

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

TEXAS, WISCONSIN, ALABAMA,
ARKANSAS, ARIZONA, FLORIDA,
GEORGIA, INDIANA, KANSAS, LOUISIANA,
PAUL LePAGE, Governor of Maine, Governor
Phil Bryant of the State of MISSISSIPPI,
MISSOURI, NEBRASKA, NORTH DAKOTA,
SOUTH CAROLINA, SOUTH DAKOTA,
TENNESSEE, UTAH, WEST VIRGINIA,
NEILL HURLEY, and JOHN NANTZ,

Plaintiffs,

v.

UNITED STATES OF AMERICA, UNITED
STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES, ALEX AZAR, in his
Official Capacity as SECRETARY OF HEALTH
AND HUMAN SERVICES, UNITED STATES
INTERNAL REVENUE SERVICE, and
CHARLES P. RETTIG, COMMISSIONER OF
INTERNAL REVENUE SERVICE,

Defendants.

Civil Action No. 4:18-cv-
00167-O

CALIFORNIA, CONNECTICUT, DISTRICT
OF COLUMBIA, DELAWARE, HAWAII,
ILLINOIS, KENTUCKY, MASSACHUSETTS,
MINNESOTA by and through its Department of
Commerce, NEW JERSEY, NEW YORK,
NORTH CAROLINA, OREGON, RHODE
ISLAND, VERMONT, VIRGINIA, and
WASHINGTON,

Intervenor-Defendants.

REPLY IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION FOR (1)
EXPEDITED CONSIDERATION, (2) CLARIFICATION OR STAY, AND (3)
ENTRY OF PARTIAL FINAL JUDGMENT UNDER RULE 54(b) OR
CERTIFICATION UNDER 28 U.S.C. § 1292(b)

INTRODUCTION

All of the parties agree that this Court's December 14, 2018 Order is not final and has no (and should not be given any) immediate effect; that the court of appeals should review the Order's legal conclusions now; and that proceedings in this Court should be stayed pending the outcome of that appeal. That is the prudent course of action. Clarifying that the Court's Order does not have any immediate effect—or promptly staying the decision if it does—is necessary to avoid the widespread confusion and extraordinary disruption that would otherwise occur. Certifying the Court's Order for review under 28 U.S.C. § 1292(b)—which all parties agree is appropriate under the circumstances—will allow for prompt appellate review of the Court's legal conclusions. And staying further proceedings in the district court serves both the public interest and judicial economy. For these reasons, the Defendant States respectfully request that the Court: (1) clarify that its December 14 Order does not have an immediate effect or, in the alternative, stay its Order pending appeal; (2) certify its Order for interlocutory appeal under 28 U.S.C. § 1292(b) or, in the alternative, direct entry of a partial final judgment on Count I of the Amended Complaint under Rule 54(b); and (3) stay the district court proceedings pending the outcome of that appeal.

I. THIS COURT SHOULD CLARIFY THAT ITS ORDER DOES NOT HAVE ANY IMMEDIATE EFFECT ON ANY PARTY'S RIGHTS OR OBLIGATIONS UNDER THE ACA, OR STAY THE EFFECT OF ITS DECISION

The parties agree that the Order is not immediately effective because it is not yet a *final* judgment. State Defs.' Br., ECF No. 213-1 at 5-7; Fed. Defs.' Resp., ECF No. 216 at 3-5; Pls.' Resp., ECF No. 217 at 2-4.¹ Nevertheless, the Court should clarify that its December 14, 2018 Order does not require immediate compliance. Even if it is

¹ The Defendant States also note that some authorities have held that the federal government may continue, pending appellate review, to enforce a statute that has been declared unconstitutional by a district court. State Defs.' Br., ECF No. 213-1 at 5-6.

technically correct that the Court’s Order is not immediately effective because it is not yet final, *see* Pls.’ Resp., ECF No. 217 at 2-3, the extraordinary circumstances presented here surely counsel in favor of making an unambiguous statement to that effect. As the Federal Defendants explain, “the *potential* disruption to the healthcare markets caused by *possible* confusion” and the fact that “open enrollment for several State-based Exchanges is ongoing” are reasons enough for this Court to explicitly state that its ruling does not have any immediate effect. Fed. Defs.’ Resp., ECF No. 216 at 2 (emphases added). Indeed, the Court’s Order has already caused confusion among some members of the public, *see* ECF NO. 213-1 at 6 n.3, and caused health stocks to “plunge[],”² all of which are ample justification for the Court to assure the country that its Order has no immediate impact.

If, however, this Court concludes that its Order has immediate effect, it should stay the effect of its ruling pending appeal. *See* State Defs.’ Br. at 7-14. No party disputes that a stay is appropriate here. Indeed, the Federal Defendants agree that the equities “weigh[] overwhelmingly in favor of a stay,” because the Court’s Order could affect “millions of Americans and impact virtually every aspect of the American healthcare system.” Fed. Defs.’ Resp., ECF No. 216 at 3. And while the Plaintiffs do not believe that a stay is necessary, they acknowledge that it may be appropriate for the Court to issue one under the “unique circumstances” of this case. Pls.’ Resp., ECF No. 217 at 5-6. Plaintiffs also agree that they “will not seek to enforce the Court’s Order while the case is on appeal,” and therefore would suffer no harm from a stay. *Id.* at 2. A stay is also warranted because, as a practical matter, neither the federal government nor States could

² The Monday after the Court issued its Order, hospital and health insurer stocks “plunged.” Berkeley Lovelace, *Health-Care Stocks Plunge After Federal Judge Rules Obamacare Unconstitutional*, CNBC, Dec. 17, 2018, <https://www.cnbc.com/2018/12/17/insurer-hospital-stocks-plunge-after-obamacare-ruled-unconstitutional.html>; *see also* Grocer, Stephen, “Obamacare Ruling Hits Health Care Stocks,” *The New York Times*, Dec. 17, 2018.

begin complying with the Court's Order "until the Court defines the scope of relief." Fed. Defs.' Resp., ECF No. 16 at 3.

