



# Fifth Circuit Holds the Individual Mandate Unconstitutional: Implications for Congress

December 23, 2019

On December 18, 2019, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) issued its decision in *Texas v. United States* on the constitutionality of the [Patient Protection and Affordable Care Act's](#) (ACA's) requirement for individuals to maintain health insurance (the so-called "[individual mandate](#)") and the continued validity of the remainder of the Act. The Fifth Circuit affirmed a [district court](#) ruling that Congress lacked the constitutional authority to enact the individual mandate, as amended by the subsequent [2017 tax revision](#), but declined to resolve a broader issue: what happens now to the ACA's remaining provisions? The Fifth Circuit reversed the district court's decision on this severability question and sent the case back to the district court to "explain with precision how particular portions of the ACA as it exists post-2017 rise or fall on the constitutionality of the individual mandate." This Sidebar provides background on *Texas*; discusses the Fifth Circuit's decision; highlights potential effects of the decision and possible next steps for the case; and identifies legislative options for Congress.

## Background

Enacted in 2010, one of the ACA's [central goals](#) was to "increase the number and share of Americans who are insured." In addition to sweeping changes to [federal private health insurance regulation](#), [income-based subsidies](#) to facilitate the purchase of health insurance, and substantial increases to the scope of [Medicaid coverage](#), the ACA, as originally enacted, also compelled certain [individuals](#) to maintain health insurance and imposed financial penalties on those who failed to do so. These latter provisions form what is commonly referred to as the individual mandate. In addition, the ACA includes other provisions covering an array of issues ranging from [health care workforce promotion](#) to [improving access to innovative medical therapies](#).

Litigation over the constitutionality of the individual mandate is not new. In 2012, the Supreme Court addressed this issue in a landmark case, *National Federation of Independent Business v. Sebelius* (*NFIB*). In *NFIB*, five Supreme Court Justices [concluded](#) that neither Congress's authority to [regulate interstate commerce](#) nor its derivative authority to [enact necessary laws to effectuate its enumerated powers](#) empowered Congress to enact the individual mandate. These Justices explained that while the Commerce Clause allows Congress to *regulate existing* commercial activity, it does not bestow Congress with the authority to compel individuals to *become active* in commerce. Nonetheless, a different group of five

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Justices concluded that Congress's [power to levy taxes](#) did so. In his controlling opinion, Chief Justice Roberts stated that it was "fairly possible" to view the penalty as a tax, especially because it possessed "the essential feature of any tax: It produces at least some revenue for the Government." Because the individual mandate could be plausibly construed as a tax, a majority of the Court held that the individual mandate was constitutional. Conversely, four [dissenting](#) justices expressed the view that neither the interstate commerce nor taxing power supported the individual mandate, and because the individual mandate was so integral to the ACA's enactment and operation, the entire Act should fall with it.

In 2017, Congress [amended](#) the individual mandate to zero out the financial penalty imposed on individuals without health coverage, but left intact the language requiring individuals to maintain such coverage. Soon after, several state attorneys general and governors (the "plaintiff-states") and other individuals filed [suit](#) against the federal government in *Texas*, claiming that the individual mandate no longer qualified as a constitutionally permissible "tax" because it no longer generated revenue for the federal government. According to the plaintiffs, without the ability to rely on Congress's taxation authority, and because a majority of Justices previously concluded that the Commerce Clause did not support the individual mandate, the amended individual mandate was unconstitutional. While the Department of Justice declined to defend the constitutionality of the individual mandate and argued that the mandate was unconstitutional, a [different group](#) of states intervened in the case as defendants (the "intervenor-defendant-states") in support of the individual mandate and the ACA.

As detailed in this CRS [Sidebar](#), in December 2018, a federal judge for the U.S. District Court for the Northern District of Texas sided with the plaintiffs and the federal government in the *Texas* case and [held](#) that the individual mandate was unconstitutional. After determining that the individual plaintiffs had standing to bring the case, the court concluded that neither Congress's interstate commerce nor its taxing power supported the individual mandate, as amended by the 2017 Act. As discussed below, when courts rule that a specific provision within a larger statute is unconstitutional, a follow-up issue is [severability](#), i.e., the extent to which the remaining statute can stand on its own, without the unconstitutional provision, consistent with congressional intent.

