



# *California v. Texas* and the Future of the Affordable Care Act

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On November 10, 2020, the United States Supreme Court is scheduled to hold oral argument in *California v. Texas* (Dkt. No. 19-840), a case in which the Trump administration and several Republican-led states have asked the Court to strike down the Affordable Care Act (“ACA”) in its entirety. While the majority of ACA has survived prior legal challenges, there is significant speculation that the recent passing of Justice Ruth Bader Ginsburg and the likely confirmation of Judge Amy Coney Barrett could change the potential alignment of the Supreme Court, creating to a conservative majority willing to strike down the individual mandate, the mandate and the insurance market reform provisions, or even all of the ACA.

This white paper provides an overview of potential outcomes in *California v. Texas* and the impact of those potential decisions on the future of the ACA. In particular, we examine how the Court may address whether the ACA’s individual mandate is severable from the rest of the statute and whether the remaining portions of the ACA may survive even in the event the individual mandate is struck down.

### **The Supreme Court and the Individual Mandate**

In 2012, the Supreme Court in *National Federation of Independent Business (“NFIB”) v. Sebelius*, upheld a challenge to the constitutionality of the ACA’s individual mandate, 26 U.S.C. § 5000A. 567 U.S. 519 (2012). The individual mandate required most Americans to either maintain a minimum level of healthcare coverage or pay a monetary penalty. In a splintered decision, Chief Justice John Roberts wrote for a 5-4 majority of the Court, joined by the Court’s liberal bloc of justices, upholding the individual mandate as an exercise of Congress’s taxing power. *Id.* at 574. At the same time, Chief Justice Roberts wrote for a 5-4 majority, joined by the rest of the Court’s conservative bloc, holding that the Commerce Clause did not provide a basis to uphold the individual mandate. Thus, absent Chief Justice Robert’s decision with respect Congress’s taxing power, the individual mandate would have been found unconstitutional in 2012.

Since the decision in *NFIB v. Sebelius*, the ideological balance of the Court with respect to the ACA has remained largely the same. Justices Neil Gorsuch and Brett Kavanaugh have been confirmed to the Court respectively filling the seats previously held by Justices Antonin Scalia and Anthony Kennedy, both of whom dissented from Justice Robert’s decision upholding the individual mandate. Justices Gorsuch and Kavanaugh are widely thought to have similar jurisprudence to their predecessors. The passing of Justice Ginsburg and her expected replacement by Judge Barrett, who has a steadfastly conservative record in her time on the United States Court of Appeals for the Seventh Circuit, marks the most significant ideological shift on Court since *NFIB v. Sebelius*.

## Overview of *California v. Texas*

In 2017, Congress amended the individual mandate to set at zero the tax imposed on those who do not maintain healthcare coverage. At the same time, Congress left the remaining provisions of the ACA intact including the language requiring that individuals “shall” buy health insurance.

Shortly after Congress zeroed out the tax penalty, two private individuals and a group of Republican-led states filed suit in the United States District Court for the Northern District of Texas, challenging the constitutionality of the individual mandate in light of the 2017 amendments. The plaintiffs argued that because the tax for non-coverage had been reduced to zero, the individual mandate was no longer a valid exercise of Congress’s taxing power. These plaintiffs further argued that entirety of the ACA – in addition to the individual mandate – was also invalid, because the individual mandate was not “severable” from the remainder of the ACA. The United States Department of Health and Human Services and the Department of Justice agreed with the plaintiffs that the individual mandate was now unconstitutional in wake of the 2017 amendment. Sixteen Democratic-led states and the District of Columbia intervened to defend the ACA.

The District Court found for the plaintiffs, holding the individual mandate unconstitutional and that the individual mandate was not severable from the rest of the ACA, rendering the entire statute invalid. On appeal, the United States Court of Appeals for the Fifth Circuit upheld the District Court’s decision that the individual mandate was unconstitutional, but remanded the case to the District Court for further review on the issue of severability. The Democratic-led states sought review from the Supreme Court.

