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Supreme Court Hears ACA Constitutionality Case

On November 10, 2020, the Supreme Court of the United States (SCOTUS) held oral arguments in *California v. Texas*, a case concerned with whether the central provision of the *Patient Protection and Affordable Care Act* (ACA) – the Individual Mandate (requiring Americans to have health insurance) – is unconstitutional. During the two-hour teleconference hearing, arguments were presented by California Solicitor General Michael J. Mongan, on behalf of California; former Solicitor General Donald B. Verrilli, Jr., on behalf of the U.S. House of Representatives; Texas Solicitor General Kyle D. Hawkins, on behalf of Texas; and, Acting Solicitor General Jeffrey B. Wall, on behalf of the federal government's Department of Justice.

Background

As set forth more fully in past *Health Capital Topics* articles, the ACA was previously litigated in the 2012 SCOTUS case, *National Federation of Independent Business* (NFIB) *v. Sebelius* (a 5-4 decision).[1] In the majority opinion upholding the ACA, Chief Justice Roberts concluded that the Individual Mandate penalty was a tax, with an essential feature being that it produced "*at least some revenue for the Government.*"[2] Consequently, the Individual Mandate's penalty tax was found to be valid under Congress' authority to tax and spend and the ACA was, therefore, deemed constitutional.[3]

In 2017, Congress enacted the *Tax Cuts and Jobs Act* (TCJA). Among other things, this tax reform legislation reduced the penalty for those who did not maintain health insurance (under the ACA's *Individual Mandate* provision) to zero dollars ($0), effective beginning in 2019.[4]

Procedural History

In February 2018, the present case was filed by Texas Attorney General Ken Paxton and a coalition of 20 Republican state attorneys general and governors, as well as two individuals (both Texas residents).[5] In December 2018, the Texas Federal District Court deemed the ACA to be unconstitutional in its entirety,[6] under the same grounds as *NFIB v. Sebelius*.[7] Further, the court ruled that the Individual Mandate could not be severed from the ACA because the Mandate was "*the keystone*" of the law, essential to the regulation of the health insurance market, rendering the entirety of the ACA invalid.[8] Contributing to the federal court decision was the *Department of Justice's* (DOJ's) position, in which the agency agreed with the plaintiffs that the Individual Mandate was unconstitutional, and asserted that other provisions such as the Guaranteed Issue provision (requiring health insurance companies to accept all applicants regardless of pre-existing conditions) are inseverable from the Mandate.[9] As a result, the DOJ did not defend the constitutionality of the Individual Mandate before the court.[10]

On appeal, the U.S. Court of Appeals for the Fifth Circuit upheld the district court's conclusion as to the unconstitutionality of the Individual Mandate, but remanded the case back to the district court for reconsideration, with the instruction that the lower court consider the congressional intent related to the TCJA.[11] However, prior to the district court's reconsideration, SCOTUS granted the parties' petition for review.[12]

Focus of Oral Arguments

The issues under review by SCOTUS are threefold:

(1) Do the plaintiffs have standing to challenge the ACA?

(2) Is the Individual Mandate of the ACA now unconstitutional because it has a penalty of zero dollars for not buying health insurance?

(3) If the Individual Mandate is unconstitutional, is it severable from the remainder of the ACA?

In summary, the plaintiffs' arguments to these issues were as follows:

(1) The two individual plaintiffs have standing because they have been harmed by having to comply with the Mandate (i.e., purchase ACA-compliant coverage), even after the penalty was set to $0, because they wanted to follow the law.[13] The 18 state plaintiffs also have standing because they have been harmed by the increase in the number of individuals on state-supported insurance and the higher administrative costs from ACA-related reporting requirements, among other things;

(2) The TCJA rendered the Individual Mandate unconstitutional, because Congress set the penalty for not purchasing "minimum essential coverage" to zero dollars; and,

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(3) The Mandate is so essential to the ACA that it cannot be severed from the rest of the law, and thus the entire ACA should be struck down. If the Court will not render the entirety of the ACA unconstitutional, then at a minimum, the Court should strike down the ACA's Guaranteed Issue and Community Rating provisions alongside the Mandate.[14]

In response, the defendants assert the following:

