

U.S. Supreme Court Agrees to Hear ACA Challenge

On March 2, 2020, the U.S. Supreme Court agreed to hear arguments in *Texas v. U.S.*, the latest court challenge to the Affordable Care Act (“ACA”). Although the briefing process will likely begin later this spring, oral arguments before the Supreme Court likely will not occur until this fall and it appears that the decision will not be released until the summer of 2021.

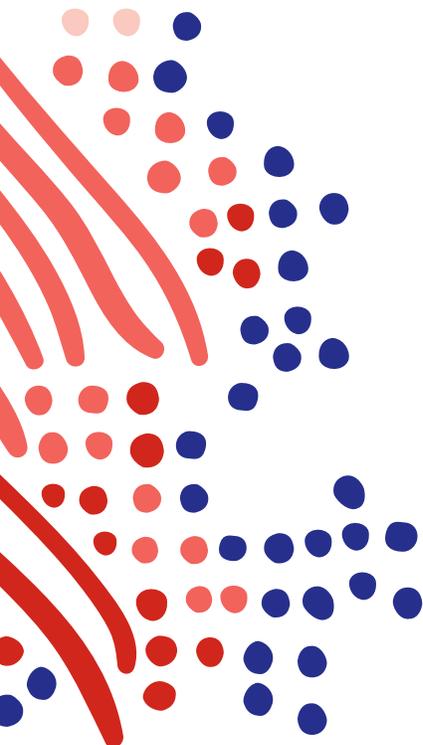
Background.

In 2012, the last time the Supreme Court addressed the ACA’s individual mandate, it ruled in *NFIB v. Sebelius* that the individual mandate was not a constitutional exercise of Congress’s Commerce Clause power, but rather was constitutional under Congress’s taxing authority. Five years later, as part of the Tax Cuts and Jobs Act of 2017, Congress lowered the individual mandate tax to zero for tax years beginning January 1, 2019.

In February 2018, Texas, other states and two individuals challenged the constitutionality of the ACA. In the case, *Texas v. U.S.*, the plaintiffs argued that because the individual mandate no longer raises revenue for the government, it is no longer a tax and therefore is unconstitutional. They further argued that the entire ACA is unconstitutional because the individual mandate cannot be separated from the rest of the ACA – i.e., it is not “severable.” California and a group of like-minded states intervened in the case, arguing that a zero penalty could still be a “tax,” and that even if it was not, the 2017 Congress that “zeroed out” the tax clearly intended that the remainder of the ACA remain or it would have repealed the ACA in its entirety.

The U.S. District Court for the Northern District of Texas (“District Court”) ruled in December 2018 that the individual mandate was unconstitutional, and the entirety of the ACA must be struck down, because the Congress in 2010 would not have passed the ACA without the individual mandate. The case was then appealed to the Fifth Circuit Court of Appeal (“Fifth Circuit”). After the appeal was filed, the Department of Justice (“DOJ”) informed the Fifth Circuit that it agreed with the plaintiff states that the individual mandate was unconstitutional and that the rest of the ACA should be struck down as unconstitutional as well. The DOJ also argued that only the parts of the ACA that harm the plaintiffs are illegal and that the Fifth Circuit should send the case back to the District Court to determine appropriate relief (an action called “remanding” the case).

On December 18, 2019, the Fifth Circuit issued a ruling in which it affirmed the District Court’s holding that the ACA’s individual mandate is unconstitutional. Instead of deciding the legality of the rest of the law, however, it remanded the case back to the District Court to provide



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additional analysis of what provisions of the ACA, if any, could be severed from the individual mandate.

Supreme Court Agrees to Hear the Texas Case Now

Both sides (Texas, et. al. and California, et. al.) filed petitions to the Supreme Court, asking it to review the case (before the District Court completed its review). On March 2, 2020, the Supreme Court granted certiorari – meaning it agrees to hear the case now – on the following questions:

- whether the individual and state plaintiffs challenging the ACA have standing (the right to sue);
- whether the mandate is constitutional, given that the penalty was reduced to zero;
- whether, if the mandate is unconstitutional, it can be severed from the rest of the ACA; and
- whether the District Court was correct in declaring the entire ACA invalid.

The Supreme Court's oral argument calendar for the spring of 2020 is full. It is currently expected that this case will be argued in the fall (possibly in October), although a briefing schedule has not yet been set. Oral arguments before the

Supreme Court will be for one hour. Assuming the case is heard in October 2020, a decision would be expected by the end of the Supreme Court's term (generally the end of June 2021).

Generally, based on the questions presented, there seem to be several possible outcomes:

- the Supreme Court concludes that the plaintiffs did not have standing and vacates the decisions below;
- the Supreme Court determines that the individual mandate remains constitutional;
- the Supreme Court agrees that the individual mandate is now unconstitutional, but the rest of the statute remains; or
- the Supreme Court agrees that the individual mandate is unconstitutional and holds that some or all of the rest of the ACA is also unconstitutional.

In the meantime, all provisions of the ACA, including the employer mandate and related reporting requirements, remain in effect.

ADP will continue to monitor this case closely and will keep you up to date on future.

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