



ACA Legal Challenge: *What's on the Docket for Medicare Value-Based Care*

On November 10, 2020, the U.S. Supreme Court will hear *Texas v. Azar*, a case concerning the constitutionality of the Affordable Care Act (ACA). NAACOS is closely following this case because the ACA includes the statutory basis for the Medicare Shared Savings Program (MSSP) for accountable care organizations (ACOs), as well as the establishment of the Center for Medicare and Medicaid Innovation (Innovation Center), which runs many Alternative Payment Models (APMs). This document will give a brief background of the case and discuss potential scenarios going into 2021.

Background

When the ACA passed in 2010, a key provision of the law was that individuals who did not purchase health insurance would be subject to a “shared responsibility” penalty. In 2012, the constitutionality of the ACA — and the individual mandate requirement specifically — was challenged before the U.S. Supreme Court in *National Federation of Independent Business (NFIB) v. Sebelius*. In that case, the Court ruled in a five-to-four decision that the penalty was a tax and, therefore, permissible under Congress’ power to tax. The Court, by a seven-to-two vote, also ruled that the mandatory Medicaid expansion provisions were unconstitutional, but the Court concluded that the Medicaid expansion provisions were severable from the remainder of the ACA, meaning the remainder of the law could remain intact.

In 2017, Congress passed the Tax Cuts and Jobs Act, which included a provision to set the ACA’s shared responsibility penalty at \$0, essentially nullifying the tax provision. That legislation triggered the current challenge to the ACA, *Texas v. Azar*, which argues that the individual mandate is no longer constitutional given the repeal of the tax provision and that the individual mandate is essential to the operation of the ACA such that all other ACA provisions must be struck down. That ruling was appealed to the Fifth Circuit Court of Appeals, which affirmed the lower court’s finding that the individual mandate is unconstitutional but remanded the case back to the lower court to reconsider striking the ACA in its entirety. The case was then appealed to the U.S. Supreme Court and scheduled by the court for oral argument shortly following the 2020 Presidential Election.

There have been changes to the Court since the initial ruling in *NFIB v. Sebelius*. Justices Scalia and Kennedy (both in the dissent) have been replaced by Justices Neil Gorsuch and Brett Kavanaugh. However, since all four of those Justices lean right, those changes may not be important. Meanwhile, the nomination of Judge Amy Coney Barrett to replace Justice Ruth Bader Ginsburg is pending. Interestingly, the three Justices who ruled in *NFIB v. Sebelius* that Medicaid expansion was unconstitutional but severable (Roberts, Breyer and Kagan) have not changed, which would suggest that only two additional justices would have to conclude that the individual mandate was either constitutional or severable for the ACA to be largely upheld.

Potential Outcomes

Scenario #1 — The entire law is struck down. The U.S. Supreme Court could rule that the individual mandate is not a tax (because the tax was repealed in 2017) and is therefore unconstitutional, and the individual mandate is so essential to the operation of the ACA that it cannot be severed such that the entire ACA is unconstitutional. However, many legal scholars view this outcome as unlikely given the widely held judicial view that, whenever possible, courts should leave laws intact and sever those provisions that are deemed unconstitutional while still retaining those provisions that can stand. In addition, since the Court previously held that Medicaid expansion was severable, it is likely that the Court would also conclude that the individual mandate is severable.

In the event that the law is struck down in its entirety, there could be a scenario in which the Congress comes back to the table to revisit the provisions of the ACA that have worked well — such as pre-existing condition coverage provisions and the value-based care programs — and advance those provisions legislatively. If, post-election, the Democrats have a majority in the House, Senate, and presidency, a legislative effort is more likely to be successful.

Scenario #2 — The law is severed, leaving certain provisions in place. Some court watchers believe that the most likely outcome is that the U.S. Supreme Court will rule that the individual mandate is unconstitutional but not essential to the entire law. Under this scenario, only the individual mandate would be struck down — all other provisions of the ACA would remain intact. While technically a victory for the plaintiffs, this type of ruling would have minimal practical impact on the health care industry, including ACOs.

Scenario #3 — The law is upheld in its entirety. We could see a decision affirming the constitutionality of the ACA in its entirety, potentially based on Congressional that were previously dismissed during *NFIB v. Sebelius*, such as the commerce clause or the necessary and proper clause. Arguments upholding the law were raised in the context of that earlier ACA case and could be re-litigated in the ACA holding in *Texas v. Azar*. This is probably the least likely scenario of the four given the Court's six-to-three ideological makeup, but it could be possible if an additional conservative leaning Justice, including appointee Judge Barrett, were to lean left on a final ruling.

Scenario #4 — Punt. The Court could decide to resolve the case without addressing the key substantive issues. For example, the issue of whether Texas has been damaged in a manner that allows it to be a plaintiff has been fully presented. Also, the U.S. Court of Appeals had asked the lower court to allow for more evidence to be gathered on the issue of severability, so the Supreme Court could conclude that it too needs more fact development before ruling on the severability issue. As such, the Court has the ability to duck the substantive issues and decide the case based upon a procedural issue.