Outside Counsel

Fifth Circuit Decision Primes SCOTUS Test for Affordable Care Act

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As predicted in these pages barely one year ago (see A.M. Sabino & J.N. Sabino, "Anticipating Another Supreme Court Test for the Affordable Care Act," 261 New York Law Journal p. 4, cl. 4 (Jan. 24, 2019) ("Anticipating Another Test")), the Patient Protection and Affordable Care Act (ACA) is once again to be tested before the United States Supreme Court. This was inevitable, once the U.S. Court of Appeals for the Fifth Circuit upheld a lower court decision declaring the health care law unconstitutional. The tribunal's affirmance was grounded upon the fact that in 2017 Congress stripped the health care law of its taxing proviso, the so-called "individual mandate," the solitary ground for the ACA's constitutionality, as affirmed by the high court nearly a decade ago in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012) (*NFIB*).

This latest chapter in the health care law's contentious journey is captioned *Texas v. United States*, ___ F.3d ___ (No. 19-10011) (5th Cir. Dec. 18, 2019). A petition for certiorari is already pending before the Supreme Court, *U.S. House of Representatives v. Texas*, No. 19-841, and, as of press time, it appears the Justices have the matter scheduled for conference before the end of this month, at which time we will learn whether there shall be review by the high court or if the matter shall be remanded back to the Texas district judge for further proceedings.

To be sure, and consistent with our earlier writing, our discussion shall assiduously avoid the political and social aspects of the ACA's survival or demise. Rather, our analysis is properly focused upon the tandem of the two constitutional principles which, to date, have been paramount in the latest challenge to the health care law's constitutionality: Congress' power to levy taxes, and the doctrine of severability.

Before proceeding, we further presume familiarity with the lower court opinion that gave rise to the appeal just decided (see supra "Anticipating Another Test") where District Judge Reed O'Connor of the Northern District of Texas concluded that when the 2017 Congress abrogated the ACA's imposition of a tax upon those who declined to purchase health insurance, the lawmakers (whether by accident or design) demolished the singular basis of the ACA's constitutionality recognized by the *NFIB* court.

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In the case at bar, the Fifth Circuit initially noted the "extremely fractured" nature of the *NFIB* ruling. Circuit Judge Jennifer Walker Elrod proceeded to exposit how a bare majority of justices coalesced around the maxim that the Commerce Clause grants Congress the power to regulate commerce, but not to compel it. See U.S. CONST., art. I, §8. Pursuant to that axiom, *NFIB* decreed that Congress had exceeded its authority to regulate commerce when it promulgated the ACA. Additionally, the appellate panel noted that the same fragile coalition concluded that the health care law could not be sustained pursuant to the Necessary and Proper Clause. As point in fact, opined Circuit Judge Elrod, the ACA survived the 2012 challenge to its constitutionality for the solitary reason that a different majority of the *NFIB* Justices declared that the health care law was a constitutional exercise of Congress' power to tax.

Much like the lower court, the Fifth Circuit now held that subsequent amendments to the ACA's individual mandate, and its kindred shared responsibility payment, had nullified the health care law's singular predicate of constitutionality. Circuit Judge Elrod concisely verified that, as modified in 2017, the ACA had ceased to produce revenue (a true tax's most fundamental characteristic, the panel observed), did not require any remittance to the Treasury when taxpayers filed their annual returns, involved no determination of taxable income or similar factors, and was no longer collected by the Internal Revenue Service like ordinary taxes. As succinctly stated by the tribunal, the "four central attributes that once saved [the ACA] because it could be read as a tax no longer exist."

With such unerring fidelity to *NFIB*, the Fifth Circuit held that the ACA, sans its taxing power, was unconstitutional. Now a more arduous question loomed: could the remaining provisions of the health care law survive or did the entire statutory regime have to be jettisoned?

Severability

Severability, observed the panel in *Texas*, is a doctrine well established in a number of Supreme Court cases, foremost among them *Alaska Airlines v. Brock*, 480 U.S. 678 (1987), where the high bench postulated the guiding principle that the remainder of a statutory regime can survive the erasure of a constitutionally infirm subpart, unless it is evident that » Page 6

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Test

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Congress would not have enacted the entire law absent the offending proviso. *NFIB*, noted the panel, had "crystallized" the necessary inquiry into the following, two-pronged framework.

