



# UPDATED: District Court Strikes the Individual Mandate and Declares the Affordable Care Act Invalid: What Happened and What Lies Ahead?

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*UPDATE 3/7/2019: In December 2018, the district court in *Texas v. United States* issued a partial final order and stayed its judgment pending appeal. The Department of Justice and the intervening state plaintiffs subsequently appealed the lawsuit to the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit also granted motions filed by the U.S. House of Representatives and four additional state attorneys general to intervene in the litigation and defend the validity of the Patient Protection and Affordable Care Act (ACA).*

*Separately, in February 2019, the U.S. District Court for the District of Maryland rejected the State of Maryland's request (discussed below) for a declaration that the ACA is constitutional and enforceable and dismissed the case.*

*The original post from December 20, 2018, follows below.*

On Friday, December 14, 2018, a federal judge for the U.S. District Court for the Northern District of Texas ruled in *Texas v. United States* that the “individual mandate” of the Patient Protection and Affordable Care Act (ACA), as amended in the 115th Congress, is unconstitutional. Furthermore, the Texas court concluded that the challenged provision was so “essential” to the remainder of the ACA that the entire law should fall as well. Despite reaching this conclusion, the court has not yet issued an

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injunction against the federal government prohibiting the implementation or enforcement of the ACA. After summarizing the relevant portions of the ACA and the prior litigation surrounding the individual mandate, this Sidebar will discuss the *Texas* court's analysis of the constitutional questions involved, its conclusion that the individual mandate is nonseverable from the rest of the ACA, and the next steps in the litigation that may be expected.

## Background on the ACA and *NFIB v. Sebelius*

Enacted in 2010, one of the ACA's [major goals](#) was to "increase the number and share of Americans who are insured." In addition to providing [income-based subsidies](#) to facilitate the purchase of health insurance and increasing the scope [Medicaid coverage](#), the ACA, as originally enacted, also included financial penalties on [large employers](#) that did not offer coverage to their employees, and on certain [individuals](#) who did not purchase or enroll in such coverage. This latter provision is commonly referred to as the "individual mandate." In addition, the ACA included a large number of other provisions that touched an array of issues, ranging from [health care workforce promotion](#) to [improving access to innovative medical therapies](#).

Congress's authority to enact the ACA, like all legislation, must derive from one of the specific ["enumerated powers"](#) identified in the Constitution. Whether Congress possessed the authority to impose the individual mandate was a central issue in the litigation that culminated in the Supreme Court's landmark 2012 ruling in *National Federation of Independent Business v. Sebelius (NFIB)*. In that case, while five Justices concluded that Congress's authority to regulate interstate commerce did not empower Congress to enact the individual mandate, the Court held that Congress's power to levy taxes did. Notably, the controlling opinion of Chief Justice Roberts reasoned that the penalty "looks like a tax in many respects," including by possessing "the essential feature of any tax: It produces at least some revenue for the Government." Four [dissenting](#) justices expressed the view that neither the interstate commerce nor taxing power supported the individual mandate, that it should be held unconstitutional, and that the entire ACA should fall with it.

## *Texas v. United States*

In 2017, Congress [amended](#) the ACA to eliminate the financial penalty the ACA imposed on individuals without coverage. Soon after, a collection of state attorneys general, governors, and individuals filed [suit](#) in *Texas*, claiming that the individual mandate no longer qualified as a constitutionally permissible "tax" because it no longer generated revenue for the federal government. According to the plaintiffs, without the ability to rely on Congress's taxation authority, and because a majority of Justices previously concluded that the Commerce Clause did not support the individual mandate, the amended individual mandate was unconstitutional. While the Department of Justice declined to defend the constitutionality of the individual mandate, a different group of states intervened in the case as defendants in support of the individual mandate and the ACA.

In its opinion, the *Texas* court first addressed the question of standing, a constitutional requirement, necessitating a plaintiff to demonstrate, among other things, an injury that is ["concrete and particularized,"](#) in order to ["ensure that the plaintiff has a personal stake in the outcome of the controversy."](#) In *Texas*, the court held that, even though the financial penalty under the amended individual mandate was \$0, the individual plaintiffs had established standing because the statutory directive to maintain health insurance injured the individuals by potentially "deter[ring] the exercise of [their] constitutional rights." (The court did not address the state plaintiffs' injury, having determined that the injury to the individuals was sufficient to satisfy Article III). Turning to the constitutionality of the

individual mandate, the court agreed with the plaintiffs and held that neither the Commerce Clause nor Congress's taxing power supported the individual mandate as amended.

Because Congress had already set the penalty for violating the individual mandate at \$0, the court's determination that the individual mandate is unconstitutional, and therefore unenforceable, may appear to be of little consequence when viewed in isolation. However, the court in *Texas* held that the entire ACA must fall with the individual mandate, potentially rendering the decision to be significantly more impactful.

As noted in this [previous Sidebar](#), when courts rule that a specific provision within a large statute is unconstitutional, a follow-up issue is how much of the remaining statute can stand on its own, without the unconstitutional provision. The Supreme Court's severability analysis, undergirded by the principle that a court "should refrain from invalidating more of the statute than is necessary," principally focuses on two issues: whether (1) the remaining provisions still operate as Congress intended and (2) Congress, had it known that inclusion of the unconstitutional provision "[was not a choice that remains open](#)," would have enacted the remaining law without the offending provision. If the answer to either of these questions is negative, then the nonseverable provisions must also fall with the unconstitutional ones.

