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Will the Affordable Care Act Survive *California v. Texas*?

*Understanding the Possible Outcomes and Unpacking the
Supreme Court Oral Arguments*

Tad Heuer and Ross Margulies

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- Background on *California v. Texas*
- Issues Before the Court
- Analysis of Oral Arguments
- Potential Outcomes
- Potential Impact on Patients and the Healthcare Sector
- Potential Congressional Fixes

What Do These Three Things Have In Common?



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Title IV, Subtitle C, § 4205
Nutrition Labeling of Menu
Items at Chain Restaurants

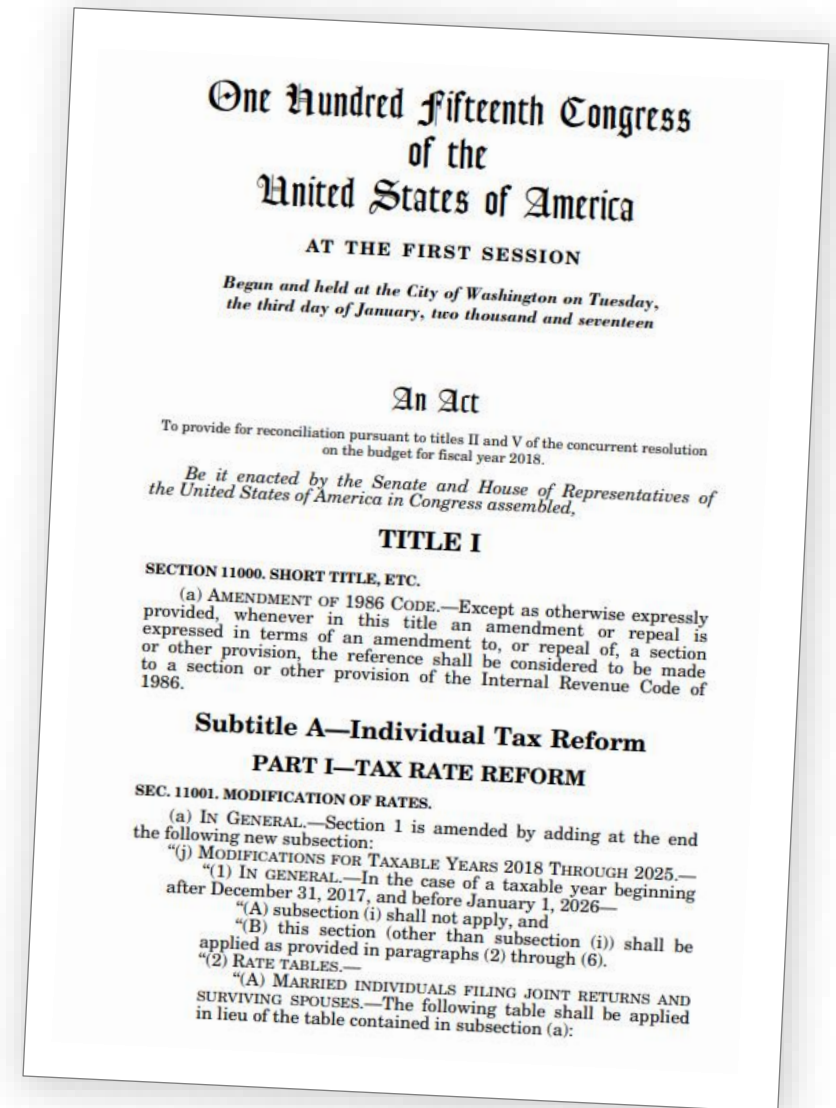


Title I, Subtitle G, § 1556
Black Lung Benefits Act Extension



Title III, Subtitle B, § 3136
Power-Driven Wheelchair Payments

- In 2012, the Supreme Court upheld the ACA on the basis that the **Individual Mandate** was a constitutional exercise of Congress's taxing authority
- In 2017, Congress passed the Tax Cuts and Jobs Act ("TCJA")
- The TJCA set at zero the tax on individuals who fail to maintain healthcare coverage under the Individual Mandate
- Two private individuals and certain Republican-led states challenged the constitutionality of the Individual Mandate, arguing that the Individual Mandate was no longer a "tax"



