

Committee on Energy and Commerce
Subcommittee on Health Hearing on
“Texas v. U.S.: The Republican Lawsuit and Its Impacts on
Americans with Pre-Existing Conditions”

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Written Statement of Simon Lazarus

Madame Chair Eshoo, Ranking Member Burgess, members of the Subcommittee, thank you for the opportunity to testify on the legal implications and basis – or, as has been recognized across the political spectrum – lack of legal basis – for the recent decision by a federal district judge in Texas to invalidate the Affordable Care Act in its entirety.

I am Simon Lazarus, a lawyer and writer on constitutional and legal issues relating to, among other things, the ACA. I have had the privilege of testifying before this subcommittee and other Congressional committees numerous times over the now near-decade in which the ACA has been the law of the land. I am currently retired from positions at the Constitutional Accountability Center (2012-2017) and the National Senior Citizens Law Center (now Justice in Aging) (2003-2012). The views I express here are my own, and cannot be attributed to these or any other organizations. This written statement incorporates thoughts and material previously expressed in briefs, articles, and other public materials which I have written or helped write.

The District Court decision in *Texas v. United States*: A Brief Summary

Late Sunday afternoon, December 30, Texas federal district judge Reed O’Connor issued an [order](#) following up on his blockbuster December 14 [decision](#) invalidating the entire Affordable Care Act (ACA). Evidently, Judge O’Connor had ingested the widespread condemnation of that decision. He granted the request of pro-ACA state attorneys general led by California’s Xavier Becerra, that he stay his ruling until the appellate process finishes. Hence, the law will remain in effect – quite likely, permanently, as far as this lawsuit is concerned.

The prospect that Judge O’Connor’s decision is likely never to take effect does not mean that it should be disregarded as some sort of non-event, or that there is any excuse for making light of this judge’s willingness to strip vital protections – for the millions of individuals with pre-existing conditions as well as other guarantees affecting substantially all Americans – and threaten chaos for the nation’s entire health care system. On the contrary, this perversion of America’s justice system merits bipartisan condemnation as, to quote one eminent conservative commentator, the editor of the *Washington Examiner*, “an assault on the rule of law.”

In 2012, per the controlling opinion of Chief Justice John Roberts, the Supreme Court held that the ACA provision popularly (though misleadingly) known as the “individual mandate,” exceeded Congress’ authority to regulate interstate commerce, but nevertheless upheld the provision as an exercise of Congress’ power to tax. In December 2017, after multiple failures to repeal Obamacare, Congress included a provision in the Tax Cut and Jobs Act that set at zero the tax penalty for failing to buy ACA-compliant insurance, while leaving other provisions of the mandate and the law intact. Then, Texas state Attorney General Kenneth Paxton came up with a legal theory that zeroing out the penalty rendered the mandate provisions no longer an exercise of the tax power, hence, unconstitutional. Further, he made the quantum leap of asserting that, if the mandate provision is unconstitutional, the entire statute must be invalidated – 2300 pages of provisions integral to every sector of the nation’s health system and vital to protections relied upon by literally all its more than 300 million patients. In February 2018, Paxton’s coalition of Republican states filed a complaint embodying these claims with District Judge O’Connor, widely recognized as a ["favorite of Republican leaders in Texas"](#), [for] reliably tossing out Democratic policies they have challenged.”

On December 14, O’Connor embraced Paxton’s theory. While highly debatable, this portion of his ruling was, in and of itself, of no practical consequence. With the penalty now zero, declaring the mandate itself void should not meaningfully shrink ACA-insured ranks. What made the decision a potential real-world [catastrophe](#) – for the ACA and the countless health providers and patients who – as even the *Wall Street Journal* acknowledged – now rely on it, is that O’Connor also bought the Republican states’ claim that striking the mandate meant that the entire ACA had to be tossed along with it.

Why bipartisan experts consider Judge O’Connor’s decision unlikely to survive on appeal

O’Connor’s edict so egregiously flouts applicable law and societal exigencies, that, as the *Wall Street Journal* editorialized, while “No one opposes Obamacare more than we do,” the decision “is likely to be overturned on appeal and may boomerang politically on Republicans.” Indeed, Chief Justice John Roberts’ pertinent opinions nearly ensure, with his four progressive colleagues, a 5-4 Supreme Court majority to reverse O’Connor. Moreover, prior decisions by Justice Brett Kavanaugh, during his long service on the D.C. Circuit Court of Appeals, augur for a larger majority.

