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## Supreme Court Review of the Affordable Care Act: A Summary of the Oral Arguments

The Supreme Court recently heard oral arguments relating to the constitutional challenges to the federal health care reform law, known as the Patient Protection and Affordable Care Act (the "ACA"). Oral arguments consumed more than six hours of time over the course of three days – the longest time set aside for a Supreme Court case in more than 40 years.

A central focus of the Supreme Court's review is the constitutionality of the ACA's so-called "individual mandate," pursuant to which Congress requires virtually all Americans to obtain health insurance by 2014, or pay a penalty with their tax returns until they do. Specifically, the Court is considering whether Congress exceeded its authority under the Constitution in enacting the individual mandate, and, if so, whether any portions of the ACA can survive if the individual mandate is declared unconstitutional. The Court is also considering whether any challenge to the individual mandate prior to its effective date in 2014 is barred by a federal tax law known as the Anti-Injunction Act. And finally, the Court is considering a challenge brought by 26 states, asserting that the ACA's expansion of Medicaid eligibility is unconstitutional.

Below, we summarize each day of oral argument and offer some thoughts as to its implications for the federal health care reform law. It is important to note that it is not possible to predict the outcome of a Supreme Court case based on the questions asked during oral argument, although oral argument does allow some insight as to issues that are of particular concern to the Court.

### Day 1: Does the Anti-Injunction Act Bar Any Challenge to the Individual Mandate Before the Mandate Takes Effect In 2014?

Before resolving whether the individual mandate is constitutional, the Court must first decide whether a 19th century federal tax law known as the Anti-Injunction Act precludes federal courts from even hearing challenges to the mandate before it goes into effect in 2014. The Anti-Injunction Act generally prohibits pre-enforcement legal challenges to the assessment and collection of taxes, and there was a split in the courts of appeal as to whether it deprived courts of jurisdiction to hear challenges to the individual mandate before 2014.

Opponents of the individual mandate argue that the Anti-Injunction Act only applies to *taxes* that raise revenue – rather than penalties that are imposed for failure to comply with a law – and they note that the ACA specifically refers to the assessment of a "*penalty*" if an individual fails to have health insurance beginning in 2014. Accordingly, they argue that the ACA does not bar constitutional challenges to the individual mandate. The Obama Administration, which is keen to have the constitutional challenges resolved quickly, agreed that the individual mandate is not the type of tax provision to which the Anti-Injunction Act applies, and it therefore urged the Court to address the merits of the constitutional challenges now, rather than deferring a decision until 2014 or beyond.

Given that neither the Obama Administration nor opponents of the ACA asserted that the Anti-Injunction Act applied, the Supreme Court appointed a lawyer who is independent of the parties to argue that the Anti-Injunction Act prevents the judicial system from accepting a challenge to the individual mandate before a penalty is imposed. In briefs submitted to the Court and during oral argument, Court-appointed counsel argued that the Anti-Injunction Act applied even to something characterized by Congress as a "penalty," and therefore urged the Court to dismiss the constitutional challenges to the individual mandate as premature.

During oral arguments, six Justices (Breyer, Ginsburg, Sotomayor, Scalia, Alito, and Chief Justice Roberts) asked questions that appeared to be skeptical of the Anti-Injunction Act's application, and made statements which suggested that the Court could decide the constitutionality of the individual mandate now. For example, Justices Breyer and Ginsburg advanced a number of questions suggesting that the penalty associated with the individual mandate is not a "tax" within the meaning of the Anti-Injunction Act, given that the individual mandate is not intended to be a revenue source. And Justice Scalia opined that the Court is barred from hearing a lawsuit only when Congress clearly wanted that effect, but noted that in the context of the individual mandate, "I find it hard to think this is clear. Whatever else it is, it's easy to think it's not clear."

