COMMITTEE ON
ENERGY & COMMERCE
CHAIRMAN FRANK PALLONE, JR.

**MEMORANDUM**

**February 1, 2019**

**To: Subcommittee on Health Members and Staff**

**Fr: Committee on Energy and Commerce Staff**

**Re: Hearing on "Texas v. U.S.: The Republican Lawsuit and Its Impacts on Americans with Pre-Existing Conditions"**

On **Wednesday, February 6th, at 10:15 a.m., in Room 2322 of the Rayburn House Office Building**, the subcommittee will hold a hearing entitled, "Texas v. U.S.: The Republican Lawsuit and Its Impacts on Americans with Pre-Existing Conditions."

## I. BACKGROUND

In February 2018, 20 Republican Attorneys General and Governors filed suit in the District Court for the Northern District of Texas challenging the constitutionality of the Affordable Care Act's (ACA) individual mandate and the law in its entirety.[1] In their complaint, the Republican Attorneys General argued that the law's individual mandate was no longer constitutional since the Tax Cuts and Jobs Act (TCJA) of 2017 reduced the tax penalty associated with the mandate to zero. The plaintiffs' argument relies on *NFIB v. Sebelius*, in which the Supreme Court held the individual mandate to be constitutional under Congress' authority to tax.[2] The plaintiffs argued that since the mandate penalty was zeroed out, it was no longer enforceable as a tax, and was therefore unconstitutional. The plaintiffs further argued that the individual mandate was inseverable from the rest of the ACA; therefore the entire law and its implementing regulations should be invalidated.

The Trump Administration's Department of Justice (DOJ) sided with the plaintiffs, and in a significant break from longstanding DOJ practice to defend federal laws, declined to defend the law's protections for pre-existing conditions.[3] In response to this decision, three of the four career DOJ lawyers representing the government refused to sign the brief and withdrew from the

[1] *Texas, et al., v. United States of America, et al.,* No. 4: I 8-cv-00167-O (N.D. Tex. Feb. 26, 2018) (Complaint for declaratory and injunctive relief).

[2] *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519, 530-38 (2012).

[3] Letter from Jeff B. Sessions III, Attorney General, Department of Justice, to Rep. Paul Ryan, Speaker, U.S. House of Representatives (June 7, 2018).

case.[4] In May 2018, 16 Democratic Attorneys General and D.C. were allowed to intervene in the case to defend the law.[5]

In December 2018, the federal district court struck down the ACA in its entirety. The court issued an opinion declaring the individual mandate unconstitutional and the remaining provisions of the ACA as inseverable from the mandate and therefore invalid.[6] [7] If the district court ruling stands on appeal, every provision of the ACA will be invalidated, including protections for pre-existing conditions, the ACA Marketplaces and affordability subsidies, Medicaid expansion, the closing of the Medicare prescription drug "donut hole," and vital public health provisions.

On January 9, 2019, the House of Representatives voted to authorize the House of Representatives to intervene in the case and defend the law.[8]

## II. THE DISTRICT COURT'S DECISION

In December 2018, federal district court Judge Reed O'Connor issued judgement invaliding the entirety of the ACA.[9] The district court ruled that because the mandate penalty was set at zero, it is no longer valid as a tax and is therefore unconstitutional. The district court further concluded that the individual mandate was "essential" to the remainder of the ACA and declared the entire law invalid. In late December, the district court issued a stay and partial final judgement, allowing the case to be appealed to the Fifth Circuit Court of Appeals. The law remains in effect while the case is being appealed.

The district court's decision has been criticized by legal scholars and experts across the ideological spectrum. Conservative scholar Jonathan Adler, who was the architect of a previous legal challenge to the ACA, argued that the decision "makes a mockery of the rule of law and basic principles of democracy."[10] Ted Frank, another conservative lawyer, called the decision "embarrassingly bad because you are twisting yourself into knots" to reach a particular

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[4] *Texas, et al., v. United States of America, et al.,* No. 4: I 8-cv-00167-O (N.D. Tex. June 7, 2018) (Unopposed motion to withdraw appearances).

[5] *Texas, et al., v. United States of America, et al.,* No. 4: I 8-cv-00167-O (N.D. Tex. May 16, 2018) (Motion to intervene and memorandum in support thereof).

[6] *Texas, et al., v. United States of America, et al.,* No. 4: I 8-cv-00167-O (N.D. Tex. 2018).

[7] *Texas, et al., v. United States of America, et al.,* No. 4: I 8-cv-00167-O (N.D. Tex. 2018).

