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Just a Minute, the ACA isn't Dead Yet

You may have heard over the weekend that a federal judge in Texas decided late on Friday evening [to kill](#) the Affordable Care Act. [Headlines](#) blared it out. President Trump [tweeted](#) for “Mitch and Nancy” to get cracking on passing a new health care law to replace the ACA, and Fox News [broke out its trumpets](#). But the reports of the ACA's death are [greatly exaggerated](#).

The judge's Friday decision in [Texas v. United States](#) does in fact rule that because Congress decided in 2017 to reduce to \$0 the penalty for failing to maintain health insurance coverage, the individual mandate is no longer constitutional and, therefore, the entire ACA is now no longer allowed to stand.

Importantly, the judge did not issue an injunction, or an order directing the government to take any immediate action. In response to the ruling, the federal agency responsible for implementing most parts of the ACA [has indicated that it will continue enforcing the law](#) and that the Marketplaces will continue to operate for the time being. A coalition of progressive Attorneys General has [already vowed](#) to appeal the judge's ruling.

So, in summary:

1. To no one's surprise, President Trump is exaggerating. The fight to protect this monumental legislation—legislation that has secured access to quality health insurance for millions of previously uninsured and underinsured Americans across the nation—is far from over. The ACA, as a whole, will live to be ruled on—yet again—by a higher court.
2. To [quote](#) CMS Administrator Seema Verma, who oversees the ACA, “[t]here is no impact to current coverage or coverage in a 2019 plan.” The court did not enjoin the ACA and, therefore, the ACA is still the law of the land. Business as usual will continue pending the ongoing legal battle in higher courts.

We have written about [Texas v. U.S.](#) in prior [Health Care in Motion pieces](#), noting how rare it was for the Department of Justice to refuse to defend a federal law being challenged in Court. The court's logic goes like this: (1) If the individual mandate (i.e., the requirement to maintain minimum-qualifying health insurance) is not a valid exercise of Congress' power to tax, it is unconstitutional based on the Supreme Court's 2012 ACA decision. (2) Congress zeroed out the value of the payment for noncompliance with the mandate. (3) Because Congress zeroed out the shared-responsibility exaction, the court can no longer uphold the validity of the individual mandate as an exercise of Congress' power to tax. (4) The individual mandate is unconstitutional. (5) The individual mandate is essential to the ACA—to Congress' vision of health care reform—and Congress intended the provision to be inseparable from the rest of the ACA. (6) Because the individual mandate, as intended by Congress, is essential to the ACA, the court cannot strike down the individual mandate and leave the remainder of the law intact. (7) The ACA in its entirety must fall.

The opinion is as sweeping as the judicial overreach is appalling. To quote Judge Reed O'Connor—the author of Friday's opinion—“therein lies the rub.” (Some of it, at least.) While paying lip service to the separation of powers and congressional intent, Judge O'Connor ran roughshod over these foundational principles. Close observers will note that Judge O'Connor is

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the same judge that conservative litigants sought out to [challenge](#) the Obama Administration’s interpretation of the ACA’s antidiscrimination provisions as protecting against gender identity discrimination. In that case, the judge—sure to be on many a conservative pundit’s holiday card list—issued a nationwide injunction halting the implementation of this key regulatory protection for transgender health care consumers. With his distaste for the ACA now well established, Judge O’Connor has turned his sights on striking down the law in its entirety.

His effort has not gone unnoticed. Both conservative and progressive liberal commentators have criticized Friday’s ruling as problematic, characterizing it as “[lawless](#),” “[mak\[ing\] zero sense](#),” and a “[blunder](#).” For starters, courts are supposed to refrain from invalidating more of a statute than necessary. More critically, Judge O’Connor ignores the appropriate congressional intent. In 2017, when Congress reduced the penalty for noncompliance with the individual mandate to zero, it did so knowing that this would weaken the individual mandate—the mandate is all bark with no bite. Congress did not, however, abolish other parts of the ACA. As we all remember, Congress certainly [did not lack for an opportunity to do so](#) in 2017. Yet, while effectively repealing the individual mandate, Congress left the guaranteed-issue (prohibiting insurers from denying health plan enrollment on the basis of health status, age, gender, or other factors that might predict the use of health services), community rating (prohibiting insurers from varying premiums within a geographic area based on age, gender, health status, or other factors), Medicaid expansion, and other provisions in place. How, then, is it sound reasoning for Judge O’Connor to conclude that, according to Congress, the individual mandate is inseparable from the rest of the ACA?

The above is only one example of the weakness of Judge O’Connor’s ruling. There are other infirmities in the opinion itself, from [a mangled interpretation of the rule](#) that allowed the plaintiffs to bring the suit in the first place, to a misbegotten [Lionel Ritchie](#) reference on page 40 of the opinion that exactly no one found amusing. In any event, it is a virtual certainty that the case will be appealed. The first stop will be at the United States Court of Appeals for the Fifth Circuit. From there, the next level of appeal would be to the United States Supreme Court, should Justice Roberts and his colleagues wish once again to wade into the complicated cross-currents of health care lawmaking.

For those of us who recognize the progress that we have made as a country increasing access to health care, and the potential in the path ahead laid out by the ACA, Friday’s ruling is frustrating. So is the fact that it was released one day before open enrollment closed on HealthCare.gov and, as such, likely caused confusion for people still looking to purchase a plan before the deadline. But the ACA is not dead yet. It is still the law of the land. If you live in a state with an open enrollment period that extends past HealthCare.gov’s December 15th deadline, enroll on. If you are supporting efforts to expand Medicaid across the country, fight on. If you are lobbying your representatives—state and federal—to protect access to comprehensive and affordable coverage, keep on holding them accountable. And rest assured that the lawyers fighting to keep the ACA in place will not let up until the justice system has run its course.

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