

Judge Rules Entire ACA Unconstitutional

On December 14, 2018, Texas Federal District Court Judge Reed O'Connor deemed the *Patient Protection and Affordable Care Act* (ACA) to be unconstitutional in its entirety, resulting in mass uncertainty for the millions of Americans who gained coverage through ACA provisions.¹ The lawsuit was commenced in February 2018 when Texas Attorney General Ken Paxton and a coalition of 20 Republican state attorneys general and governors sued the federal government on the foundation that they had been harmed by the increase in the number of individuals on state-supported insurance.² Although the judge has rendered his decision, the law remains in place for now because the court did not enjoin the ACA,³ likely because the ruling is expected to be appealed, and eventually reach the *Supreme Court of the United States* (SCOTUS).⁴

After the congressional Republicans' unsuccessful efforts to wholesale repeal and replace the ACA, the ACA's *Individual Mandate* penalty for those who did not maintain health insurance was at the forefront of the 2017 overhaul of the tax code.⁵ Through the enactment of the *Tax Cuts and Jobs Act* (TCJA) in December 2017, this penalty was reduced to \$0, effective beginning in 2019.⁶ Furthermore, in the previous 2012 SCOTUS case, *National Federation of Independent Business* (NFIB) v. *Sebelius*, Chief Justice Roberts concluded that the Individual Mandate penalty was a tax, with an essential feature being that it produced "at least some revenue for the Government."⁷ In this case, the Individual Mandate's penalty tax was valid under Congress' authority to tax and spend and the ACA was, therefore, deemed constitutional.⁸

However, under the same grounds as *NFIB v. Sebelius*, Judge O'Connor concluded that the Individual Mandate is no longer permissible under Congress's taxing power as a result of the TCJA reducing the Individual Mandate's tax to \$0 (i.e., it no longer produces revenue, which is an essential feature of a tax), rendering the ACA unconstitutional.⁹ Further, the court ruled that the Individual Mandate could not be severed from the ACA because the Mandate was "the keystone" of the law, essential to the regulation of the health insurance market, rendering the entirety of the ACA invalid.¹⁰ Contributing to the federal court decision was the *Department of Justice's* (DOJ) position, in which the agency agreed with the plaintiffs that the Individual Mandate is unconstitutional, and asserted that other provisions such

as the "guaranteed issue" (requiring health insurance companies to accept all applicants regardless of pre-existing conditions) are inseparable from the Mandate.¹¹ As a result, the DOJ did not defend the constitutionality of the Individual Mandate during the case.¹²

In an effort to avoid widespread confusion in the healthcare market, on December 17, 2018, 17 states filed a motion seeking clarity of the decision to help clarify whether the law becomes unconstitutional on January 1, 2018, and whether the ACA will stay in effect as the case moves through the courts.¹³ Representative Nancy Pelosi (D-CA), who is expected to become House Speaker in January 2019, stated that once the Democrats take control of the U.S. House of Representatives in January 2019, they will "swiftly intervene in the appeals process."¹⁴ Further, California Attorney General Xavier Becerra is leading a coalition of Democratic state officials in an attempt to defend the ACA,¹⁵ indicating their intent to appeal.¹⁶ Additionally, some states, such as Texas, are seeking to pass their own state healthcare law to replace the ACA through a "work around," should the ACA be struck down, to ensure that popular provisions, such as protecting those with pre-existing conditions, continue.¹⁷

Numerous healthcare provider associations have condemned Judge O'Connor's ruling. The *American Medical Association* (AMA) stated that this decision is "an unfortunate step backward for our health system."¹⁸ The AMA also predicted a regression to pre-ACA insurance coverage, where 20% of the U.S. population was uninsured and there were fewer patient protections.¹⁹ The *American Psychological Association* (APA) added that, especially with the Opioid Crisis, more healthcare services are needed, and there should be an expansion of access to healthcare coverage rather than a limitation of access for Americans.²⁰