## **Day 2: Is the Individual Mandate Constitutional?**

On the second day of oral arguments, the Court addressed the key Constitutional challenge to the ACA: whether Congress exceeded its authority in enacting the individual mandate. The Obama Administration defends the constitutionality of the individual mandate by asserting that it is valid under three separate provisions of the Constitution. *First*, the Administration argues that the mandate regulates the national health insurance market, and is therefore a valid exercise of Congress's power to regulate interstate commerce under the Constitution's Commerce Clause. *Second*, the Administration asserts that the individual mandate is a form of tax legislation that is authorized under the Constitution's "General Welfare Clause." And *third*, it argues that the individual mandate is a valid exercise of Congress's power under the Constitution's "Necessary and Proper" clause, which authorizes laws that are necessary and proper in carrying out an enumerated power (in this case, the argument is that the individual mandate is a necessary and proper means to implement Congress's power to regulate the interstate health care market).

In contrast, opponents of the law argue that the individual mandate does not regulate commerce, but instead forces people into the stream of commerce by requiring them to purchase health care coverage. And, accordingly, they argue that the individual mandate and its associated penalty are not necessary or proper means to regulate interstate commerce and are not tax provisions at all.

During oral argument, four Justices (Breyer, Ginsburg, Sotomayor and Kagen) asked questions which suggested that they view the individual mandate as a permissible exercise of Congress's authority to regulate interstate commerce. For example, Justice Ginsburg suggested that uninsured people are passing their health care costs on to others, which provides a basis for Congress to regulate the market. And Justice Kagan said the individual mandate simply regulates the timing in which an individual must purchase health insurance, noting that "surely" Congress can say that it makes sense to require the purchase of insurance earlier than at the time the care is needed.

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Chief Justice Roberts, however, along with Justices Scalia and Alito asked a number of questions that expressed skepticism of the Obama Administration's argument, noting that if the individual mandate is a permissible exercise of Congress's authority to regulate interstate commerce, then it would be difficult to draw a "limiting principle" beyond which the government may not go. Put simply, if the individual mandate is a permissible exercise of Congress's power to regulate commerce, are there any limits on Congress's authority to impose other types of mandates in the future, such as a mandate that Americans purchase cell phones to dial 911, or purchase gym memberships or healthy foods? (Based on prior decisions interpreting the scope of the Commerce Clause, many observers expect Justice Thomas to opine that the individual mandate is unconstitutional, and in keeping with past practice, Justice Thomas did not ask questions during oral argument).

The issue of a limiting principle appeared to be of particular concern to Justice Kennedy, who is likely to be a swing vote. Justice Kennedy stated during oral argument the individual mandate "changes the relationship of the government to the individual in a fundamental way," and suggested that there is a "very heavy burden of justification" to show where the Constitution authorizes Congress to change the relation of the individual to the government. Importantly, however, later in the argument, both Justice Kennedy and Chief Justice Roberts raised the possibility that even if the opponents of the ACA were correct that the mandate is an effort to force people into commerce to subsidize health insurance, the health insurance market may be unique enough to justify that unusual treatment.

As for the Obama Administration's backup argument that the individual mandate is a tax authorized under the Constitution's taxing power, several Justices appeared skeptical. Indeed, both Justice Kagan and Justice Scalia referred to efforts by Congress and the President to avoid labeling the individual mandate as a "tax."

### **Day 3: Is the Individual Mandate "Severable" from the Remainder of the ACA? Is the Medicaid Expansion Constitutional?**

On the third day of oral argument, the Court addressed two separate issues: *First*, what parts of the ACA will survive if the individual mandate is declared unconstitutional (the "severability" issue)? *Second*, is the ACA's requirement that states expand Medicaid eligibility constitutional?

#### **A. Severability**

In conducting the severability analysis, the Court *assumed* that the individual mandate is unconstitutional, therefore requiring it to decide which, if any, other provisions of the ACA will survive if the individual mandate is struck down. Opponents of the ACA argued that the health care reform law was enacted for purposes of creating nearly universal health insurance coverage, and that the individual mandate was the linchpin of such coverage. Accordingly, they asserted that the Court should find "interconnectedness" between the individual mandate and other provisions of the ACA, so that if the individual mandate is stricken, *all* other provisions of the ACA should be stricken as well. In contrast, the Obama Administration argued that only the ACA's guaranteed issue and community rating rules – which are applicable to insurers beginning in 2014 – were so intertwined with the individual mandate that Congress would not have enacted them without the individual mandate. Accordingly, the Administration argued that if the individual mandate is struck down, then so too should the guaranteed issue and community rating rules – but all other provisions of the ACA would still be in effect.

