



## ACA Individual Mandate Held Unconstitutional, but Case Sent Back to District Court for Further Analysis

Almost a decade after passage of the Affordable Care Act (“ACA”), litigation continues to shape the law and its impact on employers and employees. One of the most important cases to date – *Texas v. U.S.* – challenges whether the law is unconstitutional.

On December 18, 2019, the Fifth Circuit Court of Appeals (“Fifth Circuit”) released its highly anticipated decision in the *Texas v. U.S.* case. Rather than answering all of the fundamental underlying legal questions, however, the Fifth Circuit sent the case back to the lower court for further analysis.

Below is information on the background of the case, the Fifth Circuit’s decision, and the anticipated next steps.

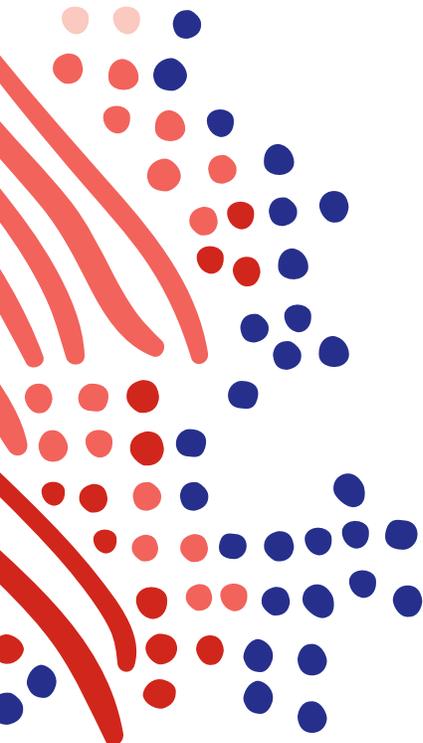
### Background of *Texas v. U.S.*

In 2012, the Supreme Court ruled in *NFIB v. Sebellius* that the ACA’s individual mandate (26 U.S. Code § 5000A) was not a constitutional exercise of Congress’s Commerce Clause power, but rather that it 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.”

The Department of Justice (“DOJ”) agreed with Texas and the other plaintiffs that the individual mandate itself was unconstitutional once Congress reduced the penalty to zero. But the DOJ argued that only those ACA provisions that were intertwined with the individual mandate should be struck down. That is, DOJ asserted that the individual mandate was “severable” from the rest of the law that was not intertwined with the mandate.

California and a group of other states intervened in the case, arguing that the DOJ was not appropriately defending the ACA. The intervening states argued that the lack of



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an individual mandate penalty did not necessarily mean the mandate was not a “tax,” and that, even if it did, the 2017 Congress that “zeroed” the tax clearly intended for the rest of the ACA to remain as law or it would have repealed the entire statute at the time. In other words, they argued that the 2017 Congress clearly believed that the rest of the ACA could survive without the individual mandate and that Congress intended that result.

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 Congress would not have originally passed the ACA in 2010 without the individual mandate.

The case was then appealed to the Fifth Circuit. After the appeal was filed, the DOJ informed the Fifth Circuit that it now 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).

The Fifth Circuit held oral arguments on July 9, 2019.

### Opinion of the Fifth Circuit

On Wednesday, 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 additional analysis as to which parts of the law (if any) can be separated from it and remain intact and which parts need to be struck down.

Specifically, the Fifth Circuit found the following:

1. There is a “live case or controversy” because the defendant states have standing to appeal and, even if they did not, there remains a live case or controversy between the plaintiffs and the federal defendants. In short, this means that federal courts have the right to hear and decide the case.
2. The plaintiff states and individual plaintiffs also have standing to bring this challenge to the ACA, because the individual mandate injures both the individuals, by requiring them to buy insurance that they do not want, and the states, by increasing their costs of complying with the reporting requirements that accompany the individual mandate.
3. The individual mandate is unconstitutional because it is no longer a tax, and there is no other constitutional provision that justifies this exercise of Congressional power.
4. On the severability question, the Fifth Circuit remanded it to the District Court to provide additional analysis.

### Next Steps

California Attorney General Xavier Becerra already has asked the Supreme Court to take up the case now. Some legal experts believe that the Supreme Court conceivably could decide to hear the case at this stage because of its importance and to expedite a decision. The Supreme Court is empowered to review “cases” from the federal courts of appeal upon writ of certiorari “before or after rendition of judgment or decree.” 28 U.S.C. § 1254(1). It requires the vote of four Justices to do so. In practice, however, the Supreme Court generally does not take cases that are not final. Due to the Fifth Circuit’s remand to the District Court, this case is clearly not final.

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If the Supreme Court does decide to take the case now, the petition and briefing would likely take several months, followed by oral arguments. Currently, the last day the Supreme Court is scheduled to hold arguments this term is April 29. The Court would have to expedite briefing (or hold a special argument session) in order to hear the case this term. If it does hear the case this term, the Supreme Court would likely decide the case in June 2020.

If the Supreme Court denies certiorari – meaning it declines to hear the case now – the time line for a final decision becomes significantly more uncertain. The District Court, to which the case has been remanded, is expected to order a new round of

briefings, likely followed by oral arguments, and would then issue another opinion. This process would likely take several months at a minimum. The District Court's decision would then most likely be appealed to the Fifth Circuit once again. This process again would last several months and be followed by another petition to the Supreme Court, making final resolution very unlikely before 2021 at the earliest.

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 developments.

### ADP Compliance Resources

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