

The Different Ways High Court Could Assess ACA Viability

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As the nation has turned its attention to fighting a global pandemic and the very real, human cost associated with that fight, the decade-old battle over the Affordable Care Act is once again in the limelight.

The U.S. Supreme Court agreed to hear arguments in *California v. Texas* after the presidential election.[1] Those consolidated cases largely turn on two things: (1) the constitutionality of the individual mandate now that Congress has zeroed out the penalty for violating the mandate, and (2) the centrality of that penalty-less mandate to the rest of the ACA's provisions.

These and other issues presented in the case could result in little or no change to the ACA and its framework — or the complete invalidation of the statute. So, much is potentially at stake.

A Tortuous Path

The litigation was originally filed in February 2018 by the State of Texas and 20 other Republican-led states seeking to invalidate the entirety of the ACA. They allege that Congress effectively invalidated the ACA when it zeroed out the individual mandate penalty by reducing the "shared responsibility payment" to \$0 as part of the 2017 Tax Cuts and Jobs Act.[2]

The original penalty contained in Section 5000A(c) was \$695 per adult or 2.5% of household yearly income, whichever was less. In *National Federation of Independent Business v. Sebelius*, Chief Justice John Roberts' controlling opinion upheld the individual mandate as a valid exercise of congressional authority as a tax, after having first determined that it would exceed Congress's authority under the commerce clause if it were characterized as a command.

Texas and the other Republican-led states argued that once the shared responsibility payment was eliminated by the TCJA, the mandate no longer had a revenue-raising purpose and could no longer be justified as a tax. Instead, as a regulatory command, it is unconstitutional under the commerce clause for the reasons Justice Roberts explained in *NFIB*.



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In December 2018, U.S. District Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas agreed with the Republican states and held that the absence of any monetary penalty meant the mandate could no longer be defended as a tax. As a result, it exceeded Congress' authority under the commerce clause.

What's more, the district court held that the mandate, even without an enforcement penalty, was sufficiently central to the ACA as a whole that the entire act had to be declared unconstitutional. In other words, the district court concluded that Congress would rather scrap the ACA altogether than permit it to survive without an unenforceable individual mandate.

In December 2019, the U.S. Court of Appeals for the Fifth Circuit upheld the portion of Judge O'Connor's decision finding the ACA's individual mandate unconstitutional. The Fifth Circuit, however, declined to address the rest of the law, remanding questions about the severability of the rest of the law's provisions and the appropriate remedy back to the district court for further analysis.

The litigation's path in the lower courts had more than its share of twists and turns. Most notably, the U.S. Department of Justice has changed legal strategies and arguments on multiple occasions, creating confusion and additional grounds for the Fifth Circuit to remand the case to the district court for further analysis.

The Fifth Circuit also admitted several new parties to the case by allowing the intervention of 20 Democratic-led states and the U.S. House of Representatives. It is these interveners that presented arguments supporting the continued legality of the ACA and petitioned the Supreme Court to take up the case.

And, while not the most interesting of the legal questions before the court, the question of the interveners' legal standing to pursue the case on behalf of their constituents has become a major legal issue present before the Fifth Circuit and the Supreme Court.

Because the federal government is not defending the ACA as is common in cases challenging a validly passed statute, the ability of the interveners to raise the harms that would be caused by a loss of federal ACA funding is critical to the dispute.

Questions Presented

The Supreme Court accepted three questions presented for argument:

- Whether the individual and state plaintiffs in the case have established Article III standing to challenge the minimum coverage provision in Section 5000A(a) of the ACA — that is the provision that requires applicable individuals to ensure they are "covered under minimum essential coverage" and that the failure to obtain such coverage results in the payment of a penalty called a "shared responsibility payment";
- Whether reducing the amount of the payment, specified in Section 5000A(c) to zero rendered the minimum essential coverage provision unconstitutional; and

- If so, whether the minimum essential coverage provision is severable from the rest of the ACA, meaning that the Supreme Court did not require a decision first from the district court, to which this provision was remanded by the Fifth Circuit.

In addition to raising interesting and important issues, these questions force the court to consider and potentially revisit a complex web of prior precedent involving the ACA. And although the Fifth Circuit declined to address the severability question, the Supreme Court has accepted the request to consider the argument. Consequently, the entire ACA as a statute will be up for consideration.

Understanding the Context of the Dispute

The individual mandate, its penalty, and the minimum essential coverage provision that give rise to the constitutionality argument are core provisions interwoven into a fabric of consumer protections that have been adopted as part of the ACA.

These reforms, as a whole, were designed in statute to incentivize near universal health insurance coverage. They targeted the creation of affordable health insurance markets, and sought to prevent adverse selection, which had historically skewed insurance pools.

These provisions included the guaranteed-issue requirement, which forbid insurers from turning customers away due to their health care needs or health profile; the community rating requirement, which keeps insurers from charging individuals more for insurance due to preexisting medical conditions; and protections against denying coverage to individuals due to preexisting medical conditions.[3]

The individual mandate and its accompanying original financial penalty were designed to drive those without insurance to the insurance market to equalize the community rating and number of individuals in the insurance pool overall. At the time many argued that the financial penalty itself was not large enough to accomplish that goal since it was, generally, less than what employees were subsidizing for their own employer-sponsored health plan coverage.

