

In a long-awaited decision in [*Texas v. Azar*](#), the Fifth Circuit held that the Affordable Care Act's (ACA) individual mandate is unconstitutional. This decision has no practical effect because no one is currently required to pay the shared-responsibility payment. A year ago, a federal district court held the individual mandate is inseverable from the ACA rendering the entire law unconstitutional. The Fifth Circuit sent the case back to the lower court for "additional analysis" on the severability question.

The ACA individual mandate required the 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. A number of 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*](#) (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 because the shared responsibility payment amount is now 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 articulated 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, 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.”

Remarkably, the federal government has changed its position in this litigation three times. The Fifth Circuit also remanded this case so the lower court could consider the federal government’s most recent position.

Before the district court, the federal government argued that only two provisions of the ACA were inseverable from the individual mandate - the guaranteed-issue and the community-rating provisions. Before the Fifth Circuit, the federal government first argued that no ACA provision was severable, meaning if the individual mandate is unconstitutional the entire ACA is unconstitutional. Now the federal government is arguing that even though the ACA is inseverable, “relief in this case should be tailored to enjoin enforcement of the ACA in only the plaintiff

states—and not just that, but that the declaratory judgment should only reach ACA provisions that injure the plaintiffs.”

So, what will happen next? The plaintiffs may immediately appeal to the entire Fifth Circuit or to the Supreme Court, but neither court must hear the case. If there are no appeals or review is denied, we must wait for a decision from the district court on severability.

Case recap provided by Lisa Soronen, Executive Director, State & Local Legal Center (SLLC)