American Journal of Law & Medicine, 47 (2021): 507-512

DOI: 10.1017/amj.2022.6

Recent Case Development

Episode III: *California v. Texas*—On June 21, 2021, the U.S. Supreme Court issued their long-awaited decision on *California v. Texas*, "the third installment in the epic trilogy" of cases challenging the Patient Protection and Affordable Care Act ("ACA").[1] In a 7-to-2 decision authored by Justice Breyer, the Court found that both the individual plaintiffs and the states lacked standing to challenge the constitutionality of the so-called individual mandate.[2]

I. BACKGROUND

The ACA, enacted in 2010, required Americans to obtain minimum essential health insurance coverage ("the individual mandate") and ensure that any dependent is similarly covered.[3] If an applicable American failed to obtain minimum essential health insurance coverage "for one or more months during any calendar year beginning after 2013," they would be required to pay a penalty.[4] The amount of the penalty was, as originally written, equal to the lesser of the "sum of the monthly penalty amounts…for months in the taxable year during which one or more such failure occurred" or "an amount equal to the national average premium for qualified health plans" subject to conditions.[5]

Since its passage, the ACA's individual mandate has faced several major legal challenges that have risen to the Supreme Court.[6] In *National Federation of Independent Business v. Sebelius*, decided in 2012, the Court addressed an action brought by 26 states challenging the constitutionality of the individual mandate.[7] In an opinion written by Chief Justice John Roberts, the Court ruled that, while the individual mandate was not a valid exercise of Congressional power under the Commerce Clause and the Necessary and Proper Clause, it could be upheld under Congress's power to tax.[8]

In *King v. Burwell*, a 2015 challenge, the Court again protected the ACA's individual mandate, as well as the law's tax credit provisions. The Court found that to side with the petitioners would mean rendering the individual mandate useless and would

[1]California v. Texas, Texas, 141 S. Ct. 2104, 2123 (2021) (Alito, J., dissenting).
[2]*Id.* at 2120.
[3]The Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A(a) (2010).
[4]§ 5000A(b)(1) ("If an applicable individual fails to meet the requirement of subsection (a) for 1 or more months during any calendar year beginning after 2013, then, except as provided in subsection (d), there is hereby imposed a penalty with respect to the individual in the amount determined under subsection (c)").
[5]§5000A(c)(1)(A)-(B).
[6]*See, e.g.,* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); King v. Burwell, 576 U.S. 473 (2015).
[7]*Sebelius*, 567 U.S. at 520.
[8]*Id.* at 520-21, 588 (Decided before the 2017 Amendments in the Tax Cuts and Jobs Act decreased the penalty to $0, the Court stated: "In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.").

effectively negate the law in direct conflict with Congressional intent.[9] According to the court "the combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral."[10] Despite its survival, the ACA has remained controversial.[11]

II. CASE HISTORY

In 2017, Congress enacted the Tax Cuts and Jobs Act ("TCJA").[12] The TCJA amended the section of the ACA regarding the amount of the penalty for not maintaining health insurance, setting it at $0.[13] Subsequently, Texas and 17 other states (later joined by two individuals) brought a lawsuit against the United States and federal officials. The parties claimed that, "without the penalty the Act's minimum essential coverage requirement is unconstitutional."[14] The states alleged (1) an indirect injury due to increased use of state-operated medical insurance program and (2) direct injury caused by unnecessary increased administrative expenses required by the ACA.[15] The individual plaintiffs alleged harm due to the payments they had to and will continue to make to abide by the Individual Mandate in §5000A(a).[16] Further, both the individual and the state plaintiffs argued that the rest of the Act is not severable from the individual mandate provision and finding the individual mandate unconstitutional renders the entire Act unconstitutional.[17]

Although a named defendant in the suit, the United States agreed with the plaintiff's position.[18] In response, California, the District of Columbia, and 15 other States intervened to defend the ACA's constitutionality.[19]

The District Court found that the individual plaintiffs had standing to challenge the constitutionality of the individual mandate.[20] Despite acknowledging the Supreme Court's prior ruling upholding the individual mandate under Congress's tax power,[21] the District Court found that the Individual Mandate was "no longer readable as an exercise of Congress's Tax Power" due to the enactment of TCJA and, therefore, was unconstitutional.[22] The District Court then found that the text of the ACA and the Supreme Court's

[9] *King*, 576 U.S. at 492-94 ("Here, the statutory scheme compels [the Court] to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid…Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter." *See also* New York State Dept. of Social Servs v. Dublino, 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.")).

