In December 2018 a federal district court declared the Affordable Care Act (ACA) individual mandate unconstitutional. It also declared the remaining provisions of the act “inseverable,” meaning also invalid. The court didn’t issue a nationwide injunction which would have had the effect of immediately ceasing all aspects of law.

In the district court litigation the Department of Justice (DOJ) didn’t defend the individual mandate. But it did argue that other provisions of the ACA, excluding the guaranteed-issue and community-rating requirements, which were intended to provide affordable health insurance for those with pre-existing conditions, were severable. Now DOJ has informed the Fifth Circuit that it has changed course and agrees with the lower court that the entire ACA was properly invalidated.

Other elements of the ACA which would have been severable had the district court adopted DOJ’s previous position include eliminating coverage limits, allowing dependent children to remain on their parents insurance until age 26, health insurance exchanges, and the Medicaid expansion.

The ACA individual mandate required uninsured who didn’t purchase health insurance to pay a so-called shared-responsibility payment. In 2012 the Supreme Court held the individual mandate is a constitutional “exercise of Congress’s Tax Power because it triggered a tax.” The Tax Cuts and Jobs Act of 2017 reduced the tax to $0 as of January 1, 2019.

Challengers argued the individual mandate is no longer a “constitutional exercise of Congress’s enumerated powers” when the shared-responsibility payment is zero. The district court agreed. According to the court the individual mandate and the shared-responsibility payment are distinct. The Supreme Court concluded the individual mandate was constitutional because it triggers a tax. But following the Tax Cuts and Jobs Act the mandate no longer triggers a tax.

If Congress would have enacted the constitutional parts of a law without the unconstitutional parts the unconstitutional parts are severable. The district court concluded the individual mandate is inseverable from the entire act because “Congress stated three separate times that the Individual Mandate is essential to the ACA.”

A number of states, led by California, have appealed and will defend the individual mandate before the Fifth Circuit. Presumably these states will argue, as they did before the district court, that if the individual mandate is unconstitutional it is also severable. While presumably no one will argue that the individual mandate plus the guaranteed-issue and community-rating requirements are severable now that DOJ has abandoned that position, the Fifth Circuit could adopt that position regardless.