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Mandate debate; Conservative justices sharply question the rule; Requirement for all to buy coverage under fire

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WASHINGTON - Conservative justices yesterday sharply questioned Congress' power to require Americans to buy health insurance, raising the possibility that the Supreme Court could strike down the linchpin of the national health care law.

The outcome of the historic case, which enters its third and final day of arguments today, could hinge on Justice Anthony Kennedy, who often casts the critical vote on a divided court, legal experts said.

"The question will be whether Kennedy is satisfied that the government met the heavy burden in justifying the individual mandate" to obtain coverage, said Max Stearns of the University of Maryland School of Law. "The case could end up turning on that."

The court will hear arguments on two issues today: whether to strike down the entire health care law or just parts if it finds the individual mandate is unconstitutional, and whether Congress can require states to expand Medicaid. The court is expected to issue a decision on all the issues argued this week some time in June. That ruling will carry significant legal, economic and political ramifications.

Yesterday, the court heard two hours of arguments on the most significant issue before it this week: How far can Congress go in regulating commerce and can it make citizens buy a commercial product?

U.S. Solicitor General Donald Verrilli argued that the uniqueness of the health care market, and problems now caused when people with insurance bear the costs of care for the uninsured, gives Congress the power to require everyone to get insurance.

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But attorneys Paul Clement and Michael Carvin, who represent states and private parties seeking to overturn the law, said the health care market is not unique. They said the law seeks to compel people to buy insurance so that they enter commerce that Congress can then regulate.

Four of the five conservative justices peppered Verrilli with questions. If the mandate is upheld, what would limit Congress from requiring people to buy other products, such as cellphones, Chief Justice John Roberts asked.

The four liberal justices raised issues and posed arguments that supported Verrilli, with Justice Stephen Breyer making an expansive case for congressional power.

But much of the focus by the attorneys and observers in the courtroom was on Kennedy.

Early on, he expressed the concern that the individual mandate fundamentally alters the relationship between government and individuals.

"Do you not have a heavy burden of justification to show authorization under the Constitution?" he asked Verrilli.

But as the session closed, Kennedy raised doubts about Clement's argument that it's unfair to make young, healthy people buy insurance to subsidize older, less well people.

In a nod to the insurance industry's use of pools of people to spread risk, Kennedy said, "the young person who is uninsured is uniquely ... very close to affecting the rates of insurance and the costs of providing medical care in a way that is not true in other industries."

Kennedy appeared to be weighing both sides, said Mineola attorney Deborah Misir, who wrote a friend of the court brief against the health law.

"He's carefully considering one of the government's most important arguments, that health care is a very unique market and that uniqueness serves as an important limit on Commerce Clause power," she said.

Justices' questions during arguments do not always tip their final position on an issue.

The hearing yesterday suggested that the liberal bloc may vote to uphold the mandate and that at least three conservative justices will vote to strike it, said Supreme Court expert Jeffrey Segal of Stony Brook University.

"If Kennedy upholds, I think there is a decent chance Roberts will also," so he can control who writes the opinion to keep it as narrow as possible, Segal said.

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GRAPHIC: SKETCH BY DANA VERKOUTEREN/AP - U.S. HEALTH CARE LAW: An artist rendering shows attorney Robert A. Long with six of the nine Supreme Court justices.

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