

Parties Argue Constitutionality of ACA before 5th Circuit

On July 9, 2019, the parties in the *Texas v. U.S.* lawsuit presented their oral arguments before a three-judge panel at the 5th Circuit Court of Appeals in New Orleans regarding the constitutionality of the *Patient Protection and Affordable Care Act* (ACA). The various questions posed to the attorneys by the judges (two of whom are Republican appointees, and one of whom is a Democratic-appointed)¹ indicated that the (two Republican-appointed) judges may uphold the lower court’s ruling – at least as regards the Individual Mandate constitutionality issue.

During the 90-minute hearing, the judges (note that, the Democratic-appointed judge did not ask any questions during oral arguments) focused on a number of issues in the case, including whether the parties have standing to bring and/or defend the case; the constitutionality of the Individual Mandate (given that the tax penalty for violating the mandate is now \$0); and, the severability of the Individual Mandate portion of the ACA from the remainder of the law.² The Republican-appointed judges seemed partial to the arguments of the Republican plaintiff states and the Department of Justice (DOJ) regarding the Individual Mandate’s constitutionality – with one of the judges bluntly asking: “*If you no longer have the tax, why isn’t it unconstitutional?*”³ However, the panel appeared less certain on the issue of the Mandate’s severability from the entirety of the ACA, and uncomfortable with the prospect of being the body responsible for making the decision as to which ACA provisions should stay in effect and which should be voided.⁴ However, one of the judges noted that Congress could pass a new law(s) to remedy this issue, although the attorney for the U.S. House of Representatives (an ACA proponent) pointed out that the law would also require the signature of President Trump, which action is extremely unlikely.⁵ The judges also listed a number of ACA provisions that have nothing to do with the Individual Mandate, such as the requirement that certain restaurants post calorie counts on their menus,⁶ potentially indicating their hesitance to declare the entire law invalid.

This appeal came before the 5th Circuit as a result of the December 14, 2018 ruling in Texas Federal District Court, in which Judge Reed O’Connor deemed the ACA to be unconstitutional in its entirety.⁷

As explained more fully in a December 2018 issue of *Health Capital Topics*, Judge O’Connor concluded that the Individual Mandate was no longer permissible under Congress’s taxing power (under the same grounds as the 2012 *NFIB v. Sebelius* case, in which the U.S. Supreme Court found the ACA to be legal under Congress’s taxing power) as a result of the 2017 tax reform law, which reduced the Individual Mandate’s tax to \$0 (i.e., it no longer produces revenue, which is an essential feature of a tax), rendering the ACA unconstitutional.⁸ Further, the court ruled that the Individual Mandate could not be severed from the remainder of the ACA because the Mandate was “*the keystone*” of the law, essential to the regulation of the health insurance market, thereby rendering the entirety of the ACA invalid.⁹ Contributing to the federal court decision was the DOJ’s position – the agency agreed with the plaintiffs that the Individual Mandate is unconstitutional, and asserted that other provisions such as the “*guaranteed issue*” (requiring health insurance companies to accept all applicants regardless of pre-existing conditions) are inseverable from the Mandate.¹⁰ As a result, the DOJ did not (and will not) defend the constitutionality of the Individual Mandate during the case.¹¹

While many ACA opponents believed that the questions posed by the judges indicated a receptiveness to the idea that the ACA is now unconstitutional in its entirety, but noted that the judges also expressed doubt as to whether the courtroom is the correct venue for this debate (in contrast to Congress).¹² On the other hand, legal scholars agree that there is little likelihood of the 5th Circuit affirming the lower court’s ruling in its totality, considering the breadth of the law, and the severability option available to the court, as well as the strength of the Republican states’ arguments.¹³

The next step in this ongoing saga will be for the appellate court to publish a ruling, which may take several months.¹⁴ Regardless of the outcome, the case is anticipated to be ultimately appealed to the U.S. Supreme Court.¹⁵ If the lower court’s ruling is upheld, the millions of individuals that gained insurance through the enactment of the ACA (including through Medicaid Expansion) will effectively lose their coverage, among numerous other detrimental implications.¹⁶

- 1 “ACA Opponents Celebrate as Appellate Judges Appear Receptive to their Arguments” By John Commins, Health Leaders Media, July 9, 2019, <https://www.healthleadersmedia.com/strategy/aca-opponents-celebrate-appellate-judges-appear-receptive-their-arguments> (Accessed 7/10/19).
- 2 “Appeals Court Seems Skeptical About Constitutionality of Obamacare Mandate” By Abby Goodnough, New York Times, July 9, 2019, <https://www.nytimes.com/2019/07/09/health/obamacare-appeals-court.html> (Accessed 7/10/19).
- 3 Judge Jennifer Elrod (George W. Bush appointee)
- 4 *Ibid*; “Appeals Court Signals Peril for Affordable Care Act” By Brent Kendall, The Wall Street Journal, July 9, 2019, <https://www.wsj.com/articles/fate-of-affordable-care-act-to-be-considered-in-court-11562685805> (Accessed 7/10/19).
- 5 Goodnough, July 9, 2019.
- 6 Kendall, July 9, 2019.
- 7 “Texas, et al. v. United States of America, et al.” Case No. 4:18-cv-00167-O (N.D. Tex. December 14, 2018), Memorandum Opinion and Order.
- 8 *Ibid*, p. 1-2; “Judge Strikes Down ACA Putting Law In Legal Peril – Again” By Julie Rovner, Kaiser Health News, December 14, 2018, <https://khn.org/news/texas-judge-puts-aca-in-legal-peril-again/> (Accessed 12/17/18).
- 9 Memorandum Opinion and Order, p. 40-41; “Texas Judge Strikes Down Obama’s Affordable Care Act as Unconstitutional” By Abby Goodnough and Robert Pear, The New York Times, December 14, 2018, <https://www.nytimes.com/2018/12/14/health/obamacare-unconstitutional-texas-judge.html> (Accessed 12/17/18).
- 10 “Federal Judge Strikes Down Entire ACA; Law Remains In Effect” By Katie Keith, Health Affairs, December 15, 2018, https://www.healthaffairs.org/doi/10.1377/hblog20181215.617096/full/?utm_source=Newsletter&utm_medium=email&utm_content=Federal+Judge+Strikes+Down+ACA%3B+Expanding+The+Serious+Illness+Care+Team%3B+Telehealth+Policy&utm_campaign=HAT (Accessed 12/17/18).
- 11 *Ibid*.
- 12 Commins, July 9, 2019.
- 13 “There’s little chance appeals court will strike down ACA, legal experts say” By Shelby Livingston, Modern Healthcare, July 8, 2019, <https://www.modernhealthcare.com/legal/theres-little-chance-appeals-court-will-strike-down-aca-legal-experts-say> (Accessed 7/10/19); “The Health 202: The Obamacare lawsuit, by the numbers” By Paige Winfield Cunningham, The Washington Post, July 10, 2019, https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2019/07/10/the-health-202-the-obamacare-lawsuit-by-the-numbers/5d246d541ad2e552a21d5315/?utm_term=.b6e1da98f824 (Accessed 7/10/19).
- 14 Commins, July 9, 2019.
- 15 *Ibid*.
- 16 “DOJ Drops Its Partial ACA Defense, Argues Entire Law Should Fall” By Steven Porter, Health Leaders, March 25, 2019, <https://www.healthleadersmedia.com/strategy/doj-drops-its-partial-aca-defense-argues-entire-law-should-fall> (Accessed 3/26/19).

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