On November 10, 2020, the U.S. Supreme Court heard oral arguments for California v. Texas, a case that will potentially decide the fate of the Patient Protection and Affordable Care Act (“ACA”).

As discussed in prior Healthcare Law Blog posts, California v. Texas - a case originally brought by 20 states[1] and two individual plaintiffs in 2018 – challenges the ACA’s minimum essential coverage provision (known as the individual mandate) and raises questions about the enforceability of the ACA in its entirety. The individual mandate provides that most people must maintain a minimum level of...
health insurance coverage. Individuals who fail to maintain such coverage must pay a financial penalty (known as the shared responsibility payment) to the IRS. In 2012, in the case of *National Federation of Independent Business v. Sebelius*, the Supreme Court upheld the ACA based upon its conclusion that the individual mandate and, in turn, the ACA, was a constitutional exercise of Congress’ taxing power. However, in the 2017 Tax Cuts and Jobs Act, Congress set the shared responsibility payment at zero dollars as of January 1, 2019. By “zeroing out” the shared responsibility amount, Congress set the stage for the current litigation which asks the Court to determine whether the individual mandate and, in turn, the ACA, are still constitutional even though the shared responsibility amount – i.e., the tax upon which the Supreme Court based its 2012 decision – has effectively been eliminated.

Although it is too early to know how the Supreme Court will rule, it appears that Chief Justice John Roberts, Justice Clarence Thomas, Justice Samuel Alito, Justice Brett Kavanaugh, Justice Neil Gorsuch, and Justice Amy Coney Barrett, who make up the conservative majority of the court, may be leaning towards a finding that the ACA’s individual mandate is unconstitutional. However, there also appears to be a group of five justices, Chief Justice Roberts, Justice Kavanaugh and the three more liberal justices, Justice Stephen Breyer, Justice Sonia Sotomayor, and Justice Elena Kagan, who seem to be leaning towards the determination that the unconstitutionality of the individual mandate does not invalidate the rest of the ACA.[2]

### No Harm, No Foul: Standing to Sue

Prior to any ruling on the substantive issues of the case, the majority of justices first need to determine whether the individual and state challengers to the ACA have standing – aka, the right to sue. Under current law, a plaintiff has standing to bring suit only upon alleging an injury in fact. In this case, the question as to whether the individual plaintiffs and the state plaintiffs have actually been injured by the individual mandate requirement or any other aspect of the ACA is a significant one. In fact, the two-hour oral arguments largely centered on the question of standing, dominating the discussion more than any other topic.[3]

In the *Fifth Circuit decision* that is the basis of the current appeal before the Supreme Court, the court concluded that the individual plaintiffs have standing because they have spent money that they otherwise would not have spent, absent the individual mandate, to purchase health insurance. The 5th Circuit also concluded that the state plaintiffs have standing because they are incurring costs from the individual mandate by having to verify which state employees have minimum essential coverage.

Before the Supreme Court, legal counsel for the plaintiffs – Texas Solicitor General Kyle D. Hawkins on behalf of Texas, and Acting Solicitor General Jeffrey B. Wall on behalf of the federal government – argued that Texas and the other state plaintiffs suffered actual injuries from the mandate and the ACA generally. Therefore, they concluded, the states had standing to challenge the individual mandate based upon multiple theories. During oral argument, the justices focused on two of these theories – the states experienced actual harm due to (i) increased enrollment in
state health programs (e.g., Medicaid) under the ACA and (ii) higher administrative
costs from ACA-related reporting requirements. As for the two individual plaintiffs,
legal counsel for the defendants – 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 – argued that the individuals did not have standing
because, without a penalty for failure to comply with the mandate, there is no real
threat of enforcement and, in turn, no financial or other consequences to the
individual plaintiffs for failure to comply with the mandate.

By the end of the day, the justices appeared to be mostly undecided as to whether
the individual or state plaintiffs are really harmed by a mandate that no longer
carries a penalty and, in turn, have standing to bring the ACA case.