The provisions, taken together, were to create a patchwork that would drive all to obtain health care coverage. They were to work, inextricably, together.

It is this argument and this intention that has created the very counterargument that has gained traction in the lower courts in *California v. Texas*. The argument proffered by the plaintiffs, the Department of Justice, and the GOP that would unravel the entirety of the ACA is that the statute was intended to work as a whole document together and if one aspect of the statute were found unconstitutional, the entire act would need to be invalidated.

The interveners — the Democrats — argue that the court should look at the intent of Congress when they passed the TCJA in 2017, which eliminated the mandate's penalty but did not eliminate or modify any of the other ACA provisions indicating their intent to allow the ACA's remaining provisions to remain intact.

There are several nuances to the argument that have come up and been offered by the government, as well. One such argument is that if the court were to find that the ACA is unconstitutional, it would only be applicable to the plaintiff states raising the objection. These arguments have confounded the court and were described in the Fifth Circuit decisions.

Interveners argue that even if the court finds the individual mandate unconstitutional it is severable from the remaining statute and urge validation of the ACA's remaining provisions — admittedly the opposite argument that had been made to sustain the ACA in earlier arguments on the viability of the law.

Practical Impact Today

It is safe to say that the ACA will not be struck down the day after the Supreme Court argument. The consequences of the Nov. 3 election may determine what, if anything, can and should be done to shore up insurance market reforms or other provisions of the ACA.

It is clear that both parties have come to rely upon consumer protection provisions that are popular, such as those that eliminate discrimination by health plans based on preexisting conditions. Other key provisions of the ACA individuals rely upon are full out-of-pocket coverage of preventive care services, no annual or lifetime limits on the value of essential health benefits, caps on out-of-pocket cost sharing and limitations on waiting periods that can be applied.

In an age of a global pandemic, where a diagnosis and recovery from COVID-19 could signal continuing health problems, the elimination of the preexisting condition protections, the imposition of additional cost sharing obligations, or the reinstatement of a cap on annual or lifetime limits for coverage, would be supremely unpopular. Coverage of children up to age 26 for health plans is equally popular. Thus, legislative action by Congress could result in the elimination of any sting that an eventual Supreme Court decision could inflict.

The Supreme Court decision itself could take on the issue in a number of ways that would not signal a permanent end to the ACA. For instance, it could affirm the unconstitutionality of the individual mandate and penalty as a command, but go no further, resulting in a decision that does not impact much of anything today. We live today under a health insurance regime in which the individual mandate is meaningless and its penalty is nonexistent. The status quo would be maintained and very little would change.

The Supreme Court could also invalidate the collateral provisions involving guarantee issue and preexisting conditions, which would impact the insurance markets, likely shifting considerable pressure on individual states to pass laws that might reinstate these provisions at a state level. Any state level action, however, would not preserve these rights under self-insured group health plans, which are not subject to state insurance laws.

Of course, if the entire ACA is determined to be inseverable from the offending individual mandate provision, the consequences could be comprehensive and unsettling. There are, however, a number of scenarios that may prevent an unsettling outcome between now and next summer.

Congress could move to address health insurance reforms in a way that would sustain the popular provisions of the ACA, shoring up some of the consumer protection provisions that would be unraveled should Supreme Court determination dissolve the ACA's constitutionality. Should this occur, any adverse Supreme Court determination could be rendered moot upon its issuance and there would likely be no practical impact to the application of the ACA.

While such action might address the consumer protection provisions, it would not address the complex

compliance scheme instituted by employers to comply with other components of the ACA, such as the employer shared responsibility mandate, which would all unravel should the Supreme Court determination dissolve the ACA's constitutionality.

Additionally, the Supreme Court could issue a decision that refuses to fully address the standing or severability questions before it, sending those issues back to the Fifth Circuit to complete its analysis.

Plaintiffs also, at one bizarre point, argued that the invalidation of the ACA's provision should be applicable to only the plaintiff states and individuals who brought the case before the Fifth Circuit, noted above. This could set up a scenario in which any adverse decision would be applicable to only a portion of the U.S. While interesting, it is unlikely that a decision of this magnitude would be analyzed in this way, leading to such disarray.

It is true that the ACA's fate is now in the hands of the Supreme Court and the now infamous nuance navigated by Justice Roberts to uphold the ACA in NFIB may be foreclosed. And the recent addition of Justice Amy Coney Barrett to the court adds additional uncertainty.

Additionally, it is true that elections have consequences and California v. Texas's tortured path to the Supreme Court is a lesson in those consequences.

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[1] S. Ct. Nos. 19-840 & 19-1019.

[2] 2017 Tax Cuts and Jobs Act, 26 U.S.C. § 5000A(c).

[3] (42 USC §§ 300gg, 300gg-1, 300gg-13(a)(3)-(4)).