
Affordable Care Act Litigation Update & Analysis

Background

The Affordable Care Act (ACA), signed into law in 2010, has three primary goals:

Expand Americans' access to affordable health insurance. The law includes an individual mandate that requires most Americans to maintain "minimal essential" health coverage. The maximum penalty for failing to maintain minimal essential health coverage in 2014 was 1% of family income or \$285, whichever is greater, with increases to penalties over time. The law also provides subsidies ("premium tax credits") that lower costs for households with incomes between 100% and 400% of the federal poverty level.

Allow states to expand the Medicaid program to cover all adults with income below 138% of the federal poverty level. (Not all states have expanded their Medicaid programs.)

Support innovative medical care delivery methods designed to lower the costs of health care and increase the value of care.

The ACA has been the subject of various lawsuits since its passage into law. In 2012, the Supreme Court of the United States heard constitutional challenges to the law in *National Federation of Independent Business v. Sebelius*. Among other holdings, the Court found that the individual mandate is a constitutional exercise of Congress' power to tax.

In December 2017, President Trump signed the Tax Cuts and Jobs Act of 2017 (TCJA), which eliminated the tax penalty for violations of the individual mandate. The penalty for violating the individual mandate requirement was specified as \$0.

California v. Texas

1. Case Overview

Subsequent to the passage of the TCJA, in February 2018, a coalition of 20 states led by Texas sued the federal government to challenge the constitutionality of ACA. The states' theory is that the individual mandate is no longer a valid exercise of Congress' power to tax because the penalty was reduced to zero. The states also take the position that the individual mandate is not severable from the rest of the law, meaning that if the individual mandate is found to be unconstitutional, then the entire ACA must be unconstitutional.

In December 2018, the District Court held that the individual mandate is no longer constitutional because the financial penalty no longer produces any revenue for the federal government. Furthermore, the trial court found that the entire ACA is invalid as a result.

The U.S. Court of Appeals for the 5th Circuit affirmed in December 2019, finding that the individual mandate can no longer be considered a tax and there is no other constitutional provision that justifies it. However, the 5th Circuit avoided the question of whether the individual mandate is severable from the rest of the ACA. Instead, the Court of Appeals remanded the case to the lower court for additional analysis on that point.

In early January 2020, a coalition of states led by the California Attorney General petitioned the U.S. Supreme Court for a writ of certiorari to review the 5th Circuit's ruling. In March 2020, the Supreme Court agreed to hear the case.

2. AzHHA's Amici Curiae Brief

The Arizona Hospital and Healthcare Association (AzHHA) joined 35 other state hospital associations in filing an *Amici Curiae* Brief with the Supreme Court of the United States in *California v. Texas*. The brief represents the interests of over 5,000 hospitals and health systems nationwide.

The Brief acknowledged that the ACA is perhaps best-known for prohibiting insurance companies from denying coverage or charging drastically higher rates due to preexisting conditions, allowing young adults to stay on their parents' plans up to age 26, requiring most Americans to have health insurance, creating the Health Insurance Marketplaces and incentivizing states to expand Medicaid. But the law's lesser-known healthcare delivery reforms have proved to be just as groundbreaking and consequential.

The Brief highlighted the ways in which the ACA has modernized health care including promoting innovative models for delivering health care that incentivize the provision of high-quality care with the best health outcomes. The ACA also created a new focus on health wellness and prevention, establishing the Health Prevention, Health Promotion and Public Health Council to lead the federal strategy and increasing access to preventive care for those with Medicare and Medicaid coverage.

Far from minor provisions that are merely adjuncts of the requirement to obtain insurance, the Brief argues that the ACA's transformational delivery reforms stand entirely on their own. How hospitals and healthcare systems deliver care is completely independent from and unrelated to whether individuals are required to maintain health insurance. Therefore, the Brief urged, even if the Supreme Court finds the individual mandate to be unconstitutional, these vitally important delivery system reforms should remain the law of the land.

3. Oral Arguments & Possible Holdings

The Supreme Court of the United States heard oral arguments in *California v. Texas* on November 10, 2020. The Court could issue its decision at any point before the current session ends in June. The timing of the decision may depend in part on the decision that is rendered. Here are some possible outcomes:

The Supreme Court could decide that the plaintiffs do not have standing to bring the lawsuit, in which case the Court's decision could be shorter and issued sooner rather than later. In this scenario, the Court would not need to analyze the underlying questions about the ACA because the case would be dismissed for lack of standing.