The consequences of allowing the Court's Order to take immediate effect would be stark: nearly every American "would be affected in some way." Kaiser Family Foundation, *If the Affordable Care Act Is Struck Down, Nearly All Americans Would Be Affected in Some Way*, Dec. 20, 2018, <https://www.kff.org/health-reform/press-release/if-the-affordable-care-act-is-struck-down-nearly-all-americans-would-be-affected-in-some-way/>. The Defendant States have already identified some of the most severe consequences of allowing the Court's decision to take effect immediately. See State Defs.' Br., ECF No. 213-1 at 12-14. But as the Kaiser Family Foundation analysis discusses in detail, nearly every American would be harmed in one way or another.³

For these reasons, the Court should clarify that its ruling does not have immediate effect, or stay its decision if it otherwise would.

II. THE COURT SHOULD CERTIFY ITS DECEMBER 14 ORDER UNDER 28 U.S.C. § 1292(b)

The parties also agree that appellate review of the Court's Order is appropriate now. And all parties concur that the Order meets all of the criteria required for certification of an interlocutory appeal under 28 U.S.C. § 1292(b). State Defs.' Br., ECF No. 213-1 at 5-7; Fed. Defs.' Resp., ECF No. 216 at 3-5; Pls.' Resp., ECF No. 217 at 4-5. As the Plaintiffs explain, the Court's Order resolves three "controlling questions of law" that are both "central to this suit and highly disputed": (1) whether the Plaintiffs have standing; (2) whether the minimum coverage provision, as amended by the Tax Cuts and Jobs Act of 2017, is constitutional; and (3) if not, whether the remainder of the ACA is severable, in whole or in part. Pls.' Resp., ECF No. 217 at 4. And as the Federal Defendants

³ See <https://www.kff.org/health-reform/press-release/if-the-affordable-care-act-is-struck-down-nearly-all-americans-would-be-affected-in-some-way/>. Examples include seniors who rely on Medicare Part D to cover their prescription drugs, individuals who rely on free preventative services such as cancer screening and pregnancy-related services, and numerous Americans who no longer have insurance coverage with annual and/or lifetime limits on that coverage. See *id.*

explain, the Court’s Order “presents the type of extraordinary circumstance justifying § 1292(b) certification because the ACA is intertwined with the function of the Nation’s healthcare markets.” Fed. Defs.’ Resp., ECF No. 216 at 6.⁴

Certification now will also materially advance termination of the litigation. It will simplify the remaining district court proceedings, including resolution of the potentially complex “remedial issues” that will turn on whether the Court’s Order is reversed in whole, reversed in part, or affirmed. Fed. Defs.’ Resp., ECF No. 216 at 7. And reversal or affirmance could obviate the need for the parties to litigate the Plaintiffs’ remaining claims. See State Defs.’ Br., ECF No. 213-1 at 20-21. As the Plaintiffs assert, it is “far better to have an orderly appeal process now,” rather than “requiring the Court to consider and address the remaining claims.” Pls.’ Resp., ECF No. 217 at 5.

In the alternative, should this Court conclude that certification under section 1292(b) is not appropriate, the Court should enter partial final judgment on Count I of the Plaintiffs’ Amended Complaint pursuant to Rule 54(b). See State Defs.’ Resp., ECF No. 213-1 at 15-17.

III. THE COURT SHOULD STAY THE PROCEEDINGS IN THIS COURT PENDING APPEAL

Finally, the Defendant States agree with the Plaintiffs and the Federal Defendants that this Court should stay all remaining proceedings in this Court pending appellate review of the Court’s December 14 Order. See Pls.’ Resp., ECF No. 217 at 6; Fed. Defs.’ Resp., ECF No. 216 at 9-10. Appellate resolution of the legal questions underlying the

⁴ The Federal Defendants’ phrasing could be read to suggest that certification should be limited to the severability question. See Fed. Defs.’ Resp., ECF No. 218 at 7 (“an immediate appeal of the Court’s severability ruling . . .”). But under section 1292(b) it is the “order, not the question, that is appealable” and the court of appeals may address “all issues material to the order.” *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 398-399 (5th Cir. 2010) (internal citation omitted). Moreover, each of the three issues identified by the Defendant States and the Plaintiffs—standing, the constitutionality of the minimum coverage provision, and severability—is potentially dispositive, and there is also substantial ground for difference of opinion on each of them. See State Defs.’ Br., ECF No. 213-1 at 18-20.

Court's December 14 Order will inform much of the remainder of this litigation, including the scope of relief (should any relief be necessary). A stay of any further district court proceedings pending appeal is therefore appropriate.

CONCLUSION

The Defendant States respectfully request that this Court:

Issue an order clarifying that its ruling does not require or permit any immediate change in the legal rights or obligations of the parties to this litigation—or of any other State, entity, or individual—under the ACA, pending further proceedings and appellate review; or, in the alternative, an order staying any effect of its decision pending appeal; and;

Issue an order certifying its partial summary judgment Order under 28 U.S.C. § 1292(b) or, in the alternative, directing the entry of a partial final judgment under Rule 54(b); and

Stay further district court proceedings in this matter pending the outcome of proceedings in the court of appeals.

Dated: December 26, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 26, 2018, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5 (b)(2).

/s/ Ashley Harrison