

ROUND THREE: THE SUPREME COURT TAKES UP THE AFFORDABLE CARE ACT

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INTRODUCTION

The Patient Protection and Affordable Care Act (ACA) was signed into law by President Obama on March 23, 2010.¹ The individual mandate² requirement of the ACA was immediately challenged³ on constitutional grounds. On June 28, 2012, the United States Supreme Court found the individual mandate was not constitutional under either the Interstate Commerce clause or the Necessary and Proper clause but constitutional under the Tax and Spending clause.⁴ The ACA was subsequently challenged on the statutory grounds that the IRC section 36B premium tax credits for ACA insurance were not available in those States that relied upon federally established health insurance exchanges. On June 25, 2015, the Supreme Court rejected the arguments that the credits were restricted to only those health insurance exchanges established by a State.⁵

On December 14, 2018, the District Court for the Northern District of Texas held the individual mandate to be unconstitutional⁶ because the “shared responsibility payment”⁷ was reduced to zero after December 31, 2018 as a result of the Tax Cuts and Jobs Act (TCJA).⁸ The District Court found that, since the individual mandate could not be severed, the entire ACA⁹ was unconstitutional.¹⁰ This decision was appealed to the United States Court of Appeals for the Fifth Circuit. On December 18, 2019, Fifth Circuit affirmed in part and vacated in part the District Court’s grant of partial¹¹ final judgment.¹² The Fifth Circuit agreed that

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¹ Pub L No 111-148, 124 Stat 119 (2010) amended by the Health Care and Education Reconciliation Act of 2010, Pub L No 111-152, 124 Stat 1029 (2010).

² 26 U.S.C. § 5000A(a).

³ *National Federation of Independent Business v. Sebelius*, 567 US 519, 540 (2012). (“On the day the President signed the [ACA] into law, Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida.”).

⁴ *Id.*, However, the Court also held that the Medicaid expansion provisions were unconstitutional.

⁵ *King v. Burwell*, 576 US 988 (2015)

⁶ *Texas v. United States*, 340 F. Supp. 3rd 579 (N.D. Texas 2018).

⁷ 26 U.S.C. § 5000A(b).

⁸ Pub. L. 115-97, 131 Stat. 2054 (2017).

⁹ Pub. L. 111-148, 124 Stat. 119 (2010).

¹⁰ The District Court denied the application for a preliminary injunction and stayed judgment pending appeal. Thus, the ACA remains in full force and effect until this case is fully resolved.

¹¹ The original complaint has five counts each seeking declaratory relief under different legal theories. The District Court addressed Count One in its opinion but did not address the issues raised in Counts Two through Five.

¹² *Texas, et al. v. United States, et al.*, No. 19-10011 (Dec. 18, 2019). <https://casetext.com/case/texas-v-united-states-31>.

the individual mandate was unconstitutional because a zero tax rate was not a valid exercise of Congress' power to tax. However, the Fifth Circuit ordered a remand for the District Court to reconsider whether the unconstitutional portions of the ACA could be severed from the otherwise constitutional portions of the ACA.

On March 2, 2020, the United States Supreme Court granted a Petition for Writ of Certiorari considering an appeal from the decision of the United States Court of Appeals for the Fifth Circuit finding the ACA to be unconstitutional.¹³ The Court agreed to consider three issues:

Whether the individual and state plaintiffs in this case have established Article III standing to challenge the minimum-coverage provision in Section 5000A(a) of the ACA;

Whether reducing the amount specified in Section 5000A(c) to zero rendered the minimum-coverage provision unconstitutional; and

If so, whether the minimum-coverage provision is severable from the rest of the ACA.

This article will examine the history of the individual mandate as originally enacted in the ACA and subsequently interpreted by the United States Supreme Court.¹⁴ Additionally, we will address the effect of the 2017 amendment to the shared responsibility payment (Issue Two) and the Fifth Circuit's reasoning regarding severability (Issue Three). We will not address the question of Article III standing (Issue One).¹⁵

THE INDIVIDUAL MANDATE

Section 5000A(a) provides that “[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.” This provision is commonly-known as the individual mandate. Section 5000A(b) provides that applicable individuals who fail to secure minimum essential coverage for any given month that “there is hereby imposed on the taxpayer a penalty with respect to such failures.” This provision is known as the shared responsibility payment. Section 5000A(c) provided that the shared responsibility payment was originally to be assessed at the greater of either \$695 or 2.5% of taxable income.

