

## ACA Uncertainty Reigns: What Happened in Texas and What is Next?

DECEMBER 18, 2018

On December 14, 2018, a federal judge in Texas struck down the Affordable Care Act (ACA), holding that the individual mandate is unconstitutional and, without it, the entire ACA must fall. *Texas v. United States*, No. 4:18-cv-167 (ND Tex) (J. O'Connor). On December 17, 2018, states that had intervened to defend the ACA asked the judge to certify an immediate appeal to the Fifth Circuit and to clarify that his order would not shut down the ACA until an appeal had run its course.

The individual mandate of the ACA requires all individuals to buy health insurance. That requirement is enforced by a penalty, which the ACA calls a "shared-responsibility payment." In 2012, the Supreme Court deemed the ACA's penalty to be a tax validly imposed as part of Congress's constitutional Tax Power. *NFIB v. Sebelius*, 567 U.S. 519, 561-63 (2012). Last year, in the Tax Cut & Jobs Act, Congress reduced the tax to \$0 starting in 2019.

Two individuals and 20 states, including Texas, brought an action against the United States, including the U.S. Department of Health and Human Services. The plaintiffs sought a declaration that, with the tax reduced to \$0, the individual mandate is unconstitutional and that the remainder of the ACA is inseverable from the mandate, and thus must be struck down entirely. The United States agreed that the individual mandate is unconstitutional, but maintained that most of the ACA was "severable" and remained good law. A group of 16 states and the District of Columbia intervened as additional defendants, arguing that neither the individual mandate nor the ACA as a whole are unconstitutional.

In his decision, Judge Reed O'Connor sided with the plaintiffs, striking down the ACA in its entirety. Judge O'Connor held three things.

*First*, the plaintiffs have standing to challenge the ACA's individual mandate. To have standing, a plaintiff must have suffered a concrete injury that is traceable to the challenged conduct of the defendant and likely to be redressed by a favorable decision. Judge O'Connor held that the plaintiffs have standing because they must "comply with the Individual Mandate" and are "subject to an increased regulatory burden," referring to the individual plaintiffs, as the state plaintiffs are not subject to the mandate or the tax. *Second*, Judge O'Connor held that the individual mandate "no longer triggers a tax beginning in 2019. So long as the shared-responsibility payment is zero, the ... Individual Mandate cannot be upheld under Congress's Tax Power." *Third*, and most controversially, Judge O'Connor held that the individual mandate is not "severable" from the rest of the ACA, which thus must fall in its entirety. "Because

rewriting the ACA without its ‘essential’ feature is beyond the power of [a federal] court,” he wrote, the mandate is “inseverable from the ACA’s remaining provisions.”

Critically, Judge O’Connor did *not* preliminarily enjoin the United States from enforcing the ACA—meaning he did not order the program to summarily shut down until the parties could try the case. To the contrary, he denied the plaintiffs’ request for that relief. Instead, he granted summary judgment, declared the individual mandate unconstitutional, and found rest of the ACA inseverable—and thus unconstitutional—thereby resolving the main issue in the case, and leaving the parties to sort out the implications.

Though Judge O’Connor struck down the ACA, that is far from the end of the process. Judge O’Connor’s decision will likely be appealed. A spokeswoman for the California attorney general has already announced that California and the other defendant states will challenge the ruling in the Fifth Circuit. Depending on the results of that appeal, the case could end up being heard by the Supreme Court. All of this could take several months, or even years, and there are many possible outcomes. The decision could be affirmed, reversed, affirmed in part, and reversed in part—or even dismissed entirely if the Fifth Circuit determines that the plaintiffs lacked standing because a toothless mandate causes no injury. That would require the case to be dismissed immediately, a result many learned commentators think is a real possibility.

For now, the U.S. Department of Health and Human Services has announced it will continue to enforce all aspects of the ACA. But the intervening states would like more assurance, and immediately asked Judge O’Connor to clarify that the ACA can keep running until they take an appeal. They also asked Judge O’Connor for permission to appeal right away.

But Judge O’Connor seems potentially not ready to part with the case. Late on Sunday, December 16, 2018, he ordered further briefing on the plaintiffs’ remaining claims, including their request for a permanent injunction shutting down the operation of the ACA. Those briefs are due January 4, 2019.

After last week’s ruling, the only thing certain is that uncertainty will continue to surround the ACA for the foreseeable future.

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