

ACA Challenge Draws Conservative Fire At Supreme Court

By Jeff Overley

Law360 (May 13, 2020, 9:50 PM EDT) -- A Republican-led challenge to the Affordable Care Act's constitutionality attracted wide-ranging attacks Wednesday in a flurry of amicus briefs at the U.S. Supreme Court, including several briefs joined by state attorneys general, legal scholars and economists with conservative views.

More than 30 briefs submitted Wednesday criticized the high-stakes challenge, which is being waged by GOP state attorneys general and is supported by the Trump administration, that seeks to invalidate the entire ACA. A handful of briefs came from self-described ACA critics who nonetheless called the lawsuit ill-conceived.

The Republican attorneys general of Ohio and Montana, for example, said in an amicus brief that they "oppose much of the Affordable Care Act," but that "the task of repealing and replacing it falls to Congress, not the courts."

The two AGs agreed with the challengers that the ACA's individual mandate to maintain health insurance — previously upheld under congressional taxing powers — became unconstitutional when Congress repealed its tax penalty. But they rejected the challengers' assertion that the rest of the ACA should be deemed "inseverable" from the mandate and fall along with it.

"An unconstitutional statutory provision is deemed inseverable only when Congress ... makes it inseverable," Ohio Attorney General Dave Yost and Montana Attorney General Timothy Fox wrote.

Another brief filed by three law professors — including former Tenth Circuit Judge Michael W. McConnell, an appointee of President George W. Bush — argued that federal courts don't even have jurisdiction to hear the case. They cited the Supreme Court's 1950 decision in *Skelly Oil v. Phillips Petroleum*, which described when courts can hear declaratory judgment actions.

According to the professors, because the individual mandate is "entirely unenforceable" against the plaintiffs, federal courts do not have authority "to opine whether this unenforceable provision is also unconstitutional."

Wednesday's briefs hit the Supreme Court's docket one week after Democratic state attorneys generals and the Democratic-controlled U.S. House of Representatives, which are leading the ACA's defense, launched opening salvos at the high court. At issue is a Fifth Circuit decision last year that

declared the penalty-free mandate unconstitutional but told a Texas federal judge to reconsider a ruling that said the whole ACA should be struck down.

The amicus briefs also came against the backdrop of the devastating coronavirus pandemic. On Wednesday, the nonpartisan Kaiser Family Foundation projected that almost 27 million newly unemployed people in the U.S. are poised to become uninsured, but most will be eligible for ACA-subsidized private policies or Medicaid, which the ACA expanded.

An amicus brief filed Wednesday by more than 50 "bipartisan economic scholars" warned that "eliminating the ACA in whole or in part would inflict broad damages on individuals, state governments and businesses," and that "those consequences would be even more dramatic during the current pandemic and its aftermath."

The scholars include "economists who have served in high-ranking positions" during the administrations of former Republican Presidents Richard Nixon, Gerald Ford, George H.W. Bush and George W. Bush, according to the brief.

Not counting any new coverage involving laid-off workers, the ACA directly covers about 20 million Americans, and it provides an array of consumer protections — including guaranteed coverage for Americans with preexisting conditions.

Another amicus brief Wednesday came from two right-leaning law professors — Jonathan H. Adler of the Case Western Reserve University School of Law and Ilya Somin of the Antonin Scalia Law School at George Mason University — as well as two left-leaning law professors.

The four professors "disagree on many legal and policy questions concerning the Affordable Care Act," but "they agree on this: Even assuming the insurance mandate is unconstitutional, it is severable from the other provisions of the ACA," according to the brief.

Many of the conservative critics who filed amicus briefs on Wednesday also voiced opposition during proceedings at the Fifth Circuit and district court. Notably, the Trump administration did not fully support the challenge until after the district court's wholesale invalidation of the ACA; it had previously endorsed only the challenge to the mandate and the preexisting conditions protections.

Opening briefs from the GOP attorneys general and the Trump administration are due by June 25. Oral arguments haven't been scheduled but could happen as early as October, shortly before the presidential election.

McConnell and his fellow amici are represented by Raffi Melkonian of Wright Close & Barger LLP.

Adler, Somin and their fellow amici are represented by Joshua L. Hedrick of Hedrick Kring PLLC, and Joseph R. Palmore, Samuel B. Goldstein and James R. Sigel of Morrison & Foerster LLP.

The bipartisan economic scholars are represented by Shanna H. Rifkin and Matthew S. Hellman of Jenner & Block LLP.

The attorneys general are represented by their respective offices.

The cases are California et al. v. Texas et al., case number 19-840, and Texas et al. v. California et al., case number 19-1019, before the Supreme Court of the U.S.

--Editing by Adam LoBelia.

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