A TEXAS FEDERAL JUDGE DECLARES THE AFFORDABLE CARE ACT UNCONSTITUTIONAL: WHAT NEXT?

WRITTEN BY
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On February 26, 2018, eighteen state attorneys general and two Republican governors filed suit in a Texas district court against the federal government over the constitutionality of the Affordable Care Act ("ACA"). While *Texas v. United States* is not the first serious legal challenge brought against the Obama administration's signature healthcare law (*see, e.g., King v. Burwell*, 135 S. Ct. 2480 (2015); *see also National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)), it is the first in which the executive branch broke with tradition and declared that it would not defend the ACA in court.

The case has certainly represented the most serious threat to the ACA since the GOP's legislative efforts to repeal the healthcare law failed last summer. As it turns out, this threat should have been taken more seriously by industry analysts. On December 14, 2018, Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas found that the ACA was unconstitutional.

His decision has rattled the markets, Democratic political leaders, advocacy groups, and the broader healthcare industry. One prominent Democratic senator remarked, "This is a five alarm fire – Republicans just blew up our healthcare system."

Senate Minority Leader Chuck Schumer (D-NY) called it an "awful ruling . . . [which, if not reversed] will be a disaster for tens of millions of American families, especially for people with pre-existing conditions." After taking a closer look at this ruling, however, many legal experts have concluded that it is not nearly as earth shattering as the headlines have made it appear.

First, Judge O'Connor's ruling did not block enforcement of the ACA despite the fact that the plaintiffs had asked the court to issue a nationwide injunction on the federal government from implementing, regulating, or enforcing the ACA. Since the judge declined, all of the existing provisions of the ACA with which employers, fully insured plans, and self-funded plans must comply are still in effect.

This decision has no effect whatsoever on plan design, on cost containment, on employee incentives, or on regulatory compliance. A quick check of Healthcare.gov post-ruling revealed that federal officials have even added this reassuring message: "Court's decision does not affect 2019 enrollment coverage."

Second, a spokeswoman for the California attorney general has already confirmed that the sixteen states (and D.C.) that stepped in to defend the ACA will appeal this district court ruling to the United States Court of Appeals for the Fifth Circuit in New Orleans, Louisiana. That means there is a chance that this decision could be overturned before the case reaches the Supreme Court.

That possibility brings me to my third point; that legal scholars across the ideological spectrum have found the legal arguments made by the plaintiffs in this case to be remarkably unpersuasive. To understand why, let us break down the court's opinion (which sided with those arguments).

Judge O'Connor's opinion has two major elements. First, he contends that since Congress reduced the ACA's individual mandate penalty to $0, the mandate to purchase insurance must be invalidated.

Then, he argues that since the individual mandate is essential to and inseverable from the remainder of the ACA, the entire 2,000 page healthcare law must be struck down. This issue of "severability," or whether one provision of a law can be severed without invalidating the entire law, is key. Prior to addressing severability, however, Judge O'Connor explains his constitutional analysis for finding that the individual mandate is no longer fairly readable as an exercise of Congress's tax power.

Regarding his first contention, that the individual mandate could not be saved from the ACA, Judge O'Connor has made a rather compelling case. When the ACA was passed in 2010, the bill contained a requirement that all Americans purchase health insurance or pay a penalty.

In 2012, the Supreme Court ruled that this requirement, known as the individual mandate, was a legitimate exercise of Congress's constitutional authority to tax. See *NFIB v. Sebelius* (2012). In late 2017, in the Tax Cuts and Jobs Act ("TCJA"), Congress zeroed out the penalty associated with the tax, meaning the individual mandate can no longer reasonably be considered a tax.

As such, the constitutional foundation identified by the majority of the Supreme Court, on which the individual mandate was based, was invalidated (recall that the majority in *NFIB v. Sebelius* also declined to sustain the individual mandate's constitutionality under the Commerce Clause).

