

Divided Fifth Circuit Panel Rules the Individual Mandate is Unconstitutional and Remands for Further Analysis of Severability

Insights

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On Wednesday, a divided panel of the United States Court of Appeals for the Fifth Circuit issued its long-anticipated decision in *Texas v. United States*, the latest in a now long line of challenges to the Affordable Care Act (ACA). The court ruled that the individual mandate was unconstitutional, but remanded the case for further analysis with respect to the severability of the ACA's many provisions. Previously, the United States District Court for the Northern District of Texas had concluded that the individual mandate provision was inseverable from the remainder of the ACA, striking down the entire law in its entirety. It is possible that the sixteen intervenor states and the District of Columbia might seek *en banc* review by the entire Fifth Circuit or petition the United States Supreme Court for review before the matter is remanded to the District Court, and in fact California's Attorney General Xavier Becerra has announced that it is prepared to file a petition for *certiorari*. If further appellate review is denied or not sought at this stage, the remand could significantly prolong the timeline for this litigation as the decision on remand would be subject to further appeal to the Fifth Circuit and perhaps the United States Supreme Court.

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Washington, D.C.**Background**

This challenge to the ACA arose out of the Tax Cuts and Jobs Act of 2017 (TCJA), which was passed with 51 Senate votes under the Senate's reconciliation rules in December 2017. In relevant part, the TCJA amended the ACA by reducing the "tax" associated with the individual mandate to \$0. Two individual plaintiffs and nineteen (now eighteen) plaintiff states¹ filed suit alleging that the individual mandate itself was rendered unconstitutional after the TCJA because it was no longer enforceable through a tax and was therefore not a lawful exercise of Congress' taxing power. The plaintiffs also contended that the individual mandate was inseverable from the remainder of the ACA, such that the ACA should be invalidated. Notably, Congress was unable to achieve this outcome on its own because the Senate's rules precluded Congress from repealing the individual mandate and other non-budgetary aspects of the ACA in a reconciliation measure. The federal defendants agreed that the individual mandate was unconstitutional and argued before the district court that the individual mandate

could not be severed from the ACA's guaranteed-issue and community-rating requirements but could be severed from the remainder of the ACA. (On appeal, however, the federal defendants changed their position and argued that the ACA is inseverable from the individual mandate, but that relief should be limited to the ACA provisions that are unnecessary to remedy the plaintiffs' injuries and should not be extended beyond the plaintiff states.) Sixteen states and the District of Columbia intervened to defend the ACA.

Judge Reed O'Connor of the United States District Court for the Northern District of Texas ruled on December 14, 2018 for plaintiffs, concluding that the plaintiffs had standing to sue, that the individual mandate was unconstitutional, and that the individual mandate could not be severed from the remainder of the ACA. In so ruling, Judge O'Connor largely focused on the intent of the Congress at the enactment of the ACA in 2010, largely concluding that the 2017 Congress had "no intent with respect to the Individual Mandate's severability" because the Congress was only concerned with eliminating the shared responsibility payment.

Fifth Circuit Decision

Judge Jennifer Walker Elrod (nominated by President George W. Bush in 2007) wrote for the two-judge majority of the Fifth Circuit and was joined by Judge Kurt Damian Engelhardt (nominated by President Donald J. Trump in 2018). Judge Elrod concluded that (1) there is a justiciable case or controversy because both the federal defendants and the intervenor-defendant states have standing to appeal, (2) the plaintiffs had standing to bring the challenge at the time they filed the lawsuit, and (3) the individual mandate is unconstitutional.

Plaintiffs' Standing and Injury. On the second question, the majority concluded that the two individual plaintiffs "are the objects of the individual mandate and . . . have purchased insurance in order to comply with that mandate." Therefore, the court concluded that they have incurred financial harm. In her dissent, Judge Carolyn Dineen King criticized this determination, stating that the individual plaintiffs' injury was "entirely self-inflicted" because there was no penalty for failing to comply with the individual mandate after the TCJA: "Nobody has standing to challenge a law that does nothing. When Congress does nothing, no matter the form that nothing takes, it does not exceed its enumerated powers." With respect to the state plaintiffs, the majority concluded that they incur costs in complying with the IRS reporting requirements that verify which employees are covered by minimum essential coverage and therefore do not need to pay the shared responsibility payment. These costs include printing and processing the forms as well as updating the state employers' in-house management systems. Judge King's dissent, however, argues that the reporting requirements (26 U.S.C. §§ 6055(a) and 6056(a)) rather than the individual mandate (26 U.S.C. 5000A(a)) produce this burden and that the state plaintiffs could only establish standing if "at least some state employees have enrolled in employer-sponsored health insurance solely because of the unenforceable coverage requirement."