Legal experts, including prominent anti-ACA conservatives, have blistered Judge O’Connor’s result. Here are some examples::

- As noted above, Philip Klein, Executive Editor of the *Washington Examiner*, no less an avowed opponent of the ACA, as a matter of policy, than the *Wall Street Journal* editorial board, called the decision ["an assault on the rule of law."](#)
- Case Western Reserve professor Jonathan Adler, recipient of the Federalist Society’s Paul M. Bator Award for excellence in teaching and scholarship and a central architect of the second fundamental legal challenge to the ACA (*King v. Burwell*, rejected by the Supreme Court in 2015), in a *New York Times* article co-

authored with Yale health law expert Abbe Gluck, called the decision "[an exercise of raw judicial power, unmoored from the relevant doctrines concerning when judges may strike down a whole law because of a single alleged legal infirmity buried within it;](#)"

- Harvard Law professor Lawrence Tribe, no conservative, but universally acknowledged for decades as among the nation's most respected constitutional experts, called the decision "[legally indefensible from start to finish;](#)"

Given such show-stopping legal inadequacies, Judge O'Connor's decision seems unlikely to survive review even in the right-leaning Fifth Circuit. Even a hostile reviewing panel will likely be reluctant to lift his stay pending Supreme Court review. And, while no one can predict such matters with certainty, on the basis of prior decisions by a majority of the justices, Supreme Court reversal appears highly likely.

The Texas v. United States plaintiffs lack standing to bring the case.

To begin with, the Court could well throw Texas and its anti-ACA allies out of court, without entertaining their constitutional arguments at all, by dismissing their suit on standing grounds. Transparently, the state plaintiffs themselves lack any legally cognizable injury to justify their asking an Article III court to hear their far-fetched legal allegations. Well aware of this threshold hole in their case, they recruited two individual plaintiffs. Their complaint is that, even with no enforcement sanction, the mandate imposes a legal obligation to buy insurance that they would feel uncomfortable to ignore. But this claim is directly contradicted by the Supreme Court's characterization of the ACA's mandate provision. Chief Justice Roberts, in his 2012 *NFIB v. Sebelius* decision, expressly ruled that, if a person did not buy insurance, thus "choos[ing] to pay [the prescribed penalty] rather than obtain health insurance, they have fully complied with the law." After Congress retained intact the entire corpus of Section 5000A, as well as the rest of the ACA, a non-purchaser will still *not* be in violation of the law, simply because Congress *reduced* (to zero) the financial incentive to buy insurance.

In common-sense terms, as construed by the Supreme Court, the so-called "mandate" section of the ACA – Section 5000A – does not in fact impose a categorical mandate; rather, it gives individuals a choice: either purchase ACA-compliant insurance *or* pay the penalty prescribed by Subsection (b) (1) of that section. As amended by the 2017 Tax Cuts and Jobs Act (TCJA), Section 5000A still provides that choice, except that, with TCJA's reduction of the amount of the penalty to zero, there is, literally no financial cost to choosing not to purchase insurance. Hence, no financial injury.

Further, no basis exists for claiming that Congress' decision to reduce to zero the financial bite of foregoing insurance perversely transforms applicable provisions of the law so as to turn that lawful choice into a rigid command. In 2012 Chief Justice Roberts observed that, in light of the Congressional Budget Office's forecast that approximately four million individuals would fail to purchase ACA-prescribed insurance, "We would expect Congress to be troubled by that prospect if such conduct were unlawful. That Congress apparently regards such extensive failure to comply with the mandate as

tolerable suggests that Congress did not think it was creating four million outlaws.” That sensible observation was rendered no less indisputable by Congress’ decision last year to reduce to zero the financial penalty for foregoing insurance. In other words, individuals who choose that option have breached no legal obligation, and suffer no psychological injury of the tenuous sort the *Texas v. United States* plaintiffs allege. No financial injury, no injury, period. No standing to sue.

In sum, If the case reaches the Supreme Court, the Court is quite likely to order it dismissed on the ground that no standing exists, for the Republican state attorneys general who organized the litigation, nor for the individual plaintiffs they recruited.

On the merits, the ACA’s “mandate” provision remains a valid exercise of the tax power, taking into account Congress’ 2017 reduction of the penalty to zero..

