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Supreme Court Leaves ACA in Place

On June 17, 2021, the Supreme Court of the United States (SCOTUS) rejected, for the third time, a legal challenge to the *Patient Protection and Affordable Care Act* (ACA). A 7-2 majority found that the two individual and 18 state plaintiffs did not have standing, stating, *"the plaintiffs…failed to show a concrete, particularized injury fairly traceable to the defendants' conduct in enforcing the specific statutory provision they attack as unconstitutional*."[1] The Court ruled only on the standing issue and thus declined to proceed and rule on the constitutionality of the Individual Mandate. This *Health Capital Topics* article will discuss the background and procedural history of the case, as well as the analysis contained in the Court's decision.

Background

The ACA's Individual Mandate[2] was previously litigated in the 2012 case, *National Federation of Independent Business* (NFIB) *v. Sebelius*, in which a 5-4 decision found the provision constitutional.[3] Chief Justice Roberts concluded that the Individual Mandate produced "*at least some revenue for the Government*," and was found to be valid under Congress's authority to tax and spend.[4] However, in 2017, Congress passed the *Tax Cuts and Jobs Act* (TCJA), which among other things, reduced the Individual Mandate penalty to zero dollars ($0) effective January 2019.[5] Setting the penalty to zero dollars under the TCJA arguably rendered the Individual Mandate unconstitutional because "*the Individual Mandate no longer carries a noncompliance penalty that produces revenue.*"[6]

Procedural History

In February 2018, Texas Attorney General Ken Paxton and a group of 20 Republican state attorneys general and governors sued the federal government asserting they had been harmed by the increased number of beneficiaries they had to support on state insurance.[7] The Texas Federal District Court deemed the ACA unconstitutional in its entirety.[8] The decision was then appealed to the U.S. Court of Appeals for the Fifth Circuit, which also found the Individual Mandate unconstitutional, but remanded the case to the district court for further review to determine which parts of the ACA could survive without the Individual Mandate.[9] The ruling to uphold the lower court's decision did not come as a surprise after the Trump Administration's Department of Justice (DOJ) filed a letter in the case in 2019,[10] arguing the Individual Mandate could not be severed from the rest of the ACA if the mandate was declared unconstitutional.[11]

The saga then continued with an appeal to SCOTUS to determine:

(1) The constitutionality of the Individual Mandate with its penalty of zero dollars for not purchasing health insurance; and,
(2) Whether the Individual Mandate, if determined to be unconstitutional, is severable from the rest of the ACA.[12]

Oral arguments for the case were heard by the justices in November 2020.[13] The questions asked of counsel during oral arguments indicated that the justices seemed to take issue with the fact that a mandate without a penalty could not be enforced; therefore, invalidating the Individual Mandate would not address the alleged injuries at hand.[14] Additionally, several justices expressed skepticism that the entire ACA must be invalidated if the Individual Mandate was determined unconstitutional. The main argument for severability came from Chief Justice Roberts, who noted that the 2017 Congress left the rest of the law intact when it passed legislation reducing the Individual Mandate's penalty to zero.[15] From the oral arguments, legal experts predicted that even if SCOTUS would have found the Individual Mandate unconstitutional, they would have still held that the mandate was severable from the rest of the ACA.[16]

In February 2021, the DOJ (now under President Biden) submitted a letter to SCOTUS wherein the agency retracted its previous opposition to the ACA and argued *for* the validity of the ACA's Individual Mandate. [17] The letter also supported the severability of the Individual Mandate from the rest of the ACA, in the event that SCOTUS found the provision unconstitutional.[18]

SCOTUS Ruling

The long-awaited fate of the ACA was decided by SCOTUS on June 17, 2021, with a 7-2 majority finding that none of the plaintiffs had faced any "cognizable" injury from the removal of the Individual Mandate's monetary penalties. The Court's decision reversed the Fifth Circuit's judgment, which had previously declared the ACA unconstitutional.[19]

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The majority opinion, written by Justice Breyer (with Chief Justice Roberts and Justices Sotomayor, Kagan, Kavanaugh, and Barrett joining, and with Justice Thomas concurring), found that none of the plaintiffs lacked legal standing to bring the lawsuit. In order to have standing to sue in federal court, plaintiffs must show that they have: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[20] The two individual plaintiffs claimed that their injury was "in the form of payments they have made and will make each month to carry the minimum essential coverage" required by the Individual Mandate.[21] The majority found that, even assuming the individual plaintiffs incurred this "pocketbook injury" (i.e., the first element of standing), they did not prove that this injury is traceable to the Individual Mandate, because the $0 penalty rendered the Mandate unenforceable.[22] Therefore, if the individual plaintiffs simply canceled their health insurance, there would be no repercussions, i.e., there is no government action (such as a penalty) that is traceable to the plaintiff's alleged injury of paying for insurance.

