

How the Supreme Court Could Rule on the Affordable Care Act

There are a number of different ways the court could rule, giving it options

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October 26, 2020

[Editor's note: This article has been updated from a previous version.]

On Nov. 10, the U.S. Supreme Court is scheduled to hear arguments on whether the Affordable Care Act (ACA) is constitutional, in whole or in part. The court is expected to rule on the matter before its term ends in June 2021.

In the meantime, "the health care law remains fully in effect during the litigation, including all employer coverage obligations and reporting requirements," said Chatrane Birbal, vice president of public policy at the Society for Human Resource Management.

A vacancy on the nine-justice Supreme Court was created by the death of Justice Ruth Bader Ginsburg on Sept. 18. The U.S. Senate confirmed 7th U.S. Circuit Court of Appeals Judge Amy Coney Barrett to fill the vacancy on Oct. 26, and she was sworn in shortly afterward. She will now join her fellow justices in hearing the ACA case when it is argued.

During her confirmation hearing, Barrett, when asked about her position on the constitutional issues involving the ACA, stated she could not comment on an upcoming case. When Sen. Dick Durbin, D-Ill., asked if her previous writings that were critical of the ACA would affect her decision, Barrett responded (<https://www.nbcnews.com/politics/supreme-court/live-blog/live-updates-amy-coney-barrett-faces-questions-supreme-court-confirmation-n1243016/ncrd1243169#blogHeader>), "I think that your concern is that because I critiqued the statutory reasoning that I'm hostile to the ACA, and that because I'm hostile to the ACA, I would decide a case a particular way." She added, "I'm not hostile to the ACA. I'm not hostile to any statute that you pass."

Complex Case History

The Supreme Court's options for deciding this case are shaped by the complicated history of litigation over the ACA.

The origins of the case go back to 2012, when the court upheld the constitutionality of the ACA's penalty on individuals who lack health coverage—the so-called individual coverage mandate—as a justifiable exercise of Congress' power to tax.

In December 2017, however, President Donald Trump signed into law a tax bill that eliminated the ACA's penalty on individuals who lack health coverage. Afterward, several Republican state attorneys general, led by the state of Texas, filed a lawsuit arguing that the health care statute itself, or at least the parts of the act closely linked to the individual mandate, were no longer valid. Democratic states and the House of Representatives, led by Democrats, stepped in to defend the statute.

In December 2018, a Texas district court struck down the ACA but stayed its ruling pending appeal, concluding that the individual mandate is so connected to the law that Congress would not have passed the ACA without it.

On appeal, in *Texas v. United States* (<http://www.ca5.uscourts.gov/opinions/pub/19/19-10011-CV0.pdf>), a split panel of the 5th U.S. Circuit Court of Appeals deemed that the individual mandate was unconstitutional, but the panel 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 mandate."

However, on March 2, 2019, before the district court could carry out the appellate court's directive, the Supreme Court announced it would hear the case in its term beginning in the fall of 2020 (www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/supreme-court-to-rule-next-year-on-CAs-validity.aspx), blocking the lower courts from taking further action.

The case the Supreme Court will decide is now titled *Texas v. California* (<https://www.scotusblog.com/case-files/cases/texas-v-california/>).

5th Circuit Ruling Was Narrowly Focused

When the 5th Circuit instructed the district court to rehear the matter and to focus on those ACA provisions that Congress intended to be "inseverable from the individual mandate," this suggested, legal analysts said, that the appellate court was unlikely to overturn the ACA in full.

"Only the individual mandate was declared unconstitutional (<https://www.segalco.com/consulting-insights/latest-aca-court-ruling>), and the portion of the lower court's decision invalidating the rest of the Affordable Care Act [was] vacated," according to an analysis of the appellate ruling by Segal, an HR consultancy. As a result, "plan sponsors know that the entire Affordable Care Act will not be overturned."

Had the case proceeded at the appellate level, the 5th Circuit might have struck down those parts of the law directly related to the individual mandate. The appellate decision noted, for instance, that community rating, which prevents insurers from varying premiums within a geographic area based on age, gender, health status or other factors, might be among the provisions determined to be "inseverable" from the individual mandate, because the increase in revenue to insurers from the mandate was meant to offset the decrease from these restrictions.

The ACA's guaranteed-issue provisions, which ban insurers from rejecting coverage based on a person's pre-existing conditions, might also be inseverable, the appellate decision noted.

