

Justices Seem Unlikely to Strike Down Entire Affordable Care Act

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The U.S. Supreme Court appears hesitant to invalidate the Affordable Care Act (ACA) in its entirety, based on questions the justices posed during oral argument Nov. 10.

The ACA requires that most Americans either maintain a minimum level of health care coverage or pay a specified amount to the Internal Revenue Service. In a 2012 opinion written by Chief Justice John Roberts Jr., the Supreme Court upheld this mandate (<https://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf>) as a legitimate exercise of Congress' taxing power. In 2017, and effective in 2019, Congress amended the ACA to set the penalty to zero, making the individual mandate provision unenforceable.

In two consolidated cases, *California v. Texas* (<https://www.scotusblog.com/case-files/cases/california-v-texas/>) and *Texas v. United States* (<http://www.ca5.uscourts.gov/opinions/pub/19/19-10011-CV0.pdf>), the Supreme Court has been asked to decide whether reducing the penalty to zero rendered the minimum-coverage provision unconstitutional—and, if so, whether the rest of the ACA can remain enforceable without it.

"The justices seem to be leaning toward, at a minimum, finding the individual mandate severable and preserving the remainder of the law," observed Benjamin Conley, an attorney with Seyfarth Shaw in Chicago. The most notable takeaway from the arguments, he said, was that Roberts and Justice Brett Kavanaugh "all but stated that they believe the individual mandate is severable."

Questions Before the Court

The court will first consider whether the plaintiffs have standing to challenge the ACA, then it will move to the merits of the case. Texas and other states that challenged the ACA argued that "Congress may not use its power to regulate interstate commerce to order Americans to buy health insurance" and that the only reason the individual mandate survived a legal challenge was because it was "fairly possible" to read the ACA's mandate as a tax trigger. "Because the mandate raises no revenue, it can no longer be read as a tax," they wrote in a brief to the Supreme Court.

The U.S. House of Representatives and a group of Democrat-led states are fighting to keep the ACA intact. If Texas successfully challenges the ACA, "more than 20 million Americans could lose their health care coverage, 130 million Americans with pre-existing conditions could lose protections, and drug costs could skyrocket for seniors," House Speaker Nancy Pelosi tweeted (<https://twitter.com/SpeakerPelosi/status/1326248614562291717>) Nov. 10.

In December 2019, the 5th U.S. Circuit Court of Appeals sided with Texas, holding that the mandate is unconstitutional since there is no longer a penalty for people who fail to buy health insurance.

But the Supreme Court justices raised doubts about that argument. "I think it's hard for you to argue that Congress intended the entire act to fall if the mandate were struck down when the same Congress that lowered the penalty to zero did not even try to repeal the rest of the act," Roberts said during oral argument. "I think, frankly, that they wanted the court to do that. But that's not our job."

Justice Amy Coney Barrett, the court's newest justice and sixth conservative on the bench, has previously raised concerns with the Supreme Court's 2012 ruling. "Justice Barrett has criticized Justice Roberts' decision to uphold the ACA," said Sage Fattahian, an attorney with Morgan Lewis in Chicago. "The general view is that her vote may be the deciding vote in invalidating the ACA, but all of that remains to be seen."

Seyfarth Shaw's Conley noted that votes from Roberts and Kavanaugh, plus the three liberal justices—Justices Stephen Breyer, Elena Kagan and Sonia Sotomayor—would be enough to preserve the remainder of the law.

"The most interesting questions and comments, for me, came from Justice Kavanaugh," Fattahian observed. At oral argument, Kavanaugh said he thinks there is "a very straightforward case for severability" under Supreme Court precedent.

"Chief Justice Roberts also asked questions that seemed to indicate that the proper remedy in this case would be to sever the individual mandate from the rest of the ACA," Fattahian said. "This would mean that the ACA's plan mandates and employer mandate, along with ACA reporting requirements, would all remain intact."

Employer Takeaway

So what will a ruling in the case mean for employers? "While a ruling striking down the entire law could definitely have an impact in the long term, we don't think any short-term action is required," Conley said.

Even if, for instance, the Supreme Court invalidates the provision of the law allowing dependents to remain on their family's plans until age 26, an employer could certainly continue to offer such coverage even if it is no longer required. "So any plan-driven changes resulting from the ruling would be more incremental and long term," Conley added.

A decision in the case is not expected until June 2021. "In the meantime, employers should note that the health care law remains fully in effect during the litigation, including all coverage obligations and reporting requirements," said Chatrane Birbal, vice president of public policy for the Society for Human Resource Management. If there are changes to the health care law, employers should be aware that the changes will not take effect immediately, she noted.

Fattahian said, "Employers should continue down the path of compliance. Should the ACA be held to be unconstitutional, it will remain to be seen how it will all unwind and what, if anything, will take its place."

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