Some individuals were exempt from the individual mandate including resident aliens and incarcerated individuals.¹⁶ Section 5000A(e) exempted five categories of individuals from the shared

¹³ <https://www.scotusblog.com/case-files/cases/california-v-texas/>

¹⁴ *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012); *King v. Burwell*, 135 S. Ct. 2480 (2015).

¹⁵ The standing issue is procedural with a very low threshold. As long as at least one plaintiff has standing, the case can proceed. The authors do not believe that this issue will be dispositive in this case.

¹⁶ 26 U.S.C. § 5000A (d) (3), (4).

responsibility payment but not the individual mandate. These individuals were required to have health insurance coverage but were not subject to the penalty for a failure to comply. This group included “[i]ndividuals who cannot afford coverage.”¹⁷

The individual mandate was one of three fundamental legs to the transformational change to the United States private health insurance system. The individual mandate was intended to mitigate the issue of adverse selection by broadening the health insurance risk pool to include more low-risk healthy individuals. Adverse selection is the increased tendency of higher-than-average risks to purchase insurance while lower-than-average risks avoid purchasing insurance until they become average or higher-than-average risks. The inclusion of more low-risk healthy individuals into the risk insurance pool by way of the individual mandate created a source of revenues for the insurers to cover the cost of two other fundamental changes: guaranteed-issue and community-rating.

Guaranteed-issue addressed the problem of insurers denying health insurance coverage to individuals with pre-existing conditions. Community-rating addressed the problem of pricing insurance to reflect individual risk factors based upon age, sex, health status, or other factors. The ACA required insurers to price their policies within a 3 to 1 band, that is, the highest premium for a given policy could not be more than three times the premium cost for the lowest priced premium. Community-rating lowered the premiums for high-risk insureds and increased the premiums for low-risk individuals. Health care expenses for the elderly are greater than that of young adults by a factor of 4.8.¹⁸ Guaranteed-issue and community-rating combined to increase the health insurance premiums for young healthy adults beyond the actual underwriting costs for this group while lowering the premium costs for the elderly and the sick.

The first case challenging the constitutionality of the ACA to reach the United States Supreme Court was *National Federation of Independent Businesses v. Sebelius*.¹⁹ Those challenging the ACA claimed that the individual mandate exceeded Congress’s enumerated powers. The government responded that Congress was empowered to enact the individual mandate under either the Interstate Commerce clause²⁰ or the Tax and Spending clause.²¹

¹⁷ 26 U.S.C. § 5000A (e) (1).

¹⁸ Alice Burns & Philip Ellis, *Private Health Insurance Premiums and Federal Policy*, Congressional Budget Office, Feb. 2016. <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51130-Health_Insurance_Premiums.pdf>

¹⁹ 567 U.S. 519 (2012).

²⁰ U.S. Const., art. 1, § 8, cl. 3.

²¹ *Id.*

A majority of the Supreme Court concluded that the individual mandate exceeded the power of Congress under the Interstate Commerce clause. The court reasoned that Congress could regulate activity once an individual chose to participate in Interstate Commerce. However, if an individual chose to not participate in Interstate Commerce by simply doing nothing, Congress did not have the power under this clause to force individuals to engage in commerce, that is, purchase a health insurance policy.²² The power to regulate commerce did not include the power to compel it.²³ On this issue, the Court majority consisted of Chief Justice Roberts who authored the opinion and joint dissenters consisting of Justices Scalia, Kennedy, Thomas, and Alito.

A majority of the Supreme Court concluded that the individual mandate was permissible within the power of Congress under the Tax and Spending clause. On this issue, the Court focused on the shared responsibility payment of section 5000A(b) and viewed the individual mandate of section 5000A(a) as a mere predicate to the imposition of a tax. The shared responsibility payment was considered to be a tax for a number of reasons. The payment was paid into the United States Treasury when individuals filed their tax returns. The amount of the payment was determined by familiar factors including taxable income, the number of dependents, and filing status. The requirement was found in the Internal Revenue Code and enforced by the Internal Revenue Service. Finally, the Court observed that the shared-responsibility payment yielded the essential element of any tax – “[i]t produces at least some revenue for the Government.”²⁴ On this issue, the Court majority consisted of Chief Justice Roberts who authored the opinion and Justices Ginsberg, Breyer, Sotomayer and Kagan.

