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A Mandate or a Choice?

Solicitor General Hawkins's exchange with Justice Kagan illustrates the foundational disagreement about what NFIB held.

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NFIB v. Sebelius is more than eight years old. To this day, a disagreement exists over what precisely the case held. Did *NFIB* hold that the ACA provides people with a lawful "choice" to purchase insurance or pay a tax? Or did *NFIB* hold that the ACA imposes an unconstitutional mandate that could be saved by reading the statute as giving people a lawful "choice" to purchase insurance or pay a tax? During oral argument in *California v. Texas*, Justice Kagan took the former view. And Texas Solicitor General Kyle Hawkins took the latter view.

Consider this colloquy:

JUSTICE KAGAN: Yes, Mr. Hawkins, continuing on, on the merits, I –I'm not sure I understand the position. **In NFIB, we held that the ACA –that the ACA was not an unconstitutional command**. So I would think that that has to be the starting point. Now, since then, there has been the change –this change, and –and –and –and in this change where Congress reduces the penalty to zero, Congress has made the law less coercive. So how does it make sense to say that what was not an unconstitutional command before has become an unconstitutional command now, given the far lesser degree of coercive force?

MR. HAWKINS: Well, Justice Kagan, I –I'd like to start with the **premise of your question about the holding of NFIB**. That holding is an **alternative reading** of the statute, a savings construction, predicated on the fact that at the time the individual mandate could possibly be read as glued together with the penalty provision to –

JUSTICE KAGAN: Well, I think you have to –excuse me, if I might interrupt, General. **I think you have to accept that holding**, because that holding is what allowed the ACA to remain in existence all this time. I mean, so, however it was, that it was four plus one and what exactly that one said, the holding of the Court was that the ACA was not an unconstitutional command.

MR. HAWKINS: And –and we would submit this Court is not bound by that holding today because the **underlying predicate of that holding is no longer in the United States Code today**. When Congress–

JUSTICE KAGAN: Well—the only thing that's changed is something that made the law **less coercive**, is what I'm suggesting.

MR. HAWKINS: Well, Your Honor, what –

JUSTICE KAGAN: If you make a law less coercive, how does it become **more of a command**?

MR. HAWKINS: Well, Your Honor, the law **was always best read as a command**, as III-A of the Chief Justice's opinion makes clear.

JUSTICE KAGAN: —**you're just disputing the premise of what we held in NFIB, which has, you know –which I –I don't think you can dispute,** but let me go on.

Kagan said that Hawkins had to "accept that holding" and he could not "dispute" the premise of *NFIB*. Hawkins disagreed with Kagan's reading of the case. The entire case turns on this colloquy. If Kagan is right about *NFIB*, this case should be dismissed outright. Most people who say the case is frivolous take the Kagan view. But if Texas is right, then Texas should prevail on the merits. I have held Texas's view since 2012, but admit I may be wrong. And the Cato Institute brief articulated this position. Thankfully, Kagan is not the arbiter of *NFIB*. The Chief Justice may be the only person who can adjudicate this dispute. Indeed, I think that the Chief got a little miffed at how former SG Verrilli characterized *NFIB*.

I will have much more to say about the case when I have had time to fully digest the transcript.

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