



UPDATED: Déjà Vu All Over Again: States Renew Constitutional Challenge to the ACA's Individual Mandate

Updated September 5, 2018

UPDATE: Oral arguments in this case are scheduled for September 5, 2018, in the U.S. District Court for the Northern District of Texas. Parties before the court include the state plaintiffs, the U.S. Department of Justice (DOJ) as defendants, and a different group of states as intervenors. The intervening states are arguing in favor of preserving the individual mandate and the rest of the ACA. In a June 7, 2018, [filing](#), DOJ stated that it would not defend the constitutionality of the individual mandate. DOJ further asserted that certain ACA insurance provisions should be struck along with the individual mandate, but that the remainder of the ACA should remain intact.

On February 26, 2018, a collection of attorneys general and governors from twenty states filed a federal [lawsuit](#) in *Texas v. United States*, arguing that Congress lacks the authority to impose an “[individual mandate](#)” to purchase health insurance. A well-known provision of the [Patient Protection and Affordable Care Act](#) (ACA) of 2010, the individual mandate is codified in the Internal Revenue Code (IRC) and imposes a financial penalty on certain individual taxpayers who do not maintain adequate health coverage for themselves and their dependents. In their lawsuit, the plaintiffs seek a declaratory judgment that the individual mandate does not fall within any of Congress’s enumerated powers and is, therefore, unconstitutional. Further arguing that the individual mandate cannot be severed from the broader ACA, the plaintiffs also seek an injunction against future implementation or enforcement of the Act’s regulatory scheme.

If you find yourself experiencing déjà vu after reading the preceding paragraph, it may be because the Supreme Court previously addressed the constitutionality of the individual mandate in its landmark 2012 decision in [National Federation of Independent Businesses \(NFIB\) v. Sebelius](#). The part of that case that addressed the individual mandate primarily focused on what constitutional provision gave Congress the authority to penalize individuals who did not purchase health insurance. By a narrow margin, the Court held that the individual mandate was *not* a valid regulation of interstate commerce, but *was* a valid exercise of Congress’s power to levy taxes. Chief Justice Roberts writing for himself, combined with a separate opinion jointly authored by Justices Scalia, Kennedy, Thomas, and Alito, explained that the power of Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with

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the Indian Tribes” presumes that there must be some type of activity to regulate in the first place. Therefore, while the Commerce Clause has served as the [constitutional basis](#) for a significant portion of the laws passed by Congress over the last 50 years that regulate “economic activity” (including health insurance and other aspects of the health care system), it does not bestow Congress with the authority to compel individuals to *become* active in commerce. Nonetheless, largely because the individual mandate imposed only a modest financial penalty that was projected to raise an appreciable amount of revenue, the Chief Justice, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, held that it was plausible to read the individual mandate as a constitutionally permissible tax under Article I, Section 8, Clause 1’s Taxing Clause.

In late 2017, the law that the *NFIB* Court examined changed in potentially significant ways. Most notably, Congress [lowered](#) the maximum penalty (beginning in 2019) for failing to comply with the individual mandate to \$0 as part of larger changes to the IRC. Plaintiffs in the new lawsuit argue that because the modified individual mandate cannot raise revenue, even theoretically, it is no longer plausible to characterize it as a tax. Furthermore, as the only remaining justification for the individual mandate, namely the Commerce Clause, was rejected by a majority of the Supreme Court in *NFIB*, the plaintiffs argue that this amendment has consequently rendered the individual mandate unconstitutional.

Before the issue of Congress’s legislative authority may be examined, it may be debated whether the federal court in which the lawsuit was filed has jurisdiction to decide these issues in the first place. Namely, the state plaintiffs in *Texas* must convince the court that they have standing to bring the legal action. Standing requirements stem from [Article III](#) of the Constitution and generally concern who is a proper party to seek relief from a federal court. These requirements compel a plaintiff to demonstrate, among other things, an injury that is “[concrete and particularized](#),” in order to “[ensure that the plaintiff has a personal stake in the outcome of the controversy](#).” The Supreme Court has also [held](#) that a state may have standing to sue the federal government in cases where the state has adequately alleged an injury. In *Texas*, the state plaintiffs have generally asserted that the individual mandate and other ACA provisions harm the states by detrimentally impacting their insurance markets and burdening them with costs associated with the Medicaid, the State Children’s Health Insurance Program (CHIP), as well as the federal employer mandate.

In the earlier challenges to the constitutionality of the individual mandate, two courts of appeals addressed the issue of whether state plaintiffs had standing to sue. In *Florida v. HHS*, the case later accepted by the Supreme Court as *NFIB*, plaintiffs consisted of a group of 26 states, certain private individuals, and a small business association. The state plaintiffs in *Florida* generally argued that they had standing to challenge the individual mandate because, among other things, compliance with the mandate would lead to an increase in Medicaid enrollment and drive up the state’s share of the program’s costs. The Eleventh Circuit declared that while the question of whether the state plaintiffs could challenge the individual mandate was an “interesting and difficult one,” it was a question that did not need to be addressed. Because it was clear that the other plaintiffs in the case had standing to file the lawsuit, there was no need to examine whether the states’ had standing in the case.

