federal power.

At the heart of the complex case: Does Congress have the power, under the Constitution's interstate commerce clause, to require that most individuals obtain insurance coverage or pay a penalty? The question examined over three days of oral arguments in March and privately deliberated by the nine justices goes to the crux of intensifying debate about the role of government in the everyday lives of Americans, particularly concerning their purchasing decisions.

If the court strikes the mandate to have insurance, it is essentially saying that the government cannot force individuals to purchase a product or service, said M. Miller Baker, from McDermott Will & Emery's Washington office.

"The issue here is unprecedented," Baker said. "Congress has never before, through its commerce clause power, penalized a person for failing to engage in a commercial transaction."

The court's conservative justices have likened the mandate to forcing Americans to buy everything from cellphones, gym memberships, burial insurance, fuel-efficient cars, and even broccoli an overreach of federal power that tramples on individual rights and violates the sovereignty of the states.

"Here the government is saying that the federal government has a duty to tell the individual citizen that it must act, and that is different from what we have in previous cases and that changes the relationship of the federal government to the individual in a very fundamental way," Justice Anthony Kennedy, a Republican appointee who is considered the key swing vote, said during oral arguments.

The 2010 health law requires nearly all Americans to have insurance starting 2014 or pay a modest financial penalty when tax returns are due. The legal basis for making such a requirement is the commerce clause, written to ensure that Congress had the power to enable free trade among states. Over the past century as new markets emerged and local, national, and global activity became more interconnected, the power of the commerce clause has expanded.

Before Kennedy and several other justices harshly questioned the legal underpinning

of the health law, many Democrats as well as constitutional scholars were confident such usage of the clause would be upheld.

They reasoned that the health care market crosses state lines and the mandate, originally a concept put forward by top Republicans, does regulate economic activity because everyone will need health care at some point in their lives.

The mandate, proponents say, is necessary to make key elements of the law work prohibiting insurers from discriminating against those with preexisting medical conditions and charging the sickly prohibitively high rates.

Boston University law professor Abigail Moncrieff points out the government has used penalties to compel people to buy things. In the 1790s, sailors were forced to buy health insurance and able-bodied men were required to buy guns, she said. Furthermore, all Americans are required to pay taxes to buy into infrastructures and systems such as police and fire protection, safe roads, even corn discounts.

Nevertheless, she is bracing for the law to be struck down because, she said, of the politicized court and its conservative majority.

If the Supreme Court is not careful in how it writes this opinion, she said, a slew of popular tax credits and deductions such as the homebuyer's tax credit, mortgage interest deduction, and tax credit for fuel-efficient cars could suddenly become unconstitutional.

"It will become this weird existential question if the Supreme Court strikes down the mandate in an aggressive broad opinion," Moncrieff said. "It is much more likely they are going to say, 'This is novel. This could lead to a slippery slope of forcing people to buy too many private products. We don't trust the political limit and we need to have some backstop.' "

Some conservatives say such limitations on the scope of the commerce clause are long overdue.

Roger Pilon, vice president for legal affairs at the **Cato Institute**, believes the clause has been improperly applied since the New Deal and the 1942 Supreme Court ruling that held that the clause allows the government to regulate growing wheat even if it never left the farm. The court then said such an activity affected the price of wheat because the farmer would not be purchasing wheat on the market.

A ruling against the mandate would deal a significant blow to Obama's legacy and reelection campaign. Mitt Romney, his Republican challenger, is poised to portray Obama as wrongly prioritizing an unconstitutional health care mandate over fixing the sputtering economy during his first term in office.

While campaigning in Salem, Va., on Tuesday, Romney said, "If ObamaCare is not deemed constitutional, then the first three and a half years of this president's term will have been wasted on something that does not help the American people."

Romney incorporated the individual mandate in the health care law he championed in Massachusetts. The law has sliced the number of the state's uninsured, but Romney now says such a mandate has no place in a national reform and promises to repeal it.

Obama, for his part, praised the more popular provisions of the law during a fund-raising appearance in Boston on Monday, ticking off the lowering of prescription drug costs for seniors, the end of insurance companies discriminating against the very ill, and the addition of millions of young people to their parents' health plans as the "right thing to do." But he steered clear of addressing the controversial individual mandate and the Supreme Court case.

House Speaker John A. Boehner on Wednesday reaffirmed Republicans' commitment to repeal any portion of the law left intact by the court. But last week he sent a memo to Republican members warning them against celebrating in the event the court strikes down part or all of the law.

"There will be no spiking of the ball," Boehner wrote, mindful of a potential backlash against Republicans who have campaigned hardest against ObamaCare. Better, he said, to stay focused on economic issues.

Boehner advocated replacing the law with incremental reforms that focus on access, choice and cost containment, not rushing to pass a massive bill that the majority of Americans do not support.

Randy Barnett, a constitutional law professor at Georgetown whose argument against the individual mandate as a government intrusion laid the foundation for legal challenges to Obama's law in the lower courts, said if the court upholds the law, he will scour the opinion to see if the justices were able to tailor it narrowly and set a limit on the powers of Congress.

"If they don't, then Congress will now have carte blanche to impose purchase mandates on the American people," he said. "That's what I'm going to be doing at 10 a.m. reading the fine print."

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