Latest ACA Assault Has Fighting Chance Despite Clear Flaws

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February 27, 2018

The latest legal effort to demolish the Affordable Care Act by targeting the law's individual mandate has realistic odds of gaining traction despite some likely problems with its arguments.

In a lawsuit filed Monday, 20 states argued that the individual mandate — upheld by the U.S. Supreme Court in 2012 as a lawful exercise of congressional taxing power — is now unconstitutional because Congress recently eliminated the mandate's penalty. Because the mandate is a cornerstone of the ACA, it can't be "severed" from the broader law, and so the entire law must be struck down, the states asserted.

"The remainder of the ACA is nonseverable from the individual mandate, meaning that the act must be invalidated in whole," the complaint said.

Several experts told Law360 on Tuesday that the lawsuit makes a strong point about the mandate no longer involving taxing power.

"The legal theory underlying the lawsuit is obviously correct," said Ilya Shapiro, a senior fellow at the Cato Institute.

Importantly, the penalty's disappearance is unlikely to make the individual mandate acceptable under Congress' power to regulate interstate commerce. The Supreme Court already called the mandate an invalid exercise of that power, and the mandate's ongoing command to buy health insurance — even without a penalty attached — would still probably be deemed excessive, several experts said.

"I don't see the absence of the penalty as impacting the commerce power analysis," said Nicole Huberfeld, a professor at Boston University School of Law.

The lawsuit is also likely to benefit from its strategic filing in the Northern District of Texas. U.S.

District Judge Reed O'Connor — a nominee of President George W. Bush who struck down an ACA gender identity rule in 2016 — will hear the case. Any appeal would go to the Fifth Circuit, which is dominated by conservative judges.

Those are "about as friendly forums as they could find," Shapiro said.

But the lawsuit will nonetheless confront some very high hurdles. One of the most daunting obstacles relates to the fact that the GOPcontrolled Congress last year failed to repeal the ACA and subsequently scrapped the mandate penalty.

That's a big deal because when courts decide whether an unconstitutional provision can be severed from a broader statute, they look at whether Congress would have enacted the statute without the provision.

"Congress, by virtue of its own actions, has already decided ... that the Affordable Care Act can stand without the mandate," Yale Law School professor Abbe Gluck said.

Ilya Somin, a law professor at George Mason University, said it's possible that a court will find that the mandate is now unconstitutional. But he voiced skepticism about any bolder move.

"What I think is very unlikely is that a court will rule the entire law must be brought down because of this," Somin said. "Because even if [the ACA] wasn't severable initially, in some legal sense Congress has now, in fact, effectively severed it."

It's also not a fait accompli that the taxing power argument is off the table. In 2012, Chief Justice John Roberts identified several factors in treating the penalty as a tax, including the fact that it wasn't so large as to make insurance purchases all but compulsory.

"Raising revenue was just one marker for what made it an exercise of the taxing power," Huberfeld said.

The Trump administration fiercely dislikes the ACA, raising questions about how it will respond to the lawsuit. Representatives of the White House and the U.S. Department of Justice had no comment on Tuesday.

Josh Blackman, an associate professor at the South Texas College of Law, predicted that the administration will battle the suit on procedural grounds by contending that the states haven't been harmed.

"First, DOJ is going to argue there's no standing," Blackman said. "They can write that brief in their sleep. This is like an automatic DOJ position."

But experts on Tuesday were generally doubtful that such an argument would succeed. They noted that the mandate — even without a penalty — is still expected to drive a small amount of enrollment, thus affecting state insurance markets and Medicaid programs.

"If it's costing the state even a dollar or something, then they could have standing," Somin said.

That could force the Trump administration to choose between advancing a fullthroated defense of the ACA or bowing out of the lawsuit. If it takes the latter route, then Democratic state attorneys general would "without a doubt" seek to take over the defense, Blackman said.

Although many observers on Tuesday predicted that the ACA would survive its latest mortal threat, they had different rationales. Some, for example, were simply dubious about the case's merits.

"It's clever, but too clever by half. There is no precedent for this sort of argument, and I would be surprised if it went anywhere," said Jonathan H. Adler, a professor at the Case Western Reserve University School of Law. "Congress is free to revise statutes, and doing so doesn't suddenly generate constitutional issues."

Others predicted that Chief Justice Roberts, who has displeased ACA critics by shielding the law in a pair of major cases, would serve as a bulwark for the law once again, should the states eventually wind up at the Supreme Court.

"He can easily twistify some more words to reach the desired result," Shapiro said.

But even among those who panned the case on Tuesday, there was a reluctance to unequivocally declare that it would fail. After all, most experts in 2012 thought that the individual mandate was clearly lawful, but it almost vanished when a minority of four Supreme Court justices voted to block it and the entire ACA.

Later, many experts derided a legal bid to dramatically curtail ACA subsidies. But that effort succeeded at the D.C. Circuit and seriously rattled ACA supporters before falling short in a 63 ruling at the Supreme Court.

Now, a strikingly similar situation is at hand: a creative legal theory, a host of skepticism, and the lingering possibility that the ACA could be in real jeopardy.

"It will be interesting to see what happens," Huberfeld said. "Nobody thought that the first set of challenges would go anywhere. I think we all learned a lesson that anything's possible these days."

The states are represented by their respective attorneys general.

Counsel information for the U.S. was not immediately available.

The case is Texas et al. v. U.S. et al., case number 4:18cv00167, in the U.S. District Court for the Northern District of Texas.