Background on *California v. Texas*



- DOJ and HHS chose not to defend the constitutionality of the Individual Mandate
 - 16 Democratic-led states and D.C. intervened at the District Court
 - U.S. House of Representatives intervened at the Court of Appeals
- **U.S.D.C. for the Northern District of Texas:** Held the Individual Mandate unconstitutional and not severable from the ACA, rendering the entire ACA invalid
- **Fifth Circuit Court of Appeals:** Upheld the District Court's decision that the Individual Mandate is unconstitutional, but remanded for further review on severability

- The Court's ideological balance remained largely the same between *NFIB v. Sebelius* (2012) and 2020:
 - Justice Gorsuch replaced Justice Scalia
 - Justice Kavanaugh replaced Justice Kennedy
- The replacement of Justice Ruth Bader Ginsburg with Justice Amy Coney Barrett could create a conservative majority willing to revisit the constitutionality of the ACA
- In a 2017 law review article, then-Professor Barrett criticized Chief Justice Roberts for “*push[ing] the Affordable Care Act beyond its plausible meaning to save the statute.*”



The Supreme Court focused on three key issues in *California v. Texas*, with a decision expected by June 2021:

1. Standing

- Did the individual plaintiffs (or the Republican-led states) show they are harmed?

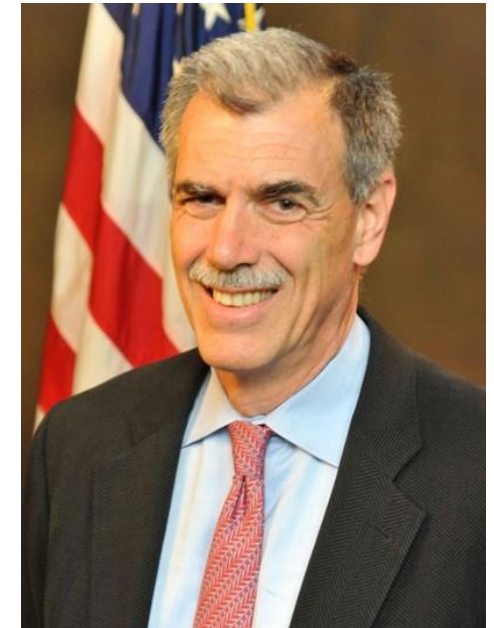
2. Constitutionality of the Individual Mandate

- Without the monetary penalty, is the Individual Mandate still constitutional under Congress's taxing power (or another Congressional authority)?

3. Severability

- If the Individual Mandate is invalid, is it “severable” from the rest of the ACA?

- Michael Mongan, California Solicitor General
- Don Verrilli, former Solicitor General (for the U.S. House)





- Kyle Hawkins, Texas Solicitor General
- Jeffrey Wall, Acting U.S. Solicitor General



- **Democratic-led states:** Plaintiffs are not harmed by a zero-dollar penalty, so they lack standing
- **Republican-led states:** States suffer a “pocketbook” injury by having to cover new Medicaid patients (because the requirement to have insurance remains law), and by incurring costs of filing certain forms
- **DOJ:** “Standing by Inseverability.” If the entire ACA is inseverable, a Plaintiff harmed by *any* provision of the ACA has standing to challenge the *mandate*, even if the mandate doesn’t harm the Plaintiff

- Moderate skepticism about “pocketbook standing”

- **Justice Thomas** (to Texas): “The individual mandate now has no enforcement mechanism, so it's really hard to determine exactly what the threat is of an action against you.”

- Disagreement about whether a mandate without penalties can still generate injury (and standing)

- **Roberts & Kavanaugh**: Laws without penalties are still ones we expect people to follow
- **Breyer**: Numerous laws are precatory or hortatory without being unconstitutional

- Significant skepticism about “standing by inseverability”

- **Chief Justice Roberts**: Administration theory “really expands standing dramatically,” by allowing “somebody not injured by the provision that needs challenging sort of roam around through those thousand pages and pick out whichever ones he wants to attack.”