## Overview of Severability in the ACA

A provision of a law is “severable” if its unconstitutionality does not affect the rest of the law. While Congress will sometimes expressly state in the text of a statute itself whether its provisions are severable, the ACA does not include an express severability clause. In instances where the text of the statute does not reference severability, Courts will search for evidence of Congressional intent while generally applying a presumption that unconstitutional provisions *are* severable from the remainder of an otherwise-constitutional statute.

In their Supreme Court briefing, the Democratic-led states argue that Congress’s choice in 2017 — to amend the ACA by eliminating the individual mandate’s only enforcement mechanism but leaving the remainder of the ACA untouched — evidenced Congress’s affirmative intent that the individual mandate *was* severable from the rest of the law. In making these amendments, Congress created the precise arrangement where the remainder of the ACA was expected to stand on its own absent the individual mandate.

In response, the Republican-led states and the Trump administration argue that the individual mandate is essential to the operation of the rest of the law. First, they argue that the individual mandate is essential to the ACA’s insurance market reforms, including the guaranteed-issue and community-rating provisions. They argue that these insurance market reforms could not function without the individual mandate, resulting in the opposite of what Congress had intended, indicating the individual mandate is *not* severable. Second, they argue that all the remaining provisions of ACA are intended to effectuate near-universal health care coverage, balance the costs affected by the insurance market reforms, and would not have been enacted absent the individual mandate. Absent the individual mandate, they argue that the entirety of the ACA must fall. While neither the Republican-led states nor the Trump Administration provide significant argument specifically addressing the ACA’s drug pricing provisions, their argument necessarily implicates these provisions.

## POTENTIAL OUTCOMES IN CALIFORNIA V. TEXAS

### The ACA is Upheld in its Entirety

The Supreme Court could reverse the decision of the Fifth Circuit and hold that the individual mandate is constitutional absent the tax for non-coverage. However, even prior to the passing of Justice Ginsburg, it seemed unlikely that there would be a five-vote majority to uphold the individual mandate absent the tax for non-coverage. Specifically, Chief Justice Robert’s deciding vote to uphold the individual mandate in *NFIB v. Sebelius* was dependent on it “yield[ing] the essential features of any tax: It produces at least some revenue for the government.” *NFIB*, 567 U.S. at 564. Absent the tax, it does not appear likely that Chief Justice Roberts will find the individual mandate permissible. Further, Judge Barrett has been critical of Chief Justice Robert’s decision in *NFIB* to uphold the individual mandate as an exercise of Congress’s taxing power, arguing in a 2017 law review article that the Chief Justice “pushed the Affordable Care Act beyond its plausible meaning to save the statute.”<sup>1</sup> In light of the passing of Justice Ginsburg and the likely confirmation of Judge Barrett, a reversal of the Fifth Circuit—resulting in the ACA being upheld in its entirety—is increasingly remote.

### The Individual Mandate is Held Unconstitutional, but Severable

The Supreme Court could find that the individual mandate is unconstitutional. In this scenario, the impact on the rest of the ACA would depend on whether the Court determines the individual mandate is severable from the rest of the ACA. The Court could conclude that all or

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<sup>1</sup> Amy C. Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61 (2017) (book review).

specific portions of the ACA are severable from the individual mandate. Some potential outcomes include:

- The Court concludes the individual mandate is severable from *all* remaining portions of the ACA, allowing the remainder of the law to stand. In this event, the insurance market reforms, including the pre-existing condition protections (also known as guaranteed-issue) and community-rating provisions, and all other provisions would continue absent the individual mandate.
- It is also possible the Court could find that the individual mandate is unconstitutional *and* not severable from certain other specific provisions of the ACA, most likely the pre-existing condition protections, insurance market reforms, or the insurance exchange subsidies. In this instance, the provisions found non-severable from the mandate would be struck down, but other provisions of the ACA would survive. For example, provisions such as the ACA’s Biologics Price Competition and Innovation Act (“BPCIA”) could be determined to be unconnected to the individual mandate or the other insurance provisions, and those provisions would continue to remain in force even if the mandate and other insurance provisions are struck down. The Court could either conduct its own analysis about which provisions are severable or it could remand back to the District Court for a more detailed section-by-section review.