(1) The plaintiffs failed to satisfy their burden to establish standing: (a) the individuals do not have standing because there is no enforcement for not abiding by the Mandate and, (b) the states failed to show that the Mandate increased enrollment in state health programs;

(2) The Individual Mandate is best read not as a *command* to purchase health insurance but as a legal *choice* to purchase coverage, i.e., the Mandate should be treated as a precatory suggestion. In fact, Congress maintained the structure of the Mandate so that they could reimpose the tax penalty at a future time; and,

(3) Because Congress specifically chose to change the Mandate penalty, and leave all other ACA provisions in place (which provisions are working without the Mandate penalty in place), striking down the entire ACA would directly contradict congressional intent.[15]

Standing

Many of the Justices seemed to take issue with the fact that a mandate without a penalty cannot be enforced against the plaintiffs; therefore, invalidation of the Individual Mandate by itself would not address their alleged injuries.[16] Some of the Justices also seemed concerned that the alleged injuries could not be traced to the challenged conduct.[17] Specifically, Justice Gorsuch asked the plaintiffs who SCOTUS would be enjoining and from what activity, noting that some proof is typically needed before a court can remedy a plaintiff's injury beyond a mere declaratory judgment.[18] Additionally, Justices Sotomayor, Gorsuch, and Kavanaugh asked the plaintiffs whether a general national estimate indicating that enrollments in the aforementioned state health programs (e.g., Medicaid) have increased is enough to establish standing (in contrast to a more specific showing, e.g., state-specific estimates).[19]

Justices also expressed skepticism as to the "*standing through inseverability*" theory argued in the alternative by the plaintiffs and the DOJ,[20] wherein plaintiffs argued that the harm they face is not from the Individual Mandate itself but from other provisions of the ACA.[21] Because those provisions of the ACA are inseverable from the Mandate, the injury caused by those provisions would still be relevant to the plaintiffs' standing.[22] Notably, SCOTUS has never previously validated the "standing through inseverability" theory.[23]

Constitutionality of the Individual Mandate

The Justices' questions were generally split as to whether the Mandate could continue to be read as a choice between purchasing health insurance or not, or a legal command to purchase health insurance under NFIB, i.e., whether the provision is simply inoperative or a request.[24] The Justices posed several questions regarding congressional intent in the 2017 passage of TCJA and Congress's understanding of SCOTUS's decision in *NFIB v. Sebelius*.[25] The Justices also posed a few rhetorical questions on this point, noting that the 2017 Congress passed a law to make the Mandate penalty $0, but left the remainder of the ACA intact, inferring that they could have altered the rest of the law if they had wanted. Justice Kagan asked "*[h]ow does it make sense to say that what was not an unconstitutional command before has become an unconstitutional command now, given the far lesser degree of coercive force?*"[26] Analyzing the issue from a different angle, Justice Kavanaugh asked the parties to confirm that there were no similar examples in federal law where Congress has directed an individual to purchase a good or service, with or without a penalty.[27]

Severability

Several Justices expressed skepticism that the entire ACA must be invalidated alongside the Mandate. Chief Justice Roberts stated:

> "*I think, frankly, that they wanted the Court to [repeal the rest of the Act]. But that's not our job…I certainly agree with you about our job in interpreting the statute, but, under the severability question, where -- we ask ourselves whether Congress would want the rest of the law to survive if an unconstitutional provision were severed. And, here, Congress left the rest of the law intact when it lowered the penalty to zero. That seems to be compelling evidence on the question*."[28]

Justice Kavanaugh asked the plaintiffs whether Congress intended in 2017 to preserve protections for people with preexisting conditions, noting: "It *sure seems that way from the -- the record and the text*."[29] Further, Justice Kavanaugh responded to the House of Representatives that "*I tend to agree with you that it's a very straightforward case for severability under our precedents, meaning that we would excise the mandate and leave the rest of the Act in place, reading our severability precedents*."[30] These statements affirm Justice Kavanaugh's reasoning in a recent case before the Court, wherein he wrote that "*[c]onstitutional litigation is not a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute*."[31]

Notably, there is a strong presumption of severability, as set forth in a couple of recent cases authored by the current Justices.[32]

