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Will Another Court Vote to Strike Down Obamacare?

It sure looks like it.

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Nearly a decade after the passage of the Affordable Care Act, the health law is still tied up in the courts. You could be forgiven for having lost track of the latest in Obamacare lawsuit news, which now involves conservative states suing a federal government that agrees with them, and several former legal critics of the health law weighing in against the latest legal attack. Let's see if we can sort it out a bit.

To recap: In 2012, the Obama administration, following some congressional findings related to the text of the Affordable Care Act, defended the law's individual mandate all the way to the Supreme Court by saying that it was not separable from the rest of the law. Chief Justice John Roberts, after privately flirting with signing on to a decision that invalidated the mandate, eventually penned a ruling upholding the mandate—but only as a tax penalty that raised revenue rather than as a compulsory purchase.

In 2015, another suit, launched based in part on arguments made by Case Western Reserve Law Professor Jonathan Adler and Cato Institute Health Policy Scholar Michael Cannon, challenged the legality of the subsidies for most of the law's exchanges; once again, Roberts wrote an opinion upholding the law.

In 2017, however, the GOP Congress, following several months of failed efforts to repeal the health law and replace it with some other health care legislation, passed the Tax Cuts and Jobs Act (TCJA), which reduced the individual mandate tax penalty to zero. In theory, the command to purchase insurance remained on the books. In practice, it was utterly toothless.

This legislation, however, gave rise to a new lawsuit, in which a group of conservative states, led by Texas, argued that because the individual mandate was only constitutional as a revenue-raising tax, the mandate—which, as a result of the tax law, raised no tax revenue—was now unconstitutional. Furthermore, they argued, because the congressional findings related to the original Affordable Care Act indicated that the law could not stand without the mandate, the entire law should be struck down.

Somewhat surprisingly, last December, a District Judge in Texas agreed, and so, in turn, did the Trump administration, which took the rather unusual step of declining to defend any part of the law. Complicating things further, conservative legal scholars who had backed previous

cases *against* Obamacare—including Cannon and Adler—were aggressively critical of the Texas-led suit.

To top it all off, there have been lingering questions about whether anyone, on either side of the case, has standing to challenge or defend the law at all. The toothless mandate caused no obvious injury to the red states challenging the law: Who is harmed by a mandate that penalizes no one? Yet if the administration declined to defend it in court, agreeing with the challengers that it should be struck down, wouldn't that mean that both sides of the suit were, in fact, on the same side? Lawyers from blue states who want to preserve Obamacare, plus the House of Representatives, argued the case for leaving the law in place.

And that, more or less, brings us to where we are now. Like so many television shows in their later seasons, the Obamacare legal battle appears to have lost the plot. Yet it continues.

In a nearly two hour hearing yesterday, a three-judge panel in the 5th U.S. Circuit of Appeals heard arguments about nearly all of this. Only two of the judges, both GOP appointees, asked questions, but they gave the distinct impression that they might be willing to invalidate the mandate.

As for the rest of the law, which the lower court tossed along with the penalty, it was unclear. Much was made of the question of "severability"—as in, whether discrete components of the law can be severed from the whole—and what Congress intended and when. Judge Kurt Engelhardt seemed resistant to the idea that the courts should be asked to slice and dice congressional statutes. Why couldn't Congress address these issues on its own, and leave the court to decide other things? A fair enough question but, in some sense, Congress did exactly that by eliminating the mandate penalty while leaving the rest of the law unchanged. Messy or not, that is the resolution that the 2017 Congress arrived at, and that is the law as it stands.

The outcome of these sorts of cases can be difficult to gauge from oral arguments, but after listening to the oral arguments, it sounded to me as if the judges were at least open to the idea of tossing out all of Obamacare along with the mandate.

Which is, I think, a mistake. I have spent nearly a decade arguing that Obamacare is bad policy, but like Adler and Cannon, I think the Texas suit goes much too far. The zeroed-out mandate should be struck down; in its current form, it is hard to see how it is constitutional, since Roberts' ruling allowed it only as a tax that raised revenue.

But as for the question of whether the rest of the law should go too, I continue to think that the Texas argument is an overreach and that the Trump administration has erred in declining to defend the law.

It's true that the Democratic Congress that passed the law (and later the Obama administration) believed that the mandate was closely linked to the policy scheme of the original statute. But the operative question isn't what Congress believed in 2010 when the law was passed, or what the Obama administration argued in 2012; it's what Congress intended in 2017 when amending the statute. And it is exceedingly clear, both from the relevant statutory text, which zeroes out the mandate penalty while leaving the rest of the law intact, and the relevant legislative and political history (the Obamacare repeal effort failed, multiple Republicans said they intended to eliminate the mandate penalty, not the whole law), that the 2017 Congress intended to eliminate the mandate penalty and nothing else. There is no reason to believe that the elimination of the

mandate penalty was, as one of the judges suggested today, a sneaky backdoor plot to get rid of the rest of the law via the courts. It was an effort to remove the mandate penalty—and that's it.

It is also difficult, at this point, to make a convincing case that the mandate is an essential part of the law since it is no longer enforceable in any way. It is an empty provision, one that was effectively repealed by the tax bill, just as the 2017 Congress intended. It was reasonable to think of it as essential in, say, 2012, and had the mandate been stricken then, the rest of the law would have been called into question.

But in the aftermath of the TCJA, it is, in the current legislative schema, obviously inessential. To strike down the entire law now would be to assume that the 2017 Congress did not know what it was doing when it declined to repeal the entire statute and instead got rid of the mandate penalty alone; it would be to ignore both clear congressional intent and the plain text and meaning of the law as it now stands.

In the meantime, it is troubling that the Trump administration has declined to defend the law in court. While this sort of decision is not entirely unprecedented, it is certainly unusual, and it suggests that the administration has adopted a pick-and-choose sensibility to the federal laws that the executive branch is charged with upholding. Declining to defend a law is a close cousin to declining to enforce or implement a law, and it is worrying when an administration does so, regardless of the issue, and regardless of the partisan incentives involved. The job of the executive isn't to uphold the laws the president likes; it's to uphold the law, period.

None of this makes Obamacare good policy or good law. But it is the law, and consequently, both the courts and the executive branch should treat it with the seriousness it deserves.

Whatever happens with the current appeal, it's likely that the case will end up at the Supreme Court, again, with Chief Justice Roberts overseeing its fate, again. And that could happen as early as next summer, on the eve of a major election.

You can expect Democrats to make hay of this and attempt to use it to their political advantage. Indeed, they already are, with Senate Minority Leader Chuck Schumer (D–N.Y.) hosting a press conference this week to draw attention to the case. That may well work, given how effective the Democrats' health care argument was during the 2018 midterm elections. And if it does, Republicans will only have themselves to blame. The GOP has spent most of the last decade backing themselves into an increasingly small corner on health care policy, so that their position amounts to little more than pointing to Obamacare and saying, "not that." They squandered an opportunity to both pass and make the case for a real alternative in 2017, and that failure is now likely to haunt them. When asked what they will do if the court overturns the law, it's unlikely that they will have answers—or at least not good ones.