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Three Weeks to go Until Oral Arguments in Texas v. United States

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There are now only three weeks before the Fifth Circuit Court of Appeals is scheduled to hear oral arguments in *Texas v. United States*, the latest legal front in the ongoing battle over the future of the Patient Protection and Affordable Care Act (ACA).

Texas v. United States is a lawsuit focusing on the indispensability of the individual mandate, which required most Americans to maintain “minimum essential” health insurance coverage, to the rest of the signature Obama-era healthcare law.

As background, in 2013, in the case of *National Federation of Independent Business v. Sebelius*, the US Supreme Court upheld the constitutionality of the individual mandate. However, Chief Justice John Roberts upheld the mandate under Congress’s power in Article I, Section 8 of the Constitution “to lay and collect taxes,” holding that because the Commerce Clause does not authorize Congress to compel Americans to buy insurance, the individual mandate should instead be construed as the imposition of a tax upon those individuals who elect not to purchase insurance.

Fast forward to December 2017, and Congress passed the Tax Cuts and Jobs Act, which reduced the penalty for individuals electing not to purchase insurance to nil. This paved the way for Texas and various other states to bring the lawsuit of *Texas v. United States* in the United States District Court for the Northern District of Texas, arguing that the effective elimination of the tax penalty meant that there was no longer a constitutional basis for the individual mandate, and that because the mandate could not be severed from the remainder of the ACA, the entirety of the ACA should be struck down as unconstitutional. Judge O’Connor agreed and held that the entirety of the law was unconstitutional. This was despite opposition from Democratic controlled states as intervening defendants, and against the position taken by the US Department of Justice that while the mandate was unconstitutional, many of the other parts of the ACA were severable and could be preserved.

Now, on appeal before the Fifth Circuit, in addition to the Democratic controlled states, the House of Representatives has also intervened to defend the ACA, and the case docket is heavy with advisory briefs from amici curiae representing the various interest groups weighing in on both sides of the dispute. Most notably, however, the US Department of Justice, now under a new Attorney General, has changed its position, and informed the Court of Appeal that it now agrees with the District Court’s ruling that the mandate is unconstitutional *and* not severable from the remainder of the Act.

With briefing now concluded and extended oral arguments scheduled for the week beginning July 8, many expect that the Fifth Circuit’s subsequent ruling will be appealed to the U.S. Supreme Court to be decided next year ahead of the Presidential election. By then, it will have been ten years since the ACA passed Congress, and a health care industry that has shaped its business in compliance with that law for a decade now faces continued uncertainty as to the legal landscape ahead. We will provide a further update on the status of this significant case after oral arguments are completed.

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