The Supreme Court could hold that the individual mandate is a valid exercise of Congress' power to tax notwithstanding the fact that the tax penalty is \$0. Or, the Court could find another constitutional basis upon which to find that the individual mandate is constitutional. In this scenario, the Court would not need to consider the rest of the law because the entire law would stand.

The Supreme Court could find that the individual mandate with \$0 tax penalty is unconstitutional. The Court would then need to address whether the unconstitutional mandate is severable from the rest of the ACA. In other words, does the unconstitutional mandate invalidate the entire law as unconstitutional, or can the mandate be severed, leaving the rest of the law in effect?

While it is a distinct possibility that the Court will find the individual mandate to be unconstitutional, the prevailing general wisdom is that the Court probably will not strike down the entire law. This is due in part to comments made by Chief Justice Roberts and Justice Kavanaugh during oral arguments on November 10, 2020.

If the mandate is found to be unconstitutional yet severable from the rest of the ACA, the rest of the ACA would continue to be the law of the land. In practical terms, the status quo is likely to continue since an individual mandate with zero penalty is effectively similar to no mandate. And of course, if the Court upholds the individual mandate, the status quo will continue with the entire ACA as the law of the land.

Potential Ramifications of ACA Repeal

1. Reduce Healthcare Coverage & Access to Care

The ACA's federal health insurance marketplace provides a forum for people to compare and purchase health plans and access financial assistance if they qualify. Over 150,000

Arizonans enrolled in a health plan through the federal marketplace during 2020 open enrollment. If the ACA is repealed, these marketplaces will no longer exist.

The ACA allows states to expand Medicaid to cover low-income adults who earn up to 138% of the federal poverty limit (\$17,609 for an individual in 2020). The federal government provides an enhanced match rate for this expansion group. Due to this enhanced match rate, the Arizona Health Care Cost Containment System was able to lift the enrollment freeze on the state's Prop. 204 adult program and further expand coverage up to 138% FPL. If the ACA is repealed, approximately 380,000 Arizonans stand to lose coverage under the Prop. 204 program and 120,000 under Medicaid expansion program—for a total of 500,000.

If the ACA is repealed, young adults will no longer be allowed to remain on their parent's plan until they reach 26. Before the ACA, about 30% of young adults had no health insurance. Because of the ACA, 50,000 young adults and over 3,300 former foster youth in Arizona gained coverage.

About 2.8 million non-elderly Arizonans have a pre-existing health condition. The ACA prohibits insurers from using an individual's pre-existing condition, like a chronic illness, cancer, or pregnancy, as a reason to deny coverage or charge more. If the ACA is repealed, these individuals' coverage will no longer be protected.

Since the ACA was passed, the uninsured rate in Arizona has dropped from 18% in 2008 to 10% in 2016. If the ACA is repealed, we can expect the uninsured rate to spike back up again.

2. Destabilize the Healthcare System

The loss of health insurance coverage for over 650,000 Arizonans (150,000 under the federal marketplace and 500,000 under AHCCCS) will have dire implications for the healthcare system and state economy.

- The state legislature froze enrollment in the Prop. 204 adult program in 2011 due to the recession. As a result, hospital uncompensated care doubled, and hospitals went through a series of hiring freezes and lay-offs. Services were cut and at least eight hospitals filed for bankruptcy protection.
- The restoration of Prop. 204, which the ACA made possible, eliminated more than \$500 million in uncompensated care and brought greater economic stability to the healthcare sector. This improved access to care for all Arizonans, not just AHCCCS beneficiaries.

- If the ACA is repealed, the financial stability brought about by reinstatement of the Prop. 204 program will be jeopardized. Uncompensated care will again spike, and healthcare jobs will be at risk.

As the healthcare system grapples with the current COVID-19 pandemic, it is imperative that the system not be financially weakened. Eliminating healthcare coverage for over 650,000 Arizonans places their health and the health of the delivery system at risk.

3. Derail Innovations in the Delivery of Health Care

As discussed in the Amici Curai brief AzHHA joined, the ACA includes transformational reforms to the way health care is delivered in this county. These reforms incentivize providers to improve quality of care and health outcomes, in contrast to the prior fee-for-service models. AzHHA has long supported this modernization of the health care delivery system.

If the Supreme Court find the ACA to be unconstitutional in its entirety, these reforms will no longer be the law of the land. Reverting to pre-ACA delivery models would derail ten years' worth of innovations in health care delivery and would negatively impact hospital operations and patient care nationwide, in the midst of a global pandemic no less.