



California v. Texas: The Fate of the Affordable Care Act

October 27, 2020

On November 10, 2020, the Supreme Court is scheduled to hear oral argument in *California v. Texas* (consolidated with the related case *Texas v. California*), a constitutional challenge to the Affordable Care Act's (ACA's) **individual mandate**. The suit also seeks to invalidate the ACA's many other provisions, which cover a range of issues such as the regulation of private health insurance, changes to public health care programs like Medicaid and Medicare, funding for preventive health care programs, drug regulation, and nutritional content display at restaurants. This Sidebar provides background on the ACA's individual mandate, including relevant prior litigation, followed by a discussion of the *California v. Texas* case, including the parties' arguments in the case. It concludes with some select considerations for Congress.

The ACA's Individual Mandate

Enacted in 2010, one of the ACA's central goals was to “**increase the number and share of Americans who are insured.**” In its original form, the ACA's major components included sweeping changes to **federal regulation of private health insurance**, established income-based **subsidies** to facilitate the purchase of health insurance, and substantially **increased** the scope of Medicaid coverage. Additionally, in a requirement commonly referred to as the **individual mandate**, the law compelled certain individuals to maintain minimum levels of health insurance and, as originally enacted, imposed financial penalties enforced as a tax on those who failed to comply with the requirement.

The Supreme Court has once before considered the individual mandate's constitutionality. In 2012, the Court addressed this issue in its landmark case, *National Federation of Independent Business (NFIB) v. Sebelius*. In *NFIB*, several states and private litigants argued that the individual mandate exceeded Congress's legislative authority. They further claimed the rest of the ACA was not severable from the individual mandate and would thereby have to be invalidated in its entirety if the individual mandate was held unconstitutional. Chief Justice Roberts, writing for himself, was joined by Justices Scalia, Kennedy, Thomas, and Alito, writing separately, in **ruling** that neither Congress's authority to regulate interstate commerce nor its derivative authority to enact necessary laws to effectuate its enumerated powers gave Congress authority to enact the individual mandate. These Justices collectively 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 participate in commerce. A different group of five Justices,

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comprised of the Chief Justice and Justices Ginsburg, Breyer, Sotomayor, and Kagan, concluded that the individual mandate could “[reasonably be characterized](#)” as a valid exercise of Congress’s power to levy taxes. In his controlling opinion, the Chief Justice 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 falling within Congress’s authority under Article I to impose taxes, a Court majority upheld the individual mandate.

Background of *California v. Texas*

The individual mandate that the Supreme Court is to consider in 2020 is not the same as the provision the Court upheld in 2012. Specifically, in 2017, Congress passed major tax reform legislation (2017 tax revision), which [reduced](#) the amount of the financial penalty for failing to comply with the individual mandate to \$0. However, due to procedural restrictions associated with the way that the 2017 tax revision was passed, the actual provision stating that “[a]n applicable individual shall . . . ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month” [remains](#) in federal law.

After the 2017 tax revision, several states and individuals (plaintiffs) [sued](#) the U.S. Department of Health and Human Services and the Internal Revenue Service (federal defendants) challenging the constitutionality of the *amended* individual mandate. The plaintiffs argued that the individual mandate could no longer be reasonably characterized as a tax because it could not raise revenue with a financial penalty of \$0. The plaintiffs further argued that the individual mandate could not be severed from the rest of the ACA, so the entire statute should be invalidated. The federal defendants [did not contest](#) the plaintiffs’ argument regarding the individual mandate’s constitutionality, arguing instead that the rest of the ACA (save a handful of private health insurance provisions—guaranteed issue and community rating provisions or GICR) could be severed from the individual mandate and remain good law. A separate group of states joined the litigation as intervenors (state-intervenors) to argue, among other things, that the amended individual mandate remained constitutional and the rest of the ACA was entirely severable. The district court issued an injunction in the plaintiffs’ favor, including ruling that the individual mandate was not severable, but stayed its effect pending appeal.

