Supreme Court Hears Oral Arguments on Latest ACA Case

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On November 10, 2020, the U.S. Supreme Court heard oral arguments (via teleconference) on the latest constitutional challenge to the Affordable Care Act (ACA). The case, *California v. Texas*, was brought by 18 state attorneys general after the ACA's individual mandate was reduced to $0 as part of the 2017 Tax Cuts and Jobs Act (TCJA) . This latest challenge questions whether the ACA can survive without the "tax" that was used as the primary basis to uphold the law in 2012 when its constitutionality first reached the Supreme Court in *National Federation of Independent Business (NFIB) v. Sebelius*. Based on Tuesday's oral arguments and some pointed questions from a few of the conservative-leaning justices, it looks like the ACA may again survive; however, this is only speculation, and we will not have a final written decision until the summer of 2021.

Background

In 2012, the Supreme Court upheld the ACA in a 5-4 decision after finding that the individual mandate was a choice between purchasing health insurance or paying a tax penalty. The court held that the individual mandate penalty was a tax, and therefore concluded the ACA was legitimate under Congress's power to tax. Because the court also held that the individual mandate was not a proper use of Congress's Commerce Clause powers, the fact that the penalty was classified as a tax was critical to the court's holding.

In 2017, Congress passed the TCJA, which, among other things, reduced the individual mandate penalty to $0. Since the ACA's individual mandate no longer required payment of a tax penalty for individuals who fail to purchase [approved] health insurance, an argument arose as to whether the ACA remained constitutional since it no longer was predicated upon Congress's power to tax (i.e., no revenue was being collected from the mandate).

The current challenge to the ACA was originally brought by 20 states, led by Texas (two states have since dropped out), and two

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individual plaintiffs who joined the suit in 2018. The federal government declined to defend the ACA in the suit, so 17 other states (21 on appeal), led by California, intervened to defend the law. Later, the U.S. House of Representatives also joined the states to defend the ACA. The case reached the 5th Circuit Court of Appeals, which held that the individual mandate, as amended by the TCJA, was unconstitutional. According to the 5th Circuit, the federal government's assertion that the law must produce some revenue was essential to the Supreme Court's earlier finding in *NFIB v. Sebelius* that the individual mandate is a valid exercise of Congress's taxing power.

Without a tax generating actual revenue, the 5th Circuit held that the individual mandate was an unconstitutional exercise of Congress's power under the Commerce Clause. The court then sent the case back to the trial court to address severability (i.e., to determine which parts of the ACA can survive without the individual mandate). Because the ACA does not have a severability clause, the ACA is not clear on its face as to whether the entire law must be thrown out if only a piece of it is found unconstitutional. The issue of severability was not reached by the Supreme Court in *NFIB v. Sebelius* because the individual mandate was upheld.

Supreme Court

The Supreme Court decided to take the latest constitutional challenge to address four legal questions:

- Whether Texas and the individual plaintiffs have standing to bring the lawsuit to challenge the individual mandate.
- If the plaintiffs have standing, whether the TCJA rendered the individual mandate unconstitutional.
- If unconstitutional, whether the remaining portions of the ACA can survive.
- If the entire ACA is found to be unconstitutional, whether the entire law should be unenforceable nationwide or whether it should be unenforceable only to the extent that provisions injure the individual plaintiffs.

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There are two avenues that the Supreme Court could take to uphold most of the ACA. First, the court could find that the plaintiffs do not have standing (i.e., that plaintiffs are not injured or that a favorable decision cannot redress the plaintiffs' injury). The court could conclude that because the individual mandate tax is now $0, there is no real harm to an individual if coverage is not purchased, and that the 18 states bringing the challenge are not incurring any specific cost with respect to enforcing the individual mandate. Even though much of the oral argument focused on standing, it seems unlikely that the Supreme Court would take the case and then punt on deciding the main issue due to a lack of standing. It is more likely that the court will find that at least one of the plaintiffs has standing, in a manner that is narrowly tailored to the specific facts of this case.

Second, the court could find that the individual mandate is unconstitutional but hold that the entire law should not be thrown out. This second point seems to be the most likely outcome, based on questions and comments from the justices during Tuesday's oral argument. Justice Kavanaugh said, "It does seem fairly clear the proper remedy would be to sever the mandate provision and leave the rest of the law in place." Justice Roberts also seemed receptive to severability, stating that, with respect to the TCJA, "Congress left the rest of the law intact when it lowered the penalty to $0. That seems to be compelling evidence [that the rest of the law should be upheld]."

A final point to consider – even though it seems unlikely that the court will find the individual mandate unconstitutional and throw out the entire ACA – is whether the court could conclude that parts of the ACA cannot be severed from the individual mandate, and then decide which parts will be thrown out along with the individual mandate and which parts remain law.

At this point, we can only speculate how the court will rule based on questions asked in the oral argument. While this is clearly not a scientific process, two of the more conservative justices seem to have indicated that the ACA can remain intact even if the individual mandate is deemed unconstitutional. We will have to wait until the

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summer to be sure, but it looks like at least some of the ACA is here to stay.

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