On December 22, 2017, the Tax Cuts and Jobs Act (TCJA) was signed into law. This legislation was passed through the budget reconciliation process, which limits congressional action to fiscal matters. The TCJA reduced the shared responsibility payment to zero.²⁵ However, no other action was taken with respect to the ACA. The TCJA amendment reducing the shared responsibility payment to zero framed the primary issue in *Texas v. United States* – whether the individual mandate was constitutional under the Tax and Spending clause as a predicate to a tax when the shared responsibility payment, the underlying tax, was reduced to zero?

²²567 U.S. 519 (2012). Chief Justice Roberts observed, if the individual mandate were a proper use of the power to regulate interstate commerce, that power would “justify a mandatory purchase to solve almost any problem.” *Id.* at 553 (Roberts, C.J.). If Congress can compel the purchase of health insurance today, it can, for example, micromanage Americans’ day-to-day nutrition choices tomorrow. *Id.* (Roberts, C.J.); see also *id.* at 558 (Roberts, C.J.) (reasoning that, under an expansive view of the Commerce Clause, nothing would stop the federal government from compelling the purchase of broccoli).

²³ 567 U.S. 519, 555 (2012).

²⁴ 567 U.S. 519, 564 (2012) citing *United States v. Kahriger*, 345 U.S. 22, 28 n.4 (1953).

²⁵ Pub. L. No. 11597, § 11081, 131 Stat. 2054, 2092 (2017); see also 26 U.S.C. § 5000A(c).

The TCJA continued to impose the individual mandate on all applicable individuals, but now exempted everyone from any financial obligation under the shared responsibility payment. The individual mandate has never been viewed as a tax. Rather, the individual mandate was considered a condition – failing to purchase health insurance – that triggered a tax, the shared responsibility payment. The District Court concluded that the individual mandate could no longer be sustained under the Tax and Spending clause when the condition – failing to purchase health insurance – no longer triggered a tax. The District Court identified the four factors defining a “tax” discussed in *National Federation of Independent Businesses v. Sebelius*. Since the shared responsibility payment produced no revenue for the government, it could no longer be considered a “tax.” Thus, the predicate to this tax – the individual mandate – was no longer permissible. The power of Congress under the Tax and Spending clause is limited to requiring an individual to pay money into the Federal Treasury, no more.²⁶

A majority of the Fifth Circuit panel agreed that the individual mandate could not be sustained under the Tax and Spending clause after the shared responsibility payment had been reduced to zero. The majority examined the four reasons that were the original basis for finding the individual mandate constitutional under the Tax and Spending clause. The individual mandate coupled with the shared responsibility payment:

1. Produced some revenue for the government;
2. Paid to the Treasury when they filed their income tax returns;
3. The amount owed was determined by such familiar factors as taxable income, number of dependents, and joint filing status; and
4. The requirement to pay was found in the Internal Revenue Code and enforced by the IRS, which collected it in the same manner as taxes.

The Fifth Circuit majority held that none of these four attributes were present after the shared responsibility payment had been reduced to zero. The defendants claimed that the shared responsibility payment continued to possess the potential to produce revenue because a future Congress could reintroduce a rate above zero. The Court rejected this argument on the grounds that the proper exercise of power under the Tax and Spending clause required the actual production of revenue and not simply the potential for producing revenue.²⁷

Judge King, writing a dissenting opinion in the Fifth Circuit decision, rejected the argument that the individual mandate required a constitutional foundation. The dissent reasoned that “the real question

²⁶ 567 U.S. 519, 574 (2012).

