

ACA Individual Mandate Ruled Unconstitutional

On December 19, 2019, the U.S. Court of Appeals for the Fifth Circuit ruled that the central provision of the *Patient Protection and Affordable Care Act* (ACA) – the *Individual Mandate* (requiring Americans to have health insurance) – is unconstitutional.¹ However, the court did not decide whether the unconstitutionality of the Individual Mandate invalidated the rest of the ACA; instead, the Fifth Circuit sent the case back to the district court for further review and determination of which ACA provisions could survive without the mandate.²

Judge Jennifer Elrod, writing for the Fifth Circuit majority, commenced the decision by remarking on the many policy arguments made before the court, both in favor and against, the highly controversial law.³ However, the court clarifies that their decision addresses “*questions of law, not of policy.*”⁴ The court instead addressed the four pertinent questions before them:

*“First, is there a live case or controversy before us even though the federal defendants have conceded many aspects of the dispute; and, relatedly, do the intervenor-defendant states and the U.S. House of Representatives have standing to appeal? Second, do the plaintiffs have standing? Third, if they do, is the individual mandate unconstitutional? Fourth, if it is, how much of the rest of the Act is inseverable from the individual mandate?”*⁵

As to the first question, the court concluded that there is a live case or controversy and the intervenor-defendant states have standing to appeal.⁶ Second, the court found that the plaintiffs have standing to bring the challenge to the ACA.⁷

In answering the third question, the court held that when the U.S. Congress, through the *Tax Cuts and Jobs Act of 2017* (TCJA),⁸ set the individual health insurance penalty (the tax that individuals had to pay if they did not comply with the Individual Mandate) to zero dollars,⁹ it effectively rendered the Individual Mandate unconstitutional.¹⁰ In its consideration of this question, the court reviewed one of the seminal ACA challenges, *National Federation of Independent Business (NFIB) v. Sebelius*. The 2012 Supreme Court case found in part that the Individual Mandate, while a violation of the Constitution’s commerce clause, was a constitutional exercise of Congress’s federal taxing power.¹¹

Based on the Supreme Court’s reasoning in the 2012 NFIB decision, the Fifth Circuit reasoned that the actions of Congress, wherein they essentially eliminated the penalty for not having health insurance (by virtue of making the penalty zero), do not allow the mandate to be construed as a tax any longer.¹² The Individual Mandate, without any monetary penalty, “*is only cognizable as a command,*” thus rendering the mandate unconstitutional because “*there is no other constitutional provision that justifies this exercise of congressional power.*”¹³

The majority opinion criticized the lower court’s severability analysis as flawed and incomplete due to the court’s lack of consideration regarding the congressional intent behind the passage of the TCJA.¹⁴ The Fifth Circuit also stated that there was not a proper explanation by the lower court as to why the newer provisions of the ACA are “*inextricably linked*” to the Individual Mandate.¹⁵ Importantly, the court made no conclusive decision on whether any (or all) of the ACA can be severed from the Individual Mandate, stating:

*“It may still be that none of the ACA is severable from the individual mandate, even after this inquiry is concluded. It may be that all of the ACA is severable from the individual mandate. It may also be that some of the ACA is severable from the individual mandate, and some is not.”*¹⁶

The Fifth Circuit’s instruction to the lower court to consider the congressional intent related to the TCJA is surprising, as previous Supreme Court decisions have lamented the “*nebulous inquiry into hypothetical congressional intent.*”¹⁷ However, the court found that the lower court’s analysis needed to include congressional intent in 2010 (when the ACA was passed) and 2017 (when the Individual Mandate tax was eliminated) to be proper.¹⁸

Of note, Judge Carol King dissented from the majority, rebuking the standing of the suit to wit:

*“Without any enforcement mechanism to speak of, questions about the legality of the individual “mandate” are purely academic, and people can purchase insurance—or not—as they please. No more need be said; it has long been settled that the federal courts deal in cases and controversies, not academic curiosities.”*¹⁹

