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On November 10, 2020, the United States Supreme Court held oral arguments in *California v. Texas* (Dkt. No. 19-840), a case in which the Trump Administration and several Republican-led states have asked the Court to strike down the Affordable Care Act ("ACA") in its entirety. The Court is evaluating three key questions:

1. Whether the individual and state plaintiffs have standing to challenge the individual mandate;
2. Whether the elimination of the individual mandate penalty in the 2017 Tax Cuts and Jobs Act (TCJA) rendered the individual mandate unconstitutional; and
3. If unconstitutional, whether the individual mandate is "severable" from the rest of the ACA.

All nine Supreme Court justices, including newly confirmed Associate Justice Amy Coney Barrett, participated in the two-hour proceedings. Arguments for the Petitioners were presented by California Solicitor General Michael Mongan (on behalf of states defending the individual mandate), and Donald Verrilli, Jr. (on behalf of the U.S. House of Representatives). Arguments for the Respondents were presented by Texas Solicitor General Kyle Hawkins (on behalf of states challenging the individual mandate), and Acting Solicitor General Jeffrey Wall (on behalf of the United States).

We have summarized the background and history of the case in a separate white paper. The Supreme Court is expected to render its decision by June 2021.

OVERVIEW

During oral argument, the nine Justices revealed more about their intentions for the Affordable Care Act than many expected. Both Chief Justice Roberts and Justice Kavanaugh expressed clear skepticism that Congress' elimination of the individual mandate penalty in the 2017 TCJA invalidates the entire ACA. The Justices also spent an unexpected amount of time discussing a key procedural issue: whether the plaintiffs had suffered a legal injury sufficient to give them standing to sue in the first place.

If the Court's written opinion reflects the tenor of the oral argument, the impact of *California v. Texas* will be minimal. Even if the Court finds the individual mandate unconstitutional, this provision has been inoperative since the elimination of the penalty in 2017. If, as is expected based on the views shared by the Justices, it is found that the mandate is "severable" from the remainder of the ACA, the result will simply be the excision of a single (and now largely symbolic) provision.

Finally, if the Court does decide to invalidate provisions of the ACA beyond the individual mandate, Solicitor General Hawkins (on behalf of Texas and the states challenging the ACA) appeared to encourage the Court to "stay" the effect of such a decision "for an appropriate time to allow the states and political branches of the federal government an opportunity to accommodate [the] reliance interests" on those provisions. In other words, even in the unlikely scenario in which the Court

invalidates the entire law, we suspect any immediate effect will be delayed until Congress and the Administration can develop transition plans for the historic and far-reaching 2010 law.

STANDING

Perhaps the biggest surprise of the two-hour long oral arguments was the sheer amount of time devoted by the Justices to the threshold issue of Article III standing – that is, whether the states and individuals challenging the individual mandate had shown that they had suffered an actual or threatened harm sufficient to permit them to sue.

California argued that the lack of injury was obvious: when Congress eliminated any penalty associated with the individual mandate in the 2017 TCJA, the mandate became inoperative. In other words, neither the states (such as Texas) nor individual plaintiffs are harmed by the current individual mandate, because there is no longer any real or threatened penalty for failing to maintain minimum essential coverage. Not all of the Justices were clearly persuaded by this reasoning: Chief Justice Roberts, Justice Thomas, and Justice Kavanaugh all proffered colorful examples of hypothetical mandates without penalties (from a requirement to mow your lawn to a requirement to fly an American flag), and asked whether individuals aggrieved by those statutes would have standing to sue to overturn them. These three conservative Justices insinuated that individuals may be injured by the existence of a legal mandate even absent any real enforcement.

For Texas, Solicitor General Hawkins argued in favor of standing on the basis of "pocketbook" injury, contending that (1) individuals eligible for Medicaid are more likely to enroll and generate increased state expenditures; and (2) as large employers, states are required to comply with costly IRS reporting requirements (filing of 1095-B and -C forms) that stem at least in part from the individual mandate. Yet as Justice Thomas noted to Solicitor General Hawkins, "the individual mandate now has no enforcement mechanism, so it's really hard to determine exactly what the threat is of an action against you."

The Trump Administration argued a different theory of "standing by severability." As explained by Acting Solicitor General Wall, the injury here is that certain individuals want to purchase insurance plans that they can no longer purchase because of the ACA as a whole. On this novel theory, because the individual mandate is not severable from the rest of the ACA, and because provisions elsewhere in the ACA have resulted in the injury to these individuals, those individuals have standing to sue — notwithstanding that the provision of the ACA being *challenged* is not the provision of the ACA causing them *injury*.

