

## CLIENT ALERT

### In the Midst of a Pandemic, the Validity of the Affordable Care Act will be Revisited this Fall

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The Supreme Court's October Term 2019 undoubtedly was a blockbuster one, both for its decisions and atypical length, but let us not forget a colossal case that looms next term, just over the summer horizon. In the fall, the Supreme Court will hear arguments in *California v. Texas*—a case that revisits the validity of the Affordable Care Act, one of the most impactful and controversial laws of the 21st century. How the Court handles this case in a world stricken by the COVID-19 pandemic will have huge implications for virtually all Americans, not to mention payers who sell products in the marketplaces created by the ACA or who serve states that expanded Medicaid.

*California v. Texas* is the historic 2012 Supreme Court case *National Federation of Independent Business v. Sebelius* redux (with a twist). The *Sebelius* Court upheld the constitutionality of the ACA's individual mandate—a requirement that most Americans obtain health insurance—as a valid exercise of Congress's constitutional power to tax. That was because, under the individual mandate, an individual's failure to obtain health insurance resulted in a penalty called a "shared responsibility payment," which most uninsured Americans were required to pay on their federal income tax form. The *Sebelius* Court held that although the mandate exceeded Congress's power to regulate interstate commerce, it was still constitutional because the mandate effectively operated like a tax. Thus, the Court reasoned, *it is a tax* for constitutional purposes and therefore within the ambit of Congress's taxing powers.

Now the present-day twist. In 2017, Congress passed the Tax Cuts and Jobs Act of 2017, which "zeroed out" the individual mandate's shared responsibility payment—effective on January 1, 2019—while keeping the rest of the ACA intact. Americans who fail to obtain health insurance are still in violation of the law but now owe *zero dollars* on their federal income tax form for that violation. In 2019, the Fifth Circuit held that Congress's zeroing out of the individual mandate's penalty rendered the mandate unconstitutional: without the collection of revenue, the Fifth Circuit reasoned, the mandate fails to operate like a tax, which constitutionally speaking was its only saving grace.

The Fifth Circuit's decision set the stage for this fall's main event at the Supreme Court. In *California v. Texas*, the Court is set to hear three major arguments:

- **First, whether the individual mandate is still constitutional.** Texas, several other states, the Justice Department, and a few individual challengers say that the mandate has been rendered unconstitutional. They argue that the *Sebelius* Court's saving construction of the mandate as a tax no longer holds. That construction falls apart, they assert, when the mandate's enforcement mechanism is no longer a financial payment from which the government collects revenue. But defenders of the law, including California, various other states, and the U.S. House of Representatives, disagree. They argue that the individual mandate is still a tax—just a tax in dormant form. The mandate may still be used to collect revenue in the future, just as it did before the Tax Cuts and Jobs Act. The law's defenders also argue that the mandate in its current form really doesn't do anything. It is a "precatory" provision that encourages Americans to obtain health

insurance. Such a provision, they argue, is not really an exercise of congressional power, let alone one subject to constitutional doubts.

- **Second, whether the individual and state plaintiffs have standing.** How are the law’s challengers injured? The Fifth Circuit determined that the individual plaintiffs have standing to challenge the mandate despite its lack of penalty because they each declared paying for health insurance that they otherwise would have forgone but for the mandate. The Fifth Circuit additionally ruled that the State plaintiffs have standing since they incur certain administrative costs arising from the mandate, which include costs associated with reporting whether their employees are in compliance with the law. The ACA’s defenders dispute these rulings. They argue that the choice to forgo health insurance results in no cognizable injury to the individual plaintiffs because these uninsured Americans no longer owe any penalty payment. They further contend that the State plaintiffs have failed to present evidence of the costs they claim to suffer because of the law.
- **Third, whether the individual mandate is severable from the rest of ACA.** If the Supreme Court determines that the individual mandate is unconstitutional, the question arises whether the rest of the ACA must go, too. Under the Supreme Court’s historic “severability” analysis, the question is whether Congress would have intended the balance of a law remain in effect where a specific provision within the law is held unconstitutional. Defenders of the ACA argue that of course the individual mandate is severable from the remainder of the ACA: severability is a question of congressional intent, and Congress’s intent in this instance to keep the ACA despite an unconstitutional mandate could not be clearer in light of the fact that, through the Tax Cuts and Jobs Act, it did in fact leave the rest of the ACA intact despite the neutered mandate. But the ACA’s challengers disagree, arguing that the individual mandate is the heart of the law, an integral component that makes the rest of ACA work. Without it, they assert, the law ceases to properly function, and Congress would rather see its law go than be rendered non-functional.

*California v. Texas* could have huge implications for health insurance in the United States. It is hardly a stretch to say that the ACA has fundamentally altered the healthcare industry over the last decade. Justice Kavanaugh has referred to the ACA as “one of the most consequential laws” in U.S. history. Aside from the individual mandate, the law has, among various other things, provided tax credits to individuals purchasing health insurance on the marketplace exchanges; mandated coverage of essential health benefits; prohibited the denial of coverage on the basis of preexisting conditions; placed limits on insureds’ cost-sharing obligations; and incentivized states to expand Medicaid eligibility and benefits. Defenders of the law argue that these provisions still function despite the effective absence of a mandate.

Millions of Americans have obtained health insurance through the ACA. And virtually every business has been affected by the law, not the least of which, health insurers whose business operations changed in fundamental ways after the law took effect. But if the Supreme Court ultimately invalidates the individual mandate and holds it non-severable from the rest of the law, the ACA will cease to exist. These consequences would have been weighty in a pre-COVID 19 world. But now, in the midst of a global pandemic, where demands on our healthcare system are at an unprecedented level, they could be some of the weightiest the Court has faced in a long time.

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