Repealing the entirety of the ACA will undoubtedly affect the millions of people that received healthcare coverage upon the enactment of the ACA. This includes over 133 million individuals with pre-existing conditions (who were previously unable to obtain insurance);²¹ the 12 million individuals who gained coverage through *Medicaid Expansion*, who would lose their insurance coverage if the decision survives appeal;²² and, the 10 million individuals who received private insurance through the online marketplaces, who would also lose their insurance coverage, limiting the access of healthcare services to this population.²³ In total, the

Kaiser Family Foundation (KFF) estimates that 52 million adults under the age of 65 (27% of the U.S. population) would be rejected for healthcare coverage by insurers, which will, ultimately, negatively affect healthcare access, which the ACA sought to remedy.²⁴

Other popular ACA provisions that would be rescinded should this ruling stand include the requirements that insurers cover those under age 26 on their parents' plans, and that certain employers offer coverage to their employees.²⁵ With a complete overhaul, healthcare costs would likely increase for individuals, leading to additional financial strain. For example, annual and lifetime limits on coverage would again be permitted and there would no longer be a cap placed on out-of-pocket costs.²⁶ Without these provisions, out-of-pocket expenditures will likely rise for individuals and further limit access to services due to cost.

However, even though many Americans would lose insurance and bear a greater financial burden as a result of deeming the ACA unconstitutional, there is likely a "long legal road to travel before that is an immediate threat."²⁷ As there have been more than 70 unsuccessful ACA-repeal attempts, many legal experts conclude that this decision will not hold upon appeal.²⁸ Notably, this could potentially be the third time since 2012 that SCOTUS contemplates a challenge to the ACA.²⁹ In the previous two decisions, SCOTUS ruled to uphold the ACA, further indicating that Judge O'Connor's decision might not be upheld.³⁰

The December 14th decision was revealed just hours before the end of 2019 Open Enrollment period through the marketplace insurance exchange on HealthCare.gov.³¹ In response, the Centers for Medicare & Medicaid Services (CMS) Administrator, Seema

Verma, made an announcement that open enrollment would continue as planned and that the case would not impact current insurance coverage or coverage in 2019 plans.³² However, the confusion caused by this decision could result in lower enrollment numbers for 2019, which are down from last year by approximately 12%.³³ However, this low enrollment is also partly due to the excise of the tax penalty of the Individual Mandate that sparked this lawsuit, as well as the increased number of individuals utilizing Medicaid Expansion in states that have recently expanded.³⁴ Additionally, it is hypothesized that this low enrollment could be as a result from unawareness of the enrollment period as funding for marketing and outreach was decreased by 90% last year.³⁵ Arguments have also been made that the thriving U.S. economy has contributed to low enrollment, as more people are employed and thus receiving insurance from their employer.³⁶

Should the *Texas v. United States* decision survive appeal, it would have major consequences for a large number of healthcare consumers. The decision would force people off of Medicaid in states that have expanded and restrict reasonable and affordable insurance options for those that currently obtain health insurance through the online marketplace. In addition, the decision would eliminate popular ACA provisions that both political parties support, such as covering those with pre-existing conditions. Although the decision has been rendered at the District Court level, the case will inevitably be appealed, eventually to SCOTUS. Until then, it appears that the ACA will remain in place and coverage will not be affected for individuals impacted by ACA provisions at this time.

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4 Goodnough and Pear, December 14, 2018

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6 "Tax Cuts and Job Act" Pub. L. No. 115-97, § 11081, 131 Stat. 2054, (December 12, 2017); Rovner, December 14, 2018; Keith, December 15, 2018.

7 Case No. 4:18-cv-00167-O (N.D. Tex. December 14, 2018), p. 5-8.

8 *Ibid*, p. 7.

9 *Ibid*, p. 1-2; Rovner, December 14, 2018.

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11 Keith, Health Affairs, December 15, 2018.

12 *Ibid*.

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- 26 *Ibid.*
- 27 *Ibid.*
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