

Analysis of Affordable Care Act Supreme Court Challenge: Jurisdictional Arguments

Monday morning marked the beginning of the marathon arguments before the Supreme Court about the Affordable Care Act (ACA). The first issue on the Justices' plate is whether they have jurisdiction (or authority) to hear the States and individual plaintiffs' challenge to the ACA's individual mandate at this time, and initial indications were that the Justices will likely uphold the Court's authority to resolve the plaintiffs' suit on the merits. At the same time, there is some overlap between the parties' arguments regarding the merits questions the Court will consider later this week and this threshold issue of jurisdiction. Thus, it remains possible that the Court will ultimately hold that the plaintiffs' challenge to the individual mandate must wait until the penalty for failure to purchase minimum coverage has been paid, at which point the plaintiffs' constitutional arguments could be heard as part of an action for a refund.

The argument against hearing the challenge to the individual mandate at this time is that the Anti-Injunction Act (AIA) precludes suits to restrain the assessment or collection of any tax. The penalty for failure to buy minimum health insurance is collected by the IRS in the manner that taxes are collected. And, in fact, the United States has defended Congress's authority to enact the minimum coverage provision as an appropriate exercise of Congress's taxing powers. There are two flavors of counter-argument that would preserve the Court's authority to hear the challenge at this time: first, the plaintiffs argue that the AIA does not limit the courts' jurisdiction at all, but is instead a procedural rule directed at the party bringing the suit and provides a defense that the government can raise or waive at its option (here the United States did not assert the AIA as barring the plaintiffs' suit); second, the United States takes the position that the AIA does limit the courts' jurisdiction (meaning the parties can't waive the limitation) where it applies, but that the AIA does not apply here because Congress designated the payment as a "penalty" rather than a "tax" and did not identify the penalty as one to which the AIA applies.

The Justices' questioning at oral argument on Monday suggested that there was likely a majority of the Court that would uphold its authority to hear the merits of the plaintiffs' challenge to the individual mandate. In recent years, the Court has issued numerous decisions in which it has rejected attempts to read statutory limitations on litigation as restrictions on the courts' authority, preferring instead to see them as requirements imposed on the parties, but which can be waived or forfeited if not asserted at the proper time. A number of questions appeared to place the AIA in the category of non-jurisdictional "claims processing rules." Other questions suggested some sympathy with the government's argument, such as a question to the Solicitor General on whether the Court would have to resolve the question whether the AIA limits the courts' jurisdiction if the penalty for failure to buy minimum coverage were deemed not a "tax" within the scope of the AIA.

While initial questioning suggested support for viewing the AIA as not barring the plaintiffs' challenge, there is some chance the Court could ultimately conclude that the AIA precludes a challenge to the individual mandate at this time. As several questions at oral argument reflected, there is some overlap between the jurisdictional issue and how the Justices view the statute as a substantive matter. If, for example, the Justices are persuaded that the individual mandate penalty is a "tax" for constitutional purposes, they may be more likely to regard it as a tax under the AIA as well. More generally, argument over the coming days regarding the merits issues may persuade the Justices that plaintiffs' suit really is directed at restraining collection of a tax and that the current challenge presents precisely the type of circumstance in which resolving the parties' constitutional arguments would benefit from consideration in the context of a particular application of the penalty to concrete circumstances. One example of the overlap between merits and jurisdiction came Monday morning in the form of questions to the plaintiffs' lawyer about why the States have standing to challenge the individual mandate, since it merely encourages individuals who are already eligible to enroll for State Medicaid benefits to do so.

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