Texas, et. al., v. U.S. – The Fifth Circuit Rules

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As you may recall, in late September, we expected a decision from the Fifth Circuit in *Texas v. United States*—the case challenging the constitutionality of the Patient Protection and Affordable Care Act (ACA)—in the fall of 2019. Although we may have been[1] overly optimistic on timing, we did receive a decision from the Fifth Circuit on December 18, 2019.

Although the Fifth Circuit did not fully resolve all the questions before it, instead remanding the case to the District Court, the House of Representatives and the Democratic Attorneys General have petitioned the Supreme Court for review. At the same time, the House moved for expedited consideration of its petition for review and the Democratic Attorneys General argued in their petition that the Supreme Court "should grant immediate review and resolve the case this Term."

Recap

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.

California and a group of like-minded Democratic-led states intervened in the case, arguing that the lack of a penalty did not necessarily mean the mandate was not a "tax," and that even if it did, the 2017 Congress that "zeroed" the tax clearly intended that the remainder of the ACA remain or it would have repealed the ACA in its entirety.

[1] Winter officially began on December 21, 2019 but the authors of this brief do not consider December to be "fall," and admit that we expected a decision before mid-December.

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.

The DOJ and California, et. al., appealed the case to the Fifth Circuit. The DOJ later changed its position, generally agreeing with the plaintiff states that the mandate was unconstitutional and that it was not severable, but disagreeing with Texas, et. al., as to remedy. The House of Representatives intervened on appeal, supporting California, et. al.

The Fifth Circuit Decision

In a lengthy opinion, and over a vigorous dissent, the Fifth Circuit addressed the following questions:

1. Is there a live case or controversy even though the United States has conceded many aspects of the dispute and do the intervenors have standing to appeal?

Yes. The majority concluded that the state intervenors (California, et. al.) did have standing, but that even if they did not, there remained a live case or controversy between the United States and Texas. In short, the Fifth Circuit concluded that although Texas and the United States "are in almost complete agreement on the merits of the case, the government continues to enforce the entire Act" and therefore, the District Court's decision would require the United States to take actions it would not take "but for" the court's order. The state intervenors had standing because they can demonstrate injury from the district court's judgment (e.g., funding they would have otherwise received under the ACA and the possible preclusive effect of an adverse judgment).

2. Do the plaintiffs have standing?

Yes. The majority concluded that both the individual plaintiffs and Texas, et. al. demonstrated standing. The individual plaintiffs (individuals that objected to the requirement to purchase insurance, even without the financial penalty) had standing because the "increased regulatory burden" of purchasing insurance that the plaintiffs did not want establishes an injury for standing purposes.

Texas, et. al. demonstrated standing because the ACA imposes financial burdens (such as verification of minimum essential coverage and providing the 1094 and 1095 statements).

3. Is the individual mandate unconstitutional?

Yes. Under *NFIB*, the majority reasoned, the mandate was saved because it was reasonably read as a tax. After Congress set the shared responsibility payment to zero, the mandate could no longer be reasonably read as a tax because it no longer raises revenue, is not paid into the Treasury (because there is no payment), the amount is not determined in relation to income (because there is no payment), and the IRS no longer collects the amount in the same manner as taxes (because there is nothing to

collect). The majority rejected the argument that the mandate penalty could always be raised by a future Congress, dismissing this argument as a "potential-to-produce-revenue" rather than the Constitution's requirement to raise "some revenue." The majority further rejected the argument that the mandate, after removing the penalty, was a mere suggestion and not a requirement. Instead, it concluded that NFIB already foreclosed the issue when it held that the mandate was "a command to purchase health insurance." In short, the mandate was originally a command or a tax; the Supreme Court held it to be a tax. After the penalty was removed, it became only a command.