It is perhaps no surprise that this "curious" (using the word of Justice Thomas) standing theory received a lion's share of attention during the oral arguments, and Chief Justice Roberts expressed significant skepticism, noting that this theory "really expands standing dramatically" by allowing "somebody not injured by the provision that needs challenging sort of roam around through those thousand pages and pick out whichever ones he wants to attack." Justice Kagan raised the concern that

this "standing by severability" argument could open up the floodgates to achieve standing to challenge nearly any piece of legislation so long as you first advance a theory of inseverability. As pointed out by Solicitor General Mongan, an individual regulated by the biosimilar or menu calorie count provisions of the ACA would presumably be able to challenge the individual mandate without showing that the mandate itself actually caused harm.

Given the skepticism expressed by the Justices for this novel theory, we expect standing will ultimately turn on whether the Court agrees (as the Fifth Circuit did) that the pocketbook injury of the states (as a result of IRS reporting costs and increased Medicaid enrollment) flow clearly from and are traceable back to the individual mandate.

CONSTITUTIONALITY OF INDIVIDUAL MANDATE

Despite being the main event, the Justices spent relatively little time examining whether the individual mandate is constitutional if the tax penalty is now zero. In 2012, the majority in *NFIB v. Sebelius* rejected the argument that the Commerce Clause justifies the individual mandate, holding instead that the mandate was a constitutional exercise of Congress's taxing authority. Justice Barrett, who publicly disagreed with Chief Justice Robert's taxing powers decision in *NFIB v. Sebelius*, zeroed in on what is likely to be the overarching opinion of the Court's conservative majority: "when Congress zeroed out the tax, it was no longer a tax because it generated no revenue, and, therefore, it could no longer be justified as a taxing power." Unless the Court agrees that the mandate (without a penalty) holds no real legal effect, we suspect a majority of the Court will likely find the individual mandate unconstitutional.

Texas and the challengers repeatedly emphasized the Court's previous reliance on Congress' taxing power to support the constitutionality of the individual mandate in *NFIB v. Sebelius*, and emphasized that a zero-dollar penalty cannot constitute a tax because it does not raise revenue for the government. Without proper taxing authority, Texas argued, the individual mandate is now an unconstitutional command. The Court's liberal wing clearly disagreed with this assessment, characterizing the penalty-less mandate instead as a mere hortatory statement. Justice Breyer noted that Congress often passes statutes with nominally mandatory language (such as "buy war bonds" or "plant a tree"), but that these provisions have never been held unconstitutional. Justice Kagan similarly noted that the only thing that changed between 2012 (when the Court upheld the individual mandate based on Congress' taxing power) and 2017 (when the TCJA eliminated the mandate penalty) is that the law became *less* coercive. "If you make a law less coercive," asked Kagan, "how does it become more of a command?"

Yet even the defenders of the ACA did not seem particularly focused on defending the mandate *per se.* Instead, arguing for the United States House of Representatives, Mr. Verrilli repeatedly suggested that *even if* the Court found the mandate unconstitutional, the Court's severability precedent limited any impact to just that provision. Justice Kavanaugh responded in kind, noting 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." This indifference by the defenders of the ACA to the future of the individual mandate is perhaps unsurprising, given that their case rests, in part, on the fact that the individual mandate without a penalty is already inoperative.

SEVERABILITY

The true stakes in *California v. Texas* rest on the issue of severability: whether or not the rest of the ACA can survive if the individual mandate is unconstitutional.

The three liberal Justices required little convincing that the mandate, if unconstitutional, was severable. However, the skepticism of several conservative Justices regarding the broad inseverability arguments from Texas and the challengers was striking. Justice Kavanaugh, for his part, appeared convinced, repeating to Solicitor General Hawkins a variant of his exchange with Mr. Verrilli: "looking at our severability precedents, 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, the provisions regarding preexisting conditions and the rest." Chief Justice Roberts had a similar observation to Solicitor General Hawkins: "I think it's hard for you to argue that Congress intended the entire Act to fall if the mandate were struck down when the same Congress that lowered the penalty to zero did not even try to repeal the rest of the Act. I think, frankly, that they wanted the Court to do that. But that's not our job."

In response, Texas repeatedly asserted that Section 1501 of the ACA — a legislative finding by Congress — was a functional inseverability clause. Section 1501 does indeed state that the individual mandate "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold." But as Chief Justice Roberts plainly put it, Section 1501 "doesn't look like any [in]severability clause anywhere else in the rest of the U.S. Code to me." Justice Kavanaugh seemed to dismiss this theory out-of-hand: "I'm sorry to interrupt, but inseverability clauses usually are very clear … Congress knows how to write an inseverability clause. And that is not the language that they chose here."

Still, the Respondents proffered several additional arguments, including the Obama Administration's reliance on Section 1501 in briefing *NFIB v. Sebelius* as establishing the centrality of the individual mandate. Justice Thomas did appear to see some merit in this argument, noting that this provision was previously viewed as the "heart and soul" of the ACA. But even Justice Alito seemed somewhat skeptical of whether the mandate remained central, noting that in 2012, "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."

The overall tone and tenor from a majority of the Justices seemed to indicate a reluctance to find unconstitutional any provision of the ACA other than the individual mandate.