

CALIFORNIA V. TEXAS: ANALYSIS OF SUPREME COURT ORAL ARGUMENT

I. Executive Summary

On November 10, the United States Supreme Court (the “Court”) heard oral arguments in the case of *California v. Texas*. While the outcome of the case is far from certain, the Court made clear during these arguments that all three issues at stake – the standing of the plaintiffs (those seeking repeal of the mandate and the rest of the Affordable Care Act) to sue, the constitutionality of the mandate, and the severability of the mandate from the rest of the law – are open questions about which there is substantial debate among the Justices.

Two key developments stand out. First, while the attorneys for both sides did not intend to devote much time to the question of standing, the Justices believe it is a critical issue that must be resolved. Chief Justice Roberts called it an “important doctrine” and several Justices pressed the parties on whether the Court should even consider the constitutionality and severability issues because plaintiffs may have failed to demonstrate bona fide harm and thus a right to sue. In particular, the Justices also spent considerable time debating the novel “standing by inseverability” theory, explained in more detail below, which is a key plank of the plaintiffs’ standing argument.

The other key development was the apparently strong preference by Justice Kavanaugh and others to find that, if the individual mandate is deemed unconstitutional, which Kavanaugh repeatedly stated he believed it now is, then it should be severed from the rest of the ACA, allowing the remaining provisions to stand. Kavanaugh said he is “inclined to agree” that the mandate is severable and that it is “fairly clear” the Court should do so if it finds the provision to be unconstitutional.

Given the prominence of the standing and severability debates in today’s oral argument, and the posture in particular of Justices Roberts and Kavanaugh, we believe it is more likely than not the Court will allow the rest of the ACA to stand based on its holding on one of these issues, even if it finds the individual mandate to be unconstitutional. A decision will be delivered in 2021, as early as February and as late as June.

II. Legal Background

In 2012, the Supreme Court upheld the individual mandate provisions of the Affordable Care Act (the “ACA”) as a constitutional exercise of Congress’s taxing power. In the Tax Cuts and Jobs Act of 2017, Congress repealed the ACA’s tax-based penalty for violation of the mandate. In 2018, Texas and 19 other states, as well as two individuals, filed suit claiming that repeal of the tax-based penalty for the mandate eliminated the basis for the Court’s 2012 ruling and that, therefore, the individual mandate and the rest of the ACA are now unconstitutional.

In December 2018, the federal District court sided with the plaintiff states and ruled the mandate was now unconstitutional along with the rest of the ACA. One year later, a federal Appellate court agreed with regard to the mandate but referred the case back to the District judge to reconsider whether portions of the ACA could still stand.¹

There are three issues at stake in the case. First, there is a question of whether the plaintiff states and individuals have standing to sue over the constitutionality of the mandate because, given that there is no penalty for noncompliance, they have not suffered any bona fide harm. The Constitution only allows courts to adjudicate actual cases or controversies.² If the plaintiffs cannot demonstrate that the mandate has adversely impacted them, the Court could reject their claim before reaching the other issues in the case. The lower courts gave short shrift to this element.

The second issue is whether the repeal of the individual mandate’s tax penalty renders it unconstitutional. While this is the “meat” of the case, it appears to hinge on the relatively straightforward question of whether reducing the tax penalty to zero changes the Court’s holding in 2012 that the mandate is a valid exercise of Congress’s taxing power. Those who support upholding the mandate submit that, when Congress repealed the mandate, they clearly did not intend to render the mandate unconstitutional because they left it in place. Those who believe it should be stricken argue that, because the policy no longer raises any revenue, it is inappropriate to consider it a tax.

On the third issue of severability, the Supreme Court has recently expressed resistance to striking down additional aspects of a law based on the unconstitutionality of one provision.³ The precise standard for determining severability is not abundantly clear. The Court has recently presented two, related standards: (1) unconstitutional provisions are severable unless Congress would not have passed the rest of the law without them; and (2) unconstitutional provisions are severable unless other aspects of the law are not “capable of functioning independently” without the stricken provision.

