

## DOJ ASKS FEDERAL COURT TO TOSS WHOLE ACA — WITH EXCEPTIONS

The Trump administration recently told a federal appeals court it agrees with a district judge's ruling that the entire health care law is invalid, yet also asked the court to retain certain ACA provisions the administration claims would not harm the plaintiffs, including updates to Medicare fraud laws – a move that left key legal experts scratching their heads.

The Department of Justice's (DOJ) argues in its May 1 brief to the Fifth Circuit Court of Appeals in New Orleans that the individual plaintiffs in *Texas v United States* have standing to challenge the ACA's "injurious insurance reforms" but not to challenge other parts of the law from which they suffered no harm. As a result, DOJ says, the court should only grant relief from the insurance provisions. Yet DOJ also argues the entire law is inseverable from the mandate and should be scrapped.

The May 1 brief marks the first time DOJ has shown its hand since telling the appeals court in a brief letter March 25 that it had decided the entire ACA should be scrapped. That legal pivot shocked health care stakeholders and essentially aligned the administration with the 18 GOP attorneys general and two Texas residents that succeeded in getting a federal Texas district court judge to invalidate the ACA. The plaintiffs argued that, since Congress zeroed out the penalty for failing to purchase coverage, the individual mandate is unconstitutional, and since the mandate was only legal under Congress' taxing authority, the rest of the law is invalid. But at the district court level DOJ argued only the guarantee issue and community rating provisions should be axed with the mandate.

DOJ's subsequent legal shift in March reportedly was opposed by some in the administration. House Democrats queried HHS, DOJ and the White House in early April shortly after reports emerged that Attorney General William Barr disagreed with the shift but was overruled by White House staff.

In the brief, DOJ largely echoes the arguments made by the plaintiffs. Because the individual mandate operates as a command but no longer functions as a tax, it exceeds Congress' enumerated powers, DOJ writes. The administration rejects arguments by the House of Representatives and a group of Democratic attorneys general intervening in the case who said, among other things, that bringing the mandate penalty down to zero does not mean the tax is eliminated from the books.

DOJ further argues the mandate cannot be severed from the guarantee issue and community ratings provision, despite the Democrats' argument that the GOP had essentially delinked the provisions when it zeroed out the penalty in 2017 but did not repeal the other provisions. Finally, DOJ says, the mandate and guarantee issue cannot be severed from the rest of the law.

"Once the individual mandate and the guaranteed-issue and community-rating provisions are invalidated, the remaining provisions of the ACA should not be allowed to remain in effect—again, even if the government might support some individual provisions as a policy matter," DOJ says.

But DOJ's argument that such minor provisions should be invalidated because there's no reason to believe Congress would have passed them independently seems to conflict with DOJ's stance that the court should not provide relief from provisions that do not harm a plaintiff.

DOJ requests that the court make exceptions when considering relief, and then seems to again counter that request by highlighting a brief from California on what it calls the "dangers of crafting a judicial remedy that picks and chooses among the provisions that Congress enacted to work together in this highly complex area." ■