Over the past decade, the ACA has survived numerous attacks from congressional Republicans attempting to repeal the monumental (but controversial) legislation.²⁰ However, one of the largest impediments to the effectiveness of the ACA to date has been the elimination of the Individual Mandate penalty, which led to increases in the number of uninsured Americans.²¹ The rate of uninsured Americans, for the second year in a row, increased by 500,000 people in 2018.²² Nearly 28 million Americans remained uninsured, up by 1.2 million from the historic lows reached in 2016.²³ In addition to the elimination of the mandate, many Americans chose²⁴ not to purchase health insurance in 2018 due to large increases in premiums for the individual market.²⁵ These increases are largely due to the reinstatement of the health insurance tax (which is discussed further in another article in this month's issue regarding 2018 healthcare spending)²⁶ and the termination of federal cost-sharing reduction payments.²⁷ These factors, coupled with the

limited expansion of Medicaid in many states, have led to increasing numbers of Americans remaining uninsured.²⁸

For now, key popular provisions, such as the protection for those with pre-existing conditions, of the ACA remain preserved, although there is significant concern that this may not last.²⁹ The Fifth Circuit's ruling remands the law on the point of severability, meaning that the case returns to the same court that invalidated the entire law for further proceedings.³⁰ There are many potential conclusions with regard to severability – (1) one or more additional portions of ACA may be ruled unconstitutional; (2) all of the ACA is declared unconstitutional; or, (3) the rest of the ACA is found to be severable from the Individual Mandate, and remains in place.³¹ The future of the ACA and health coverage for millions of Americans, and the timeline in which these questions are answered, remains to be seen.

1 "Texas v. United States" Case No. 19-10011 (5th Cir. Dec. 18, 2019), Judgment, available at: <http://www.ca5.uscourts.gov/opinions/pub/19/19-10011-CV0.pdf> (Accessed 12/19/19), p. 3.

2 *Ibid.*, p. 60.

3 *Ibid.*, p. 2.

4 *Ibid.*

5 *Ibid.*, p. 2-3.

6 *Ibid.*, p. 3.

7 *Ibid.*

8 "BUDGET FISCAL YEAR, 2018 (a.k.a. Tax Cuts and Jobs Act of 2017)" Pub. L. No. 115-97, 131 Stat 2054 (December 22, 2017).

9 "Requirement to maintain minimum essential coverage" 26 U.S.C. § 5000A.

10 Case No. 19-10011 (5th Cir. Dec. 18, 2019), p. 3.

11 "National Federation of Independent Business v. Sebelius" 567 U.S. 519 (2012).

12 Case No. 19-10011 (5th Cir. Dec. 18, 2019), p. 3.

13 *Ibid.*, p. 3, 44.

14 *Ibid.*, p. 56-60.

15 *Ibid.*, p. 56.

16 *Ibid.*, p. 60.

17 Justice Thomas in "Murphy v. Nat'l Collegiate Athletic Association" 138 S. Ct. 1461, 1486 (2018), quoting his dissent in "U.S. v. Booker" 543 U.S. 220, 314 (2005).

18 Case No. 19-10011 (5th Cir. Dec. 18, 2019), p. 56.

19 *Ibid.*, p. 63.

20 There have been at least 70 Republican-led attempts to repeal, replace, modify, or curb the ACA since 2010. "GOP AIMS TO KILL OBAMACARE YET AGAIN AFTER FAILING 70 TIMES" By Chris Riotta, Newsweek, July 29, 2017, <https://www.newsweek.com/gop-health-care-bill-repeal-and-replace-70-failed-attempts-643832> (Accessed 12/19/19).

21 Finding eliminating the individual mandate would cause relatively small increases in premiums, but large declines in the number of people insured. "How Does the ACA Individual Mandate Affect Enrollment and Premiums in the Individual Insurance Market?" By Christine Eibner and Evan Saltzman, Rand Corporation, 2015, https://www.rand.org/pubs/research_briefs/RB9812z4.html (Accessed 12/19/19); See also the Commonwealth Fund finding that enrollment would fall for the individual market. "The Effect of Eliminating the Individual Mandate Penalty and the Role of Behavioral Factors" By Christine Eibner and Sarah Nowak, The Commonwealth Fund, July 11, 2018, <https://www.commonwealthfund.org/publications/fund-reports/2018/jul/eliminating-individual-mandate-penalty-behavioral-factors> (Accessed 12/19/19).

