

# Health Care in Motion

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## Judges Kick the Can Down the Road – Affordable Care Act Uncertainty Lives On

Have you ever had the experience of deep, all-encompassing dread for some upcoming event; an impending ordeal likely to ruin you? You wait and wait, riddled with anxiety and trepidation, and then the day finally arrives – dressed in all of the promised trappings – but it turns out to be just another day of [business as usual](#)? Yeah, us neither.

The United States Court of Appeals for the Fifth Circuit – based in New Orleans – issued its [long-awaited decision in Texas v. United States](#) yesterday. And the news is not good – but it’s also not nearly as bad as it might have been. The Affordable Care Act (ACA) has survived another round of ongoing Republican onslaught. But the end is nowhere in sight, and storm clouds remain firmly planted on the horizon. In the immediate future, the case has been punted back to the same conservative ideologue who ruled the ACA unconstitutional in the first place. Barring intervention by the Supreme Court, this move simply pushes out the day of reckoning and prolongs the type of uncertainty that has come to be routine when it comes to the Affordable Care Act.

### Background

As we have [written before](#), this lawsuit began in February 2018 when a group of 20 Republican state attorneys general thought they discovered a back door into blowing up the Affordable Care Act. Following the [deeply embarrassing failure](#) of a Republican controlled Congress to deliver on its tagline to “repeal and replace” the ACA in the summer of 2017, the strategy shifted to seek more piecemeal methods of undermining the law. Among many other elements, this strategy involved a successful legislative effort to do away with the “individual mandate.”

The individual mandate is the part of the ACA – Title 26 of the United States Code, Section 5000A to be precise – that gave Americans a choice – either purchase qualifying health insurance for yourself, or pay a penalty when you submit your federal income taxes each year. It lies at the heart of what Republicans detest about the ACA – in their eyes it is government compulsion to buy something that one might not choose to buy otherwise. Yet, the individual mandate was a key element of the ACA because its architects believed that unless everybody was in the health insurance risk pool, the premiums and other costs associated with that insurance would not be affordable. This was an effort to address “adverse selection” – the problem where individuals without immediate or known health care needs opt out of health insurance until such a time that they need it, and thus leave insurance pools covering those with high costs imbalanced against a lower overall amount of premium payments. Of course, health insurance is different from other kinds of insurance because everyone is likely to experience a health care need at some point in their life, many times unexpected. The Affordable Care Act recognized this truth and took some initial steps toward a health care system built on a theory of [societal solidarity](#).

So it was that the Trump Administration’s lone major legislative enactment – the [Tax Cuts and Jobs Act of 2017](#) – took aim

at the individual mandate, reducing the penalty associated with failing to buy insurance down to \$0. And this is where the right wing attorneys general saw their opportunity. Their theory is built on the back of the Supreme Court’s famous [NFIB v. Sebelius](#) case from 2012. That case is widely remembered as a prior iteration of the ongoing Republican assassination campaign against the ACA, rebuffed by Chief Justice John Roberts’ opinion that the individual mandate represented a constitutional exercise of Congress’s taxing power. Now, with the penalty reduced to \$0, the conservatives argued that this taxing authority evaporated, and so too must the entirety of the law be struck down. These plaintiffs went in search of an ideological bedfellow, and found one in Fort Worth, Texas. Judge Reed O’Connor of the Northern District of Texas – a conservative stalwart who has proven friendly to all manner of attack on progressive lawmaking – issued an opinion in December 2018 that transformed the right wing attorneys general ideological brainstorm into a binding court judgment.

An appeal soon followed, with the federal government choosing ultimately to side with the plaintiffs and take the extraordinary position that a current federal law should be struck down in whole. In response, some 16 progressive state defendants asked the courts to intervene in the case to defend the ACA, and took up that cause on appeal. Later, the U.S. House of Representatives also asked to intervene in the case. Throughout this process, some sticky legal issues about the identity of the parties came to dominate the arguments. On appeal, the court was faced with the question as to whether these states – and some individuals that had been recruited as allies – had the kind of case that federal courts are qualified to hear. Similarly, the question whether the intervening defendants ought to be permitted to argue in the absence of a disagreement between the conservative states and the federal government was an important part of the case. Briefing and argument were completed in July, and then the waiting began.

## Yesterday’s Court of Appeals Decision

With the opinion now in hand, we can share the news that the ACA has [lived to see another day](#). The Fifth Circuit Court of Appeals first dealt with the questions around which parties were properly before it, finding that it was appropriate to hear the case despite the federal government’s ultimate decision to agree with the conservative states, their erstwhile courtroom opponents. The court approved the intervention of the progressive states and chose not to rule on whether the U.S. House of Representatives could join the case. Somewhat notably, the court reached the further conclusion that the individual plaintiffs bringing the case also had the right to do so.