¹ https://en.wikipedia.org/wiki/California_v._Texas

² <https://www.scotusblog.com/2020/11/symposium-no-injury-means-no-standing/>

³ <https://www.scotusblog.com/2020/07/a-scalpel-rather-than-a-bulldozer-severability-in-the-spotlight-as-the-newest-aca-challenge-looms/>

III. Highlights of Oral Argument

Michael Mongan, the Solicitor General for California, began the session by focusing on the constitutionality of the mandate and its severability from the rest of the law.

Chief Justice Roberts' first question related to standing. He inquired whether, if someone does not purchase insurance, they have violated the law even though they do not have to pay a penalty. In this exchange, Roberts appeared to demonstrate he believes the consumers in the case, at least, may have standing because violation of a law, in and of itself, can produce harm, such as if one is asked about their criminal record by an employer.

Justice Thomas also addressed the standing issue by saying that the issue of severability should be addressed in conjunction with it. This premise, known as "inseparability by standing," became a key focus of discussion throughout the oral argument.

In dialogue with Justices Breyer and Alito, Solicitor General Mongan asserted that conflating the standing and severability issues would be unprecedented in the Court's jurisprudence. He argued that ruling otherwise would set a precedent that the Court could find plaintiffs have standing based on elements of a law that are not at issue in the case at hand.

Justice Sotomayor appeared to assist Solicitor General Mongan by clarifying his point that, if plaintiffs felt harmed by other aspects of the ACA, they should have brought claims against those aspects rather than the individual mandate. Sotomayor then questioned whether the plaintiff states have standing based on their argument that increases in enrollment due to the mandate poses additional costs to them (especially, we assume, with regard to Medicaid). Mongan responded that the states had not presented valid evidence that their costs have in fact gone up due to the mandate, especially now that it has no penalty.

Justice Gorsuch suggested that the federal government could still bring an action against consumers who violate the individual mandate even if there is no tax penalty. Mongan disagreed, saying there is no real threat of such an action under the law. Mongan here cited the Court's presumption that Congress prefers statutes be upheld, quoting Justice Roberts that severability doctrine is a "scalpel rather than a bulldozer."

Justice Kavanaugh suggested the Court has ruled in other cases that a mandate to purchase an unwanted good is sufficient to establish standing. Mongan countered that there is not sufficient evidence to suggest that individuals have in fact felt compelled to purchase insurance due to the mandate.

Donald Verrilli, on behalf of the U.S. House Representatives, called on the Court to uphold the rest of the ACA as striking it would contradict Congress's intent. Justice Roberts responded by saying that, during passage of the ACA, supporters argued that the mandate was essential to the Act and questioned whether Congress's position has now changed. Verrilli said, in 2017, Congress did demonstrate it had changed its mind that the mandate could be repealed and the rest of the market would continue to function healthily.

Justice Alito returned to the issue of standing via inseverability. Verrilli responded that creating a presumption of inseverability at the standing stage would open up the Court to rendering advisory opinions, which the Constitution forbids.

Alito then questioned whether, in 2017, some members of Congress knew that striking the mandate would render the rest of the ACA unconstitutional and if the Court can infer that was in fact their intent. In response, Justice Sotomayor pointed out that there were efforts to repeal the entire ACA and that Congress failed to do that. She says this should be interpreted as evidence that Congress did not want the entire ACA to fall.

Sotomayor went on to claim that plaintiff states have failed to show evidence that their paperwork burden or other costs have increased since the mandate was repealed, which is essential to their claim of standing.

Justice Gorsuch turned to the merits of the constitutionality of the individual mandate given the repeal of the tax penalty. Verrilli said that, because the provision has been rendered inoperative, it doesn't require a constitutional basis to stand, though it could be deemed "necessary and proper" under the taxing power because it leaves it open to additional enforcement measures in the future.

Justice Kavanaugh stated that he is inclined to agree that the individual mandate should be severed from the rest of the ACA if it is deemed unconstitutional.

Texas Solicitor General Kyle Hawkins then delivered his opening arguments on behalf of the plaintiff states and consumers. Like Mongan, Hawkins bypassed the question of standing to address the questions of the constitutionality of the mandate and its severability from the ACA. He based his arguments on the text of the ACA in saying that the mandate has no basis in the Constitution and there is a finding in the law that Congress believe the mandate is essential and thus inseverable from the rest of the law.

