

Sparring over ACA Picks Up Before 2021 Supreme Court Ruling

November 2020 elections are also driving partisan fight over the health care law

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Ahead of the November 2020 presidential and congressional elections, the Trump administration and Republican states want to convince the U.S. Supreme Court to find the entire Affordable Care Act (ACA) unconstitutional, while Democrats are defending the act.

Earlier this year, the U.S. Supreme Court agreed to hear *Texas v. United States* (<http://www.ca5.uscourts.gov/opinions/pub/19/19-10011-CV0.pdf>), a case challenging the health care law, during its term beginning in the fall of 2020. A ruling is expected in 2021. On June 25, 18 Republican state attorneys general and the U.S. Department of Justice filed opening briefs arguing that the health care law should be invalidated (https://www.supremecourt.gov/DocketPDF/19/19-840/146332/20200625125704552_Brief.pdf). Democratic state attorneys general and the U.S. House of Representatives are expected to take the other side and have until July 29 to submit reply briefs.

The case is before the Supreme Court because in December 2018 a Texas district court found the ACA unconstitutional after Congress removed the act's individual mandate penalty for not purchasing health insurance. On appeal, the 5th Circuit rejected that ruling and instructed the district court to rehear the matter and to determine which provisions of the ACA Congress intended to be "inseverable" from the individual mandate. That effort was short-circuited when, earlier this year, the Supreme Court agreed to rule on the matter, including whether Texas and the Republican attorneys general have standing to bring the lawsuit.

For more information, *SHRM Online* has gathered the following articles on the issue.

Republicans Ask Supreme Court to Overturn ACA

The Republican brief argues that because the law's requirement to have health insurance was upheld in court as a tax in 2012, and Congress has since repealed the financial penalty for violating that requirement, in 2017, it is no longer a tax and therefore no longer constitutional. The plaintiffs contend that the rest of the law is so intertwined with this provision that the entire law should fall, too.

Most legal observers think the current makeup of the Supreme Court would rule to uphold the law, especially given that Chief Justice John Roberts has already upheld it in two previous ACA cases.

(*The Hill* (<https://thehill.com/policy/healthcare/health-insurance/504660-trump-administration-calls-for-supreme-court-to-strike>))

Court Could Dismiss the Case

The Supreme Court could decide that neither Texas (nor the states that joined it) nor the individuals that sued had standing and, therefore, that this case should have been dismissed from the beginning. The court could decide that, although the individual mandate no longer raises revenue for the U.S., it is still a "tax" and, therefore, still constitutional. Perhaps the most likely outcome is that the court strikes down

the individual mandate on the basis that it is no longer a constitutionally permitted tax but severs the mandate from the statute, allowing implementation of the law to proceed essentially as it is now.

(Groom Law Group (<https://www.groom.com/resources/the-return-to-the-supreme-court/>))

[*SHRM members-only toolkit: Complying with and Leveraging the Affordable Care Act* (www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/complyingwithandleveragingtheaffordablecareact.aspx)]

Roberts Unlikely to 'Rock the Boat'

This term, Roberts voted with the court's liberals in a 5-4 ruling blocking Trump's moves to end the immigration program known as DACA. Roberts, along with Justice Neil Gorsuch, also joined the court's liberals to rule that federal law protects LGBTQ workers from employment discrimination. Both of those rulings upset conservative legal activists, following his 2012 decision to uphold the ACA.

"His critics expected him to be more conservative, or more reliable or more steadfast," said Jonathan Adler, a prominent conservative legal expert and a professor at Case Western Reserve University. An explanation Adler has advanced is that Roberts likes to rock the boat as little as possible in high-profile cases.

(Axios (<https://www.axios.com/john-roberts-supreme-court-abortion-trump-taxes-375c1d44-9c05-416d-a17f-f2e7e48d89d5.html>))

5th Circuit Review Cut Short

On appeal of the Texas district court ruling against the ACA, a split panel of the 5th Circuit instructed the district court to rehear the matter and "to employ a finer-toothed comb on remand and conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable from the individual mandate."

That suggested, legal analysts said, that the 5th Circuit was unlikely to overturn the ACA in full but could have struck down parts of the law directly related to the individual mandate, such as the 5:1 ratio age band, under which insurers can't charge seniors premiums more than five times what younger patients pay, and community rating, which prevents insurers from varying premiums within a geographic area based on age, gender, health status or other factors. The increase in revenue to insurers from the individual mandate was meant to offset the decrease from these restrictions.

However, in March 2020, the Supreme Court justices announced they would hear the case, ending the lower courts' adjudication over it. Not letting the appellate court rule on provisions that might be considered "inseverable" from the individual mandate might suggest that a majority of the Supreme Court is not interested in paring back the statute, much less overturning it.

(*SHRM Online* (www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/supreme-court-to-rule-next-year-on-CAs-validity.aspx))

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