In *Texas v. California* [2] and *California v. Texas* [3] the Supreme Court will decide whether the Affordable Care Act’s (ACA) individual mandate is unconstitutional. More importantly, if the Court holds that it is, it will decide whether the individual mandate is severable from the ACA. It is possible the Court will conclude it isn’t and that the entire law is unconstitutional.

The ACA individual mandate required uninsured who didn’t purchase health insurance to pay a “shared-responsibility” payment. The Tax Cuts and Jobs Act of 2017 reduced the payment to $0 as of January 1, 2019. Texas, and a number of other states argued, and the Fifth Circuit agreed, that the individual mandate is no longer constitutional as a result.

According to the Fifth Circuit, in *NFIB v. Sebelius* [4] (2012) five Supreme Court Justices agreed that the “individual mandate could be read in conjunction with the shared responsibility payment” as “a legitimate exercise of Congress’ taxing power for four reasons.” Specifically, the shared-responsibility payment generated revenue for the federal government by taxpayers when they filed their tax return. The IRS enforced the requirement to pay, and the amount owed was “determined by such familiar factors as taxable income, number of dependents, and joint filing status.”

The Fifth Circuit reasoned that now the shared responsibility payment amount is zero “[t]he four central attributes that once saved the statute because it could be read as a tax no longer exist.” “Most fundamentally, the provision no longer yields the ‘essential feature of any tax’ because it does not produce “at least some revenue for the Government.”

Regarding whether all or parts of the ACA could stand even though the individual mandate is unconstitutional, the Fifth Circuit articulate the “well-established” severability test. “Unless it is ‘evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.’”

While the district court held that none of the ACA was severable from the individual mandate (meaning the entire Act is unconstitutional), the Fifth Circuit concluded the district court failed to take a “careful, granular approach” in its severability analysis. “The district court opinion does not explain with precision how particular portions of the ACA as it exists post-2017 rise or fall on the constitutionality of the individual mandate. Instead, the opinion focuses on the 2010 Congress’ labeling of the individual mandate as ‘essential’ to its goal of ‘creating effective health insurance markets,’ and then proceeds to designate the entire ACA inseverable.”

California and a number of other states defending the ACA argue that the individual and state plaintiffs lack standing to bring this case. California argues the individual plaintiffs haven’t been harmed by the tax being reduced to zero because “[a] statutory provision that offers individuals a choice between purchasing insurance and doing nothing does not impose any legally cognizable harm.” California claims that the states have failed to alleged harm because they have no proof that the shared-responsibility payment being zero will force individuals into the states’ Medicaid and CHIP
programs or increase state costs for “printing and processing [certain] forms.”

The case will most likely be heard and decided sometime next term which begins in early October.

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