Further, the majority stated that the 18 state plaintiffs did not show any "past or future injury" surrounding the enforcement of the Individual Mandate without that monetary penalty.[23] The state plaintiffs claimed "pocketbook injuries" stemming from the increased use of Medicaid by state residents attempting to comply with the Mandate, which in turn resulted in more costs to the states.[24] However, the majority determined that the states did not demonstrate a clear link between the (unenforceable) Mandate and increased Medicaid enrollments.[25]

Because the majority concluded that none of the plaintiffs had legal standing, they were able to sidestep opining on the constitutionality of the Individual Mandate itself.

Justice Thomas, who wrote the dissenting opinion in the 2012 NFIB case, issued a concurring opinion in this case, agreeing with the dissent's opinion that the Mandate is unconstitutional because it goes beyond Congress's taxing power if there are no financial consequences.[26] However, Justice Thomas did not agree with the theory proffered by the dissent on the issue of standing (which theory is discussed further below), and thus agreed with the ultimate opinion reached by the majority.[27]

Justices Alito and Gorsuch dissented in the case, arguing that the plaintiffs do have standing sufficient to move onto analyzing the constitutionality of the Individual Mandate specifically, and the ACA as a whole. In a theory characterized by Justice Thomas as "standing through inseverability," the dissent argued that there are several provisions of the ACA (in addition to the Individual Mandate) that impose burdensome reporting and financial requirements, and because the Individual Mandate cannot be separated from the rest of the ACA, those provisions may also be taken into consideration in assessing standing. Upon a finding that the plaintiffs have standing, Justice Alito, the dissent's author, moved on to the merits of the plaintiffs' claims. The dissent argued that even if the Mandate was constitutional under Congress's taxing power prior to the TCJA (although Justice Alito dissented from this decision in the previous ACA cases), it is constitutional no longer, as it is no longer "produc[ing] at least some revenue for the Government," an "essential feature of any tax," as its tax penalty is now $0.[28] Further, citing to the reasoning set forth in the dissent within the 2012 NFIB case decision, the dissent asserted that, "to the extent the provisions of the ACA that burden the States are inextricably linked to the individual mandate, they too are unenforceable."[29]

Conclusion

The plaintiffs' lawsuit against the ACA is the "third installment in our epic Affordable Care Act trilogy"[30] since the 2010 passage of the law (in addition to the 70 times that Republicans have attempted to "repeal and replace" the ACA[31]). While most commentators assume this decision to be the ultimate end of this long-running saga, others have speculated as to other potential future legal challenges, considering the current conservative tilt of SCOTUS, and the Court's hints in the decision as to how to demonstrate standing in future legal challenges.[32] However, with the SCOTUS decision now in the rearview mirror, to ensure the ACA's security, President Biden and Congress are already looking to take steps to strengthen the ACA and close gaps in coverage,[33] shoring up the landmark healthcare law for decades to come.

1 "California, et al. v. Texas, et al." Case No. 19-840, June 17, 2021, available at: https://www.supremecourt.gov/opinions/20pdf/19-840_6jfm.pdf (Accessed 6/17/21), Majority, p. 19.

2 The ACA's Individual Mandate was a tax penalty of either $695.00 or 2.5% of a household's income (whichever was greater) on individuals who did not to have health insurance for at least 9 months during a calendar year, unless they were exempted. "National Federation of Independent Business v. Sebelius" 567 U.S. 519 (2012), p. 3.

3 "National Federation of Independent Business v. Sebelius" 567 U.S. 519 (2012), p. 64-65.

4 "Texas, et al. v. United States of America, et al." Case No. 4:18-CV-00167-O (N.D. Tex. December 14, 2018), Memorandum Opinion and Order, available at: https://oag.ca.gov/system/files/attachments/press-docs/211-texas-order-granting-plaintiffs-partial-summary-judgment.pdf (Accessed 6/9/21), p. 5-8.