²⁷ The majority also rejected different scenarios involving the argument that potential rather than actual revenue was sufficient under the Tax and Spending clause. These scenarios involved taxes which are still in the Internal Revenue Code but no longer enforced (excise tax on machine guns after machine guns became illegal), taxes which have been temporarily suspended or taxes with a delayed start date.

is whether Congress exceeds its enumerated powers when it passes a law that does nothing.”²⁸ Since individuals have always had the choice to either purchase health insurance or else pay zero dollars, the individual mandate was a suggestion rather than a command. Congress exercises its legislative power only when it alters the legal rights and duties of persons.²⁹

Judge King stated that “[u]nder the old scheme, applicable individuals could lawfully choose between maintaining health insurance and paying a tax. Under the new scheme, applicable individuals can lawfully choose between maintaining health insurance and doing nothing. In other words, the coverage requirement is a dead letter – it functions as an expression of national policy or words of encouragement, at most.”³⁰ In short, the individual mandate is an option rather than a command.

The majority refused to view the individual mandate as anything other than a command. The original scheme involved a command coupled with the option of paying a tax to avoid obeying the command. This scheme was permissible under the Tax and Spending clause. The new scheme involved a command coupled with a zero rate tax to avoid obeying the command. The majority reasoned that Congress could not expand its enumerated powers under the Tax and Spending clause through the pretext of a zero rate tax. Since there was no constitutional basis for Congress to mandate the purchase of health insurance, the majority agreed with the District Court that the individual mandate was unconstitutional.

SEVERABILITY

Once the District Court determined that the individual mandate was unconstitutional, the Court then had to address the question of whether individual mandate could be severed from the balance of the ACA leaving the remaining parts intact. The doctrine of severability is rooted in the separation of powers.³¹ Courts should “try to limit the solution to the problem”³² and “refrain from invalidating more of a statute than is necessary.”³³

The District Court examined the question of whether the ACA could function in the manner intended by Congress without the individual mandate. This issue turns on Congressional intent – would Congress have passed the ACA without including the individual mandate? The

²⁸ *Texas, et al. v. United States, et al.*, No. 19-10011 (Dec. 18, 2019). <https://casetext.com/case/texas-v-united-states-31>, at 79.

²⁹ Citing, *INS v. Chadha*, 462 U.S. 919, 952 (1983).

³⁰ *Texas, et al. v. United States, et al.*, No. 19-10011 (Dec. 18, 2019) <https://casetext.com/case/texas-v-united-states-31>, at 84.

³¹ *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329-330 (2006).

³² *Id.*, at 328

³³ *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984).

text of the ACA included findings explaining the reasoning behind the individual mandate.³⁴ The Court noted that findings included in the statute carried greater weight than legislative history as these findings underwent the Constitution’s requirements of bicameralism and presentment – both houses of Congress agreed with the findings and they were signed into law by the President.

The findings included in the ACA clearly state that the individual mandate was intended to increase the participants in the health insurance pool describing the individual mandate as an essential part of the larger Federal regulation of the health insurance market.³⁵ The individual mandate was required to minimize the issue of adverse selection, broaden the health insurance risk pool and establish effective markets that included guaranteed-issue and community-rating.

In *NFIB*, Chief Justice Roberts recognized that guaranteed-issue and community-rating would impose new costs on insurers and exacerbate the problem of healthy individuals foregoing health insurance.³⁶ He described the individual mandate as the “Congressional solution” to these problems.³⁷ Justice Ginsberg, joined by Justices Breyer, Kagan, and Sotomayer, wrote that “Congress devised a three-part solution,”³⁸ guaranteed-issue, community-rating, and the individual mandate. The District Court concluded that “[w]ithout the individual mandate, the guaranteed-issue and community-rating provisions ‘could not work.’”³⁹

The United States Supreme Court had a second occasion to review the ACA in *King v. Burwell*.⁴⁰ The majority noted that health insurance reforms initiated by the States that did not include an individual mandates “led to an economic ‘death spiral’” and that “guaranteed issue and community rating requirements would not work” without the individual mandate.⁴¹ The District Court observed that between the decisions in *NFIB* and *King*, all nine Justices had agreed that the guaranteed-issue and community-rating could not work without the individual mandate. The District Court concluded that the individual mandate could not be severed from the ACA and, therefore, the entire ACA was unconstitutional.

The Fifth Circuit majority adopted a more nuanced approach to the issue of severability suggesting that the appropriate tool would be a scalpel rather than an axe preferring a salvage effort rather than a demolition operation.⁴² The Court observed that the issue of severability

³⁴ 42 U.S.C. §18091.