[10] *Id.* at 494, 498.

[11] *California*, 141 S. Ct., 2126 (Alito, J., dissenting).

[12] Press Release, White House Office of the Press Secretary, Statement from the Press Secretary on the Tax Cuts and Jobs Act (Dec. 2, 2017), https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-tax-cuts-jobs-act/ [https://perma.cc/FV4E-Z5LZ].

[13] § 5000A(c)(3)(A).

[14] *California*, 141 S. Ct., 2112.

[15] *Id.* at 2116, 2117; *Id.* at 2119 (State plaintiffs pointed to "the costs of providing beneficiaries of state health plans with information about their health insurance coverage, as well as the cost of furnishing the IRS with that related information" as increasing administrative costs).

[16] *Id.* at 2113 (citing Brief for Respondents-Cross Petitioner Hurley et. al. 19-20).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Texas v. United States, 340 F. Supp. 3d 579, 593-595 (ND Tex. 2018) [*hereinafter* Texas I].

[21] *Sebelius*, 567 U.S. at 520-21.

[22] *Texas I*, 340 F. Supp. at 605.

https://doi.org/10.1017/amj.2022.6 Published online by Cambridge University Press

decisions in *Sebelius* and *King* make it clear that the individual mandate is not severable from the rest of the law.[23] Because the Individual Mandate was unconstitutional and inseverable, the Court declared the remaining provisions of the ACA to be invalid.[24]

On appeal before the Fifth Circuit, a panel majority agreed with the District Court, finding "that the plaintiffs had standing" and that the individual mandate was unconstitutional.[25] However, the Fifth Circuit found that the District Court's severability analysis was "incomplete."[26] The Fifth Circuit remanded the case to the District Court for further analysis on severability.[27] California and the other intervening states filed a petition for a writ of certiorari to the Supreme Court, seeking review of the Fifth Circuit's interlocutory decision.[28]

III. SUPREME COURT RULING

The Supreme Court explicitly stated in its opinion that they will only rule on standing and go no further in their analysis.[29] To establish standing, a plaintiff must (1) "allege a personal injury" that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and is (3) "likely to be redressed by the requested relief."[30]

A. The Individual Plaintiffs

The Court started by addressing the standing of the two individual plaintiffs.[31] The individuals claimed that they were harmed because of the payments they had to and will continue to make to abide by the individual mandate in §5000A(a).[32] The Court asserted that, because the penalty has been set at $0 under the TCJA, the plaintiffs lack standing because the IRS can only enforce the collection of taxes and cannot enforce the Individual Mandate.[33] Subsequently, "there [was] no Government action that is causally connected to the plaintiffs' injury- the costs of purchasing health insurance."[34]

The Court rejected the individual plaintiffs' arguments pointing to precedent as invalid because all of those cases were decided when the penalty provision was still in effect and "indisputably enforceable."[35] The Court cited *Babbitt v. Farm Workers* to affirm that, because the penalty was no longer enforceable, the plaintiffs could no longer

[23] *Id.* at 613 ("The requirement – the Individual Mandate- was essential to the ACA's architecture. Congress intended it to place the Act's myriad parts in perfect tension. Without it, Congress and the Supreme Court have stated, that architectural design fails." The District Court proceeds, stating, "Based on unambiguous text, Supreme Court guidance, and historical context, the Court finds 'it is evidence that the Legislature would not have enacted" the ACA "independently of" the individual mandate." *Id.* (citing *Alaska Airlines Inc. v. Brock*, 480 U.S. 678, 684) (1987)).

[24] *Id.* at 619.

[25] Texas v. United States, 945 F.3d 355, 377-393 (5th Cir. 2019) [*hereinafter* Texas II].

[26] *Id.* at 400.

[27] *Id.* at 402 ("[I]t is no small thing for unelected, life-tenured judges to declare duly enacted legislation passed by the elected representatives of the American people unconstitutional. The rule of law demands a careful, precise explanation of whether the provisions of the ACA are affected by the unconstitutionality of the individual mandate as it exists today.").

[28] *California*, at 2126 (Alito, J., dissenting).

[29] *Id.* at 2133 (citing Art. III, § 2).

[30] *Id.* (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006)).

[31] *Id.*

[32] *Id.* (citing Brief for Respondents-Cross Petitioner Hurley et. al. 19-20).

