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DATE: March 21, 2019

TO: Milwaukee County Board
Interested Stakeholders

FROM: Corporation Counsel Margaret C. Daun

SUBJECT: Request for Permission to Join an Amicus Brief to Appeal the Decision of a Texas District Court in Support of the Affordable Care Act in *Texas v. United States*

On December 14, 2018, in a widely reported decision, a federal judge in Texas ruled that the entire Affordable Care Act (ACA) is unconstitutional. The judge reasoned that since the ACA's "individual mandate" is unconstitutional, the rest of the law cannot stand without it. However, the ACA will remain in place pending appeal, and it is highly unlikely that this ruling will stand.

This resolution seeks permission for the County to join an amicus brief brought by local governments ***in support of the ACA***.

Background

The ACA in 2010 created an individual mandate to expand health insurance coverage, along with Medicaid expansion and subsidies for moderate and low-income households. The mandate required most Americans to maintain "minimum essential" coverage, enforced through a "shared responsibility payment" in the form of a tax. The United States Supreme Court in *National Federation of Independent Business v. Sebelius* (2012) upheld the individual mandate as within Congress' power to tax.

The individual mandate is the law's controversial requirement that all Americans maintain qualifying health insurance coverage or pay a penalty. In 2012, as noted above, the Supreme Court upheld this penalty as an exercise of Congress's taxing power. In 2017, unable to get the votes to repeal the entire law, Congress just zeroed out the penalty as part of President Trump's tax legislation package.

In this case, Texas and 19 other states argue that without the tax penalty to enforce the mandate, the mandate lacks a constitutional basis because it will no longer be enforced like a tax. Based upon the linkage to any tax policy, the district court in Texas concluded that the rest of Obamacare

must fall, too because the mandate is so central to the ACA that **nothing** else in it can operate without it.

Merits of the Amicus Brief

Should this resolution be adopted, the Office of Corporation Counsel will review the proposed amicus brief and caucus with its authors before signing onto the brief. The basis of appeal of the district court's ruling is described below.

Summary of the Appeal Argument: Reasonable people may disagree on whether the health law represented the best way to reform America's health care system, and reasonable people may disagree on whether it should be replaced with a different approach. But the appeal will argue that those choices are left to Congress, not to the courts.

Detailed Explanation of the Appeal Argument: An established legal principle called "severability" is triggered when a court must consider what happens to a statute when one part of it is struck down. The principle presumes that, out of respect for the separation of powers, courts will leave the rest of the statute standing unless Congress makes clear it did not intend for the law to exist without the challenged provision. This is not a liberal principle or a conservative principle. It is an uncontroversial rule that every Supreme Court justice in modern history has applied.

Sometimes severability cases are difficult because it is hard to guess how much importance Congress attributed to one provision, especially in a lengthy law like the ACA.

However, the appeal will argue that the ACA case before the Texas district court is an easy case because Congress, not a court, eliminated the mandate tax penalty and left the rest of the statute in place.

How can a court conclude that Congress never intended the rest of the ACA to exist without an operational tax penalty-based mandate, when it was the 2017 Congress itself that decided it was fine to eliminate the penalty and leave the rest of the law intact?

Congress is allowed to amend its own law, and the Constitution does not permit any court to undermine that power. Bizarrely, the Texas court concluded that Congress's intent in 2017 was unknown because Congress wished to repeal the ACA, but didn't have the votes to do so. This cannot be a rationale permitted to stand.

Congress expresses its intent through its votes. And Congress expressed its intent numerous times by failing to repeal the ACA. Congress's failure to repeal the ACA means that Congress, as a body, regardless of the views of its individual members, intends to leave the ACA in place, even after the tax penalty to enforce the mandate was removed.¹

¹ One would not say Congress wished it could repeal the Civil Rights Act if only a minority of Congress supported such a move.

It is conservative judicial doctrine 101, as repeatedly emphasized by Justice Antonin Scalia, that the best way to understand congressional intent is to look at the text Congress was able to get through the legislative process.

United States Chief Justice John Roberts has warned against allowing the court to be an instrument of politics, particularly when doing so violates separation of powers. Justice Brett Kavanaugh is an expert on statutory interpretation who has previously said that courts should “sever an offending provision from the statute to the narrowest extent possible unless Congress has indicated otherwise in the text of the statute.” To do otherwise would be for the court to substitute its own judgment for Congress’s.

And Justice Clarence Thomas has opined that the kind of hypothesizing analysis on which the Texas district court relied is inappropriate: Congress’s intentions “do not count,” he wrote earlier this year, unless they are “enshrined” in a text that made it through the “constitutional processes of bicameralism and presentment” — as everyone agrees the 2017 tax bill did.²

Finally, in terms of potential local impact, according to an article published October 23, 2018, in the Milwaukee Journal Sentinel, Wisconsin is the only state in the country that partially expanded eligibility for Medicaid but did ***not*** accept the additional federal dollars available through the law to fully expand the program. As a result, according to an analysis performed by the Wisconsin Legislative Fiscal Bureau, Wisconsin has lost approximately \$1.1 billion in federal funds through June 2018. Given the election of Governor Evers, should the ACA stand, it is possible that it could produce significant benefits for Milwaukee County residents and taxpayers.

² The OCC wishes to expressly acknowledge that much of the legal analysis presented herein was borrowed, nearly verbatim, from an editorial published in the New York Times on December 15, 2018, written by Jonathan H. Adler, professor of law of the Case Western Reserve University School of Law and Abbe R. Gluck, professor of law and faculty director of the Solomon Center for Health Law and Policy at Yale Law School.