Conscience Concerns Could Prove Decisive in Health Care Ruling says Jesuit Priest and Scholar

By Benjamin Mann
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WASHINGTON, D.C. (CNA/EWTN News) - Inadequate conscience protections may lead the Supreme Court to reject the 2010 health care law, a Jesuit priest and legal scholar predicted after three days of arguments in the historic case.

"I think there are sufficient problems with the bill, as passed, that the justices could say: 'This is unconstitutional,'" Father Robert J. Araujo, S.J., told CNA on March 29.

"There are certainly those problems that have been in the news, and I think there are some other ones. For example - the question of conscience, and conscience protection."

"This is a very complicated law, and the more we examine it, we see more problems and concerns," noted Fr. Araujo, who holds the John Courtney Murray Professorship at the Loyola University Chicago School of Law.

"I tend to think that's on the minds of the lawyers and the justices: 'Are we going to see more litigation, if we don't resolve these conscience-protection and other issues?'"

"That's why I see an opportunity for the court to say: 'Look, there are some serious problems with this legislation. Congress has done a lot of work, (but) it's their responsibility to write a law that will pass constitutional muster and judicial review."

The court's March 26-28 period of questioning focused on the law's "individual mandate," which requires virtually all citizens to obtain health insurance.

Most observers believe the law's fate will hinge upon whether the requirement is judged to be a means of regulating interstate commerce - as the Obama administration maintains - or an unconstitutional overtaking of states' power by the federal government.

Fr. Araujo thinks the law is unlikely to be upheld either fully or in part.

"Having followed the arguments and the questions, I don't think the likelihood of a complete vindication is very strong," the Loyola University professor predicted on March 29.

He also has doubts about the law being upheld with some portions removed - because legislators did not include a "severability" provision that would allow some parts to stand if others, such as the individual mandate, were struck down.

Although the main issue before the court is the individual insurance mandate, the Jesuit professor thinks other aspects of the law will factor into the court's decision as well - including the widely-criticized contraception and sterilization mandate, a federal rule made as part of the health care law's implementation.

The Supreme Court justices, he said, realize that there are constitutional concerns surrounding "who exactly is going to be paying for what" under the law, and "how that might affect their own moral concerns, which are constitutionally protected."
If the law is upheld, the justices could reasonably expect challenges to continue on different constitutional grounds - including the free exercise of religion, a factor in eight states' current lawsuits against the law's contraception mandate.

The result could be "a repetition of what we've seen so far," with various lawsuits advancing in federal court seeking "review of the legality of certain provisions" in the health care law.

"There are lots of concerns with this legislation," Fr. Araujo said. "Do we want to have another 'go-around' in the not-too-distant future, on other elements?"

Health care, the priest and professor noted, is a pressing issue that seriously affects millions of people.

But the Obama administration, he suggested, should not have attempted to solve it in a manner that was both constitutionally questionable and morally provocative.

Although the Church regards health care as a right that should be secured for all members of society, opinions differ as to how this should be achieved in practice. The Catholic notion of "subsidiarity" requires that problems be solved by the lowest level of competent authority.

Some Catholic critics of the health care law have invoked this concept as a criticism of the federal health care reform, which they say could have been better handled by the individual states.

"I think in its own way, the U.S. Constitution - under the Tenth Amendment - in part addresses this important concept of subsidiarity," Fr. Araujo said, citing the provision by which the powers not given to the federal government by the constitution "are reserved to the states respectively, or to the people."

"What might be proper for Florida may not work in California," the Loyola University professor noted. "The states do have a proper, lawful role in determining what is good and what is not for their citizenry. That's how I see the subsidiarity rule playing out in the U.S. Constitution."

"The program Massachusetts legislated a few years ago is not without its problems or faults," Fr. Araujo observed, recalling legislation signed by then-Governor Mitt Romney. "But the state was addressing the issue of health care for its citizens."

CNA also spoke on March 29 with Professor Michael Scaperlanda, who teaches at the University of Oklahoma and contributes to the Catholic law blog "Mirror of Justice."

Scaperlanda has criticized the federal government's individual insurance mandate as unconstitutional. On Thursday, however, he held off from making any predictions as to whether the health care law would be upheld in part or in full by the Supreme Court.

But he noted that there were good reasons for Catholics to prefer state-level solutions to the problem of securing health care for all.

At the state level, he noted, a requirement for individuals to purchase insurance could be squared with both the Constitution and Catholic social teaching.

If the federal health care law is overturned, Scaperlanda is hopeful that solutions for the uninsured, and those with preexisting conditions, can be found at a lower level of authority.

"One reason would be, that our state legislators are much more accessible to us than our federal legislators," he explained.
"I’m Facebook friends with several of my state legislators; I can have conversations with them. They’re much more in tune to the values of people in the community than people in Washington."

Similarly, individual states would have greater freedom to experiment to see which policies best solve the complex problems of health care reform. Other states could adopt policies that are shown to work, and more local control would make it easier to change those that do not achieve results.

"Multiple heads are better than one," Scaperlanda said.

"Having different proposals and solutions, and watching to see what works, leads to a better solution than having a small group of policy experts tell us what’s going to work and then hoping for the best."