Justice Roberts pushed back on the issue of severability by saying the fact that Congress did not repeal the rest of the ACA when it repealed the mandate penalty is evidence it did not believe the rest of the law should be invalidated. He said some may have hoped the Court would do that but, he said, "that's not our job."

Justice Thomas pushed on the issue of standing and Hawkins identified the plaintiffs have several bases for establishing their right to sue in this case.

Justice Breyer asserted that if the Court strikes down the mandate even though it has no penalty, then there are several other provisions of federal law that may be challenged because they are "hortatory," i.e., encouraging certain conduct but not forcibly compelling people to do anything *per se*. Hawkins argued the individual mandate is distinguishable from those other provisions.

Justice Alito returned to his thread that other aspects of the ACA do harm the states and that therefore they have standing, again appearing to support the theory of standing by inseverability.

Justice Sotomayor challenged the assertion that more people would sign up for the ACA coverage options now that the tax penalty has been repealed, which is essential to the plaintiffs' claim of harm and thus standing to sue.

Justice Kagan picked up a thread from Sotomayor that, in 2012, the Court upheld the mandate as constitutional. In 2017, she said, Congress has made the law less coercive, which she says contradicts the assertion that the provision is now less constitutional than it was before the mandate penalty was removed.

Hawkins stated that the Court is not bound by the 2012 decision because the mechanism for upholding the mandate is no longer in law. Kagan again retorted that it is difficult to conclude Congress made something more of an unconstitutional command by weakening or removing the enforcement penalty.

Justice Gorsuch picked up the issue of the merits of the mandate's constitutionality. He said Verrilli's argument is contingent on the possibility Congress will later decide to reinstate the tax penalty. Hawkins suggested this would imply that no provision could be stricken as an impermissible use of congressional power because it could always be enforced as a tax someday in the future.

Gorsuch raised the issue of standing by questioning whether the states or individual plaintiffs have already suffered harm. Hawkins pointed out that they have requested injunctive relief, the purpose of which would be to avoid the potential for harm in the future.

Justice Kavanaugh reiterated that it is "fairly clear" that precedent requires them to sever the mandate from the rest of the ACA. He said that the provisions plaintiffs claim constitute an inseverability clause in the ACA are not explicitly so and that they fail to meet the threshold for concluding Congress intended them to be such.

Justice Barrett returned to the question of standing for the individual plaintiffs. She asked Hawkins to explain how the defendant agencies are responsible for any "pocketbook" injury the individuals suffered to the defendant agencies (HHS, etc.) identified in the plaintiffs' brief. She also pressed on the issue of the states' standing as well.

Hawkins concluded by saying that, if the Court is unwilling to strike down the entire ACA, it should at least strike down the "three legged stool" of the law, which is a term applied by former President Obama and other supporters of the law to describe: (1) the individual mandate; (2) protections for people with preexisting conditions; and (3) subsidies to improve the affordability of insurance.

U.S. Solicitor General Jeffery Wall also relied on textual arguments to assert the plaintiffs' case. Chief Justice Roberts again returned to the issue of standing and cast doubt on the "standing by inseverability" argument. He called standing an "important doctrine."

Justice Thomas implied that the issue of severability should be settled by the text of the ACA itself, suggesting alignment with the plaintiffs' position. He also said it is distinct from the standing issue. Wall seemed to imply that the evidence of inseverability in the ACA is so overwhelming that it overcomes the presumption of severability and thus other aspects of the law are relevant to the question of standing.

Justice Kagan pressed Wall on the issue of standing, despite the fact the U.S. government has not taken a position on it. She questioned again the theory of “standing by inseverability” as opening the floodgates to lawsuits because it drastically expands standing doctrine. Wall pushed back that he does not believe that theory would prompt a rash of new lawsuits.

Kavanaugh again suggested he agrees on the merits of the constitutionality of the mandate but raised the issue of severability. He said “as you know, we have a strong background presumption of severability.” Wall responded by saying that there are no “magic words” required to establish an inseverability clause and that the findings in the ACA about the mandate are enough to constitute such a provision.