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# Health law foes to Supreme Court: No 'severability,' no Affordable Care Act

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By Sean P. Carr

While both the Obama administration and those seeking to overturn the Affordable Care Act claim the individual mandate provides essential glue to the law, they reach different conclusions about how the U.S. Supreme Court should settle the question.

Congress intended the minimum coverage provision, or the mandate for most Americans to carry health insurance, to be inextricable from the law, according to briefs filed Jan. 6 by [26 states](#) and [three private individuals or organizations](#), including the National Federation of Independent Business. They note that the first health reform bill that passed the U.S. House of Representatives contained a severability clause, but the final version lacked a provision that would allow the rest of the law to remain intact.

"Not only did Congress consider the individual mandate central to the act and necessary to make the other provisions work as intended; it considered the mandate a critical means of achieving its overall goal of providing near-universal health insurance," the multistate brief argued.

As a result, the plaintiffs said, if the Supreme Court finds the mandate to be invalid, the whole thing must go. They called on the court to uphold the 11th Circuit U.S. Court of Appeals' decision to reject the mandate as unconstitutional but reverse its finding that the mandate is severable.



Mary Massaron Ross  
Source: Vicki Bendure

"It underscores the fact that the minimum coverage position is a foundation to some of the other provisions of the act," Mary Massaron Ross, an appellate court attorney who has represented insurance companies and the president-elect of DRI, an international organization of defense attorneys, told SNL. "If Congress had been presented with this law without it, then would it have adopted the same law or not?"

"The minimum coverage provision is key to the viability of the guaranteed issue and community rating provisions," U.S. Solicitor General Donald Verrilli Jr. said in the administration's [brief](#). Broadly defined, these provisions require insurers to offer coverage to applicants regardless of medical history, pre-existing conditions or other factors and deny them the ability to cancel policyholders for the same.

However, the administration stopped short of arguing that severability must necessarily follow. It argued that the health reform law, including the mandate, is not without precedent, as plaintiffs claim, but an [appropriate progression](#) of federal involvement in health care that dates back to the early 20th

century.

"This is not such the radical idea [opponents] make it out to be," Andrew Selesnick, a partner at Michelman & Robinson LLP who chairs the firm's health care law department, told SNL.

Each side's briefs devote many pages to the political debates surrounding passage of the health law in March 2010. They also dwell on the business practices of health insurers, agreeing that without a mandate to drive consumers into the insurance marketplace, new rules and restrictions could make doing business very difficult for insurers.

Public policy arguments are vital to the question before the Supreme Court, Carrie Severino, chief counsel and policy director for the Judicial Crisis Network, told SNL. Her organization filed its own amicus curiae brief, joined by 36 Republican members of the U.S. Senate, opposing a severability option.

"This is where the actual question goes to what happened, how it was passed," she said.

The emphasis on severability is a risky move for the law's foes, said Selesnick, who primarily represents medical care providers.

## Tools



## Sources

- [Industry Document: Brief for Petitioners 1/6/2012](#)
- [Industry Document: Brief for State Petitioners on Severability 1/6/2012](#)
- [Industry Document: Brief for Private Petitioners on Severability 1/6/2012](#)

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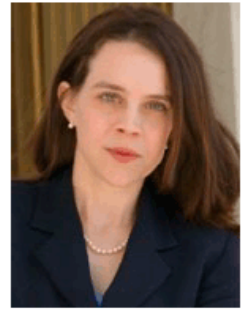
"Making it basically the centerpiece, so that the entire 2,700 pages go away, is surprising," he said.

The Obama administration's defense also rests on another leg: The tax penalty for noncompliance with the mandate makes it a valid extension of tax law.

Even when the primary goal of a tax is for another purpose — reducing the number of the uninsured, in this case — the tax is not invalid, Verrilli argued. Here, too, the Affordable Care Act builds on incentives and penalties long applied to health insurance coverage, he said. That the law identifies the charge as a "penalty" and not a "tax" does not change what it is, Verrilli said.

Severino dismissed the tax argument as one other appellate courts have rejected. "They figure they'll go for a 'Hail Mary' on that one," she said.

The Supreme Court will hear five-and-a-half hours of [oral arguments](#) from March 26 to March 28. The case before the court is the only appellate court decision to overturn the health reform law. Other petitions before the court, stemming from challenges brought by Virginia, Liberty University and the Thomas More Law Center, are pending.



Carrie Severino  
Source: Judicial Crisis Network

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