U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

February 10, 2021

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: California, et al. v. Texas, et al., No. 19-840, and Texas, et al. v. California, et al., No. 19-1019

Dear Mr. Harris:

On November 10, 2020, this Court heard oral argument in these consolidated cases concerning whether, as a result of the elimination in 2017 of the monetary payment under 26 U.S.C. 5000A, which was enacted as part of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119, that provision is no longer a valid exercise of Congress's legislative authority; and whether, if that provision is now invalid, the remainder of the ACA's provisions are inseverable from it.

1. The federal respondents had previously filed a brief contending that Section 5000A(a) is unconstitutional and is inseverable from the remainder of the ACA, although the scope of relief entered should be limited to the provisions shown to injure the plaintiffs. The government advanced the same positions at oral argument.

Following the change in Administration, the Department of Justice has reconsidered the government's position in these cases. The purpose of this letter is to notify the Court that the United States no longer adheres to the conclusions in the previously filed brief of the federal respondents.

2. After reconsideration of the issue, it is now the position of the United States that the amended Section 5000A is constitutional. In *National Federation of Independent Business* v. *Sebelius* (*NFIB*), this Court held that the payment provision in Section 5000A could be sustained as a valid exercise of Congress's constitutional power because it offered a choice between maintaining health insurance and making a tax payment. 567 U.S. 519, 570, 574 & n.11 (2012). In so ruling, the Court noted that no negative legal consequences attached to not buying health insurance beyond requiring a payment to the IRS, and that the government's position in the case confirmed that if someone chooses to pay rather than obtain health insurance, that person has fully complied with the law. *Id.* at 568. Congress in 2017 amended Section 5000A(c) by reducing to zero (effective in 2019) the shared responsibility payment assessed under Section 5000A(b) as a lawful alternative to purchasing insurance under Section 5000A(a), see Tax Cuts and Jobs Act, Pub. L. No. 115-97, Tit. I, § 11081, 131 Stat. 2092, but it did not amend Section 5000A(a) or (b). In the view

of the United States, Congress's decision to reduce the payment amount to zero therefore did not convert Section 5000A from a provision affording a constitutional choice into an unconstitutional mandate to maintain insurance. Rather than imposing a new burden on covered individuals, the 2017 amendment preserved the choice between lawful options and simply eliminated any financial or negative legal consequence from choosing not to enroll in health coverage.

It is also now the position of the United States that, if this Court nevertheless concludes that Section 5000A(a) is unconstitutional, that provision is severable from the remainder of the ACA. The severability inquiry typically requires asking "whether Congress would have wanted the rest of [a statute] to stand, had it known that" one or more particular provisions of the statute would be held invalid. *NFIB*, 567 U.S. at 587 (opinion of Roberts, C.J.). And the "normal rule is that partial, rather than facial, invalidation is the required course." *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (citation and internal quotation marks omitted). In the view of the United States, that presumption of severability cannot be overcome here, particularly as the 2017 Congress that reduced to zero the amount of the shared responsibility payment option under Section 5000A simultaneously left in place the remainder of the ACA.

3. Because oral argument was held and these cases were submitted three months ago, and because other parties have fully briefed both sides of the questions presented, the United States is not requesting supplemental briefing.

I would appreciate it if you would circulate this letter to the Members of the Court.

Sincerely,

Edwin S. Kneedler
Deputy Solicitor General*

cc: See Attached Service List

* The Acting Solicitor General is recused in these cases.

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