

THE WOODRUFF LAW FIRM, PLLC

William "Woody" Woodruff
Attorney at Law
Admitted in Utah and D.C.

gro.658.8624
wawlaw@icloud.com

October 12, 2020

Senator Lindsey Graham
Chair, Committee on the Judiciary
U.S. Capitol
Washington, DC

Dear Senator Graham:

As a retired law professor, I am interested in the confirmation process for Associate Justices on the Supreme Court of the United States. I've watched this morning's opening statements by members of the Committee with interest and dismay. While the opening statements are ongoing, it is obvious that the opposition to Judge Barrett's nomination is centered on the impact her elevation to the Court would have on the Affordable Care Act (ACA).

So far, no one has addressed the *actual* impact of Judge Barrett's nomination on the pending case of *California v. Texas*. That *actual* impact is non-existent. As explained below, Judge Barrett's confirmation will have no impact on the ultimate resolution of *California v. Texas*.

The Democrat opposition claims that Barrett is opposed to the ACA as evidenced by public comments made while a law professor and, thus, will vote to affirm the lower court's decision.

To evaluate the merits of this argument, one must take a look at the procedural posture of the ACA case that is on the SCOTUS docket this term. You will recall that when the ACA was before SCOTUS in *NFIB v. Sebelius*, the challengers argued that the individual mandate to purchase health insurance under Obamacare was unconstitutional because Congress did not have the constitutional authority to regulate the health care insurance industry under the Commerce Clause or the Necessary and Proper Clause. A majority of the Court agreed that neither the Commerce Clause nor the Necessary and Proper Clause supported the individual mandate. But, Chief Justice Roberts famously joined Justices Kagan, Sotomayor, Ginsburg, and Breyer in finding that the individual mandate was a legitimate exercise of Congress' Taxing Power and, accordingly, upheld Obamacare as constitutional.

In 2017, however, Congress passed legislation that reduced the individual mandate “tax” to \$0. Another case was then filed arguing that since the tax that supported the constitutionality of the ACA had been repealed the constitutional support for the rest of the ACA regulations on health insurance must fail because the Court already ruled that neither the Commerce Clause nor the Necessary and Proper Clause gave Congress the authority to legislate in this area. The District Court held that the elimination of the “tax” also eliminated the constitutional authority for the rest of the ACA. That decision was upheld by the US Court of Appeals for the Fifth Circuit. It is that decision that is pending oral argument before SCOTUS.

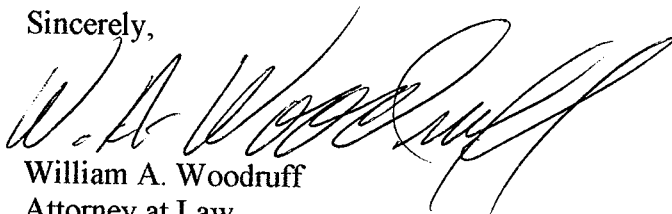
So, the question is what effect, if any, would a Justice Barrett have on the outcome before SCOTUS? First, assume that Thomas, Alito, Gorsuch, and Kavanaugh would all vote to affirm the lower court’s decision. Further assume that Breyer, Kagan, Sotomayor, and Roberts would all vote to reverse. That leaves a 4-4 split. The 4-4 split means that the lower court judgment is affirmed. Thus, if Judge Barrett is not confirmed, or if confirmed takes no part in the decision, the ACA will be struck down based on the decision of the District Court as affirmed by the Court of Appeals.

If Barrett does take part in the case before SCOTUS and votes to affirm the lower court decision, and all the other justices vote as assumed above, the lower court’s decision will still be affirmed. In other words, the result will be the same as it would have been without Justice Barrett’s vote.

If Barrett does take part and votes to affirm and one of the other “conservative” justices votes with the “liberal” justices, there will be 5 votes to reverse and only 4 to affirm and the ACA will survive. In any case, due to the procedural posture of this case Judge Barrett’s vote will make no difference whatsoever. The Democrats’ talking points to the contrary simply trade on the public’s lack of understanding of how things work when cases reach SCOTUS.

I urge you and other members of the Committee to use the opportunity these hearings present to inform the American people of the *actual* impact of the confirmation of Judge Barrett will have on the ACA and to dispel the cloud of fear and disinformation that hovers over this nomination.

Sincerely,



William A. Woodruff
Attorney at Law
Professor of Law *Emeritus*