

CLIENT ALERT

Biden Administration Messes with Texas, Changes Position in *California v. Texas*

February 17, 2021

On February 10th, the Biden Administration informed the U.S. Supreme Court that the United States “no longer adheres” to the position advanced by the Trump Administration in *California v. Texas*, the case argued in November that challenges the constitutionality of the Affordable Care Act. In short, the U.S. Department of Justice now says that the Affordable Care Act’s individual mandate *is* constitutional, but even if it is not, the remainder of the ACA should remain in place.

As discussed in a [previous post](#), in *California v. Texas*, a group of states, led by Texas, contend that the ACA’s individual mandate—the constitutionality of which was upheld in the 2012 decision in *National Federation of Independent Business v. Sebelius* as a valid exercise of Congress’s taxing authority—is no longer constitutional in light of the Tax Cuts and Jobs Act of 2017, which zeroed out the tax penalty for anyone who opts not to buy health insurance. Absent an actual tax, Texas argues, the individual mandate can no longer be justified as an exercise of Congress’ taxing authority. Furthermore, Texas contends, the individual mandate is so central to the ACA that, if the mandate falls, the rest of the ACA must also be invalidated.

In its briefs and at argument in November, the United States concurred with the central arguments advanced by Texas and the other plaintiffs challenging the ACA: the individual mandate is unconstitutional and not severable from the ACA. Now, though, with the Biden Administration in office and no decision having yet been issued, the Justice Department informed the Court that, after “reconsideration of the issue,” the United States’ position is that the individual mandate is in fact constitutional and, even if the Court decides it is not, the mandate is severable under the Court’s “severability doctrine” precedents, such that, at least, the rest of the ACA should be left untouched.

As the Court heard arguments on this case in November, a decision can be expected from the Court before the end of the term, likely just prior to the summer recess. Given the posture of the case, the Justice Department stated that it will not submit any supplemental briefing reflecting its changed position, and this late change in position likely will not impact the outcome of the case. Based on recent “severability doctrine” precedent and oral argument, a majority of the Justices already appear unwilling to invalidate the ACA in its entirety, even if they find the individual mandate to be unconstitutional.

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