Health Care ADVISORY

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Supreme Court Review of the Affordable Care Act

Oral arguments before the Supreme Court on the constitutionality of the Affordable Care Act (ACA) drew the attention of the nation last week. The Supreme Court allocated six and a half hours, over three days, to hear arguments on four issues. The following provides a high-level summary of the issues under review and highlights from the oral arguments. While the comments and questions of the justices may be indicative of their thinking, we caution against reading too much into the questions and comments from the bench.

I. Standing: Applicability of the Anti-Injunction Act

Issue before the Court: Does the Supreme Court have the authority to consider the constitutionality of the "individual mandate," given that penalties for non-compliance do not take effect and would not be paid until 2015? The central issue is whether the penalty for not purchasing insurance is a "tax." The Anti-Injunction Act (AIA), a federal law enacted in 1868, provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." It generally requires that the taxpayer pay the tax before being able to challenge it. If the Court determines that the penalty is a tax, the AIA may, thus, prohibit the Court from ruling on the constitutionality of the individual mandate until 2015 or later. However, the Court could, as it has in "extraordinary cases" in the past, recognize the government's waiver of the AIA's application and proceed.

Challengers' position: None of the parties in the two principal cases before the Court, the National Federal of Independent Business (NFIB), the several individuals, or the collection of 26 states challenging the law, believes that the AIA has applicability to this case. They point out there is the individual mandate that requires all individuals to purchase health insurance or otherwise have minimum essential coverage and a separate enforcement provision that applies a penalty to individuals who do not comply with the mandate. They maintain that they have raised an objection to the mandate itself, not to the penalty for non-compliance. They also do not believe that the penalty is a tax; if the penalty was a tax, they maintain it would be an unconstitutional direct tax. The states also point out that the AIA cannot bar their challenge to the individual mandate because it does not apply to the states as sovereigns; the states would also fall into an exception from the AIA recognized by the Supreme Court.

Administration's position: The Affordable Care Act (ACA) does not call the penalty a "tax," and the administration argues in this context that words matter. If Congress had used the word "tax," the AIA could bar consideration of this issue until 2015. However, Congress used the word, "penalty" and the fact that the penalty is administered through the federal tax system is not dispositive for purposes of application of the AIA.

Highlights from oral arguments: The Court appointed outside counsel to argue that the AIA bars consideration of the case, given that neither the law's challengers nor the administration believes that it does. Robert Long, the attorney appointed by the Court, argued that the AIA applies to virtually every "tax penalty" in the Internal Revenue Code and there are at least three reasons to believe Congress intended it to apply here. First, per Section 5000A of the ACA, the penalty is to be "assessed and collected in the same manner as taxes." Second, the penalty is included in individual taxes for assessment purposes. Third, the penalty bears the key indicia of a tax.

Overall, the Court seemed skeptical of the AIA's application to the individual mandate penalty. Chief Justice John Roberts raised the issue of whether the AIA is "jurisdictional" in nature: if it is, the Court may not proceed, regardless of whether the government raises the AIA as a defense. The Court's jurisprudence on this point is inconsistent, and Chief Justice Roberts pointed out that the Court has permitted the government to waive the application of the AIA in several cases. Justice Stephen Breyer and Justice Ruth Bader Ginsburg both opined that the AIA's purpose is to prevent interference with revenue-raising measures and the penalty is not a revenue source—if everyone complies with the law, no revenue will be raised through the penalties. Justice Samuel Alito took the government's counsel, Solicitor General Donald Verrilli, to task for arguing on day-one of oral arguments that the penalty is not a tax—so the case should be permitted to proceed—while simultaneously planning to return the next day to argue that the individual mandate is a constitutional exercise of Congress's taxing and spending power. He asked Verrilli whether there has been a time when the Court found something to be a tax for the purposes of Congress's taxing power, but not for purposes of the AIA. Verrilli responded that it had not.

II. Constitutionality of the Individual Mandate

Issue before the Court: Whether the federal government, through its authority to regulate commerce under the Constitution's "Commerce Clause," can require Americans to obtain health insurance by January 1, 2014, or pay a penalty. The ACA amended the Internal Revenue Code to require individuals to maintain minimum essential coverage beginning in 2014. Individuals who fail to maintain coverage would be subject to penalties, to be collected in conjunction with annual tax filings. This provision is commonly referred to as the "individual mandate" and its constitutionality has been viewed by many as the central question before the Court.

Challengers' position: The parties challenging the law argue that the Commerce Clause does not authorize Congress to compel an individual to enter into interstate commerce. They argue further, if Congress could compel the purchase of health insurance under the Commerce Clause, its power would

be unbounded, contrary to the structure of the Constitution (which established the federal government as a government of limited and enumerated powers), and the Tenth Amendment (establishing that un-enumerated powers are left to the states or to the people). They assail the government for failing to identify a limiting principle to the power of Congress under its view of the Commerce Clause. These parties also argue that the individual mandate is not a valid exercise of Congress's tax power.