Were the Court to reach the merits of the case, the justices could well conclude that, with a penalty set at zero, the otherwise intact mandate provision remains a valid exercise of the tax power. This is true for essentially the same common-sense reason that the individual plaintiffs recruited by Texas’ attorney general lack standing. In the Supreme Court’s 2012 decision upholding the ACA “mandate” as an exercise of the tax power, the Court construed the relevant section of the law, Section 5000A, as a unitary whole, in which the subsection purporting to require most eligible individuals to buy insurance, had to be read, in light of the following subsection, which prescribes the penalty for non-compliance, as simply an option. That basic fact remains true, except that the penalty alternative is now set at zero, hence, there is even less coercion to pressure individuals to buy insurance they don’t think they need.

Texas’ and Judge O’Connor’s entire case rests on a reading of the ACA’s mandate provisions flatly antithetical to the Supreme Court’s holistic construction – which, after all, constitutes The Law. At the outset of his December 14, 2018 opinion, and repeatedly throughout its 55 pages, the judge asserts that, with the penalty for going uninsured set at zero, “the Individual Mandate *continues to mandate* the purchase of health insurance” *Texas v. United States*, N.D. Texas, C. A. No. 4:18-cv-00167-0 at page 2 (December 14, 2018), and that, without a tax penalty, that “mandate” cannot be justified under the tax power, must therefore rest solely on the interstate commerce power. (emphasis supplied) Since the Court held in *NFIB v. Sebelius* that the commerce clause did not authorize an absolute requirement to buy insurance, Judge O’Connor contends, that requirement must now be invalid. But that reading of the ACA is manifestly wrong. As Chief Justice Roberts construed the relevant provisions of the law, the ACA in fact did not impose a categorical mandate, it created a choice. That remains the case today. The fact that Congress has set the penalty at zero does not make the shared responsibility payment any more mandatory, if anything, it makes it less so.

In sum, under the Court’s 2012 decision, Congress had, and exercised, the authority under the tax power to give individuals a choice whether to buy insurance or pay a penalty. Congress’ subsequent 2017 determination, that the goals of the law could be served if the penalty were reduced to zero, did not strip Congress of that constitutional

authority, nor can that determination sensibly be understood to mean that Congress was no longer exercising that authority.

The states and friend of the court briefs opposing Judge O'Connor's decision provide additional arguments favoring the view that the ACA mandate, with a zero penalty, remains a valid exercise of the tax power. They point out that neither applicable precedent nor Chief Justice Roberts' analysis in *NFIB v. Sebelius* impose a rigid rule that, under all circumstances, Congress cannot be understood to exercise its taxing authority, unless a measure actually raises revenue. They also show that, were a valid tax provision to automatically lose its validity as a tax, if it were, in a given year or other time-period, to cease bringing in at least some actual payments to the government, bizarre, literally absurd consequences would follow. Such consequences were certainly not intended by Congress in 2010 or 2017, nor by the framers who gave Congress its sweeping tax-and-spend authority in 1787. For example, it makes no sense to interpret the Constitution or the ACA, as Judge O'Connor has, to mean that the shared responsibility payment provision of the law died when, without repealing or amending it, Congress zeroed out the penalty, but will spring back to life if a future Congress reinstates a positive dollar figure.

Such arguments reinforce the straightforward point I have sought to highlight here: Judge O'Connor's opinion suffers from a pervasive, root flaw. His blinkered reading of the law and the Constitution directly contradicts the common-sense, holistic, and realistic approach to construing major and complex federal statutes that the Supreme Court, led by Chief Justice Roberts, prescribed in its landmark decisions construing the ACA.

On the issue that matters in the real world – whether invalidating the mandate requires or justifies throwing out the rest of the statute – Supreme Court reversal of O'Connor's decision looks close to a sure thing.

Even if a final reviewing decision, by the Fifth Circuit Court of Appeals or the Supreme Court, were to grant plaintiffs standing and to accept their merits claim that, with the penalty zeroed out, the remaining individual mandate "command" provision of Section 1500A (a) is unconstitutional – an outcome few observers expect – such a result will have virtually no impact on the operation of the ACA, nor on the millions of Americans – in reality, substantially all Americans – who depend on the ACA and its guarantees for people with pre-existing conditions and myriad other protections that now are "baked into" the national health care system. To declare invalid the law's shared responsibility payment provision, when that provision has no financial penalty behind it, will, by itself, have little if any depressive effect on the number of enrollees in health insurance plans.