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At oral argument, four Justices (Kagan, Breyer, Ginsburg and Sotomayor) expressed skepticism that the ACA should be invalidated as a whole if the individual mandate is ruled unconstitutional. Justices Kennedy, Scalia, Alito and Chief Justice Roberts, however, asked questions that suggested they were considering whether *any* provision of the ACA could survive without the individual mandate. (As noted above, many observers expect Justice Thomas to vote to strike down the individual mandate based on his prior opinions, and also expect that he would vote to strike down the entirety of the ACA). It did appear, however, that a majority of Justices agreed with the Obama Administration that if the individual mandate is ruled unconstitutional, then the ACA's guaranteed issue and community rating provisions should also be stricken.

## **B. Medicaid Expansion**

The last issue considered by the Court was the constitutionality of the ACA's Medicaid expansion. Twenty six states challenged the constitutionality of the ACA's requirement that, beginning in 2014, states must expand eligibility for their Medicaid programs to cover individuals up to 133 percent of the Federal Poverty Level.

The states argued that the federal government was unconstitutionally "coercing" states to expand Medicaid eligibility as a condition for qualifying for federal funds to help pay for Medicaid. The states essentially argued that the federally imposed conditions were so onerous that they threatened the states' sovereignty and their fiscal health. In contrast, the Obama Administration argued that under the Constitution's Spending Clause, Congress can impose any requirements it sees fit on the recipient of federal funds, and that the political risks state officials face if they choose to decline Medicaid funding do not constitute "coercion" by the federal government.

During oral argument, four Justices (Ginsburg, Breyer, Sotomayor and Kagen) asked opponents of the ACA skeptical questions about how the ACA coerces the states into growing their Medicaid program. Justice Kagen, for example, asked "Why is a big gift from the federal government a matter of coercion? . . . It's just a boatload of federal money." And Chief Justice Roberts suggested that perhaps the states had given up some of their claims of sovereignty with respect to Medicaid by accepting federal funding for the program that had stings attached.

It appeared, however, that a number of other Justices – including Justice Kennedy and Chief Justice Roberts – had significant concerns that at some point, the federal government could place such onerous conditions on the states that it would in effect be coercing the states to participate in the Medicaid program.

## **Observations**

As noted above, it is not possible to predict how the Supreme Court will rule on any of the challenges to the ACA based on oral arguments. We note, however, that based on the questions asked during the three days of oral arguments:

- *Anti-Injunction Act*: Not one Justice suggested that it would be premature for the Court to rule promptly as to whether the individual mandate is constitutional.

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- *Individual Mandate:* The Court's likely swing vote, Justice Kennedy, expressed concern that the individual mandate has profound implications for individual liberty, and that the Obama Administration must meet a "very heavy burden of justification" for the mandate to be upheld. However, he also suggested that the health insurance market may be unique enough to justify upholding the constitutionality of the individual mandate even with the government's heavy burden. Additionally, Chief Justice Roberts made comments toward the end of oral arguments that appeared to temper his earlier skepticism about the individual mandate, noting that the key to the Obama Administration's argument is that *everyone* is in the health care market, which makes this different than other products.
- *Severability:* The Court appeared to struggle with how much of the ACA, if any, can survive if the individual mandate is ruled unconstitutional. It seemed, however, that a majority of the Court was concerned that striking down the individual mandate without also striking the ACA's guaranteed issue and community rating rules would expose insurers to risks that Congress did not contemplate.
- *Medicaid Expansion:* It appeared that at least four Justices were skeptical that the federal government was "coercing" states to expand Medicaid eligibility. Other Justices (Roberts, Alito and Scalia, and Kennedy) expressed concerns that at some point, the federal government could place such onerous conditions on the states that it would in effect be coercing the states to participate in the Medicaid program. It is unclear, however, if these Justices will view the ACA's expansion of Medicaid as imposing such onerous conditions.

### **Next Steps**

The Justices attended a confidential conference on March 30th to vote on the outcome of the challenges to the ACA, after which drafting responsibility for the written Opinion of the Court was assigned. We expect that the Court will issue its written decision at the end of its current term, near the end of June 2012.

We will provide updates as to the Supreme Court's ruling – and its implications for insurers and plan sponsors – as events unfold.

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