Administration's defense: The administration argues that Congress had authority to enact the individual mandate under the Commerce Clause and further, that the penalties operate as a tax. The government defends the individual mandate as a policy designed to address an economic problem and argues that the purchase of health care is economic activity with substantial effects on interstate commerce. The government argues that the health care market is unique because individuals who have insurance are forced to subsidize the care of the uninsured, which justifies this exercise of the Commerce Clause power. The government also argues that, even though the fee for not maintaining health insurance coverage is characterized as a penalty, rather than as a tax, Congress nonetheless has authority within its taxing power to establish the requirement.

Highlights from oral arguments: In his arguments in favor of the mandate's constitutionality, Verrilli emphasized that the ACA was designed to address the fact that 40 million Americans lack health insurance, demonstrating a "fundamental and enduring problem in the health care system and our economy." Verrilli argued that the health care market is unique in that "virtually everybody . . . is either in that market or will be in that market, and . . . people cannot generally control when they enter that market or what they need when they enter that market." He asserted that Congress has authority "to ensure that people have insurance in advance of the point of sale because of the unique nature of this market." Questions from Justice Anthony Kennedy have generated substantial interest, as his is likely to be a critical vote. Justice Kennedy asked whether Congress could "create commerce in order to regulate it." He also hypothesized that congressional regulation of the "affirmative duty to act to go into commerce" might be unprecedented. Justice Kennedy later suggested that "here the government is saying that the federal government has a duty to tell the individual citizen that it must act, and that . . . changes the relationship of the federal government to the individual in a very fundamental way" and that, accordingly, there would be a heavy burden of justification to show authorization under the Constitution. The Court also examined what limits would remain on congressional power if the mandate were upheld. Justice Alito suggested that the government's position on the Commerce Clause would permit Congress to mandate that everyone purchase burial insurance. Justice Scalia asked, "[i]f the government can do this, what . . . else can it not do?" Justice Kennedy also asked the solicitor general to "identify for us some limits on the Commerce Clause." Chief Justice Roberts and Justice Alito asked Verrilli to state his limiting principle. With respect to the Necessary and Proper Clause, Verrilli responded that a comprehensive regulatory scheme should be "necessary to counteract risks attributable to the scheme itself that people engage in economic activity that would undercut the scheme." Outside of the comprehensive scheme, under the Commerce Clause, Verrilli articulated the position that "Congress can regulate the method of payment by imposing an insurance requirement in advance of the time in which the service is consumed when the class to

which that requirement applies either is, or virtually most certain to be, in that market when the timing of one's entry into that market and what you will need when you enter that market is uncertain and when you will get the care in that market, whether you can afford to pay for it or not and shift costs to other market participants."

Appearing for the 26 states to argue against the constitutionality of the mandate, former Solicitor General Paul Clement stressed that the mandate was an unprecedented effort by Congress to compel individuals to enter commerce in order to regulate it, that Congress's authority under the Commerce Clause is limited to regulating existing commerce, and that Congress's power would be boundless if the Court allows the mandate to stand. Clement responded to questions regarding whether everybody is already in the health care market, or whether the mandate compels action. Here, Justice Kennedy postulated that even the uninsured may be "in the market in the sense that they are creating a risk that the market must account for." Clement argued that the government was seeking to regulate the health insurance market, not the health care market.

The final counsel to present an argument was Michael Carvin, appearing on behalf of the NFIB and the individual challengers. Carvin argued that what matters is whether the activity actually being regulated negatively affects commerce regulation, bringing it within the commerce power. In questioning Carvin, Justice Kennedy expressed concern that, in both the health insurance and health care markets, "the young person who is uninsured is uniquely proximately very close to affecting the rates of insurance and the costs of providing medical care in a way that is not true in other industries."

III. Severability: Effect of Striking the Individual Mandate on the Rest of the ACA

Issue before the Court: What happens to the remainder of the ACA if the individual mandate is struck down as unconstitutional? The health care reform law did not include a "severability" clause, which could have indicated that, if one section was found to be unconstitutional, the rest of the law would remain in place. Given the split in the Circuit courts on this question, the Supreme Court will need to determine what should happen to other provisions of the ACA if it finds that the mandate is unconstitutional. Case law would indicate that factors include whether other provisions of the law can function independently and whether, absent the unconstitutional provision, Congress would have enacted the law.

Challengers' position: The private plaintiffs, NFIB, the individual challengers, and the 26 states argue that, without the individual mandate, the entire health care reform law should be struck down because the individual mandate is central to the ACA.

Administration's defense: The administration argues that only certain insurance reforms are so connected to the mandate that they would not have been included in the law without it. Specifically, the government asserts the mandate is only essential to operation of the community rating rules and guaranteed-issue provisions, which are, like the mandate, slated to take effect in 2014.