Under the traditional severability analysis, provisions like the pre-existing condition protections and insurance market reforms, which are more closely tied to the individual mandate, are the most likely to be vulnerable. Indeed, the ACA itself described the individual mandate as “essential to creating effective health insurance markets [that] do not exclude coverage of pre-existing conditions,” and in defending the ACA before the Supreme Court in 2012, the Obama administration argued that this language “effectively serves as an inseverability clause” that tied together the individual mandate, guaranteed issue, and community-rating provisions. In contrast, provisions such as the BPCIA, which have a more attenuated relationship to the individual mandate, are the most likely to survive.

Absent Justice Ginsburg, it is possible that there are still sufficient votes on the Court to find the mandate severable from the rest of the ACA (including the insurance market reforms). Earlier this year, Justice Kavanaugh wrote the Court’s opinion in *Barr v. American Association of Political Consultants*, in which the Court found an unconstitutional provision of the Telephone Consumer Protection Act of 1991 to be severable from the remainder of the Communications Act. 140 S. Ct. 2335, 2350 (2020).

In that opinion, which was joined by Chief Justice Roberts and Justice Samuel Alito, Justice Kavanaugh reviewed the Court’s history with respect to severability and reinforced that the strong presumption is that an unconstitutional provision in a law is severable from the remainder of the law or statute. *Id.* at 2350. Justice Kavanaugh emphasized that “[t]he Court’s

presumption of severability supplies a workable solution—one that allows courts to avoid judicial policymaking or *de facto* judicial legislation in determining just how much of the remainder of a statute should be invalidated.” *Id.* at 2351.

While the high-profile nature of *California v. Texas* may limit the precedential weight that is given to Justice Kavanaugh’s decision in *Barr*, it is notable that three of the Court’s conservative justices joined that opinion reasserting the Court’s presumption of severability at a time when they knew they would soon be asked to review the same issue with respect to the ACA.

### **The Individual Mandate is Held Both Unconstitutional and Not Severable**

A majority of the Court could hold that the individual mandate is not severable from the rest of the ACA. In this case, the entire ACA would be struck down, including those provisions not directly related to insurance markets, such as those provisions related to drug pricing.

### **The Supreme Court is Split 4-4**

If the Senate does not confirm a ninth justice to the Court in advance of the November 10, 2020 oral argument, it is possible that the case could result in a 4-4 split decision. If only eight members of the Court hear oral argument, the new justice would not be permitted to participate in the decision absent a re-hearing of the case. In the event of a 4-4 split, the decision of the Fifth Circuit would be upheld. The individual mandate would be unconstitutional, but the case would not create binding precedent outside the Fifth Circuit. Consistent with the Fifth Circuit’s decision, the issue of severability would be remanded to the District Court for further review.

We think there is a low-likelihood of the Court deciding the case 4-4 prior to a new justice being confirmed. First, recent reports indicate that the Senate is likely to hold a vote to confirm Judge Barrett prior to the November 3 election and the November 10, 2020 oral argument in *California v. Texas*. Second, in the event Judge Barrett has not been confirmed prior to November 10 and the current eight justices are split on this matter, it is more likely the Court will re-hear the case after a new justice is seated. A re-hearing would be consistent with the Court’s practice in several close cases in 2016 after the death of Justice Scalia left the Court with eight members for about a year.

### **Potential Election-Related Consequences**

The impact of any decision striking down significant provisions of the ACA could also be blunted by the results of the election. A decision in *California v. Texas* will almost certainly not be released until the spring, after the new Congress is sworn in and the Presidential Inauguration.

In the event of a significant Democratic victory in November, Congress could likely salvage the ACA by either re-adopting the tax penalty associated with the individual mandate or eliminating the individual mandate while keeping the other provisions of the ACA in place.

### Conclusion

There remains significant uncertainty regarding the potential outcome of *California v. Texas* and the potential impact on the future of the ACA. Based on the Court's recent precedents, there are strong arguments that that most, if not all, of the ACA is severable from the individual mandate and should survive if the mandate is struck down. However, given the highly political nature of this case and the potential influence of a new justice, the likely scope of the Court's potential decision remains in flux. We will continue to monitor these issues and we are available to provide additional analysis as we learn more in the coming weeks.