First, any severability analysis must begin by asking if the statutes left intact remain fully operative as a law. This must be distinguished from the enactment merely functioning in a manner that is coherent, yet nonetheless inconsistent with the original legislative intent. Second, the court must determine if Congress would have passed the legislation absent the unconstitutional component. If not, then the entire statutory regime must be ousted.

Previewing the dilemma that lies ahead for the justices, the Fifth Circuit archly declared that the severability doctrine "places courts between a rock and a hard place." On the one hand, immutable principles of separation of powers and judicial restraint compel the judiciary to be faithful agents of Congress, which often means declining to delete statutory provisions in a way that leaves behind a body of law the legislative branch would never recognize as its own handiwork. Yet that axiom oft times clashes with the obligation of the courts to "do no harm," in this instance invalidating only so much of a statutory regime as necessary to expunge the unconstitutional proviso. Indeed, the tribunal affirmed that jurists are obligated to preserve as much of otherwise valid legislation as possible, if, in fact, its objectionable subparts can be deleted without undue injury.

The Fifth Circuit accurately relates that severability demands a "meticulous analysis," in accord with *Murphy v. N.C.A.A.*, 138 S. Ct. 1461 (2018), the Supreme Court's latest pronouncement upon the doctrine. Circuit Judge Elrod elaborated that there, Justice Alito, writing for the majority, concluded that none of the challenged enactment could be saved, for reason that Congress clearly meant for all of its provisions to be deployed as a cohesive whole.

Yet the *Texas* panel respectfully noted Justice Ginsburg's spirited dissent in *Murphy*, as the esteemed jurist decried the folly of wielding an ax instead of a scalpel, and further remonstrated that, when opining upon questions of severability, the high court's best course of action is to undertake "a salvage rather than a demolition operation." Lastly, the tribunal paid due heed to Justice Thomas' concurrence in that new landmark, and his warning therein that the severability doctrine, if applied injudiciously, threatens the separation of powers, provokes inescapably nebulous inquiries into hypothetical legislative intent, and otherwise asks unelected federal judges to use their imaginations in divining what the elected lawmakers would do if asked what, if any, can be saved when part of a body of law transgresses constitutional limits.

The high court's precautionary language in *Murphy* and related landmarks moved Circuit Judge Elrod to poetically describe the inherent difficulty in employing the severability doctrine; courts must skillfully "navigat[e] between the Scylla of poking small but critical holes in complex, carefully crafted legislative bargains and the Charybdis of invalidating more... legislation than necessary." Some of the hazards catalogued by the Fifth Circuit included the risk of entangling the Article III judiciary in policy decisions, and bringing courts perilously close to rendering advisory opinions. Such unintended consequences, noted the panel, are antithetical to the judiciary's constitutional role of simply determining what a statute means or, as Justice Thomas so aptly phrased it in *Murphy*, the "usual judicial bread-and-butter."

Yet by far the most pernicious dangers of severability underscored by the Fifth Circuit were the upending of nominal principles of standing, and violations of separation of powers. As observed by Circuit Judge Elrod, severability "directs courts to go beyond the necessary," while, more often than not, lacking the participation of a party with true standing to challenge the remaining portions of the statutory regime at issue. Once more invoking Justice Thomas' erudite concurrence in *Murphy*, the tribunal emphasized that the maxims of severability, well intended to preserve the enactments of Congress, run the dual and significant risks of obviating nominal rules of standing, and outright encroaching upon the separation of powers.

Little wonder, then, that the Fifth Circuit remanded the severability question for further findings of fact. And now we must speculate if that remand shall take place or if this controversial decision shall continue its ascent to the high court for adjudication. In all events, the circuit court's erudite positing of the essential parameters of the severability doctrine shall be of inestimable value in anticipating the Supreme Court's deliberations, whether they be conducted now or in the future.

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Conclusion

Given the fortitude of the Fifth Circuit's application of *NFIB*'s teachings to the amended ACA, it is highly likely that the Justices shall concur, and find the health care law unconstitutional for reason of Congress' eradication of its taxing proviso. Nonetheless, that leaves the far more profound question of how the Supreme Court shall apply the severability doctrine to the instant controversy. Indeed, the ramifications for the high court's next declaration shall extend far beyond the ACA, and touch upon the viability of all congressional enactments.