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Analysis

Based on the questions posed by the Justices during the oral argument, the consensus among legal experts is that, even if SCOTUS finds that the plaintiffs have standing, and that the Individual Mandate is unconstitutional, the Court will still likely hold that the Mandate is severable from the remainder of the ACA.[33] At least six of the Justices (two of whom are conservative-leaning) made strong statements related to severability during oral arguments. The other three conservative Justices – Gorsuch, Thomas, and Barrett – were not as transparent as to their position on severability, as all three largely avoided the subject.[34] Interestingly, Justice Alito acknowledged the immaterial functionality of the Mandate, which seems to have changed his opinion from that in the NFIB case, reasoning:

> "*At the time of [NFIB v. Sebelius], there was strong reason to believe that the individual mandate was like a part in an airplane that was essential to keep the plane flying so that if that part was taken out, the plane would crash. But now, the part has been taken out and the plane has not crashed*."[35]

In other words, if the original mandate is like a "*part*" that Congress itself decided to "*take out*," then Congress has effectively made the decision as to whether the Mandate is essential to the Act as a whole. The fact that "*the plane has not crashed*" suggests it did not require this "*part*" in the first place.[36]

While a majority of the justices seem likely to agree with the severability argument (which would result in the ACA being upheld), there is more uncertainty regarding the other two issues in the case – standing and the constitutionality of the Individual Mandate. Some believe it is probable that a majority of Justices will be inclined to conclude that the Individual Mandate is unconstitutional, because it can no longer be seen as a tax now that it does not raise revenue.[37]

Notwithstanding the Court's decision on the constitutionality of the Individual Mandate, the ACA as a whole appears likely to survive, as it seemed clear that a majority of justices rejects the plaintiff states' position on severability.[38] Therefore, the preservation of the ACA could take a few forms: by SCOTUS denying standing; by SCOTUS holding that the Individual Mandate is constitutional; and/or, by striking down the Individual Mandate while simultaneously ruling that it is severable from the rest of the ACA.[39]

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3 *Ibid*, p. 7.
4 "Tax Cuts and Job Act" Pub. L. No. 115-97, § 11081, 131 Stat. 2054, (December 12, 2017); "Judge Strikes Down ACA Putting Law In Legal Peril – Again" By Julie Rovner, Kaiser Health News, December 14, 2018, https://khn.org/news/texas-judge-puts-aca-in-legal-peril-again/ (Accessed 12/17/18); "Federal Judge Strikes Down Entire ACA; Law Remains In Effect" By Katie Keith, Health Affairs, December 15, 2018, https://www.healthaffairs.org/do/10.1377/hblog20181215.617096/full/?utm_source=Newsletter&utm_medium=email&utm_content=Federal+Judge+Strikes+Down+ACA%3B+Expanding+The+Serious+Illness+Care+Team%3B+Telehealth+Policy&utm_campaign=HAT (Accessed 12/17/18);
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11 "Texas v. United States" Case No. 19-10011 (5th Cir. Dec. 18, 2019), Judgment, available at: http://www.ca5.uscourts.gov/opinions/pub/19/19-10011-CV0.pdf (Accessed 12/19/19), p. 3, 56.
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15 *Ibid.*
16 *Ibid.*
17 *Ibid.*
18 "California, et al. v. Texas, et al. and Texas, et al. v. California, et al." Oral Argument Transcript, November 10, 2020, available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-840_i426.pdf (Accessed 11/23/20), p. 81-83.
19 Oral Argument Transcript, November 10, 2020, p. 25-26, 75; Keith, November 11, 2020.
20 *Ibid.*
21 *Ibid.*
22 *Ibid.*
23 "Oral Argument Transcript, November 10, 2020, p. 42-43.
24 Keith, November 11, 2020.
25 *Ibid.*
26 Oral Argument Transcript, November 10, 2020, p. 77.
27 *Ibid*, p. 84.
28 *Ibid*, p. 62-63.
29 *Ibid*, p. 87.
30 *Ibid*, p. 56.
31 "Barr v. American Association of Political Consultants, Inc." No. 19-631 (U.S. July 6, 2020), p. 16.
32 *Ibid*; "Seila Law LLC v. Consumer Financial Protection Bureau" No. 17-56324 (U.S. May 6, 2019); Keith, November 11, 2020.
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