The district court in *Texas* held that the individual mandate could not be severed from the *entire* ACA. In its decision, the district court relied heavily on [congressional findings](#) from 2010 that indicate, among other things, that the mandate "is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market." In addition, citing to the Justices' competing opinions in *NFIB* and subsequent cases involving the ACA, the district court maintained that "all nine Justices" have recognized that the individual mandate and other ACA provisions are inextricably intertwined. The intervenor-defendant-states and the federal government appealed the district court's decision to the Fifth Circuit. The U.S. House of Representatives [intervened on appeal](#) as defendants to defend the ACA's validity.

## Overview of the Fifth Circuit's Decision

After [determining](#) that the appeal was properly before it and that at least two plaintiff groups had [standing](#) to sue, a divided panel of the Fifth Circuit [held](#) on the merits that the individual mandate, following the 2017 amendment that reduced the financial penalty to zero, is no longer constitutional under *NFIB*. In the court's [view](#), the essential features of a tax, including that it produce some revenue for the government, no longer exist in the amended individual mandate. Thus, the Fifth Circuit [concluded](#), it is "no longer fairly possible to save the mandate's constitutionality under Congress' taxing power," and the amended individual mandate can only be viewed as a "[command to purchase insurance](#)." Because *NFIB* held that such a command was not authorized under the Interstate Commerce Clause or the Necessary and Proper Clause, the amended individual mandate was held unconstitutional.

Having determined that the amended individual mandate is unconstitutional, the Fifth Circuit next considered whether, or to what extent, the rest of the ACA is severable from the individual mandate. The severability doctrine [requires](#) a court to first consider whether the statute without the constitutionally defective provision could operate in a manner consistent with Congress’s intent. If so, the court must then determine whether Congress would have enacted the remaining provisions without the unconstitutional portion. This inquiry into “counterfactual Congressional intent,” the Fifth Circuit [observed](#), “places courts between a rock and a hard place.” Courts must refrain from rewriting a statute in an effort to preserve the legislation, while also refraining from invalidating more of the statute than necessary. The need to strike this difficult balance thus, in the Fifth Circuit’s view, [requires](#) a “meticulous analysis” that is “at its most demanding” in the context of a sprawling and amended statutory scheme like the ACA, which encompasses provisions relating to not only the regulation of private health insurance, but also Medicare, funding for preventive healthcare programs, drug regulation, nutritional content display at restaurants, and many other areas.

The Fifth Circuit held that the district court’s severability analysis—which [concluded](#) that the individual mandate is inseverable from the rest of the ACA by focusing on the 2010 Congress’s labeling of the mandate as “essential” to its goal of “creating effective health insurance markets”—did not sufficiently satisfy the need “for a careful, granular” approach in this case. Thus, the Fifth Circuit remanded the severability issue to the district court to [conduct](#) “a more searching inquiry” to explain “[with](#) precision how particular portions of the ACA as it exists post-2017 rise or fall on the constitutionality of the individual mandate.” In so doing, the court emphasized that it was not making any comment on *how* the district court should conduct this inquiry, only that the inquiry must be made. In addition to the severability issue, the Fifth Circuit also [remanded](#) for the district court to consider, in the first instance, the federal government’s arguments on appeal that the declaratory relief in this case should not be *nationwide* in scope, but instead, should be tailored to block the ACA’s enforcement in only the plaintiff-states, and only as to the injurious provisions.

The dissent disagreed with nearly all aspects of the majority opinion. As a threshold matter, the dissent [believed](#) that the court should not have reached the merits because no plaintiff had suffered a cognizable injury that establishes standing, given that “absolutely nothing” will happen to those who fail to maintain health insurance under the amended individual mandate. As to the merits, the dissent took the [view](#) that by merely zeroing out the financial penalty, Congress maintained the same “lawful choice” that existed under the original mandate under *NFIB* for individuals: either purchase insurance or pay a penalty (which is now \$0). The dissent further explained that in passing a \$0 tax, Congress did not alter the “legal rights, duties and relations of [any] persons.” Thus, in the dissent’s view, the amended mandate was not an exercise of Congress’s legislative power that must emanate from one of its enumerated powers. Finally, the dissent would have reversed the district court on [severability](#). Because Congress zeroed out the penalty without repealing any other part of the ACA, the dissent believed that “little guesswork is needed to determine that Congress believed the ACA could stand in its entirety” without the penalty.

## Immediate Effects of the Decision

Notwithstanding the court’s holding that the individual mandate is unconstitutional, the immediate consequences of the decision on the individual mandate are somewhat minimal. As noted above, the individual mandate, as amended by the 2017 tax revision, no longer imposed any consequences on those who fail to satisfy the individual mandate. Therefore, while the Fifth Circuit concluded that this mandate is invalid, noncompliant individuals would not have been subject to a penalty prior to the court’s ruling in any event.