But federal courts do not answer theoretical questions – real harm must be on the line. One might ask how an individual plaintiff risks any injury if they fail to comply with the individual mandate and the associated penalty is [zero dollars](#). Good question! In contradiction to the Supreme Court’s conclusion that the ACA presents individuals with a choice to buy insurance or pay a penalty, the Fifth Circuit relied on some scant evidence to determine that harm might result, in some abstract sense, from the failure to follow the law alone. Distinguished legal scholars – having [previously exhausted](#) the thesaurus entry for ridiculous to describe other developments in health care under the Trump Administration – have resorted to invoking the word “[balderdash](#)” in response. The Fifth Circuit’s fragile rationale makes it easy to conclude that they are twisting legal doctrine in order to get a chance to declare the ACA unconstitutional.

And so they do! With these preliminary issues out of the way, the Fifth Circuit ruled that Judge O’Connor is correct in his opinion that the individual mandate cannot be a valid exercise of Congress’s taxing power and so must be struck down. But the legal question remains – just because one part of the enormous statute is invalid, does that mean that the whole ACA must be struck down? In legal jargon, this is known as “severability” – asking whether one section of a larger law can be severed from the rest of it, to be ruled on in isolation. On this question, yesterday’s opinion takes a curious turn – albeit one that was [guessed at](#) by legal scholars. Ruling that further analysis is needed to discern legislative intent on severability, the Fifth Circuit has remanded – or sent back – the case to the lower court from whence it came, “to employ a finer-toothed comb [] and conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable from the individual mandate.” This is a punt.

In the end, Professor Nicholas Bagley [has it right](#) – yesterday’s opinion “blends arrogance and cowardice in equal measure.” On the one hand, the tone belies an odium for the Affordable Care Act. The opinion is riddled with ideological markings that read like a greatest hits of right wing attacks on the ACA – footnote 3 references theories that the ACA “was enacted as part of a fraud on the American people,” footnote 5 is a disconnected potshot at President Obama’s promise that if you like your insurance, you can keep it. And on it goes. Much of this is done in the voice popularized by President Trump – akin to the “[some people are saying](#)” trope so familiar to his Twitter followers. On the other hand, the decision to remand the case to Judge O’Connor reflects an unwillingness to take direct responsibility for the consequences of the opinion. The severability issue raises a legal question; ruling on such questions is precisely what courts of appeals are for. So, the remand represents a dereliction of duty on the part of the Fifth Circuit. In this sense, yesterday represents just another chapter in the Republicans’ tome against the Affordable Care Act – all veto, no vision.

On balance, Judge Carolyn King – writing stridently in dissent – pulls back the curtain on what the real effect of yesterday’s opinion will be. She notes that it “will unnecessarily prolong this litigation and the concomitant uncertainty over the future of the healthcare sector.” Later in her opinion, she characterizes the lower court ruling as “textbook judicial overreach” and writes “[t]he majority perpetuates that overreach and, in remanding, ensures that no end for this litigation is in sight.” [And the hits just keep on coming.](#)

## What’s Next?

By remanding the case, the Fifth Circuit may have had electoral politics in mind. Judge O’Connor is the original trial court judge who authored the first decision to strike down the ACA as a whole, and his next opinion holds little mystery. If the case does indeed end up back in Judge O’Connor’s hands, the only uncertainty relates to how long the opinion will take to be released. This procedural move may just mean that the Fifth Circuit wants to keep this case out of the Supreme Court in a term where it would likely be heard at the height of the 2020 presidential election. The judges responsible for this opinion can [read a poll](#) as well as anyone else and see that the popularity of the ACA is near an all-time high. [The effects of a total repeal of the ACA would be widespread and catastrophic.](#) All of this provides further grounds to wonder whether the opponents of the ACA – be they political or judicial – have the [courage of their convictions](#).

Regardless of the Fifth Circuit’s motivation in remand – it might be outside of its control. California Attorney General Xavier Becerra – who represents his state as an Intervenor Defendant – has already [publicly announced](#) that California intends to appeal yesterday’s decision to the United States Supreme Court. Such a tactic falls into the “high risk, high reward” category. While the Supreme Court agrees to hear only a vanishingly small number of appeals, it only takes [four votes](#) from its justices to agree to take a case. If Justices Ginsberg, Breyer, Kagan and Sotomayor want to force the hand of the Trump Administration, they could agree to hear this case. If federal lawyers are before the Court in the fall of 2020 defending a decision that has the effect of declaring the Affordable Care Act unconstitutional, there would be no ambiguity – and plenty of reminders – as to just where the presidential candidates stand. Of course, that would leave the fate of the ACA once again in the hands of the U.S. Supreme Court. And anyone who tells you that they know how that will turn out is either “[crazy pants](#)” or suffering from [some other pants-related problem](#).

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