Texas, et. al., v. U.S. (ACA Constitutionality Challenge)

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AUTHORS: Jon Breyfogle, Lisa Campbell, Tamara Killion, Mark Nielsen, Seth Perretta, Ryan Temme

Highly public litigation continues to shape the health care landscape. A decision in the biggest ticket case — Texas v. The United States — the case challenging the constitutionality of the Patient Protection and Affordable Care Act (ACA) is expected at any time. Below we have outlined a short summary of the litigation, sketched out a possible timeline and offered our thoughts on a handful of frequently asked questions.

Background

In February 2018, Texas and a group of Republican-led like-minded states challenged the constitutionality of the ACA. This is not the ACA's first constitutionality challenge. We outline the key milestones for the most recent challenge below.

The individual mandate is a "tax." In 2012, the Supreme Court ruled in *NFIB v. Sebellius* that the individual mandate was not a constitutional exercise of Congress's Commerce Clause power, but was permissible under Congress's taxing authority.

Congress "zeros" out the mandate. Five years later, as part of the Tax Cuts and Jobs Act of 2017, Congress lowered the individual mandate tax to zero for tax years beginning January 1, 2019.

Texas, et. al., files suit, arguing a "zero" tax is not a tax. In *Texas v. US*, the plaintiff states argue that because the mandate no longer raises revenue for the government, it is no longer a tax, and following *NFIB*, the mandate is unconstitutional. The suit also argued that the *entire* ACA is unconstitutional because the individual mandate could not be severed from the rest of the ACA.

DOJ agrees that the mandate is now unconstitutional, but argues it can be severed from the rest of the ACA. Before the district court, the Trump Administration's Department of Justice (DOJ) agreed with Texas, et. al., that the mandate itself was unconstitutional once Congress changed the penalty to zero. But the DOJ argued that only those provisions that were intertwined with the mandate should be struck down: specifically, several provisions that relate to guaranteed issue (the requirement that health insurers issuer coverage to eligible enrollees, regardless of health status) and community rating

(the requirement that insurers limit the factors they use to set premium) could not be severed from the individual mandate, but the rest of the ACA could and should be severed and therefore would remain in place. This would mean that the Marketplaces (Exchanges), tax subsidies and Medicaid expansion, among many other provisions, would not be disrupted.

California, et. al., intervenes in the case. California and a group of like-minded Democratic-led states intervened in the case, arguing that the DOJ was not sufficiently defending the ACA. The intervening states argued that the lack of a penalty did not necessarily mean the mandate was not a "tax," and that even it did, the 2017 Congress that "zeroed" the tax clearly intended that the remainder of the ACA remain or it would have repealed the ACA in its entirety. In other words, the 2017 Congress clearly believed that the rest of the ACA could survive without the mandate and because Congressional intent is the touchstone to a severability analysis, the balance of the ACA should remain in place.

District court finds entire ACA unconstitutional. The district court ruled in December of 2018 that the individual mandate was unconstitutional, and the entirety of the ACA must be struck down, because the Congress in 2010 would not have passed the ACA without the individual mandate.

Parties appeal to the Fifth Circuit and the DOJ changes its position. The DOJ and California, et. al., appealed the case to the Fifth Circuit. But after appealing, the DOJ informed the Fifth Circuit that it changed its mind—it now agreed with the plaintiff states that the individual mandate was unconstitutional and "the balance of the ACA also is inseverable and must be struck down" because "the ACA's provisions were highly interdependent, such that they would not 'function in a coherent way and as Congress would have intended' in the absence of the individual mandate and the guaranteed-issue and community-rating provisions." (Quoting the dissent in *NFIB*). Despite the change in position, the DOJ also argued that only the parts of the ACA that harm the plaintiffs are troublesome and that the Fifth Circuit should remand to the district court to fashion suitable relief.

Oral arguments were held July 9, 2019. Reports were that the oral arguments did not go well for the ACA.

A decision from the Fifth Circuit is expected at any time. Any decision appears likely to be appealed to the Supreme Court.

