

Update to Texas v. United States: DOJ Files a Brief in Support of Eliminating the ACA

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On May 1, 2019, the Department of Justice (“[DOJ](#)”) filed an initial [brief](#) (the “[Brief](#)”) with the U.S. Court of Appeals for the Fifth Circuit (the “[Fifth Circuit](#)”) on behalf of the United States, in favor of upholding the lower court’s decision that found the entire Patient Protection and Affordable Care Act (the “[ACA](#)”) unconstitutional.

As we discussed previously in our [December 2018 blog post](#), a federal district court judge in Texas struck down the entire ACA by ruling that the “individual mandate,” which was reduced to \$0 as part of the 2017 Tax Cuts and Jobs Act, no longer raises revenue and thus is no longer a constitutional exercise of Congress’s taxing power. The judge went on to determine that the unconstitutional individual mandate was inseverable from the rest of the ACA and therefore, the entire ACA was unconstitutional. The decision was then appealed to the Fifth Circuit.

The Brief is a dramatic shift from the Trump Administration’s original stance on the ACA. At the district court level, the DOJ declined to defend the constitutionality of the individual mandate and certain key provisions of the ACA related to pre-existing conditions, such as the guaranteed issue and community ratings. However, the DOJ argued the position that other ACA provisions, such as allowing states to have the option of expanding their Medicaid programs, were severable and thus, should not be struck down as unconstitutional along with the individual mandate. ^[1]

The Trump Administration is now taking the opposite position on the severability of the ACA. On March 25, 2019, the Trump Administration announced its changed position in a [two-sentence letter](#), stating that the DOJ has determined that the district court's decision finding the entirety of the ACA to be unconstitutional should be affirmed. The Brief explains that after further review of the district court's opinion, the United States now takes the position that the provisions of the ACA are "highly interdependent" and that they "would not 'function in a coherent way and as Congress would have intended' in the absence of the individual mandate and the guaranteed-issue and community-rating provisions." As such, the individual mandate is inseverable from the rest of the ACA and the entire ACA should be struck down.

While *Texas v. United States* is largely divided along party lines with a group of Republican-led states challenging the ACA and a group of Democratic-led states and the recently joined Democratic-majority House of Representatives defending the law, the case has created a divide within the Republican party. In early April, two Republican attorneys general filed an [amicus brief](#) with the Fifth Circuit *in defense* of the ACA. Many Republicans do not like the ACA, but are willing to fight to protect it on the grounds of stopping judicial overreach and preserving the intent of Congress. Moreover, Republican politicians worry that taking an anti-ACA stance could alienate voters because striking down the ACA could eliminate health insurance for about 21 million Americans and the ACA's guaranteed coverage for people with pre-existing conditions remains very popular with voters in both parties. [2]

On May 1, 2019, initial briefs were also filed by the 18 state plaintiffs and the two individual plaintiffs. Oral arguments are expected to occur the week of July 8, 2019.

[1] "DOJ, Plaintiffs File In Texas v. United States, " Health Affairs Blog, May 2, 2019. DOI: 10.1377/hblog20190502.780432

[2] Jan Hoffman and Abby Goodnough, "Trump Administration Files Formal Request to Strike Down All of Obamacare," *The New York Times* (May 1, 2019), <https://www.nytimes.com/2019/05/01/health/unconstitutional-trump-aca.html>.

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