Background: Constitutionality of Individual Mandate

- The Individual Mandate required most Americans to maintain a certain level of healthcare coverage or pay a monetary penalty. 26 U.S.C. § 5000A.
- *National Federation of Independent Business (“NFIB”) v. Sebelius* (2012):
 - **5-4 majority of the Court’s conservative bloc:** Commerce Clause did not provide a basis to uphold the individual mandate
 - The Commerce Clause “*authorizes Congress to regulate interstate commerce, not to order individuals to engage in it.*”
 - **5-4 majority of Chief Justice Roberts and the Court’s liberal bloc:** Individual mandate is a constitutional exercise of Congress’s taxing power
 - The monetary penalty could be “*reasonably characterized as a tax*” and yields “*the essential feature of any tax: It produces at least some revenue for the Government.*”

Oral Argument: Constitutionality of Individual Mandate

■ **Conservative Justices**: No revenue generation renders mandate unconstitutional

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- **Justice Barrett**: “When Congress zeroed out the tax, it was no longer a tax because it generated no revenue, and, therefore, it could no longer be justified as a taxing power.”

■ **Liberal Justices**: Mandate is now merely hortatory, and is not an unconstitutional command

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- **Justice Breyer**: “I can recall or I believe just dozens and dozens of statutes where Congress says something [nominally mandatory] where normally we would say it's precatory.”
 - **Justice Kagan**: “The only thing that's changed [since *NFIB*] is something that made the law less coercive If you make a law less coercive, how does it become more of a command?”
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- A provision is “severable” if its unconstitutionality does not affect the rest of the law.
- ACA does not include an express severability clause
- Chief Justice Roberts in *Seila Law v. CFPB* (2020):
 - Severability doctrine is “a scalpel rather than a bulldozer.”
- Justice Kavanaugh in *Barr v. American Association of Political Consultants* (2020):
 - “The Court’s presumption of severability supplies a workable solution.”
- **Implied inseverability clause?** Section 1501 of ACA described the individual mandate as “essential to creating effective health insurance markets [that] do not exclude coverage of pre-existing conditions.”



The “Three-Legged Stool”

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- The **Three-Legged Stool** analogy for comprehensive health care coverage:
 1. Individual Mandate
 2. Guaranteed Issue & Community Rating
 3. Exchange Subsidies
 - **Jonathan Gruber** (MIT Economist): “*Without all three legs, the stool— and effective health reform—will not stand.*”
 - **Justice Alito**: “At the time of the first case, there was strong reason to believe that the individual mandate was like a part in an airplane that was essential to keep the plane flying so that if that part was taken out, the plane would crash. But now the part has been taken out and the plane has not crashed.”

- Significant skepticism that the ACA contains an express “inseverability clause”



- **Chief Justice Roberts:** Section 1501 “doesn’t look like any [in]severability clause anywhere else in the rest of the U.S. Code to me.”



- **Justice Kavanaugh:** “Inseverability clauses usually are very clear ... Congress knows how to write an inseverability clause. And that is not the language that they chose here.”

- Significant skepticism that the ACA is otherwise “inseverable”



- **Justice Kavanaugh:** “[L]ooking at our severability precedents, it does seem fairly clear that the proper remedy would be to sever the mandate provision and leave the rest of the Act in place, the provisions regarding preexisting conditions and the rest.”



- **Chief Justice Roberts:** “I think it's hard for you to argue that Congress intended the entire Act to fall if the mandate were struck down when the same Congress that lowered the penalty to zero did not even try to repeal the rest of the Act.”

- **Potential Holding:** Reverse the Fifth Circuit on the basis that plaintiffs lack standing
- **Likelihood:** Moderate
- **Analysis:**
 - Various Justices at oral argument voiced skepticism about standing, ranging across the ideological spectrum from Justice Thomas to Justice Kagan
 - Chief Justice Roberts: the theory of “standing by severability” would “expand standing dramatically.”
 - U.S. Acting Solicitor General Wall suggested at argument that the *individual* plaintiffs may not have standing



- **Potential Holding:** Reverse the Fifth Circuit. Hold that the Individual Mandate is constitutional (even without the penalty)
- **Likelihood:** Low
- **Analysis:**
 - Chief Justice Roberts' deciding vote to uphold the Individual Mandate in *NFIB* relied on the Mandate “produc[ing] at least some revenue for the government”
 - Then-Professor Barrett publicly criticized Chief Justice Roberts' decision in *NFIB* to uphold the Individual Mandate as a tax
 - Various Justices voiced skepticism that the Mandate was constitutional under a non-taxation theory