Abbreviated Timeline

Complaint Filed by Texas, et. al.	February 26, 2018
District Court Decision	December 14, 2019
Appeal to Fifth Circuit Court	January 2019

Fifth Circuit Oral Argument	July 9, 2019
Fifth Circuit Decision	*Expected* Fall 2019
Request cert. Supreme Court • *Possible that argument is in the 2019-2020 term, but the later the Fifth Circuit's decision, the less likely it makes this Supreme Court term.*	*Expected* Fall-Winter 2019

Frequently Asked Questions

1. When will the Fifth Circuit rule?

The Fifth Circuit moved expeditiously with the case, so we would expect a decision from the court any day now. Note, however, that the Court does not have a legal deadline by which it must rule.

2. When will the case reach the Supreme Court?

Once a decision is reached by the Fifth Circuit, the parties could ask for re-hearing en banc. Because the US is a party to the case, the parties have 45 days to ask for re-hearing. If re-hearing is denied (or the parties do not ask for rehearing), the parties have 90 days from the entry of judgment (or the denial of a petition for rehearing) to ask the Supreme Court to take the case. The parties are not required to petition the Supreme Court review, but it seems likely that one or more parties will petition for review.

3. Will the Supreme Court take the case?

It depends on the Fifth Circuit's decision. If the Fifth Circuit upholds the district court decision finding the mandate penalty unconstitutional and the rest of the ACA inseverable, it seems likely the Supreme Court will want to review the decision. If the Fifth Circuit finds that the mandate penalty is unconstitutional, but severable from the rest of the ACA, the Supreme Court may not want to review the decision. Such a decision would effectively allow the status quo to continue and the Court would not be required to review another ACA decision.

4. If the Supreme Court takes the case, when will we have a decision?

It depends on when the case is heard. If the case reaches the Supreme Court calendar for the October 2019 term (between October 2019 and June 2020), then we would expect a decision by the end of June (or early July) of 2020. Otherwise, the Court would likely hear the case in the fall of the October 2020

term and a decision could come at any time after that (but the decision would be expected to be announced by the end of the term – June 2021).

5. What *could* the Supreme Court decide?

The Supreme Court has all sorts of options, including finding that no one in the case had standing to sue. But assuming the Court reaches the substance of the case, there are three primary avenues: (1) the mandate is still a tax, even if it does not currently raise revenue; (2) the mandate is no longer a tax, but it can be severed (either wholly, or in conjunction with the specific guaranteed issue and community rating provisions that have been raised below), or (3) the mandate is no longer a tax and it cannot be severed, so the entire ACA is unconstitutional.

6. What *will* the Supreme Court decide?

¯_(ツ)_/¯. More seriously – the legal question of whether a "zero" tax (a tax that does not raise revenue) is still a tax has been debated, and some commentators have urged Congress to increase the tax (even if only to a penny) to avoid the question entirely. So, conventional wisdom says that reasonable people can disagree over the tax question.

Generally, however, commentators have criticized the severability analysis from the district court—i.e., many people on both sides of the "is the individual mandate still constitutional" question have agreed that the mandate can be severed from the rest of the ACA, based on the intent of the 2017 Congress. So, conventional wisdom suggests the mandate would be severed from some or all of the ACA, rather than finding the entire statute to be unconstitutional.

Note, however, that conventional wisdom has a poor track record with respect to ACA litigation. Also, note that the reports of the oral argument before the Fifth Circuit were skeptical of the severability arguments as well.

7. What happens if the Supreme Court holds the individual mandate is unconstitutional, but can be severed from the ACA?

Practically speaking, nothing. There has been no individual penalty for the past 9 months and we would expect ACA enforcement and enrollment would continue as it has.

8. What happens if the Supreme Court holds that the mandate is unconstitutional and can be severed, but is intertwined with certain guaranteed issue and community rating provisions, so those have to be severed as well?