Highlights from oral arguments: Clement, arguing first, on behalf of the 26 states, asserted, "[i]f the individual mandate is unconstitutional, then the rest of the Act cannot stand." The role of congressional intent was central to the Court's discussion. Getting at how to define a principle for what parts of the law would stand without the mandate, Justice Elena Kagan said the issue is, "does Congress want half a loaf. Is half a loaf better than no loaf?" Clement argued that mandate is "tied at the hip" to other provisions at "the very heart of this Act," spelling out the textual interconnectedness of the mandate to the exchanges, tax credits, the employer mandates, revenue offsets, and Medicaid expansion; without all of these provisions, he said the law would be "just sort of a hollow shell." Even some of the Court's more conservative justices were skeptical of this theory. Justice Alito asked Clement to state his "fallback position." The Court seemed pragmatic in recognizing that it would not be appropriate for its law clerks to review the 2,700 pages of the ACA to determine which provisions should hold and which should fall, and that leaving it to Congress to replace the entire law was also unrealistic. Justice Scalia referred to "legislative inertia" and Chief Justice Roberts suggested that various "miscellaneous provisions" in the bill were "the price of the vote."

Next to speak was Deputy Solicitor General Edwin Kneedler, arguing on behalf of the government. He argued, "[t]he vast majority of the provisions of this Act do not even apply to the petitioners, but instead apply to millions of citizens and businesses who are not before the Court." He further suggested, "judicial restraint [and] limits on equitable remedial power limit this Court to addressing the provision that has been challenged." Justice Kennedy countered by postulating that creating a regime that "impose[s] a risk on insurance companies that Congress had never intended" would be "a more extreme exercise of judicial power" than striking the whole Act.

H. Barton Farr, who was appointed by the Court, defended the Eleventh Circuit's decision that that the individual mandate is severable from the remainder of the ACA, including the community-rating and guaranteed-issue provisions. Farr argued that even these provisions would open insurance markets and "serve central goals that Congress had of expanding coverage for people who were unable to get coverage or unable to get it at affordable prices."

IV. Constitutionality of the Medicaid Expansion

Issue before the Court: Are the conditions placed upon states' receipt of additional Medicaid dollars to cover more Americans unconstitutionally coercive? The ACA expands Medicaid eligibility to residents earning less than 133 percent of the Federal Poverty Level. If the Court finds the string attached to Medicaid expansion to be unconstitutional, it would have to determine whether the expansion provision is severable from the remainder of the law. If the Court finds that the Medicaid expansion is constitutional, it would proceed unless the Court strikes down the individual mandate and finds that it is not severable from the remainder of the law (or at least not severable from the Medicaid expansion).

Challengers' position: The 26 states challenging the law say that Medicaid expansion unconstitutionally coerces them because it requires them to expand their Medicaid rolls or risk "the loss of every penny

of federal funding under the single largest grant-in-aid program in existence if they do not capitulate to Congress' steep demands." They argue that the program has grown so large in its 40-plus-year existence that pulling out of the program entirely is not a viable option. (To date, no federal court has upheld the states' position.)

Administration's defense: Congress's spending power includes the power to fix the terms on which it will disburse funds to the states. Congress repeatedly has expanded the Medicaid program to cover new classes of people and the new expansion does not impose significant burdens on the states.

Highlights from oral arguments: Justice Kagan pointed out to former Solicitor General Clement, who represented the 26 states, that the federal government is picking up 90 percent of the cost of the Medicaid expansion, and asked the question, "why is a big gift from the federal government a matter of coercion?" Clement responded that the problem is the Congress tied a State's acceptance of the new funds to their "entire participation in the statute, even though the coverage for these newly eligible individuals is segregated from the rest of the program." Justice Breyer noted that the Medicaid statute gives the secretary of Health and Human Services the discretion to cut off federal funds if states refuse to comply, but that the states would not automatically lose their funding, and he asked Clement whether the secretary ever had followed through on the implicit threat to cut off all funding. Clement acknowledged that the secretary had not, but noted that, when Arizona had floated the idea of withdrawing from the Children's Health Insurance Program, a letter from the secretary noting that if Arizona withdrew from the program, it risked losing the entirety of its Medicaid participation. Justice Breyer stated that even if the secretary had the discretion to do so, according to principles of administrative law, she could do so only if her actions were not "arbitrary, capricious, or an abuse of discretion." The justices returned to this issue several times during oral arguments, with Justice Scalia noting to Verrilli that he did not know of a case "that, where the secretary's discretion explicitly includes a certain act, we have held that, nevertheless, that act cannot be performed unless we think it reasonable."

Verrilli pointed out that several times during the history of the Medicaid program when the federal government has sought to provide coverage to new groups, states have faced exactly the same choice as they do now and they always have made the choice to accept the federal government's money and add coverage. Justice Ginsburg mused that there has not been a federal program struck down because it was "so good that it becomes coercive to be in it." Chief Justice Roberts suggested that the coercion about which the states are complaining is a "consequence of how willing they have been since the New Deal to take the federal government's money…they have compromised their status as independent sovereigns because they are so dependent on what the federal government has done, they should not be surprised that the federal government having attached the…strings, they shouldn't be surprised if the federal government isn't going to start pulling them." Justice Scalia appeared to be the most sympathetic to the notion that the Medicaid expansion was coercive because it is inconceivable that a state would turn down all Medicaid money instead, especially "because some of [the statute's] other provisions are based on the assumption that every single state will be

in this thing." Verrilli answered that Congress predicting that every state would make that choice is not the same as Congress coercing each state to make that choice.

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The Court is not expected to issue an opinion in these cases until late June. Please let us know if you have questions.

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