Potential Outcome #2: The Individual Mandate is Both Unconstitutional and **Not** Severable

- **Potential Holding:** The Individual Mandate is not severable from the rest of the ACA. The entire ACA would be struck down.
- **Likelihood:** Low
- **Analysis:**
 - Justice Thomas has criticized existing severability precedent in *Murphy v. NCAA* (2018) (concurring)
 - However, Justices Roberts and Kavanaugh both strongly indicated their support for existing severability precedent at oral argument
 - With the three liberal justices, there would be five votes for severability



Potential Outcome #3A: Individual Mandate is Unconstitutional, But Severable

- **Potential Holding:** Individual Mandate is severable from all remaining portions of the ACA. Remainder of ACA stands, including insurance market reforms.
- **Likelihood:** High
- **Analysis:**
 - Courts generally presume that unconstitutional provisions are severable from the remainder of an otherwise-constitutional statute
 - Even absent Justice Ginsburg, there appear to remain sufficient votes on the Court to hold the mandate severable from the rest of the ACA
 - Justice Kavanaugh's decision in *Barr* and his comments at argument suggests the presumption of severability remains the default



Potential Outcome #3B: Individual Mandate is Unconstitutional, But Severable

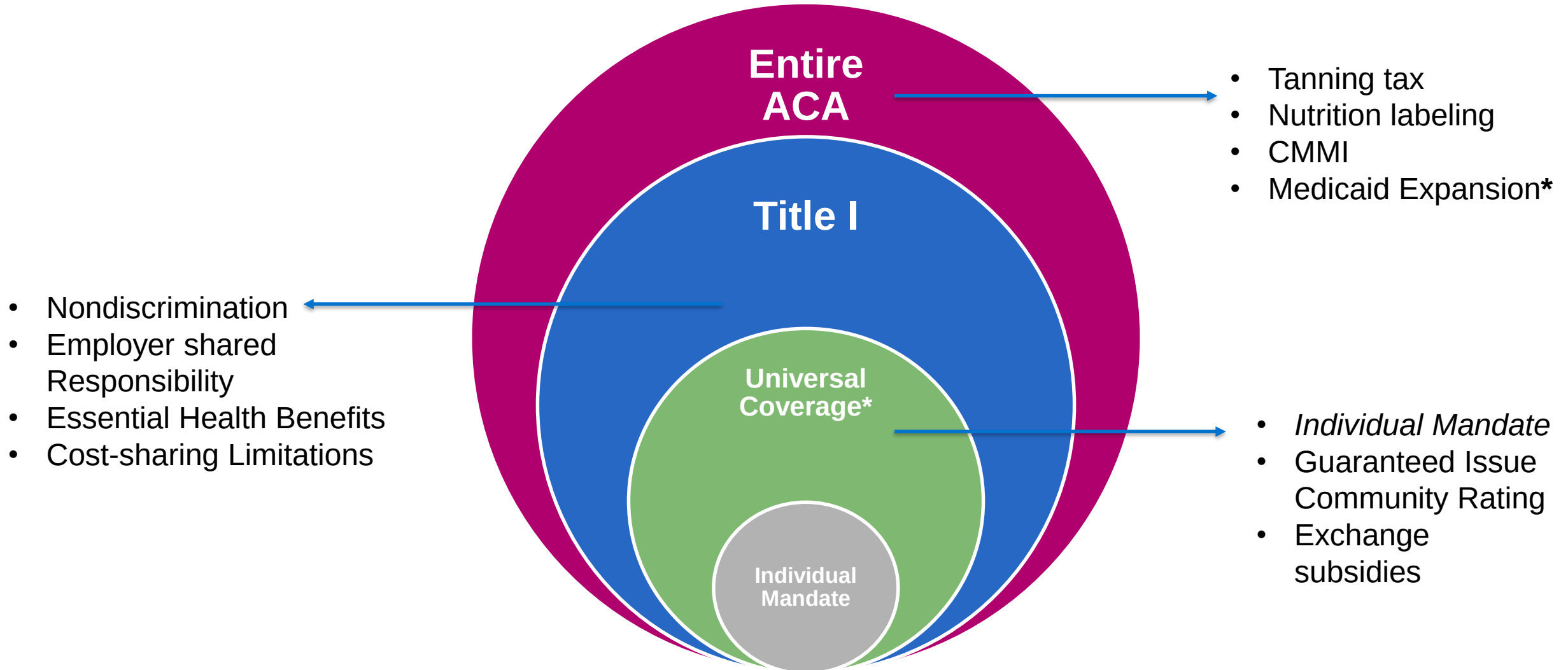
- **Potential Holding:** Individual Mandate is severable from certain ACA provisions, but not from all provisions.
 - Only provisions found non-severable would be struck down
 - Insurance market reforms (like guaranteed issue) and/or the exchange subsidies are most likely to be found non-severable
- **Likelihood:** Low-Moderate
- **Analysis:**
 - No discussion at oral argument about where to draw the line between a severable and non-severable provision.