4. If the mandate is unconstitutional, it is severable?

Maybe? This is the issue that the majority sent back to the District Court. After a lengthy discussion of severability doctrine, the majority concluded that "this issue involves a challenging legal doctrine applied to an extensive, complex, and oft-amended statutory scheme;" as a result, a court must do a "careful, granular" analysis, which the District Court did not do. Specifically, the majority faulted the District Court for failing to give more attention to the intent of the 2017 Congress, nor did the District Court "do the necessary legwork of parsing through the over 900 pages of the post-2017 ACA, explaining how particular segments are inextricably linked to the individual mandate." The majority "direct[ed] the district court to employ a finer-toothed comb on remand and conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable from the individual mandate."

The dissent

The dissent opened by suggesting that "[a]ny American can choose not to purchase health insurance without legal consequence. … No more need be said; it has long been settled that the federal courts deal in cases and controversies, not academic curiosities." Continuing, Judge King mused that even holding the individual mandate unconstitutional, while "extrajudicial," was "harmless." "What does it matter if the coverage requirement is unenforceable by congressional design or constitutional demand? Either way, that law does not do anything or bind anyone."

However, the majority sent the case back to the District Court for a severability analysis, "unnecessarily" prolonging the litigation, in Judge King's view, and forcing the Judge to write a lengthy dissent that concluded that none of the plaintiffs had standing, and that even if they did have standing, the mandate remains constitutional and "entirely severable" from the rest of the statute.

The petitions

Despite the remand to the District Court, both the House of Representatives and California, et. al. filed petitions of certiorari on January 3. Both argue that the Fifth Circuit's refusal to rule on the severability question unnecessarily prolongs the litigation (agreeing with Judge King), creates an "intolerable situation" and "uncertainty over the future of the healthcare sector." Both also argue that the remaining open issue—severability—is a strictly legal question and therefore can and should be

considered by the Court without waiting for the District Court reconsideration. Both also urge the Court to take the case for consider this term; if the Supreme Court agrees, we would presumably have a decision on the case in the summer[2] of 2020—before the Presidential election.

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	December 18, 2019
Request cert. Supreme Court • *House requested expedited consideration and Democratic AGs asked for hearing "this Term."*	January 3, 2020

Frequently Asked Questions

1. Will the Supreme Court take the case?

Maybe? The severability issue certainly appears to be a legal question, not a factual one. Appellate courts often defer to District Courts on factual determinations, but not legal determinations. In this case, however, the Supreme Court would not have the Fifth Circuit's severability determination to review—and it may not be any more inclined to "do the necessary legwork of parsing through the over 900 pages of the post-2017 ACA" than was the Fifth Circuit.

This assumes, however, that the "legwork" is necessary. Judge King (in dissent), the House and California, et. al. would argue that parsing 900 pages is unnecessary, because as Judge King explained,

[2] We now feel the need to define "summer" to include June, July and August, and not meteorological summer, although the way these ACA cases go, we will doubtlessly regret our temerity.

2017 Congressional intent makes the case "quite simple—indeed, a severability analysis will rarely be easier. … Congress declawed the coverage requirement without repealing any other parts of the ACA. … Consequently, little guesswork is needed to determine that Congress believed the ACA could stand it its entirety without the unenforceable coverage requirement."

However, the Supreme Court is generally not required to take any cases, and may be inclined to not take this one, if only because there is not a complete, final judgment.

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

It depends on when the case is heard. If the Court expedites consideration and hears arguments this term, then we would expect a decision by the end of June (or early July) of 2020. If the case does not make it onto the October 2019 term calendar, it is possible the Supreme Court could hold a special session. 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).

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

We would expect that the case will proceed before the District Court, which may use its fine-toothed comb to provide a more detailed list of what provisions (if any) can be severed from the mandate. At that point, presumably one side or the other will object to the District Court's conclusions and will appeal to the Fifth Circuit. At the risk of appearing too cynical, any decision from the Fifth Circuit will also likely be appealed. So the Supreme Court may have another opportunity—in a year or two—to take up the case then.