



Explainer: *Texas v. United States* – What Did The DOJ Do?

By [Joe McLean](#)

Earlier this year, Texas and 19 other conservative states launched a legal effort to wipe out the Affordable Care Act. California and 15 other states intervened as defendants in the lawsuit, concerned that the Trump administration would not vigorously defend the ACA. As it turns out, they were right.

In June, the Department of Justice, on behalf of the United States, filed a pleading in the case largely agreeing with Texas.¹ In the legal filing, the DOJ argued that several crucial provisions of the ACA are unconstitutional and announced that it would not defend those provisions in court. According to Attorney General Jeff Sessions, this was a legal, not a political, decision.² Notably, the decision resulted in three long-time DOJ attorneys removing their names from the brief.³ One of those attorneys resigned a few days later.⁴

The DOJ's action has no immediate legal consequences—it is merely a statement of the DOJ's position. Intervenor-defendants California and other states remain in the case to fully defend the ACA and argue on its behalf in court. Even after the judge makes a decision, the status quo will likely persist until appeals are fully resolved. However, the DOJ's position is an attempt to weaken the ACA and is consistent with the current administration's goal of reversing progress made by the ACA.

¹ https://www.justsecurity.org/wp-content/uploads/2018/06/ACA.Azar_.filing.pdf.

² <https://www.justice.gov/file/1069806/download>.

³ https://www.washingtonpost.com/national/health-science/trump-administration-wont-defend-aca-in-cases-brought-by-gop-states/2018/06/07/92f56e86-6a9c-11e8-9e38-24e693b38637_story.html.

⁴ https://www.washingtonpost.com/world/national-security/senior-justice-dept-lawyer-resigns-after-shift-on-obamacare/2018/06/12/b3001d7c-6e55-11e8-afd5-778aca903bbe_story.html.

The DOJ's Position

The original complaint in *Texas v. United States*, filed in the Western District of Texas, suggested that the ACA was now defunct because the Supreme Court's 2012 reasoning for upholding the constitutionality of ACA's individual mandate no longer applied. Texas and the other states asked a federal court to fully enjoin the ACA and declare it unconstitutional.

In its brief, the DOJ agrees with the plaintiffs challenging the ACA and states it believes the individual mandate is unconstitutional. The DOJ's interpretation is based on the context in which the ACA first passed, earlier this decade. In *NFIB v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court found that the individual mandate was constitutional under Congress's taxing power. As part of the 2017 Tax Cuts and Jobs Act, Pub. L. No. 115-97, Congress set the individual mandate's tax penalty to \$0 beginning in 2019. According to the DOJ, because the individual mandate will now collect no money, it can no longer be considered a tax and is unconstitutional for reasons discussed in the *NFIB* opinion.

The DOJ also contends that two other ACA provisions are not severable from the individual mandate and are, therefore, also unconstitutional. These provisions prohibit insurers from denying coverage to people with pre-existing conditions (the guaranteed issue provision) and from charging higher rates based on a person's health or age (the community rating provision).

In the brief, the DOJ suggested that the Court enter a declaratory judgment stating that these provisions are unconstitutional, while indicating that the DOJ would continue to defend the constitutionality of the remainder of the ACA, including the exchanges, subsidies, employer mandate, and Medicaid expansion.

Analysis

What would happen if the DOJ's interpretation became law? In the individual market, insurers could invoke pre-existing conditions to refuse coverage or increase premiums and could underwrite coverage based on gender, age, and occupation. Because of preexisting ERISA and HIPAA rules, employers would not be able to discriminate against similarly situated employees in determining enrollment or setting premiums, but the employers may be able to discriminate based on preexisting conditions if the employee had a gap in coverage. Meanwhile, the effect of the DOJ's interpretation on tax credits in the individual market is unclear.

The error in the DOJ's position is that it views Congress's decision to repeal the individual mandate through the lens of the 2010 decision to pass the ACA and the Supreme Court's

decision in *NFIB*. In 2010, Congress made explicit findings that the individual mandate was essential to the guaranteed issue and community rating provisions, implying that the other two would not function if the individual mandate was struck down. In 2017, in passing the Tax Cuts and Jobs Act, Congress had clearly evolved in its thinking: it set the individual mandate penalty at zero while leaving the other two provisions untouched. Additionally, by 2017, the Congressional Budget Office had reported that, although rates would increase, the insurance markets would still function if the individual mandate penalty were removed. While the provisions might have earlier been inextricably linked, Congress's 2017 action indicated that that was no longer true.

A much more reasonable interpretation of the evolving state of the ACA is fully explained in the brief of the intervenor-defendant states (*California et al.*).⁵ The National Health Law Program [also filed an amicus brief](#) in the case with Families USA, Community Catalyst, Center for Public Policy Priorities, and Center on Budget and Policy Priorities.⁶

Beyond the impact on the state of health care in this country, it is troubling that the DOJ is effectively abdicating its role to implement the law and arguing instead that the ACA is unconstitutional. The DOJ normally defends laws whenever reasonable arguments can be made for their legality. That should be the case here.

Analysis of the DOJ's brief provided in part by [Timothy S. Jost](#), emeritus professor at Washington & Lee University School of Law.

Statement from [Don Verrilli](#), National Health Law Program Board Member:

The Department of Justice has a duty to defend federal laws when reasonable arguments can be made in defense of the law. I find it impossible to believe that the many talented lawyers at the Department could not come up with any arguments to defend the ACA's insurance market reforms, which have made such a difference to millions of Americans. Just read the brief of the States that intervened to defend the law. A compelling defense of the law is right there in black and white. This is a sad moment.

⁵ https://oag.ca.gov/system/files/attachments/press_releases/Response%20of%20Defendant%20Statest%20to%20Application%20for%20PI.pdf.

⁶ http://familiesusa.org/sites/default/files/documents/Exhibit_A_Families_USA_Amicus_Brief.pdf.