ACA's Individual Mandate Held Unconstitutional; SCOTUS Declines to Fast Track Cert Petition

On December 19, 2019, in a split decision in *Texas v. United States*, the Fifth Circuit held that the Individual Mandate ("Mandate") of the Patient Protection and Affordable Care Act ("ACA") became unconstitutional when Congress zeroed out the penalty, but vacated the district court's decision that the ACA itself was unconstitutional without the Mandate.[1] The Fifth Circuit remanded the case to the lower court for further analysis of the Mandate's severability from the ACA. For previous coverage of the district court's decision, in which it found the ACA unconstitutional because the zero-penalty Mandate was inseverable from the rest of the statute, please click here.

Previously, in *National Federation of Independent Business v. Sebelius*, the Supreme Court held the Mandate as a constitutional exercise of Congress' power because (i) the Mandate did not violate the Commerce Clause by offering a *choice*, enter the market or face a penalty, and (ii) the penalty was constitutional exercise of Congress' taxing power as it had the "four central attributes" of a tax.[2]

The central issue in the *Texas* case was whether a zero dollar tax is a constitutional exercise of Congress' taxing power.[3] The issue arose when Congress zeroed out the Mandate's penalty in the Tax Cut and Jobs Act of 2017 ("TCJA").[4] The Fifth Circuit's majority, agreeing with the district court, held that a zero dollar penalty (tax) is an unconstitutional exercise of Congress' taxing power because a zero dollar tax violates the "four central attributes" of a tax.[5] The Court concluded that the Mandate, without the penalty, violates the Commerce Clause and the Necessary and Proper Clause.[6]

In assessing the constitutionality of the Mandate's penalty under Congress' taxing power, the Fifth Circuit underscored the importance of the "four central attributes" of a tax.[7] First, the penalty must "yield[] the essential feature of any tax: It [must] produce at least some revenue for the Government."[8] Second, the penalty must be "paid into the Treasury by taxpayers when they file their tax returns."[9] Third, the amount payable must be "determined by such familiar factors as taxable income, number of dependents, and joint filing status."[10] Fourth, "[t]he requirement to pay [must be] found in the Internal Revenue Code and enforced by the IRS, which…collect[ed] it in the same manner as taxes."[11] The Fifth Circuit concluded that since the Mandate's ~~penalty no longer meets the fir~~st three central attributes of a tax (and is no longer collected by the IRS), it could

[1] *See Texas v. United States*, No. 91-10011, slip op. at 3 (5th Cir. Dec. 18 2019).
[2] *See Nat'l Fed'n Fed'n of Indep. Bus. V. Sebelius (NFIB)*, 567 U.S. 519 (2012).
[3] *See Texas*, slip op. at 33-44. In *Texas*, the court also held that the intervenor-defendant states had standing to appeal the district court's decision, and even if they did not, a live case or controversy remained between the plaintiffs and federal defendants. *Id*. at 3. Likewise, the court determined that the plaintiffs had Article III standing to challenge the ACA because the individual plaintiffs suffered injury by being forced to buy insurance they did not want, while the state plaintiffs faced increased costs of complying with the reporting requirements accompanying the individual mandate. *Id.*
[4] *See* Pub. L. No. 115-97, 11081, 131 Stat. 2054, 2092 (2017); 26 U.S.C. § 5000A(c).
[5] *See Texas*, slip op. at 38.
[6] *See id.* at 38-39.
[7] *See id.* at 37-38.
[8] *See id.* at 37 (quoting *NFIB*, 567 U.S. at 564).
[9] *See Texas*, slip op. at 37 (quoting *NFIB*, 567 U.S. at 563).
[10] *See Texas*, slip op. at 37 (quoting *NFIB*, 567 U.S. at 563).
[11] *See Texas*, slip op. at 37 (quoting *NFIB*, 567 U.S. at 563-64).

not be considered a tax.[12] The Court found that the zero-penalty Mandate was unconstitutional under the Commerce Clause because, without the choice to pay the penalty, it became simply a command to purchase insurance, which exceeds Congress' power to regulate interstate commerce because it compels consumers to enter commerce in the first place.[13]

The Fifth Circuit vacated and remanded the issue of whether the Mandate is severable from the rest of the ACA to the district court for further analysis.[14] It directed the district court to "employ a finer-toothed comb on remand and conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable from the individual mandate."[15] The Fifth Circuit emphasized that the district court should investigate Congress' intentions throughout the life of the ACA, for each section of the ACA,[16] to determine "whether it is evident from the statute's text or historical context that Congress would have preferred no ACA at all without the individual mandate."[17]

The dissent framed the constitutional question as one of statutory construction and interpretation. It stated that when the Supreme Court construes statutes, its "'interpretive decisions, *in whatever way reasoned*, effectively become part of the statutory scheme, subject (just like the rest) to congressional change.'"[18] Further, the dissent noted the only change to the Mandate was the penalty's value; the Mandate's language remained untouched by the TCJA and therefore "its meaning could not have changed either."[19]

Not surprisingly, the democratic states and the House of Representatives moved promptly to request further appellate review of the Fifth Circuit's decision. On January 3, 2020, they filed a petition for a writ of certiorari before the Supreme Court and moved to expedite the petition's review. The Court declined to expedite the petition's review on January 21, 2020. Likewise, on January 29, 2020 the Fifth Circuit declined to rehear the case *en banc* in a narrow 8-6 vote.

[12] *See Texas*, slip op. at 38-39.
[13] *See id.* at 7, 39, 44.
[14] *See id.* at 3, 44.
[15] *See id.* at 59.
[16] *See id.* at 55-59.
[17] *See id.* at 59 (internal quotations omitted).
[18] *See id.* at 81 (King, J., dissenting) (quoting *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (emphasis in original)).
[19] *See id.* at 82 (King, J., dissenting).