[33] *Id.* at 2114.

[34] *Id.*

[35] *Id.*

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demonstrate any danger of sustaining a direct injury as a result of the individual mandate.[36] Further, in the absence of present enforcement, a plaintiff must demonstrate "that the likelihood of future enforcement is 'substantial.'"[37]

The Court then turned its analysis to redressability and asserted that, to determine whether an injury is redressable, a court must "consider the relationship between 'the judicial relief requested' and the 'injury' suffered."[38] The Court concluded that they cannot grant standing to the plaintiffs because "an acceptable Article III remedy" must "redress a cognizable Article III injury" and, given that the penalty provision is unenforceable, no Article III injury has occurred.[39]

The Court concluded that the individual plaintiffs lack standing because they failed to demonstrate that their monetary injuries caused by their payments for insurance were traceable and redressable to §5000A(c) as the TCJA rendered the provisions unenforceable.[40]

B. State Plaintiffs

The Court concluded that Texas and the 17 other state plaintiffs also failed to demonstrate an "injury fairly traceable to the defendants allegedly unlawful conduct" and, therefore, lacked standing.[41]

The Court first addressed the state plaintiff's assertion that the individual mandate has led to increased enrollment in state-operated or state-sponsored insurance programs, such as Medicaid and the Children's Health Insurance Program (CHIP).[42] The Court found that the states failed to show that the individual mandate will cause them "substantial risk of harm" by leading more individuals to enroll in state-operated and sponsored programs.[43] Although the Court found this to be enough to deny standing, they choose to extend their analysis further. Of the 21 statements the state plaintiffs introduced in the District Court, only four alleged that an increase in state costs is attributable to the individual mandate.[44] Further, all four referred to the provision before the $0 penalty became effective.[45] The Court concluded that the plaintiff states failed to show that an unenforceable mandate will cause residents to enroll in state-operated and financed programs that they would otherwise forego.[46]

The Court also rejected the plaintiff states' argument that the individual mandate caused them to incur additional administrative costs.[47] The Court found that other provisions in the ACA, not the individual mandate, impose the additional administrative

[36] *Id.* (citing Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement")).

[37] *Id.* (citing Susan B. Anthony List v. Driehaus, 573 U.S. 149, 164 (2014)).

[38] *Id.* at 2115(citing Allen v. Wright, 468 U.S. 737, 753, n.19 (1984)).

[39] *Id.* at 2116 (citing Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 107 (1998)). The Court then writes that, if they find standing to attack an unenforceable provision, this would allow unelected judges to "conduct oversight of decisions of the elected branches of Government." *See* United States v. Richardson, 418, U.S. 166, 188 (1974) (Powell, J., concurring).

[40] *California*, at 2116.

[41] *Id.* (citing Cuno, 547 U.S. at 342 (internal quotation marks omitted)).

[42] *Id.* at 2117.

[43] *Id.* (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 n.5 (2013)).

[44] *Id.* at 2118.

[45] *Id.*

[46] *Id.* at 2119.

[47] *Id.* at 2119-20.

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requirements that lead to additional costs.[48] Showing that the individual mandate is unconstitutional does not show that any other provisions in the ACA are unconstitutional.[49]

In summary, the Court concluded that the individual and state plaintiffs in this suit failed to demonstrate a concrete injury traceable to the defendant's conduct and, as a result, have failed to show that they have standing to attack the individual mandate's constitutionality. The Court reversed the Fifth Circuit's judgment, vacated the judgment, and remanded with instructions to dismiss.[50]

IV. JUSTICE THOMAS' CONCURRENCE

Justice Thomas agreed with the dissent that defenders of the ACA have changed their position on the severability of the individual mandate by arguing in *NFIB v. Sebelius* and *King v. Burwell* that, without the individual mandate, the ACA would not function as designed, while now arguing that the individual mandate can be severed without harming the rest of the law.[51] However, Justice Thomas rejected Justice Alito's assertion that the plaintiffs can establish standing through inseverability for several reasons.[52] First, Justice Thomas rejected Justice Alito's assertion because the plaintiffs did not raise it before and the lower courts did not address it.[53] Second, the state plaintiffs did not raise the issue in their opening brief before the Supreme Court.[54] Third, the Court has never thoroughly addressed standing-through-inseverability and therefore the question remains open.[55] Lastly, the Court has consistently found that, "[t]o the extent the parties seek inseverability as a remedy, the Court is powerless to grant that relief" because plaintiffs allege harm caused by the "bare existence of an unlawful statute that does not impose any obligations or consequences."[56] Plaintiffs fail to make "a clear connection between an injury and unlawful conduct."[57] Overall, Justice Thomas rejects Justice Alito's standing-through-inseverability argument and, despite asserting that the Court was incorrect in upholding the ACA in prior cases, writes that the plaintiffs in this case failed to demonstrate the harm they suffered was traceable to unlawful conduct.[58]