The sole reason that public attention is focused on this litigation – and the sole reason why Texas Attorney General Kenneth Paxton and his partisan allies filed the lawsuit – is their claim that this – now toothless – provision is so indispensable to the operation of every component of the ACA, that it is, in lawyers' jargon, "inseverable" from the rest of the statute. Hence, its demise requires extinguishing the entire law along with it.

Fortunately, as recognized by virtually all commentators across the political spectrum,

this prescription for chaos in the nation’s health care system is even more starkly at odds with applicable, long-established legal precedent than his embrace of ACA opponents’ dubious standing and merits claims.

Repeatedly, Chief Justice Roberts has vigorously [applied](#) the established rule that “[W]hen confronting a constitutional flaw in a statute, we . . . limit the solution, . . . severing any problematic portions while leaving the remainder intact.” Specifically, In *NFIB v. Sebelius*, Roberts [rejected](#) the very open-ended approach to severability on which Texas and Judge O’Connor expressly rely. “The question here,” he wrote, “is whether Congress would have wanted the rest of the Act to stand [without the Medicaid expansion fund cut-off mechanism the Court found unconstitutionally coercive] We are confident that Congress would have wanted to preserve the rest of the Act.”

Further, there is a substantial basis for expecting Justice Brett Kavanaugh to join the Chief Justice and the four progressive justices to sever the rest of the ACA from the mandate, if the latter is held unconstitutional. While on the D.C. Circuit, Justice Kavanaugh applied reasoning closely paralleling – indeed, [foreshadowing](#) – Roberts’ decisions in both the above cases, and in another (important) [case](#) he similarly stressed that “Supreme Court precedent requires us to impose the narrower remedy of simply severing the [defective] provision.”

In this case, there is no mystery to what Congress intended when, in 2017, it zeroed out the penalty for foregoing insurance. It did so without amending, referencing, or so much as mentioning any other provision of the so-called “Individual Mandate” section, Section 5000A, let alone any other provision of the ACA. Hence, Congress’ judgment, that the ACA could function with the penalty set at zero is embodied in the text of the law itself. For a court contemplating the, often speculative, question of whether Congress would have intended to sever a statutory provision found to be defective, or to strike down some or all of the rest of the statute, that question here is not speculative at all. The Supreme Court has repeatedly ruled that “enacted text is the best indicator of intent.” All of Judge O’Connor’s, and Texas’, argument that the “individual mandate” was deemed by Congress to be essential to the overall law – hence, Congress would have wanted the whole law to be struck along with that provision – is drawn from findings and legislative history of the 2010 version of the law. However credible that dubious inference may be with respect to the Congress of 2009 and 2010, it was rendered irrelevant and flat-out refuted by the contrary judgment that Congress expressly incorporated in the text of the TCJA in 2017. And that conclusion applies with equal force to the Trump Administration’s position – that the court should strike – as inseverable – “only” two critical protections for people with pre-existing conditions, the “guaranteed issue” and “community rating” provisions of the law. If found unconstitutional, the shared responsibility payment provision must be severed, and the entire remaining statute left intact, as Congress left it in 2017.

The relevant statutory text is the end of the inquiry, as a matter of law. However, it is worth noting that there was nothing irrational about Congress’ 2017 judgment that the multiple goals of the ACA could be well served with a penalty reduced to zero. Prior to adopting that amendment to the original law, Congress had available to it a November 2017 report by the CBO that concluded that, “[I]f the individual mandate penalty was

eliminated but the mandate itself was not repealed [n]ongroup insurance markets would continue to be stable in almost all areas of the country throughout the coming decade.” As Professor Jonathan Adler observed, “Congress in 2010 may have thought that a mandate may have been an essential component of the ACA, but a subsequent Congress indicated otherwise by eliminating the penalty without altering the other parts of the law.” Professor Adler’s succinct conclusion bears repetition: “That is why the states’ argument about severability (and that accepted by DOJ) is wrong.”

In sum, the lawsuit filed by Attorney General Paxton and his allies, in the court they are well-known to “favor,” is a transparently political enterprise. Judge O’Connor’s acceptance of the thin legal cover fabricated to support that effort should and likely will be given short shrift before the appeals process has run its course.