Parties to the *Texas* litigation have taken varying positions regarding the severability of the individual mandate from the rest of the ACA. The plaintiff states have argued that the entire statute should fall with the individual mandate because the mandate was the ACA's "core provision." The Trump Administration, mirroring [the position](#) taken by the government on severability in *NFIB*, have argued that although the court should strike [certain ACA insurance provisions](#) (specifically, the ACA's guaranteed issue and community rating provision) along with the individual mandate, the bulk of the ACA should remain intact. In contrast, the intervening states have maintained that the 115th Congress's choice to eliminate the individual mandate's penalty in 2017 without amending other ACA provisions evinces clear congressional intent to leave the rest of the ACA in place.

Ultimately, the *Texas* court adopted the plaintiffs' position, relying heavily on [congressional findings](#) that accompany the individual mandate. (These findings indicate, among other things, that the mandate "is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market.") In addition, the district court, citing to the Justices' competing opinions in *NFIB* and subsequent cases involving the ACA, maintained that "all nine Justices" have recognized that the individual mandate and other ACA provisions are inextricably intertwined. Further, the court [rejected](#) that the 2017 amendments demonstrate Congress's intent for the ACA to survive without the individual mandate because the 2017 amendments did not remove the requirement to purchase health insurance itself or the congressional findings accompanying the mandate.

## What Comes Next?

The decision in *Texas* culminated in a declaratory judgment, a remedy that simply "declares the rights and other legal relations" of parties to the suit, without necessarily ordering any further relief. Although the plaintiff states in *Texas* sought an injunction ordering the federal government from further implementing or enforcing the ACA, the court's December 14th order denied the request. Nor did the court address the plaintiffs' other constitutional or statutory challenges. Following the court's decision, the Department of Health and Human Services (HHS) issued a [statement](#) expressing its view that the order "does not require that HHS make any changes to any of the ACA programs it administers or its enforcement of any portion of the ACA at this time" and that the department "will continue administering and enforcing all aspects of the ACA as it had before the court issued its decision." The state intervenors have also filed a [motion seeking clarification](#) that the December 14th order "does not relieve the parties to this litigation—or any other State, entity, or individual—of their rights and obligations under [the ACA] until appellate review is

complete.” In the event that the court intends its ruling to affect the operation and implementation of the ACA immediately, the state intervenors also seek a stay of the order pending appeal.

An appeal is expected to the U.S. Court of Appeals for the Fifth Circuit, and many legal commentators predict that Supreme Court review may follow. However, when such an appeal may be filed by either the Trump Administration or the state intervenors is not clear. Typically, appeals may only be taken from final judgments of a district court, or with leave to file an [interlocutory appeal](#) (i.e., an interim appeal before the district court proceedings have concluded). In their [motion for clarification](#), the state intervenors have also asked the Northern District of Texas to either enter a partial final judgment or certify the order for an interlocutory appeal. Questions on appeal may include the substantive constitutional question presented by the individual mandate, as amended, as well as whether plaintiffs have standing to sue, or the degree to which the individual mandate is severable from the remainder of the ACA.

In response to the intervening state defendants’ motion, the district court has [ordered](#) the plaintiffs and federal defendants to respond to the state intervenors’ motion by December 21, 2018, and for the state intervenors’ to submit a reply by December 26, 2018. In addition, the court directed the parties to include proposals for addressing the lawsuit’s remaining challenges.

As plaintiffs in *Texas* seek to void the ACA, another legal challenge filed in the U.S. District Court for Maryland seeks to ensure that the Act remains in force. In *Maryland v. United States*, filed in September 2018, Maryland’s Attorney General [sued](#) the U.S. and members of the Trump Administration, claiming that the *Texas* litigation and certain administrative actions taken by the Administration have jeopardized the stability of the health care market in the state. The federal government has sought to dismiss the *Maryland* case, [asserting](#) that the state “does not challenge the violation of any law by Defendants, nor does it seek to prevent any enforcement action” against the state. The *Maryland* court has not yet issued a decision in the case. The *Texas* and *Maryland* cases raise the possibility of conflicting rulings about the validity of the individual mandate and the ACA, increasing the likelihood that the Supreme Court [would](#) resolve the conflict.

For Members of Congress concerned about the outcome of the most recent litigation over the ACA, the *Texas* and *Maryland* cases offer a variety of legislative options. Congress could, of course, choose to take no action and await further judicial developments in the *Texas* and *Maryland* cases. Alternatively, Congress could pass legislation that would target the statutory underpinnings of these cases. For example, Congress could amend the individual mandate to restore a financial penalty for failing to purchase health insurance or conversely repeal the requirement to purchase health insurance in its entirety. These types of proposals would seem to cure the individual mandate’s constitutional infirmities, as identified by the *Texas* court, as well as eliminate any questions over the entire ACA’s continued validity. Another possibility is that Congress could add a severability clause to the ACA. The Supreme Court has [ruled](#) that the inclusion of these clauses “creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision.” Currently, the ACA itself does not contain a severability clause. Should Congress deem it appropriate to enact a severability clause, it could expressly delineate which specific ACA provisions should remain intact in situations where a court concludes that one of the Act’s provisions is unconstitutional. Finally, Members of Congress may consider enacting new legislation that contains provisions similar to the ACA, but omits the provisions that the *Texas* court deemed constitutionally problematic. If enacted, such legislation could remain in effect, irrespective of the outcome in *Texas* or *Maryland*. One example of such legislation is S. 3388, the [Ensuring Coverage for Patients with Pre-Existing Conditions Act](#), which intends to preserve certain ACA health insurance requirements, including guaranteed issue requirements.