US Supreme Court's Oral Argument in *California v. Texas:* Reports of the Affordable Care Act's Demise May be Greatly Exaggerated

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This alert is Part 2 of a three-part series where White and Williams will examine the United States Supreme Court case, *California v. Texas*. Part 1 examined the case in full and how the decision in the case will affect the healthcare system and healthcare insurance marketplace. In Part 2, below, we explore the oral arguments advanced by the litigants and the Court's questions and comments from its November 10 oral argument. Finally, in Part 3, we will explore the possible outcomes, including the impacts to the healthcare and insurance industries and employers that the Court's decision may have.

While the Supreme Court's most recent Affordable Care Act (ACA) case, *California v. Texas*, raised the prospect of the potential dismantling of the entire ACA, the comments made at oral argument by the justices suggest otherwise. And while it is always somewhat dangerous to predict a potential outcome based on commentary alone, it does seem fairly clear that, with respect to the key issue before the Court, namely severability, it is highly likely that the Supreme Court will find that even if the individual mandate is struck down, that the rest of the ACA can continue on.

By way of background, as noted in our earlier alert, Congress amended the ACA in 2017 in order to reduce the penalty under the individual mandate for failure to have health insurance to $0, such that there is literally no financial risk for an individual who fails to purchase health insurance in the individual marketplace. As a direct result of this action by Congress, Texas and a number of other states (the Aggrieved States) filed a lawsuit seeking to overturn the entire ACA.

The Aggrieved States maintain that since the individual mandate was a "core provision" that would impact the rest of the ACA, it was not severable from the individual mandate. Their argument was simple: if there is no penalty for noncompliance, then the mandate is merely a command to buy insurance, and therefore, unconstitutional. Accordingly, if the individual mandate is struck down, then so too would the rest of the ACA.

In this regard, both Justice Kavanaugh and Justice Gorsuch each questioned how the mandate could still be constitutional as an exercise of Congress's tax authority when it does not raise any revenue. Conversely, Justice Breyer and Justice Kagan appeared to side with California in opposing the Aggrieved States suggesting that many laws have statements asking people to do things without a mechanism to enforce them. Accordingly, it appears that the constitutionality of the individual mandate may be a close question assuming the Supreme Court reaches this topic for the reasons discussed below.

While the media, and most legal commentators, focused on the potential termination of the ACA, one argument largely overlooked in *California v. Texas*, was the "standing defense" raised by California and the states seeking to preserve the ACA. In simple terms, they argued that if there was no penalty, there could not be any harm to the Aggrieved States or their citizens; hence the Aggrieved States lacked standing to attack the ACA. This argument seems to have struck the right chord, as several justices questioned how the Aggrieved States could show standing under such circumstances, commenting that since the mandate does not create a legal penalty there is no threat that it would ever be enforced against them.

In short, the mandate simply did not require the Aggrieved States or their citizens to do anything. In this regard, Justice Roberts posited that Congress could pass a law requiring everyone to mow their lawn once a week, but if the fine for violating the law was $0, there would be no standing to attack it. But anyone seeking to challenge a law must show real harm. Thus, it may very well be the case that the Supreme Court will not even get to the issue of the individual mandate if they find that the Supreme Court does not have standing.

Certainly, a question arises: Why would the Supreme Court even bother taking the matter at all if they were not going to reach any of the substantive issues? A possible answer may be found in the decisions below, which not only recognized standing (at the District Court level), but the District Court also threw out the mandate and several of the ACA's key provisions. On appeal, the Court of Appeals sent the matter back to the District Court with instructions to consider the matter of severability. Given the stakes, the Supreme Court may have had great concerns over the possibility that the ACA might be upended in the middle of a pandemic. By exercising its authority now, the Supreme Court could prevent a long period of confusion in the insurance marketplace, where more than 12 million people still purchase coverage. In fact, because of the layoffs of millions of workers due to the COVID-19 pandemic, the ACA marketplace is critical as a means to obtain coverage given the cost under COBRA for continuation coverage.

Assuming that the Supreme Court does reach the merits, however, both Justice Cavanaugh and Justice Gorsuch suggested that even assuming that the mandate is unconstitutional, it is likely severable from the rest of the ACA. In fact, the Court was rather united in its position that under existing severability precedent, the ACA is severable from the mandate. Indeed the justices seemed to recognize that perhaps the best evidence of this potential finding is the fact that Congress had just amended the ACA in 2017 to eliminate the penalty. Several justices reasoned that Congress could not have believed that it was putting the entire ACA in jeopardy to be dismantled by its actions; although, Justice Alito was skeptical that anything could be inferred from the 2017 amendment to the mandate. Justice Roberts also added that while some of the law makers may have wanted the Supreme Court to invalidate the ACA because of this amendment, this was simply not the job of the Supreme Court.

Accordingly, it appears that the ACA will not be struck down in its entirety and that the Court may or may not even reach the individual mandate provision. It is likely that a decision will not be handed down until the late spring of next year. In the interim, it is unclear what will happen, if anything, with respect to any legislation that may be proposed pertaining to healthcare, such as the incoming Biden administration's efforts to expand Medicare. In short, the ACA may ultimately be the only game in town in terms of covering millions of recently laid off workers who have fallen victim to the economic ravages stemming from the pandemic.

While at one time the ACA seemed to be on its way of being eliminated in 2017, millions of Americans have now changed their position on the ACA and now support it. For example, the federal government currently pays 90% of the Medicaid claims in those states that have opted to expand Medicaid coverage through the ACA. Given the current status of the pandemic, and the likelihood that many tens of thousands of our citizens will require substantial long-term care from the COVID-19 illness (so-called "long-haulers"), the ACA may become critical for addressing healthcare issues stemming from the pandemic. Moreover, it is hard to believe that many states that are in severe financial shape will not at least *reconsider* their position on expanding Medicaid under the ACA given the astronomical costs that will be borne by the states in treating their citizens if they cannot afford insurance.

In the final part of our series on *California v. Texas*, we will discuss the future of the ACA next. If you have questions or would like more information, please contact Jim Anelli (anellij@whiteandwilliams.com; 201.368.7224) or Stephen Bowers (bowerss@whiteandwilliams.com; 215.864.6247).