Constitutionality of the Individual Mandate. With respect to the merits of the case, the majority concluded that the individual mandate can no longer be justified by Congress' taxing power and must therefore be unconstitutional following the TCJA. "In *NFIB [v. Sebelius]*, the individual mandate—most naturally read as a command to purchase insurance—was saved from unconstitutionality because it could be read together with the shared responsibility payment as an option to purchase insurance or pay a tax. It could be read this way because the shared responsibility payment produced revenue. It no longer does so." Thus, because the individual mandate is a "command" but not an exercise of the taxing power, "the individual mandate is unconstitutional." Judge King, however, would conclude that "the coverage requirement is a dead letter—it functions as an expression of national policy or words of encouragement, at most." Therefore, Judge King states that "the real question is whether Congress exceeds its enumerated powers when it passes a law that does nothing. And of course it does not."

Severability and Remand. Finally, both the majority and dissenting opinions express concerns with the District Court's severability analysis. The majority concludes that "the opinion does not address the ACA's provisions with specificity, nor does it discuss how the individual mandate fits within the post-2017 regulatory scheme of the ACA." In reaching this conclusion, the court highlights the many varied ACA provisions—citing explicitly the ACA's amendment to 18 U.S.C. § 1347, concerning

the level of scienter required to establish healthcare fraud—and the numerous substantive amendments to the ACA enacted in 2010, 2011, 2014, 2017, and 2018. Thus, “this issue involves a challenging legal doctrine [severability] applied to an extensive, complex, and oft-amended statutory scheme,” necessitating “a careful, granular approach to carrying out the inherently difficult task of severability analysis in the specific context of this case.” In particular, the court concluded that the district court’s severability analysis is “incomplete” because it “gives relatively little attention to the intent of the 2017 Congress” and “does not do the necessary legwork of parsing through the over 900 pages of the post-2017 ACA.” Rather than undertaking this analysis at the appellate level, however, the majority remanded to the district court to analyze severability more closely. In doing so, the majority took pains to say that it is not dictating the outcome of that analysis: “It may still be that none of the ACA is severable It may be that all of the ACA is severable from the individual mandate.” The court also remanded consideration of the federal defendants’ newly suggested relief of enjoining the enforcement of those provisions that injure the plaintiffs or declaring the law unconstitutional only as to the plaintiff states and the two individual plaintiffs.

Judge King disagreed with remanding severability to the District Court, stating that the Fifth Circuit is equally well-equipped as the District Court to analyze and determine whether individual provisions are severable. “There is thus no reason to prolong the uncertainty this litigation has caused to the future of this indubitably significant statute.” Her dissent went on to conclude that if she were to reach the question of severability, she would conclude that the individual mandate is severable from the remainder of the ACA. She noted that “it is simply unfathomable to me that Congress hinged the future of the entire statute on the viability of a single, deliberately unenforceable provision.”

Next Steps

Although further appellate review—either in the form of *en banc* review by the Fifth Circuit and/or Supreme Court review—is still possible in 2020, the panel’s remand on the issue of severability makes it possible that any such review will be deferred until a new decision is issued by the District Court and appealed again to the Fifth Circuit. On December 18, California Attorney General Xavier Becerra announced that California’s Department of Justice is prepared to file a petition for *certiorari* seeking immediate Supreme Court review of the Fifth Circuit’s decision. In order for *certiorari* to be granted, at least four of the nine Justices must vote to accept the appeal. If further appellate review is denied, the remand will be effectuated and the District Court would likely solicit further briefing on the questions of severability and appropriate relief.

For further information, please contact [Katrina Pagonis](#) in our San Francisco office.

[1] Wisconsin was originally a plaintiff state, but sought and was granted dismissal from the appeal.