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### California v. Texas – Ending the Campaign to Undo the ACA in the Courts

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the AGs saw it, a \$0 tax is not really a tax at all. Instead, they argued, the ACA's instruction that everyone "shall" buy insurance could be understood only as a coercive command — the kind of command that the Supreme Court had already held to be unconstitutional. The AGs also argued that the "shall" language (even if it was backed only by a \$0 penalty) was so inextricably intertwined with the rest of the law — and so indispensable to its functioning — that the entire law was invalid.

Few independent legal observers, Republican or Democrat, saw merit in these arguments. Yet the Trump administration, keen to undo the law by any means, refused to defend the ACA in the courts. This decision, which prompted one government attorney to resign and others to withdraw from the case, broke with the U.S. Justice Department's bipartisan commitment to defend acts of Congress from legal challenge.<sup>2</sup> A group of Democratic-controlled states led by California intervened to defend the law — hence the case's caption, *California v. Texas*.

With the Trump administration's support, the case got a warm reception in the lower federal courts. The trial judge declared the mandate unconstitutional and the entire law invalid. On appeal, the Fifth Circuit agreed with much of the trial judge's reasoning, though it asked him to reconsider whether some parts of the law might be salvageable.

At that juncture, the Supreme Court agreed to hear the case. The ACA's supporters initially welcomed the Court's intervention: Roberts was the swing vote,

and he had already voted to turn away two much stronger challenges to the ACA. With Justice Ruth Bader Ginsburg's death and Justice Amy Coney Barrett's subsequent confirmation, however, the ideological balance of the Court lurched to the right. The law's fate might no longer be determined by the chief justice, but instead by Justice Brett Kavanaugh and Barrett, both Trump appointees.

Even as the lawsuit's odds improved, Republican officials were reluctant to endorse it, fearing that the public would blame them if the ACA were invalidated with no viable replacement on the table. During Barrett's confirmation hearings, for example, then-Senate Majority Leader Mitch McConnell (R-KY) said that "no one believes the Supreme Court is going to strike down the Affordable Care Act."<sup>3</sup> Senate candidates in the 2018 election cycle — including Josh Hawley (R-MO), who as Missouri AG had signed on to the lawsuit — tried to ignore the case and misleadingly claimed to support protections for people with preexisting conditions.

The Supreme Court's dismissal of this latest bid to overturn the ACA was thus met with relief across the political spectrum. Joined by six other justices, Justice Stephen Breyer held that Texas and the other GOP-controlled states lacked standing to sue because they could not show that a mandate with a \$0 penalty caused them harm. He rejected the states' argument that the mandate might cause more people to enroll in Medicaid and other state-sponsored insurance programs. "A penalty might have led some inertia-bound individuals to enroll," Breyer acknowledged in the

majority opinion. "But without a penalty, what incentive could the provision provide?"

For similar reasons, the majority found that the two people who sued alongside the states, both private consultants, also lacked standing. Because the mandate "has no means of enforcement," the consultants could not show "that any kind of Government action or conduct has caused or will cause" them any injury. In other words: no harm, no foul.

In an angry dissent, Justice Samuel Alito, joined by Justice Neil Gorsuch, accused the majority of making an "improbable rescue" of a defective law. In Alito's view, the states had standing to sue not because they were harmed by the mandate directly, but because they were harmed by other parts of the ACA that are inextricably linked to the mandate. What's more, Alito would have held not only that the mandate was unconstitutional, but also that the entire law was invalid. It is remarkable that two justices endorsed an outcome that would have plunged the U.S. health care system into chaos.

Because the Court decided the case on procedural grounds, not on its merits, Republicans might try to revive the case. In particular, the majority declined to address Alito's argument supporting standing because it was "not directly argued by the plaintiffs in the courts below." A new set of plaintiffs in a new lawsuit could conceivably make this argument. But Alito's theory runs counter to the general thrust of standing law.<sup>4</sup> Even if it were accepted, the majority's decision rests on the premise that an unenforceable mandate has no real-world effects.

It is hard to see how a mandate that does nothing is an essential part of the ACA, which strongly suggests that most of the justices believe the “shall” language could be severed from the law, while leaving the rest of it intact. Perhaps most important, the curt decision seems to signal that the Court wants nothing more to do with cases challenging the fundamental constitutionality of health care reform.

The resolution of *California v. Texas* does not mean the end of ACA-related litigation. A case that is now pending in Texas, for example, presents a serious challenge to the part of the law requiring insurers to cover, without cost sharing, high-value



An audio interview with Prof. Bagley is available at NEJM.org

preventive services — including contraception, preexposure prophylaxis for HIV, and Covid-19 vaccines.<sup>5</sup> Lawsuits over President Joe Biden’s implementation of the law will surely be filed.

But the broadside challenges to the law appear, finally, to have run their course. Would-be reformers — both conservatives who hope to dismantle the ACA and liberals who want to move beyond it — will have to look to Congress, not the judiciary, to achieve their goals. In a democracy, that is exactly as it should be.

Disclosure forms provided by the author are available at NEJM.org.

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