22 "Key Facts about the Uninsured Population" By Jennifer Tolbert, Kendal Orgera, Natalie Singer, and Anthony Damico, Kaiser Family Foundation, December 13, 2019, available at:

<http://files.kff.org/attachment/Issue-Brief-Key-Facts-about-the-Uninsured-Population> (Accessed 12/19/19), p. 1.

23 *Ibid.*

24 "Why Some Americans Are Risking It and Skipping Health Insurance" John Tozzi, Bloomberg, March 26, 2018, <https://www.bloomberg.com/news/features/2018-03-26/why-some-americans-are-risking-it-and-skipping-health-insurance> (Accessed 12/19/19).

25 "How Premiums Are Changing In 2018" By Ashley Semanskee, Gary Claxton, and Larry Levitt, Kaiser Family Foundation, November 29, 2017, <https://www.kff.org/health-costs/issue-brief/how-premiums-are-changing-in-2018/#> (Accessed 12/19/19).

26 "National Health Care Spending In 2018: Growth Driven By Accelerations In Medicare And Private Insurance Spending" By Micah Hartman, Anne B. Martin, Joseph Benson, Aaron Catlin, and The National Health Expenditure Accounts Team, Health Affairs, Vol. 39, No. 1 (January 2020), p. 8.

27 "Payments to Insurers for Cost-Sharing Reductions (CSRs)" Health and Human Services, October 12, 2017, <https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf> (Accessed 12/19/19), p. 1.

Insurers generally load the cost from the termination of federal cost-sharing reduction payments entirely onto the silver tier (a practice sometimes called "silver loading"). "How the Loss of Cost-Sharing Subsidy Payments is Affecting 2018 Premiums" By Rabah Kamal, Ashley Semanskee, Michelle Long, Gary Claxton, and Larry Levitt, Kaiser Family Foundation, October 27, 2017, available at: <http://files.kff.org/attachment/Issue-Brief-How-the-Loss-of-Cost-Sharing-Subsidy-Payments-is-Affecting-2018-Premiums> (Accessed 12/19/19), p. 1.

28 As of November 2019, 37 states (including D.C.) have adopted Medicaid expansion eligibility for adults under the ACA, although coverage has not become effective in three of those states. "Status of State Action on the Medicaid Expansion Decision" Kaiser Family Foundation, November 15, 2019, <https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (Accessed 12/19/19). In states that have not expanded Medicaid, eligibility remains limited, with median eligibility level for parents at just 40% of the Federal Poverty Level and adults without dependent children ineligible in most cases. "The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid" By Rachel Garfield, Kendal Orgera, and Anthony Damico, Kaiser Family Foundation, March 21, 2019, available at: <http://files.kff.org/attachment/Issue-Brief-The-Coverage-Gap-Uninsured-Poor-Adults-in-States-that-Do-Not-Expand-Medicaid> (Accessed 12/19/19), p. 1.

29 “The Health 202: Democrats want a 2020 Supreme Court hearing on the lawsuit that could upend Obamacare” By Paige Winfield Cunningham, The Washington Post, December 19, 2019, <https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2019/12/19/the-health-202-democrats-want-a-2020-supreme-court-hearing-on-the-lawsuit-that-could-upend-obamacare/5dfa7e29602ff125ce5b6b71/> (Accessed 12/19/19); “ACA’s continued uncertain fate seen as a Republican win” By Shelby Livingston, Modern Healthcare, December 19, 2019, https://www.modernhealthcare.com/legal/acas-continued-uncertain-fate-seen-republican-win?utm_source=modern-

healthcare-daily-finance-thursday&utm_medium=email&utm_campaign=20191219&utm_content=article2-headline (Accessed 12/19/19).

30 “Texas v. United States” 352 F. Supp. 3d 665, 689 (N.D. Tex. 2018).

31 Showing there are many potential consequences of the unconstitutionality of the individual mandate including declaratory judgment without enjoining any government official. “Undone: The New Constitutional Challenge to Obamacare” By Josh Blackman, Texas Law Review and Politics, Vol. 23, No. 1 (2018), p. 28-49.

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