[8] U.S. House of Representatives, Roll Call Vote on Agreeing to H.Res.6, Adopting the Rules of the House of Representatives for the One Hundred Sixteenth Congress, and for other purposes of, Title III (Jan. 09, 2019) (235 yeas, 192 nays).

[9] *Texas, et al., v. United States of America, et al.,* No. 4: I 8-cv-00167-O (N.D. Tex. 2018).

[10] Jonathan Adler, Abbe Gluck, *What the Lawless Obamacare Ruling Means,* New York Times (Dec. 15, 2018) (https://www.nytimes.com/2018/12/15/opinion/obamacare-ruling-unconstitutional-affordable-care-act.html).

conclusion.[11] Legal scholar Timothy Jost argued that the district court "ignored the limited scope of what Congress itself had done in zeroing out the individual responsibility tax in 2017," and argued that the district court "ignored decades of settled law on 'severability' of unconstitutional provisions, which counsels a court to do as little damage as possible to the underlying law" and exercise judicial restraint. [12] Jonathan Adler also noted that the court's ruling is in conflict with long-standing severability doctrine. He further stated that the "[severability principle] is not a liberal principle or conservative principle" but has been applied by every Supreme Court justice in modern history.[13]

## III. THE DECISION'S POTENTIAL EFFECTS

If the district court's ruling stands on appeal, it will impact every American regardless of where they get their health coverage. It would eliminate the ACA Marketplaces, resulting in coverage loss for over ten million Americans and causing nine million people to lose access to tax subsidies.[14] It would strike down all of ACA's consumer protection provisions, including protections for people living with pre-existing conditions, prohibitions on annual or lifetime dollar limits on coverage, guaranteed issue and renewability, comprehensive essential health benefits coverage, and limits on out-of-pocket spending. It would also end the coverage of preventive services without cost-sharing and coverage of dependents up to age 26.

It would significantly impact both the Medicaid and Medicare programs. It would end Medicaid expansion, eliminating coverage for nearly 13 million Americans. [15] It would invalidate Medicaid coverage for children aging out of foster care, expansion of Medicaid community care options for long-term care services, and the simplification of Medicaid eligibility. It would decrease the Medicaid rebates paid by drug manufacturers, increasing the cost of prescription drugs in Medicaid. It would eliminate vital protections for seniors, including zero cost coverage of preventive services in Medicare and the closing of prescription drug "donut

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[11] *Legal experts rip judge's rationale for declaring Obamacare law invalid*, The Washington Post (Dec. 15, 2018) (https://www.washingtonpost.com/world/national-security/legal-experts-rip-judges-rationale-for-declaring-obamacare-law-invalid/2018/12/15/9cab3bb8-0088-11e9-83c0-b06139e540e5_story.html?utm_term=.6254ced7a8e9).

[12] The Commonwealth Fund, *Court Decision to Invalidate the Affordable Care Act Would Affect Every American* (Dec. 17, 2018) (https://www.commonwealthfund.org/blog/2018/court-decision-invalidate-affordable-care-act-would-affect-every-american).

[13] Jonathan Adler, Abbe Gluck, *What the Lawless Obamacare Ruling Means*, New York Times (Dec. 15, 2018) (https://www.nytimes.com/2018/12/15/opinion/obamacare-ruling-unconstitutional-affordable-care-act.html).

[14] Centers for Medicare & Medicaid Services, *2018 Effectuated Enrollment Snapshot* (July 2, 2018) (www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/Downloads/2018-07-02-Trends-Report-1.pdf).

[15] The Kaiser Family Foundation, *Implications of the ACA Medicaid Expansion: A Look at the Data and Evidence* (May 23, 2018) (https://www.kff.org/medicaid/issue-brief/implications-of-the-aca-medicaid-expansion-a-look-at-the-data-and-evidence).

hole" that has saved seniors millions of dollars. It would also invalidate the provision that created the Center for Medicare & Medicaid Innovation.

There will also be a significant public health impact should the district court's ruling survive on appeal. It would end required restaurant menu labeling and disclosure requirements for calories and nutrition information. It would invalidate significant changes made to the Indian Health Service, and repeal the regulatory framework established for the Food and Drug Administration to review and approve biosimilars. It would also threaten the Prevention and Public Health Fund which has helped all states to address key public health needs in their communities, such as preventing childhood lead poisoning, tobacco prevention, and improving our ability to respond to infectious disease outbreaks. The decision would put coverage for millions of people at risk and introduce significant uncertainty into the nation's health care system.