Supreme Court's Options

The Supreme Court has the following options when it decides the case (<https://www.washingtonpost.com/politics/2020/09/21/health-202-obamacare-chances-surviving-supreme-court-diminished-with-rbg-death/>), *The Washington Post* and other sources have reported:

- To dismiss the case on technical grounds, leaving the statute in place. The court could decide, for instance, that Texas and the individual plaintiffs lacked standing to bring the lawsuit.
- To affirmatively uphold the ACA.
- To uphold the statute while finding the individual mandate to be void without its penalty, essentially maintaining the status quo.
- To uphold the statute but void both the individual mandate and other provisions closely linked to the mandate.
- To strike down the law in full, although that option has been viewed as unlikely by legal analysts. Should it happen, however, the effect of the ruling would likely be delayed, giving Congress the opportunity to correct the statute's constitutional defects or to pass a replacement health care law.

According to an analysis by the nonprofit Kaiser Family Foundation (<https://www.kff.org/health-reform/issue-brief/explaining-california-v-texas-a-guide-to-the-case-challenging-the-aca/>), "If the Supreme Court adopts the position that the federal government took during the trial court proceedings and invalidates the individual mandate as well as the protections for people with pre-existing conditions, then federal funding for premium subsidies and the Medicaid expansion would stand, and it would be up to states whether to reinstate the insurance protections."

If that were to happen, Congress also could reinstate protections for people with pre-existing conditions.

Joe Biden, the Democratic presidential nominee, has voiced his support for the ACA, sometimes referred to as Obamacare, pointing out how it safeguards people who might not otherwise qualify for coverage. His campaign website says, "Because of Obamacare, over 100 million people (<https://avalere.com/press-releases/repeal-of-acas-pre-existing-condition-protections-could-affect-health-security-of-over-100-million-people>) no longer have to worry that an insurance company will deny coverage or charge higher premiums just because they have a pre-existing condition (<https://www.healthcare.gov/coverage/pre-existing-conditions/>)—whether cancer or diabetes or heart disease or a mental health challenge."

President Trump has also pledged to maintain these protections even as his administration supports the lawsuit that seeks to overturn the act. During his acceptance speech for the Republican presidential nomination (<https://www.cnn.com/2020/08/28/politics/donald-trump-speech-transcript/index.html>), Trump said, "We will always, and very strongly, protect patients with pre-existing conditions, and that is a pledge from the entire Republican Party."

Back to the Lower Courts?

The Supreme Court could issue a ruling that maintains the status quo and leaves the appellate decision intact (<https://www.healthaffairs.org/do/10.1377/hblog20200920.954961/full/>), wrote Katie Keith, a former research professor at Georgetown University's Center on Health Insurance Reforms and a contributor to the Health Affairs blog. In that instance, "the 5th Circuit's ruling would stand and the case would be remanded back to the district court," she noted.

If that is the outcome, "the ACA would remain in effect while the district court undertook a provision-by-provision severability analysis," Keith noted. "The litigation would continue for years as we await a new district court decision, another appeal to the 5th Circuit, and most likely a return to the Supreme Court."

Thinking Ahead

"Employers will be wise to give some thought to how they might react to different outcomes (<https://www.mercer.us/our-thinking/healthcare/focus-on-high-court-seat-fuels-uncertainty-for-employer-health-plans.html>), Mercer, an HR consultancy, advised. "For example, if some common provisions eliminated by the ACA like annual/lifetime dollar limits on essential health benefits, ending dependent coverage at age 19/23, or the previously mentioned pre-existing condition exclusions were permitted again, would an employer reshape their plan design to curb costs? If the employer 'play-or-pay' mandate (the 30-hour rule) were struck down, would an employer move full-time eligibility back to 40 hours?"

Concluded Mercer's consultants, "There is much to consider with these possible ACA changes," should they come to pass.

Related SHRM Article:

3 Supreme Court Cases Employers Should Watch This Term (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/3-Supreme-Court-Cases-Employers-Should-Watch-this-Term.aspx), *SHRM Online*, September 2020

Biden and Trump Want Lower Health Care Costs, but Approaches Differ (www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/biden-and-trump-want-lower-health-care-costs-but-approaches-differ.aspx), *SHRM Online*, September 2020

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