On appeal to the U.S. Court of Appeals for the Fifth Circuit, the federal defendants [modified their position on severability](#), now agreeing with the plaintiffs that the entire ACA should fall with the individual mandate. The U.S. House of Representatives joined as an intervenor defending the ACA. A divided panel of the Fifth Circuit [affirmed](#) the district court’s determination as to the individual mandate’s unconstitutionality. However, the majority held that the district court’s decision invalidating the entire ACA improperly relied on Congress’s 2010 labeling of the mandate as “essential” and did not sufficiently explain “[how particular portions of the ACA as it exists post-2017 rise or fall on the constitutionality of the individual mandate.](#)” Thus, the Fifth Circuit remanded the severability issue to the district court to conduct “[a more searching inquiry](#)” as to which ACA provisions as it currently exists fall with the individual mandate.

The plaintiffs and state-intervenors sought Supreme Court review of the Fifth Circuit’s decision. On March 2, 2020, the Supreme Court granted certiorari to consider, among other things, whether the amended individual mandate still falls within Congress’s legislative authority, and, if not, whether the remainder of the ACA can be severed from the individual mandate or must fall with it.

Arguments in *California v. Texas*

Constitutionality of the Individual Mandate

Debate surrounding the amended individual mandate’s constitutionality largely centers on how to characterize the provision following the elimination of the financial penalty in the 2017 tax revision. Without the possibility of revenue from a financial penalty, the Fifth Circuit [concluded](#) it is “no longer fairly possible to save the mandate’s constitutionality under Congress’ taxing power,” and said 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 Constitution’s Interstate Commerce or Necessary and Proper Clauses, the Fifth Circuit ruled the amended individual mandate unconstitutional. This argument is echoed by the plaintiffs and the federal defendants in *California v. Texas*.

By contrast, the dissenting judge on the Fifth Circuit panel argued that the elimination of the financial penalty means the individual mandate now “[does not do anything or bind anyone](#),” and Congress does not “[exceed\[\] its enumerated powers when it passes a law that does nothing](#).” Adopting a similar characterization, the state-intervenors and the House of Representatives argue that the amended individual mandate “[may exhort Americans to buy health insurance, but it does not command them to do anything](#).” As a precatory provision without any “possible form of compulsion,” the individual mandate cannot compel an individual to purchase an unwanted product, obviating any concerns under the Commerce Clause. In response, the federal defendants and plaintiffs argue that such a characterization is inconsistent with the amended individual mandate’s text, which speaks in mandatory terms, stating that applicable individuals “shall” maintain minimum essential coverage.

The Court’s fractured opinions in *NFIB* may provide some insight into how the current sitting Justices may view the amended mandate’s constitutionality. Justices Breyer, Sotomayor, and Kagan would have upheld the pre-2017 individual mandate under the Commerce Clause as well as the Taxing Power, which may be suggestive of their current views. Of the remaining Justices, three more have previously written opinions addressing the constitutionality of the original individual mandate. Justices Thomas and Alito coauthored a [dissenting opinion](#) in *NFIB* arguing that the individual mandate was unconstitutional under either the Commerce Clause or Taxing Power, and Chief Justice Roberts wrote an opinion [holding](#) that the individual mandate was not authorized by the Commerce Clause.

Severability

Should the Supreme Court hold the amended individual mandate unconstitutional, the Court would then turn to the question of whether the ACA’s remaining provisions are severable. Under the [doctrine of severability](#), the Court applies a [presumption](#) that the remainder of a law is severable from an unconstitutional component if the remainder can operate in a manner consistent with Congress’s intent, and absent evidence Congress would not have enacted the remaining provisions without the unconstitutional portion. Unless the presumption is rebutted, the unconstitutional provision is severed from the remainder of the statute. If Congress includes a severability or nonseverability clause, courts follow those directives absent [extraordinary circumstances](#).