The immediate effect of the decision on the rest of the ACA is slightly more significant. The district court had previously declared the remainder of the ACA invalid as inseverable from the individual mandate.

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That holding has now been vacated by the Fifth Circuit. Moreover, while the Fifth Circuit gave minimal guidance on the severability question, it did instruct the district court to reconsider severability in the context of the ACA as it existed in 2017, suggesting that “[m]ore is needed” than the recapitulation of the dissenting justices’ view of severability in 2012 in *NFIB*. However, because the district court had not issued an injunction against the implementation or enforcement of the ACA, the existence of that declaratory judgment had not acted as a practical obstacle affecting the ACA’s implementation or enforcement. In the context of ACA enforcement and implementation, the greatest effect of the Fifth Circuit’s decision may be to delay any definitive answers to questions about the validity of the remainder of the ACA, and to what extent any invalid provisions would be enjoined. As discussed in the next section, the duration of that delay may depend upon the litigants’ next steps.

## Next Steps in the Litigation

Because the Fifth Circuit’s decision partially affirmed and partially reversed the district court’s ruling, each party in the case has standing to petition for review the particular holdings in the Fifth Circuit’s decision that were not in that party’s favor, either by the entire Fifth Circuit (known as en banc review) or by the Supreme Court. Specifically, the plaintiff-states or the federal government may argue that the Fifth Circuit’s reversal of the district court’s severability analysis was erroneous. In contrast, the intervenor-defendant-states may argue that the plaintiffs lacked standing to challenge the individual mandate or that the individual mandate remains constitutional notwithstanding the lack of a penalty associated with it.

As described in [this CRS product](#), in cases in which the United States is a party, parties have [forty-five days](#) to file a petition for rehearing or rehearing en banc. Beyond potential en banc review, parties generally have [ninety days](#) from the appellate court’s decision or denial of a rehearing to petition the Supreme Court for certiorari. Writs of certiorari are granted at the Court’s discretion and typically occur after briefing from all parties. Grants are more likely where a challenge to an important federal policy is at issue. Conversely, grants may be less likely where further litigation in the lower courts, such as the remand directed by the Fifth Circuit in *Texas*, may clarify the need for Supreme Court review, or lack thereof. Once a writ of certiorari has been granted, the parties submit additional briefing on the merits, and a time for oral argument may be scheduled. For writs of certiorari granted after January of a given year, oral argument is typically scheduled for the Court’s next term, which begins the following October.

Alternatively, if further appellate review is not sought or granted at this time, the case will return to the district court to conduct the more searching severability analysis directed by the Fifth Circuit. As part of that process, which could be lengthy, the court may require additional briefing from the parties addressing the specific questions raised by the Fifth Circuit, such as the 2017 Congress’s intent and the interaction between the individual mandate and each of ACA’s other provisions.

## Considerations for Congress

There remain a variety of legislative options for Congress to address the central legal issues presented in the *Texas* litigation. Congress could, of course, choose to take no action and await further judicial developments. Alternatively, Congress could pass legislation that would target the statutory underpinnings of the plaintiffs’ arguments. For example, Congress could amend the individual mandate to restore a financial penalty for failing to maintain health insurance to cure the constitutional infirmities the Fifth Circuit identified. Conversely, Congress could repeal the requirement to maintain health insurance in its entirety to render the litigation moot by removing the provision whose constitutionality is in question. Either option would seemingly render further litigation over the rest of the ACA’s continued validity unnecessary.

Another possibility is for Congress to add a severability clause to the ACA. The Supreme Court has [ruled](#) that the inclusion of these clauses “creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision.” Currently, the ACA itself does not contain a severability clause. Should Congress deem it appropriate to enact a severability clause, it could expressly delineate the specific ACA provisions that should remain intact in situations where a court concludes that one of the Act’s other provisions is unconstitutional. An example of such a bill from the current Congress is [H.R. 383](#), the Continuing Coverage for Preexisting Conditions Act of 2019.

Finally, Congress may consider enacting new legislation that contains provisions similar to the ACA, but are independent of the individual mandate language that the Fifth Circuit held constitutionally problematic. If enacted, such legislation could remain in effect irrespective of the outcome in *Texas*. One example of such legislation is [S. 1125](#), the Protect Act, which intends to preserve certain ACA health insurance requirements, including guaranteed issue requirements.

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