

What's At Stake In High Court Row Over ACA Constitutionality

By Jay DeSanto, Daniel Wolff and Xavier Baker (August 18, 2020, 5:34 PM EDT)

The U.S. Supreme Court's October 2019 term was undoubtedly 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 coming term, 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 a redux of the historic 2012 Supreme Court case *National Federation of Independent Business v. Sebelius*. 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 Jan. 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.



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In 2019, the U.S. Court of Appeals for 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 coming term's main event at the Supreme Court. In *California v. Texas*, the court is set to hear three major arguments.

First, is the individual mandate still constitutional?

Texas, several other states, the U.S. Department of Justice 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, do 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, is 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 nonfunctional.

California v. Texas could have huge implications for health insurance in the U.S. It is hardly a stretch to say that the ACA has fundamentally altered the health care industry over the last decade. Justice Brett 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; incentivized states to expand Medicaid eligibility and benefits; created the Center for Medicare and Medicaid Innovation, which develops new health care delivery and payment models for Medicare and Medicaid beneficiaries; and enhanced fraud prevention, detection and penalties.

Indeed, the individual mandate — along with the community rating and guaranteed-issue requirements — resides in Title I of the ACA; the ACA has 10 titles addressing a host of issues and programs far beyond provisions related to an individual opting to purchase health insurance coverage. 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. Health insurers and providers alike have changed their businesses and modified their relationships with one another as a result of the ACA's innovations for health care delivery and payment.

But if the Supreme Court ultimately invalidates the individual mandate and holds it nonseverable from the rest of the law, the ACA will cease to exist, disrupting the health care delivery system as we have come to know it. These circumstances would have been weighty in a pre-COVID-19 world.

But now, in the middle of a global pandemic, where demands on our health care system are at an unprecedented level, they could be some of the weightiest the court has faced in a long time. As millions of Americans lose their employer-sponsored health insurance, they have been able to access coverage via the ACA's exchanges.

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