The [plaintiffs](#) and [federal defendants](#) argue that the individual mandate cannot be severed from the rest of the ACA. Following the [framework](#) used by the dissenting Justices in *NFIB*, the plaintiffs divide the ACA’s provisions into three categories: (1) the GICR provisions; (2) the ACA’s *major* provisions, such as

the health insurance subsidies and Medicaid expansion; and (3) the ACA's *minor* provisions. The plaintiffs argue that [congressional findings](#) enacted as part of the ACA clearly establish that the GICR provisions are so closely intertwined with the individual mandate that they cannot function in the intended manner without the mandate. The plaintiffs [argue](#) that these findings should be viewed as equivalent to a nonseverability clause that is determinative of whether the GICR provisions can be severed from the individual mandate. With respect to the ACA's major provisions, they further [argue](#) that these provisions are inseverable from the individual mandate because they work together to balance the economic effects of "a single, coherent policy" to "effectuate the near-universal healthcare coverage that the mandate requires." Because the removal of the mandate would fundamentally alter that balance, the plaintiffs argue the major provisions would no longer operate in the same *manner* intended by Congress. Finally, the plaintiffs assert that the ACA's minor provisions should fall because Congress would not have enacted them without ACA's major provisions.

For their part, the state-intervenors and the House of Representatives argue that the individual mandate should be severed from the rest of the ACA. They argue that by "[declaw\[ing\]](#)" the individual mandate as part of the 2017 tax revision, Congress demonstrated its intent that the ACA remain in place absent the individual mandate. They further argue that this conclusion regarding congressional intent is bolstered by the fact that multiple legislative attempts to repeal or substantially amend the ACA were rejected by the 115th Congress. And they note that "[\[r\]eal-world experience since 2017](#)" has demonstrated that the GICR provisions continue to function without an enforceable individual mandate. In light of the legislative context and recent programmatic experience, the state-intervenors and the House of Representatives argue that the plaintiffs have not rebutted the presumption of severability.

Notably, several recent opinions indicate some Justices' concerns about modern severability doctrine and suggest a potential third option to the severability analysis. In 2018, in *Murphy v. National Collegiate Athletic Ass'n*, the Court was confronted with whether to sever an unconstitutional provision from the remainder of the Professional and Amateur Sports Protection Act, ultimately concluding that none of the Act was severable. In a concurring opinion, Justice Thomas wrote to express his "[growing discomfort with our modern severability precedents](#)," suggesting this doctrine should be reevaluated "in a future case." Subsequently, in 2020, Justices Thomas and Gorsuch wrote separate opinions in *Seila Law, LLC v. Consumer Financial Protection Bureau* and *Barr v. American Ass'n of Political Consultants*, respectively, expressing similar concerns about modern severability doctrine. The three opinions generally argue that the power of judicial review does not allow courts to revise statutes. Instead, Justices Thomas and Gorsuch argue that a judicial remedy should be limited to an injunction preventing enforcement of an unconstitutional provision against a plaintiff, so as to avoid rendering advisory opinions or circumventing Article III standing requirements. Although these views reflect a minority of the Court, they suggest an option other than conducting a traditional severability analysis, in favor of a simple injunction barring enforcement of the amended individual mandate against the plaintiffs, assuming it is ruled unconstitutional.

Considerations for Congress

If the individual mandate is held unconstitutional and not severable, the invalidation of the entire ACA would have significant consequences for private insurance markets, public health care programs, and many other areas. Perhaps because of the stakes in this case, the Court has permitted the House of Representatives to participate in oral arguments alongside the other parties. The time allotted for oral argument has been extended to a total of 90 minutes to accommodate the many different parties, with 30 minutes for the state-intervenors, 10 minutes for the House of Representatives, and 20 minutes each for the federal defendants and state plaintiffs. In addition to participating in the litigation, Congress has a variety of legislative options to address the central legal issues in *California v. Texas*. Congress could, for example, repeal the individual mandate in its entirety to render the litigation moot or restore the financial

penalty to the individual mandate so that it is indistinguishable from the version previously upheld in *NFIB*. Congress could also enact legislation explicitly addressing the severability or nonseverability of the individual mandate from the rest of the ACA to guide the Court's analysis.

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