The agencies (Treasury, Health and Human Services, and Labor) have not publicly announced concrete contingency plans in light of this sort of decision. However, this outcome was also a possibility under

NFIB. Although the agencies did not make contingency plans public before *NFIB*, it seems unlikely that between the two cases, the agencies have not put some thought into how to proceed.

Initially, we would expect some subregulatory guidance on what provisions were severed and how group health plans and health insurance issuers should proceed. Thus far in the court briefing, the references to the guaranteed availability and community rating provisions have been fairly general and not terribly concrete. Unless the Fifth Circuit (or Supreme Court) changes course, the decision itself may refer generally to GI and rating. Some briefing has been somewhat specific, so we would expect that the following provisions could be at issue: 42 USC § 300gg-1 (guaranteed availability), § 300gg-3 (Preexisting conditions), § 300gg-4(a) (nondiscrimination in general), § 300gg(a)(1) (rating), § 300gg-4(b) (nondiscrimination based on premiums). That said, some of these provisions pre-date the ACA, so we would expect that only the ACA amendments to these provisions would be severed.

Note that for guaranteed availability and rating, most of the operative provisions have already been included in contracts that last a year. And many states have incorporated the ACA into their own state laws that would not go away if the ACA is unconstitutional. Outside of conflicting state regulation or contractual obligations, it is possible that some changes may be immediate. For example, enrollment off-exchange may be affected quickly if guaranteed availability is no longer required in the individual market off-exchange.

Fairly quickly, we would expect new proposed rules addressing these requirements. Some may be interim final, depending on timing. We would also expect the agencies to be somewhat flexible as issuers adjust to the new landscape.

It seems that large group employer-sponsored health plans (insured and self-funded) are unlikely to be greatly affected by a decision like this.

9. What happens if the Supreme Court finds the entire ACA unconstitutional?

As with the question above, we suspect the agencies have some contingency plans in place, but they have not made them public. Obviously, holding the entire statute to be unconstitutional would be disruptive, not just to health insurance issuers, but to employers, providers, consumers and states. Accordingly, we would expect immediate guidance from the agencies on how they intend to proceed.

10. Will the Supreme Court delay the effect of the decision (to a new plan year, for example)?

While possible, it would be unusual. Court decisions are generally applied retroactively—i.e., if the individual mandate is unconstitutional because it no longer raises revenue, and the rest of the ACA is

unconstitutional as a result, it would seem that the statute was unconstitutional as of January 1, 2019 (when the penalty was "zeroed").

However, in some cases the Supreme Court has made its decisions prospective. In the oral arguments for another ACA Supreme Court decision, *King v. Burwell*, Justice Alito suggested during oral arguments that it is possible that if the Court finds that subsidies are not available through federally-facilitated Exchanges, the Court may address whether its decision is effective retroactively or at some point in the future. Justice Alito cited *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 US 50 (1982) in which the Supreme Court found that a provision of the Bankruptcy Act of 1978 was unconstitutional, but concluded that a retroactive application would "not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." *Northern Pipeline*, 458 US at 87-88. Accordingly, the Court decided to apply the decision prospectively.

As a result, it appears possible (though seemingly unlikely) that the Supreme Court could direct its decision to be applied prospectively.

For certain tax provisions, the Department of the Treasury also has authority to apply certain decisions prospectively. Code section 7805(b)(8) provides the Secretary of Treasury with discretion to "prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied *without retroactive effect*." 26 U.S.C. § 7805(b)(8) (emphasis added).

11. What happens if the Supreme Court does not take the case?

Generally that means that the Fifth Circuit decision remains the law. That may lead to additional questions about the applicability of the decision – typically Circuit court decisions apply within that Circuit, not nationally. However, conceptually, a statute that is unconstitutional on its face in Texas is also unconstitutional in California, Vermont or Maine. Therefore, it would appear that the Fifth Circuit decision could have nationwide effect, but it will depend on the judgment. In addition, the scope of the decision may be an interpretive issue that the DOJ or the agencies administering the ACA could address.