Potential Impacts are Far Reaching

Medicaid expansion	• 14.8 million Medicaid enrollees in 34 expansion states
Marketplace subsidies	• 9.2 million enrollees receive APTCs through exchanges
Pre-existing conditions	• 54 million have a pre-existing condition
Essential health benefits	• Pre-ACA, 38% of plans did not cover mental health services
Part D donut hole	• In 2018, 5 million Part D enrollees reached the coverage gap
Medicare Advantage payments	• \$350 billion in savings to Federal government
Biosimilars	• More than 25 biosimilars approved since 2010

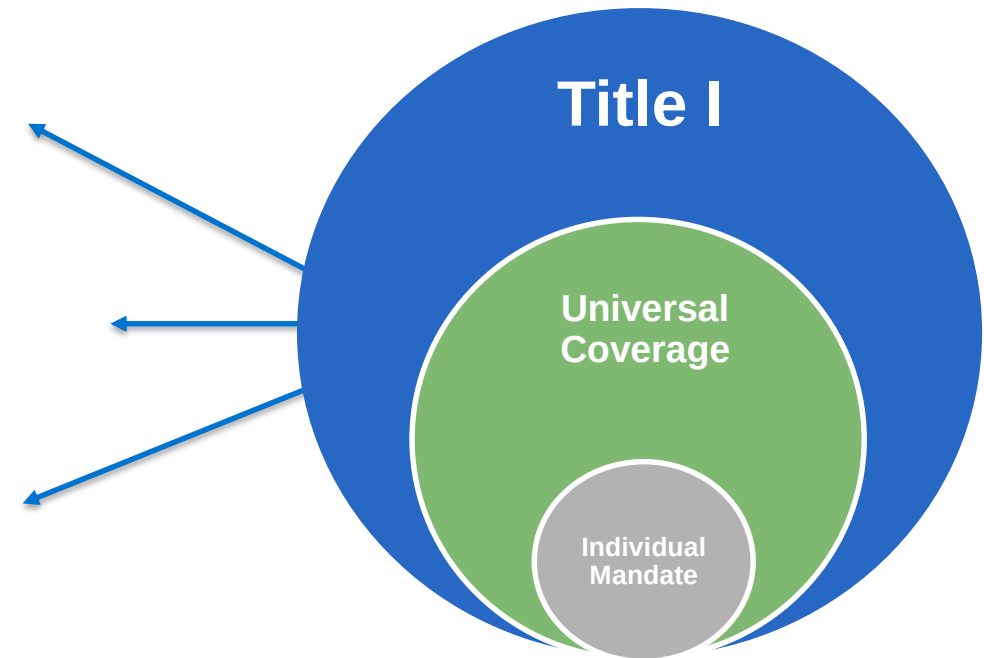
The Concentric Circles of the ACA



Key Provisions at Risk – Insurance Market Reforms

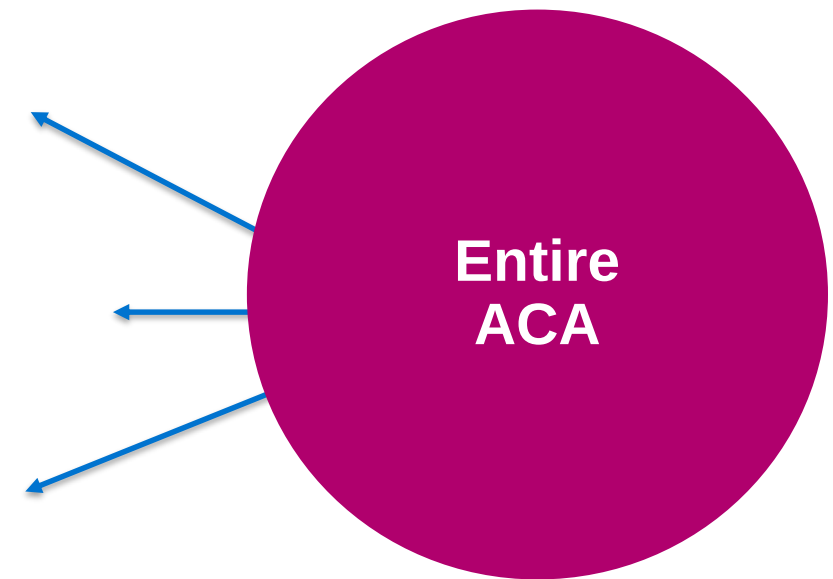
- ✓ No lifetime or annual limits (ACA § 1101)
- ✓ Coverage of preventive health services (ACA § 1101)
- ✓ Dependent coverage to 26 (ACA § 1101)
- ✓ Medical loss ratio (ACA § 1101)
- ✓ Guaranteed Issue/Preexisting Conditions (ACA § 1201)
- ✓ Community Rating (ACA § 1201)
- ✓ Health Insurance Exchanges (ACA § 1311)
- ✓ Co-ops (ACA § 1322)
- ✓ Exchange Subsidies and Reduced Cost-sharing (ACA § 1411)
- ✓ Essential Health Benefits (ACA § 1302)
- ✓ Reinsurance and Risk Corridors Program (ACA § 1302)

- ✓ Streamlined Enrollment into Medicaid (ACA § 1413)
- ✓ **Minimum Essential Coverage/ Individual Mandate (ACA § 1501)**
- ✓ Employer Mandate (ACA § 1513)
- ✓ Nondiscrimination (ACA § 1557)



Key Provisions at Risk – Medicare/Medicaid

- ✓ Center for Medicare and Medicaid Innovation (ACA § 3021)
- ✓ Medicare Shared Savings Program (ACA § 3022)
- ✓ Elimination of cost-sharing for preventive services (ACA § 4104)
- ✓ Medicaid expansion (ACA § 2001)