V. JUSTICE ALITO'S DISSENT

In a dissent joined by Justice Gorsuch, Justice Alito argued that the plaintiffs had standing because the ACA "imposes many burdensome obligations on States in their capacity as employers," such as increased reporting requirements, and thus experience

[48] *Id.* at 2120 (citing §§6055(b)(1)(B)(iii)(II)(c)(1) ("requiring certification as to whether the beneficiary's plan qualifies for cost-sharing or premium tax credits under §36B"); §§6056(b)(2)(B), (c)(1) ("requiring certification as to whether the plan qualifies as an 'eligible employer-sponsored plan' that satisfied §4980H's employer mandate")).

[49] *Id.*

[50] *Id.*

[51] *Id.* at 2120-21 (Thomas, J., concurring).

[52] *Id.* at 2121

[53] *Id.* at 2122 (citing Brownback v. King, 592 U.S.,___, ___, n. 4 (2021) (slip op., at 5, n. 4) ("we are a court of review, nor of first view)).

[54] *Id.* (citing Brief for Respondent/Cross-Petitioner States 18-30).

[55] *Id.*

[56] *Id.* (citing Murphy v. National Collegiate Athletic Assn., 584 U.S. ___,___-___ (2018) (slip op., at 3-4) (Thomas, J., concurring).

[57] *Id.* at 2123.

[58] *Id.*

https://doi.org/10.1017/amj.2022.6 Published online by Cambridge University Press

economic harm.[59] Justice Alito asserted that the Court warps the traceability requirement and sets an obstacle that States "should not have to surmount to establish standing."[60]

Once he established standing, Justice Alito considered the merits of the lawsuit, concluding that the individual mandate is unconstitutional because it no longer falls under the taxing power, that many of the ACA's provisions were inseverable, and that the entire law should be repealed.[61]

VI. NEXT STEPS

California v. Texas will most certainly have an impact on any future lawsuits brought challenging the constitutionality of the Affordable Care Act. Some attorneys in the field predict that a future challenge to the individual mandate will be difficult as the Court has established that, as long as the penalty provision is at zero, no legal injury exists.[62] However, the Court did leave several doors open to opponents of the law. Notably, during oral argument, Chief Justice Roberts and Justice Kavanaugh both indicated they believe the Individual Mandate could be severed from the ACA as a whole.[63] Additionally, some speculate that the next challenge to the ACA will rely heavily on the arguments about severability that were put forward in Justice Alito's dissent.[64] The future of the ACA is unknown, but for now it remains the law of the land.

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[59] *Id.* at 2128 (2021) (Alito, J., dissenting) ("The States have clearly shown that they suffer concrete and particularized financial injuries that are traceable to conduct of the Federal Government. The ACA saddles them with expensive and burdensome obligations, and those obligations are enforced by the Federal Government. That is sufficient to establish standing.").

[60] *Id.* at 2131 (Alito, J., dissenting).

[61] *Id.* at 2134-40 (Alito, J., dissenting).

[62] Tad Heuer & Andrew M. London, *Supreme Court Uphold Affordable Care Act (Again) in California v. Texas*, FOLEY HOAG, LLP (June 17, 2021), https://foleyhoag.com/publications/alerts-and-updates/2021/june/supreme-court-upholds-affordable-care-act-again-in-california-v-texas [https://perma.cc/6ZZY-U2GA].

[63] Transcript for Oral Argument at 55-56, 63, California v. Texas, 141 S. Ct. 2104 (2021) (No number in original).

[64] Xavier Baker, *United States: Not With A Bang But a Whimper Supreme Court Kicks Latest ACA Challenge For Lack of Standing*, SHEPPARD MULLIN (June 17, 2021), https://www.sheppardhealthlaw.com/2021/06/articles/affordable-care-act-aca/supreme-court-aca-challenge [https://perma.cc/SFU8-QSDM].

https://doi.org/10.1017/amj.2022.6 Published online by Cambridge University Press