In contrast, the Fourth Circuit in *Virginia ex rel. Cuccinelli v. Sebelius* determined that it could not evaluate the constitutionality of the individual mandate because the Commonwealth lacked standing to challenge the provision. The case was brought in conjunction with the Virginia Health Care Freedom Act, a state law declaring that Virginia residents cannot be required to obtain or maintain a policy of health insurance coverage. The court explained, among other things, that the individual mandate imposes no obligation on the Commonwealth, and, therefore, it suffered no injury to warrant bringing the claim. The court also rejected Virginia’s argument that the individual mandate impermissibly conflicts with the state law, explaining that because the only apparent function of the Commonwealth’s act is to immunize its citizens from compliance with federal law, there is no “concrete interest in the ‘continued enforceability’” of the act. As the appeals court further explained, “only when a federal law interferes with a state’s

exercise of its sovereign ‘power to create and enforce a legal code’” does the law cause the state to have the requisite injury needed for standing.

It is possible that the *Florida* and *Virginia* cases may be of little precedential value, particularly given there are no individual plaintiffs in *Texas*, nor do the plaintiff states allege that particular state laws analogous to the Virginia Health Care Freedom Act are at issue. Additionally, while the reviewing court may find these earlier decisions to be instructive, they are not binding on the court in the Fifth Circuit, and it may choose to address these issues differently. For example, the state plaintiffs challenging the individual mandate may point to the Fifth Circuit’s 2015 decision in *Texas v. United States*. In that case, a divided panel held that a state’s increased costs in issuing drivers licenses to individuals whose deportation was to be deferred pursuant to a federal agency memorandum can constitute injury for purposes of establishing standing to challenge that memorandum.

Turning to the merits of the *Texas* case—i.e., whether the individual mandate is constitutional, in *NFIB* and earlier cases, the Supreme Court has previously considered whether an *increase* in tax liability can become so extensive that “it loses its character as [a tax] and becomes a mere penalty with the characteristics of regulation and punishment.” However, there is a dearth of case law examining Congress’s authority to uniformly *reduce or eliminate* taxpayers’ liability, most likely because it is unclear what plaintiffs would have suffered an injury and therefore have standing to challenge such reduction. Nevertheless, to the extent that raising revenue has been described as “the essential feature of any tax,” the elimination of any possibility of deriving federal revenue from its operation would seem to argue against the individual mandate’s characterization as a tax. If the individual mandate can no longer be fairly construed as a tax, the validity of the individual mandate then would depend upon whether Congress has the authority to enact such a provision based on another of Congress’s enumerated powers, such as the Commerce Clause. Plaintiffs argue that the constitutionality of the individual mandate under the Commerce Clause is a settled question, answered in the negative by a majority of justices in *NFIB*. It remains to be seen how the Trump Administration will respond to these arguments.

Assuming a reviewing court finds that the state plaintiffs may challenge the individual mandate and that the individual mandate lacks a constitutional basis, the court may then confront the question of whether the provision can be severed from the rest of the ACA. Severability explores whether the *constitutional* parts of a statute can stand on their own, after other provisions have been identified as unconstitutional. The severability analysis *described* by the Supreme Court asks two questions. First, do the remaining provisions still operate as intended by Congress? Second, would Congress have enacted the remaining provisions without the offending provision? If the answer to either of these questions is negative, then the nonseverable provisions must also fall with the unconstitutional ones.

In *NFIB*, a majority of the Justices found the individual mandate to be constitutional and therefore did not have an opportunity to reach the question of whether the individual mandate could be severed from the rest of the Act. The four dissenting Justices who did consider the individual mandate to be unconstitutional also concluded that it could not be severed from the rest of the ACA and would have invalidated the entire Act. In defending the individual mandate at the time, the Solicitor General had *argued* that, if it were nevertheless found to be unconstitutional, only certain major provisions of the ACA reforming health insurance regulation should be found to be non-severable from the individual mandate. In this new challenge to the individual mandate, one question that may be raised is whether the recent actions by Congress in reducing the financial penalty for violating the individual mandate to zero would suggest that Congress intended for the rest of the ACA to operate without enforcement of the individual mandate. In light of these reasons, a court addressing severability may conclude that an unconstitutional individual mandate can be severed from the rest of the ACA.

On April 9, 2018, attorneys general from sixteen other states and the District of Columbia filed a [motion](#) to intervene in the suit in support of preserving the ACA. A response from the Trump Administration is currently [due](#) towards the end of April.

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