

Obamacare: Here We Go Again....

For those of you who have followed the storied trajectory of the Affordable Care Act (ACA), affectionately called Obamacare, strap yourselves in because here we go again. After months of waiting for an opinion, on December 18, 2020, which incidentally was the day of Donald Trump's impeachment, the 5th Circuit Court of Appeals issued its opinion in *Texas v. U.S.*, the most recent challenge to the constitutionality of the ACA. The three-judge panel ruled two to one that the individual mandate was unconstitutional in the absence of a tax penalty, and remanded the case back to Judge O'Connor in the Texas District Court to determine whether the individual mandate can be severed from the rest of the ACA or the entire law must fall with the individual mandate. Twenty democratic states and the House of Representatives [immediately appealed](#) the 5th Circuit decision to remand the case on severability to the Supreme Court, which [declined to hear](#) the case on January 21st. The States and the House of Representatives also asked the 5th Circuit to review the decision *en banc*, meaning in front of the entire 5th Circuit, and the fourteen judge court decided along party lines (8-6) to [decline the request](#) to review the decision on January 29, 2020. (see [case info](#) for more background). Unlike typical requests to review an appeals court decision that arise from the losing party, the request in *Texas v. U.S.* came from one of the judges on the Court of Appeals, suggesting that there was significant disagreement among the 5th Circuit. As a result of the 5th Circuit's decision to not review the case further, it appears unlikely that the fate of the ACA will become clear before the 2020 Presidential election, leaving the nation in a continued state of uncertainty.

The 5th Circuit Ruling

After finding that the states and the House had standing to bring the appeal, the 5th Circuit addressed whether the individual mandate could remain constitutional in the absence of a tax penalty. They found it could not. The 5th Circuit argued that without a tax penalty for failing to obtain health insurance, the individual mandate became a command from Congress that individuals engage in commerce, which exceeded Congressional authority. The 5th Circuit ruled that with the tax penalty set at \$0, the “four central attributes that once saved the statute . . . no longer exist.” Primarily, the provision no longer functions as a tax, because it does not produce any revenue for the government. Likewise, individuals would no longer make payments to the Treasury, payment amounts would not depend on personal income or filing status, and payments would not be made “in the same manner as taxes.” With the shared responsibility payment no longer qualifying as a tax, the 5th Circuit ruled the individual mandate unconstitutional.

The court then turned to the issue of severability – whether the individual mandate could be struck down on its own leaving the rest of the law in tact or whether it was so intertwined with the other features of the ACA that some or all of the rest of the Act must be struck down also. The Supreme Court in *Alaska Airlines, Inc. v. Brock* held the standard for determining severability turns on whether the legislature would have enacted portions of the act in the absence of the unconstitutional provision and the remaining portion of the statute is fully operational. As a general principle, courts try to preserve as much of the original statute as possible by presuming severability, unless Congress explicitly states otherwise.

While this legal analysis is fairly straight forward, the ACA and its subsequent history are not. The law spans 900 pages, has been amended substantively numerous times, and navigates an extensive and complex regulatory scheme, making determining severability of each and every provision a potentially gargantuan task. The 5th Circuit argued that it was “not persuaded” that the severability analysis conducted by Judge O’Connor satisfied the kind of “careful, granular approach” required in this case. Specifically, the court stated that “the district court opinion does not explain with precision how particular portions of the ACA as it exists post-2017 rise or fall on the constitutionality of the individual mandate.” The 5th Circuit took specific issue with Judge O’Connor’s use of the 2010 Congress’s claim that the individual mandate was “essential” to “creating effective health insurance markets” to invalidate the entirety of the ACA without addressing how striking down the individual mandate affects specific provisions of the ACA and the post-2017 regulatory structure of the ACA.

What’s really important here is not what the 2010 Congress thought when it passed the ACA, instead, it’s what the 2017 Congress thought when it passed the Tax Cuts and Jobs Act. After over 70 failed attempts by Republicans in Congress to repeal the ACA, it seems highly unlikely that Congress intended to strike down the entirety of the ACA by zeroing out the shared responsibility payment as one small provision in a massive tax reform bill. The intervenor states pointed out that the 2017 Congress did not repeal or amend any other provision of the ACA, several legislators made statements demonstrating assumptions that the Tax Cuts and Jobs Act would not alter other parts of the ACA, and that Congress knew that full repeal of the ACA would have severe consequences for health care in the U.S. As a result, the 5th Circuit remanded the question of severability back to Judge O’Connor with explicit instructions that he consider the intent of the 2017

Congress more explicitly and do the necessary analysis of explaining how each provision of the post-2017 ACA is “inextricably linked” to the individual mandate such that its invalidation must result in a repeal of the entire ACA.

What happens now?

While I am reluctant to think that a thorough review will result in Judge O'Connor changing his overall conclusion, consideration of congressional intent in 2017 should change the outcome. First, our understanding of the dynamics of the American health insurance market have evolved substantially since 2010. At the time of the ACA's passage, health policy experts overestimated the risk of adverse selection – the idea that people would only buy health insurance once they were sick, which would create insurance pools full of sick individuals and significantly raise health insurance premiums. It turns out that the vast majority of Americans want health insurance, not just when they are sick, but all the time for peace of mind and to cover day to day medical expenses (which, by the way, are more than high enough to warrant the desire for insurance coverage). The 2017 Congress had had time and experience with the ACA markets to see that the individual mandate payment was not high enough to encourage people who did not want to purchase insurance from opting in. In line with this, and contrary to the 2010 Congress' belief, the individual mandate and the shared responsibility payment were not necessary to stabilize health insurance markets – once the shared responsibility payment went to zero in 2019, the markets dipped, but did not crumble.

Now what remains uncertain is not whether Americans want health insurance in the absence of an individual mandate, but whether and when the promises made by the federal government to the people and the states will be kept. As a result of the Supreme Court and the 5th Circuit's unwillingness to hear the

case prior to receiving a response from the Texas District Court (which admittedly would be unusual from a procedural prospective), the case is unlikely to be resolved before the 2020 presidential election, leaving Americans and their health care system to linger in uncertainty for months and maybe years to come. We are likely to see this case, as so many before it, end in a heavily debated Supreme Court decision, with massive consequences for the nation. All we can do is hold on for yet another long, bumpy ride, and encourage people to get out and vote for what matters to them. No one can afford to sit on the sidelines, as there is just simply too much at stake for all Americans.