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Individual Mandate Ruled Unconstitutional

After a long wait a federal appeals court in New Orleans has found the Affordable Care Act's (ACA) individual mandate unconstitutional, stopping short of invalidating the entire law. The 2-1 decision likely will push any Supreme Court action challenging the ruling until after the 2020 elections.

While the court struck down the individual mandate -- which the federal government is no longer enforcing -- it declined to resolve the more pressing issue: Is the rest of the law also invalid? This is what the Supreme Court is expected to decide.

The ruling by the U.S. Court of Appeals for the 5th Circuit has little immediate practical effect on consumers because Congress already had removed the penalty for people who disregard the requirement. But the rest of the massive statute remains in limbo, pushing questions of insurance coverage and consumer health-care protections to the forefront of the 2020 elections.

Shortly after the decision was announced, the Democratic-controlled House of Representatives and 20 Democratic-led states asked the U.S. Supreme Court to review the decision before its current term ends in June, but the court denied the request..

The case originated in February 2018, when a group of 20 states, led by Texas Attorney General Ken Paxton, sued the federal government seeking to have the entire ACA declared unconstitutional. The suit reflected an earlier action by Congress, namely the 2017 Tax Cuts and Jobs Act in which Congress set the penalty for not having health insurance at zero dollars effective January 1, 2019.

When the 2018 suit went to trial, the court said actions by Congress compel the conclusion that the individual mandate ceases to be a constitutional because the associated financial penalty no longer produces revenue for the federal government. The court went on to find that, because Congress called the individual mandate "essential" when enacting the ACA in 2010, the entire law must be invalidated. Following the trial, the judge ruled the whole law unconstitutional. It then went to the 5th Circuit in New Orleans on appeal.

If the most recent decision is upheld, the most popular element that would come unglued is insurance protections for Americans with preexisting medical conditions. Other elements of the law that may potentially be at risk include insurance subsidies for most people buying health plans through ACA marketplaces, Medicaid expansion in the states, the ability of young adults to stay on their parents' insurance policies until they turn 26, and no-charge preventive care for older Americans on Medicare.¹

The law also is woven into many other aspects of the U.S. health care system, including payment formulas for hospitals and doctors and Medicare payment models designed to

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reform health care delivery from a system that pays for the value of care patients receive, rather than the quantity of services delivered.

Previously the Supreme Court has issued three rulings related to the ACA²:

- In June 2012, in *NFIB v. Sebelius*, the Supreme Court of the U.S. (SCOTUS) ruled that the individual mandate was an unconstitutional violation of the Commerce Clause.
- In the same decision, SCOTUS ruled that Obamacare's Medicaid expansion was unconstitutionally coercive on the states.
- On December 14, 2018, U.S. District Court Judge Reed O'Connor of Texas ruled the law's individual mandate is unconstitutional and that, because the mandate cannot be separated from the rest of the law, the entire law is invalid.

Once the law reaches SCOTUS again, Justice Roberts, who already has saved the law twice in previous rulings, likely would find one more way to preserve it,³ said Chris Conover, a research scholar at the Center for Health Policy & Inequalities Research at Duke University.

"Most legal scholars on the right and left are dubious that the entire law will be cast aside on grounds that it is not severable from the individual mandate," Conover noted.

"That said, there is a non-trivial chance that the ACA's regulatory provisions involving guaranteed issue, adjusted community rating, and prohibition of coverage exclusions for pre-existing conditions might also be deep-sixed as being inextricably tied to the now-unconstitutional individual mandate," he said.

1. "Individual Mandate Ruled Unconstitutional, ACA in Limbo," Amy Goldstein, Washington Post, December 18, 2019.
2. "Will Obamacare Ever Die?" Chris Conover, Forbes, December 31, 2019.

3. "Strike Three Against Obamacare: A Misguided Law Is Once Again Ruled Unconstitutional," Chris Conover, Forbes, December 17, 2018.

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