³⁵ 42 U.S.C §18091(2)(H).

³⁶ 567 U.S. at 547-548.

³⁷ *Id.*, at 548.

³⁸ *Id.*, at 597.

³⁹ *Texas v. United States*, 340 F. Supp. 3rd 579, 611 (N.D. Texas 2018).

⁴⁰ 135 S. Ct. 2480 (2015)

⁴¹ *Id.*, at 2485-2487 (2015)

⁴² *Texas, et al. v. United States, et al.*, No. 19-10011 (Dec. 18, 2019). <https://casetext.com/case/texas-v-united-states-31>, at 47.

involved the nebulous task of inquiring into hypothetical Congressional intent. This task is further exacerbated with the ACA, which involves a sprawling and amended statutory scheme⁴³ that spans over 900 pages of legislative text and is divided into ten titles.

The Plaintiffs addressed this initial classification problem by dividing the ACA into three categories:

1. The three intertwined core provisions – individual mandate, guaranteed-issue requirement, and community-rating requirement;
2. The other major provisions dealing with insurance regulations and taxes; and
3. The minor provisions of the ACA.

The Fifth Circuit rejected the portion of the district court opinion invalidating the entire ACA because it did not explain with precision how particular portions of the ACA rise or fall on the constitutionality of the individual mandate. The District Court opinion focused on the 2010 Congress’ labeling of the individual mandate as essential to its goal of “creating effective health insurance markets.”⁴⁴ The majority ordered a remand instructing the District Court to address the ACA’s provisions with specificity and consider how the individual mandate fits within the post-2017 regulatory scheme of the ACA.

Judge King, in dissenting, agreed that the District Court was flawed on the issue of severability but contended that a remand on this issue was unnecessary. Judge King observed that the ACA contained ten titles and only the first title dealt with private health insurance. The relevant inquiry was whether the ACA remains fully operative without the invalid provisions. Further, partial invalidation, rather than facial, would be the appropriate course. While the District Court framed the community-rating and guaranteed-issue provisions as intrinsic to the coverage requirement, Judge King disagreed. In zeroing-out the shared responsibility payment with the TCJA, Congress either concluded that healthcare markets under the ACA had reached a point of stability at which they no longer needed an effective coverage requirement or it chose to accept the negative side effects of effectively repealing the coverage requirement as a cost of relieving the burden it placed on applicable individuals. In sum, the dissent concluded that the individual mandate was severable from the balance of the ACA. The ACA could stand without the individual mandate. The dissent concluded that a remand to address severability was unnecessary.

CONCLUSION

⁴³See, e.g., Medicare and Medicaid Extenders Act of 2010, Pub. L. No. 111-309, 124 Stat. 3285 (2010); Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38 (2011); Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (2015); Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (2018).

⁴⁴ 42 U.S.C. § 18091(2)(I).

The opinions issued by District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit are grounded upon the constitutional limits to the powers of the United States Congress. The United States Supreme Court has held that Congress does not have the power to require individuals to purchase a product or service under the Interstate Commerce clause. The power to regulate activity does not include the power to regulate inactivity. Further, while the individual mandate was constitutional under the Tax and Spending clause when coupled with a tax, that is, the shared responsibility payment, the Fifth Circuit found that there is no tax when the tax rate is reduced to zero. The counterargument is that a command without consequences is a mere suggestion, which does not require the exercise of any enumerated powers. The United States Supreme Court is expected to resolve whether the individual mandate is a command which must be premised upon an enumerated power.

The individual mandate was one of the three critical legs of the ACA. The other two legs were guaranteed-issue, that is, eliminated pre-existing conditions as a basis for underwriting insurance, and community-rating, that is, narrowing the premium band between high-risk insureds and low-risk insureds. It is unclear whether these two legs will work in the absence of a mandate because of adverse selection, that is, low-risk insureds will not purchase health insurance until they get sick, which will eliminate the source of revenue needed to cover the cost of the high-risk insureds. Without the individual mandate, the District Court found the entire Patient Protection and Affordable Care Act to be unconstitutional. The Fifth Circuit rejected such a broad conclusion and ordered a remand on the issue of severability. The United States Supreme Court agreed to hear the case rather than wait for the District Court to reexamine the severability issue.