

## **The Affordable Care Act decision expected this fall from the Fifth Circuit Court on Texas vs U.S. and the appeal from California, et al. on its constitutionality ....read more here...**

A district court ruled in December of 2018 that the individual mandate was unconstitutional, and the entirety of the ACA must be struck down, because the Congress in 2010 would not have passed the ACA without the individual mandate. The DOJ and California, et. al., appealed the case to the Fifth Circuit. But after appealing, the DOJ informed the Fifth Circuit that it changed its mind—it now agreed with the plaintiff states that the individual mandate was unconstitutional and “the balance of the ACA also is inseverable and must be struck down”

### **Will the Supreme Court take the case?**

It depends on the Fifth Circuit’s decision. If the Fifth Circuit upholds the district court decision finding the mandate penalty unconstitutional and the rest of the ACA inseverable, it seems likely the Supreme Court will want to review the decision. If the Fifth Circuit finds that the mandate penalty is unconstitutional, but severable from the rest of the ACA, the Supreme Court may not want to review the decision. Such a decision would effectively allow the status quo to continue and the Court would not be required to review another ACA decision.

### **If the Supreme Court takes the case, when will we have a decision?**

It depends on when the case is heard. If the case reaches the Supreme Court calendar for the October 2019 term (between October 2019 and June 2020), then we would expect a decision by the end of June (or early July) of 2020. Otherwise, the Court would likely hear the case in the fall of the October 2020 term and a decision could come at any time after that (but the decision would be expected to be announced by the end of the term – June 2021).

### **What *could* the Supreme Court decide?**

The Supreme Court has all sorts of options, including finding that no one in the case had standing to sue. But assuming the Court reaches the substance of the case, there are three primary avenues: (1) the mandate is still a tax, even if it does not currently raise revenue; (2) the mandate is no longer a tax, but it can be severed (either wholly, or in conjunction with the specific guaranteed issue and community rating provisions that have been raised below), or (3) the mandate is no longer a tax and it cannot be severed, so the entire ACA is unconstitutional.

### **What *will* the Supreme Court decide?**

More seriously – the legal question of whether a “zero” tax (a tax that does not raise revenue) is still a tax has been debated, and some commentators have urged Congress to increase the tax (even if only to a penny) to avoid the question entirely. So, conventional wisdom says that reasonable people can disagree over the tax question.

Generally, however, commentators have criticized the severability analysis from the district court—i.e., many people on both sides of the “is the individual mandate still constitutional” question have agreed that the mandate can be severed from the rest of the ACA, based on the intent of the 2017 Congress. So, conventional wisdom suggests the mandate would be severed from some or all of the ACA, rather than finding the entire statute to be unconstitutional.

Note, however, that conventional wisdom has a poor track record with respect to ACA litigation. Also, note that the reports of the oral argument before the Fifth Circuit were skeptical of the severability arguments as well.

**What happens if the Supreme Court holds the individual mandate is unconstitutional, but can be severed from the ACA?**

Practically speaking, nothing. There has been no individual penalty for the past 9 months and we would expect ACA enforcement and enrollment would continue as it has.