- ✓ Reduction in Medicare DSH Payments (ACA § 3133)
- ✓ Reduction in annual provider payment rates (multiple provisions)
- ✓ Payment for biosimilar biologics (ACA § 3139)
- ✓ Changes to Medicare Advantage payments (HCERA § 1102)
- ✓ Medicare Advantage quality bonus program (ACA § 3202)
- ✓ Closing of the Part D “donut hole” (HCERA § 1101)
- ✓ Changes to Part D OOP threshold (HCERA § 1101)
- ✓ 340B Program expansion (ACA § 7101)
- ✓ Increase in mandatory drug rebates (ACA § 2501)



Immediate Effects of Decision Invalidating ACA

- **Texas:** Court should stay any decision invalidating the ACA “for an appropriate time to allow the states and political branches of the federal government an opportunity to accommodate [the] reliance interests” on those invalidated provisions.
- **DOJ:** Plaintiffs “could not obtain a declaratory judgment or injunction directed to [non-mandate ACA] provisions unless they demonstrated that such relief is necessary to redress their own cognizable injuries.”



Potential Congressional Fixes



- With a Biden Presidency and both Houses of Congress, Democrats could attempt to fix constitutional infirmities
- Congress could reinstate the penalty tax for failure to comply with the Individual Mandate.
 - With Justice Barrett's confirmation, it is unlikely there are five votes to support Chief Justice Roberts' opinion in *NFIB* that the mandate is a permissible tax
- Congress could eliminate the Individual Mandate altogether and keep the rest of the ACA
- Regardless, the signals on Severability, Standing, and Stay at oral argument suggest Democrats may wait for a decision before acting



Tad Heuer
theuer@foleyhoag.com



Ross Margulies
rmargulies@foleyhoag.com