



US Supreme Court poised to keep the Affordable Care Act

A lawsuit to overturn the Affordable Care Act may be floundering after Supreme Court justices questioned why the law should be dismantled. Susan Jaffe reports from Washington, DC.

The fate of the Affordable Care Act (ACA) is again in the hands of the US Supreme Court, after close calls in lawsuits in 2012 and 2015. But last week's hearing was different: justices who once voted to overturn the law—along with President Donald Trump's recent court appointees—bombarded opponents with sceptical questions.

After oral arguments in the case, known as *California v. Texas*, legal experts believe President Barack Obama's signature health reform law is not in mortal danger.

"That would be too much of a stretch", said Timothy Jost, emeritus professor of law at the Washington and Lee University School of Law (Lexington, VA). "I think the court was signalling to the health-care industry to quit worrying."

"This case was a loser", said James Copland, director of legal policy at the Manhattan Institute, a conservative think tank in New York (NY, USA). Even a partial win is unlikely to inflict much serious damage, he said.

Now a decade old, the ACA provides health-care coverage for around 23 million people, including 12 million low-income Americans who gained coverage through an expanded Medicaid programme, and protects millions more from discrimination by insurance companies on the basis of pre-existing health conditions. It also lowered prescription costs for 46 million older adults with Medicare drug coverage, among other changes.

In 2018, 18 Republican state attorneys general sued the Trump administration to overturn the ACA after Congress removed the tax penalty for not having health insurance as part of a budget measure that required fewer votes than would be needed to eliminate the mandate. ACA's opponents claimed that when

Congress passed the law in 2010, lawmakers said that the act could not function without the tax penalty enforcing the law's mandate for all Americans to have health insurance. To offset the cost of covering sick people, the penalty would help ensure that enough healthy people would also buy insurance. If the court could not legally

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eliminate the mandate, the challengers argued, the whole law should be invalidated. In December, 2018, a Texas federal district court judge overturned the entire law, prompting Democratic states to appeal the decision to the Supreme Court.

During the hearing, several justices indicated that the mandate could be struck down while preserving the rest of the law, said Judith Stein, executive director of the Center for Medicare Advocacy (Willimantic, CT). "That result would be correct based on the court's precedent."

The ACA has operated for 2 years without the penalty. There is no reason to overturn the ACA, according to 21 Democratic state attorneys general, led by California, who defended the law after the Trump administration took the unusual step of opposing the law it also administers. President Trump campaigned unsuccessfully for re-election on promises to replace the law.

Although the ACA provides subsidies and other incentives to those who cannot afford insurance, Congress thought the tax penalty would also help motivate people to enrol. "It's turned out that the carrots work without the stick", said Donald Verrilli, who represented the Democratic-led US House of Representatives, which also defended the law.

Conservative Justice Samuel Alito compared the opponents' argument to an aeroplane flying without a key part. "But now the part has been taken out, and the plane has not crashed", he told the Trump administration's acting solicitor general, Jeffrey Wall. "So, if we were to decide this case the way you advocate, how would we explain why the individual mandate in its present form is essential to the operation of the act?" As long as the mandate remains, Wall said, some people will feel obliged to buy insurance.

But conservative Justice Clarence Thomas noted that "the individual mandate now has no enforcement mechanism, so it's really hard to determine exactly what...your injury is". (Without proving damages, the states would have no basis to sue.)

Texas solicitor general Kyle Hawkins, representing the 18 states, said that some people would sign up only "because of the command to do so". Those people would then incur expenses for the states when they enrolled in Medicaid, which is partly funded by the state, or other health insurance.

Hawkins' argument "is transparently ridiculous", said Jost. "People sign up for Medicaid because they need health care, not because there is an unenforceable statement in the US Code that people should have health insurance."

Shortly after the hearing, President-elect Joe Biden said that his administration would protect and expand the ACA, regardless of the court's decision, which is expected by June, 2021. He pledged to "ensure that, here in America, health care is a right for all, not a privilege for the few".

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