**Constitutionality of the ACA**

Assuming that at least five justices determine that the challengers have standing to
sue, the justices will turn to analyzing the two substantive issues at play: (1)
whether the individual mandate is constitutional, and (2) whether the individual
mandate, if unconstitutional, is severable from the rest of the ACA.

**Constitutionality of the Individual Mandate**

As noted above, the individual mandate was upheld by the Supreme Court in *NFIB v.
Sebelius* on the grounds that it was a tax on individuals who did not purchase health
insurance. Both Justices Kavanaugh and Gorsuch seemed skeptical that the mandate
could be upheld as a tax when it no longer raises any revenue and noted that without
the individual mandate being considered a tax, the defendants would be forced to
rely on the other provisions of the Constitution that failed in the original *NFIB v.
Sebelius* case.

The more liberal justices saw the issue differently. Justice Breyer pointed out that
there are many laws in existence where people are entreated to do something
without there being any consequence for non-compliance. Justice Kagan pointed out
that the removal of the monetary penalty, if anything, made the ACA “less coercive.”
Justice Kagan also questioned Texas on this point, asking why Congress’ decision to
make the mandate less coercive (by setting the penalty to $0) renders it an
unconstitutional command. As she put it, “How 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?”[4]

**Severability of the Individual Mandate from the Rest of the ACA**

If the majority of justices find the individual mandate to be unconstitutional, they
would then need to determine whether the ACA should be struck down in its entirety
or if the mandate can merely be “severed” or removed from the ACA while keeping
the remainder of the law intact. Interestingly, despite the strong conservative tilt
to the Court since Justices Gorsuch, Kavanaugh and Barrett were appointed during
the Trump Administration, some of the conservative justices seemed skeptical of the
argument that the individual mandate is inseverable from the rest of the ACA.
Both Chief Justice Roberts and Justice Kavanaugh indicated that Congress’s decision to change the penalty for violating the individual mandate to $0 did not demonstrate an intent to invalidate the entire ACA. Chief Justice Roberts stated to Hawkins: “I think it’s hard for you to argue that Congress intended the entire act to fall...when the same Congress that lowered the penalty to zero did not even try to repeal the rest of the act.” Justice Kavanaugh told Hawkins “It does seem fairly clear that the proper remedy would be to sever the mandate provision and leave the rest of the act in place.”[5]

Chief Justice Roberts raised the issue that in the original *NFIB v. Sebelius* case, the defenders of the ACA specifically argued that the individual mandate was crucial to the law and asked why they were now arguing the opposite. Verrilli explained that the individual mandate was crucial eight years ago to create new insurance markets, with subsidies as “carrots” and the requirement to either purchase insurance or pay a penalty a “stick.” But now, Verrilli argued, “It’s turned out that the carrots work without the stick.”[6]

**Will the ACA Survive?**

We will likely not know the Supreme Court’s decision until early 2021 at earliest. However, despite the conservative majority on the Court, the ACA still has a chance of surviving this latest challenge since Chief Justice Roberts and Justice Kavanaugh seem like they may be willing to join the three liberal justices to sever the individual mandate from the ACA without invalidating the entire law. There is also potential for the suit to be dismissed and the ACA left intact on the issue of standing alone without the Court ever opining on the substantive issue as to the constitutionality of the individual mandate and the ACA as a whole. As noted by Chief Justice Roberts during oral arguments, standing is, “an important doctrine—the only reason we have the authority to interpret the Constitution is because we have the responsibility of deciding actual cases, and that’s what standing filters out.”[7]

Footnotes

[1] After Democratic victories in the 2018 mid-term elections, two of these states, Wisconsin and Maine, withdrew from the case in early 2019, leaving 18 states challenging the ACA before the U.S. Supreme Court.


[5] Id. at p. 85
[6] Id. at p. 36
[7] Id. at pgs. 94-95

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