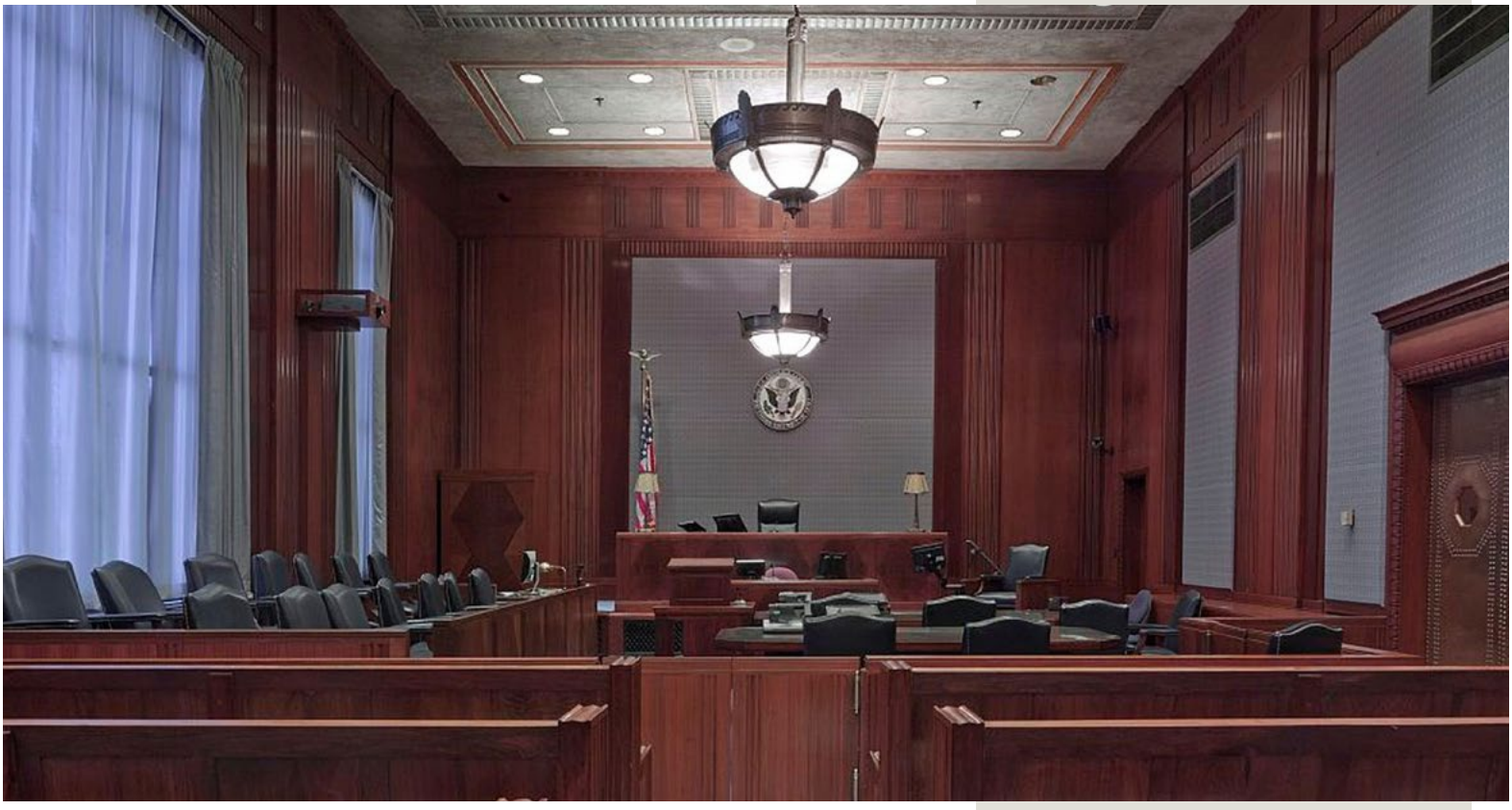
With respect to Judge O'Connor's second contention, that the entire ACA must fall, many legal experts strongly disagree. Nothing in the original 2010 bill spoke to the severability of the individual mandate.

Typically, when lawmakers neglect to include a severability clause in a bill, courts look to discern the intent of Congress when considering whether finding a particular provision of a law unconstitutional would require the elimination of the entire law.

In *NFIB v. Sebelius*, the majority never addressed severability with respect to the individual mandate since the Court upheld the requirement. Four dissenting justices concluded that the individual mandate was unconstitutional, and that Congress intended the entire ACA to be invalidated without the individual mandate.

Judge O'Connor assumes that the intent of the 2010 Congress controls the severability analysis in the case before his court; an intent only discerned by a minority of the Supreme Court. Indeed, he spends most of his 55-page opinion attempting to discern the intent of the 2010 Congress on his own.

In doing so, however, he ignores the intent of a later Congress that did speak to the issue of severability in the form a



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later legislative act. The 2017 Congress, in passing the TCJA, eliminated the individual mandate and preserved the rest of the ACA. This act presents strong evidence that Congress intended the ACA to function without the individual mandate. Judge O'Connor's explanation for this fact is that the 2017 Congress was unable to repeal the individual mandate because of budget rules and it therefore had no intent with respect to the individual mandate's severability.

By assuming Congress had no intent because it was shackled by complicated legislative rules, Judge O'Connor has drawn the ire of most of the legal community. If he had been so sure of his position, why would he neglect to issue a nationwide injunction on the ACA, as he could have done?

True, throwing a wrench into the middle of the healthcare system, where $600 billion in federal funding and health insurance coverage for millions of Americans is on the line, would have been a drastic action; however, if Judge O'Connor truly believed Congress intended this, he could have blocked enforcement of the ACA across the country.

I could go on at length about the consequences if this ruling were to stand; the impact on employer-sponsored plans, the effect on those with pre-existing conditions, the potential loss of health insurance coverage for millions of individuals, and the end of the Medicaid expansion. Yet, based on the response from the legal community of which I am a part, my position is that this decision rests on very shaky ground.

This decision also goes much further than even the Trump administration had wanted (it wanted to preserve protections in the law for people with pre-existing medical conditions). I fully expect this case to be reversed by the United States Court of Appeals for the Fifth Circuit and to eventually be declined by the Supreme Court.

In short, we should all hold our collective horses and conduct business as usual for the time being. ■

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