5 "Tax Cuts and Job Act" Pub. L. No. 115-97, § 11081, 131 Stat. 2054, (December 12, 2017), p. 39; "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 6/7/21); "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 6/7/21).

6 Case No 19-10011, p. 10.

7 "Texas Judge Strikes Down Obama's Affordable Care Act as Unconstitutional" By Abby Goodnough and Robert Pear, The New York Times, December 14, 2018, https://www.nytimes.com/2018/12/14/health/obamacare-unconstitutional-texas-judge.html (Accessed 6/9/21);

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8 Case No 19-10011, p. 10.

9 "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 6/7/21); Keith, December 15, 2018; Case No 19-10011, p. 3.

10 "The Trump DOJ has taken an unexpected and unworkable position on the ACA" By Christen Linke Young, Brooking, September 18, 2019, https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2019/09/18/the-trump-doj-has-taken-an-unexpected-and-unworkable-position-on-the-aca/ (Accessed 6/17/21).

11 *Ibid*.

12 Keith, December 15, 2018.

13 "California, et al. v. Texas, et al. and Texas, et al. v. California, et al." Oral Argument Transcript, November 10, 2020, p. 1.

14 "Supreme Court Arguments: Even If Mandate Falls, Rest of Affordable Care Act looks Likely to Be Upheld" By Katie Keith, Health Affairs, November 11, 2020, https://www.healthaffairs.org/do/10.1377/hblog20201111.916623/full/ (Accessed 6/9/21).

15 "California, et al. v. Texas, et al. and Texas, et al. v. California, et al." Oral Argument Transcript, November 10, 2020, p. 62-63.

16 "Thoughts on Today's Oral Argument in California v. Texas—the Obamacare Severability Case" By Ilya Somin, Reason, November 10, 2020, https://reason.com/volokh/2020/11/10/thoughts-on-todays-oral-argument-in-california-v-texas-the-obamacare-severability-case/ (Accessed 6/9/21).

17 "Biden admin changes DOJ's position pending in Supreme Court ACA case" By Paige Minemyer, FierceHealthcare, February 10, 2021, https://www.fiercehealthcare.com/payer/biden-admin-changes-doj-s-position-pending-supreme-court-aca-case (Accessed 6/9/21); "Re: California, et al. v. Texas, et al., No. 19-840, and Texas, et al., v. California, et al., No. 19-1019" U.S. Department of Justice, February 10, 2021, accessible at: https://www.supremecourt.gov/DocketPDF/19/19-840/168649/20210210151147983_19-840%2019-1019%20CA%20v%20TX.pdf (Accessed 6/9/21), Majority, p. 1-2.

18 *Ibid*.

19 Case No. 19-840, p. 19.

20 "Spokeo v. Robins" 136 S. Ct. 1540, 1547 (2016).

21 *Ibid*, p. 5.

22 *Ibid*.

23 *Ibid*, p. 1.

24 The states presented two types of evidence in furtherance of their injury: (1) 21 declarations from states "about how new enrollees will increase the costs of state health insurance programs; and, (2) a 2017 Congressional Budget Office (CBO) report. The Court found that: (1) only four of the states' statements even alleged that the increased costs were attributable to the Mandate, and all four referred to that provision as it existed when the penalty was still enforceable; and, (2) the CBO report's statement that reducing the penalty to $0 would result in "only a small number of people" continuing to obtain health insurance out of a "willingness to comply with the law" was "predictive" in nature, and not sufficient to prove a link between the unenforceable Mandate and additional Medicaid beneficiaries. "California, et al. v. Texas, et al." Case No. 19-840, June 17, 2021, available at: https://www.supremecourt.gov/opinions/20pdf/19-840_6jfm.pdf (Accessed 6/17/21), Majority, p. 11-13 (citing "Repealing the Individual Health Insurance Mandate: An Updated Estimate" Congressional Budget Office, November 2017, p. 1).

25 Case No. 19-840, p. 3, 10-11.

26 *Ibid*, p. 3-5.

27 *Ibid*, p. 5-6.

28 *Ibid*, p. 32 (citing *NFIB*, 567 U.S., at 564).

29 *Ibid*, p. 4 (citing NFIB, 567 U.S., at 564).

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31 Republicans have led an estimated 70 attempts to repeal, modify, replace, or differently restrain the ACA since it became law in 2010. "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 6/17/21).

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