GROOM LAW GROUP

www.groom.com

Department of Labor Guidance on Private Equity Adds Flexibility for Defined Contribution Plans

PUBLISHED: June 4, 2020

Regular readers of this Benefits Brief will recall that there is a case challenging the constitutionality of the Patient Protection and Affordable Care Act (ACA) percolating through the courts. Last we left this story, the Fifth Circuit had concluded that yes, the individual mandate was now unconstitutional because Congress in 2017 lowered the tax penalty to zero. However, the Fifth Circuit remanded the case to the District Court for an analysis of what provisions of the ACA, if any, could be severed from the individual mandate or whether the entire statute is unconstitutional.

Not content to wait for the District Court to re-evaluate its severability analysis, the House of Representatives and the Democratic Attorneys General petitioned the Supreme Court for review. Not to be outdone, Texas, et. al., cross-petitioned the Court, arguing first that the Fifth Circuit's ruling was not worthy of the Court's consideration at this time, but that if the Court did agree to hear the case, Texas, et. al. thought that the Fifth Circuit's decision was wrong with respect to severability and that the Fifth Circuit should have affirmed the District Court's judgment in its entirety.

Previously, in *Texas v. US* …

In *Texas v. US*, the plaintiff states argued that because the mandate no longer raises revenue for the government, it is no longer a tax, and following *NFIB*, the mandate is unconstitutional. The suit also argued that the *entire* ACA is unconstitutional because the individual mandate cannot be severed from the rest of the ACA. California and a group of like-minded states intervened,

If you have any questions, please do not hesitate to contact your regular Groom attorney or the authors listed below:

Jon Breyfogle
jbreyfogle@groom.com
(202) 861-6641

Lisa Campbell
lcampbell@groom.com
(202) 861-6612

Tamara Killion
tkillion@groom.com
(202) 861-6328

Matthew Muma
mmuma@groom.com
(202) 861-5405

Mark Nielsen
mnielsen@groom.com
(202) 861-5429

Seth Perretta
sperretta@groom.com
(202) 861-6335

Ryan Temme
rtemme@groom.com
(202) 861-6659

Brigen Winters
bwinters@groom.com
(202) 861-6618

arguing that the lack of a penalty did not necessarily mean the mandate was not a "tax," and that even if it did, the 2017 Congress that "zeroed" the tax clearly intended that the rest of the ACA remain or it would have repealed the ACA in its entirety.

The district court ruled in December of 2018 that the individual mandate was unconstitutional, and the entirety of the ACA must be struck down, because the Congress in 2010 would not have passed the ACA without the individual mandate.

The DOJ and California, et. al., appealed the case to the Fifth Circuit. The DOJ later modified its position, generally agreeing with the plaintiff states that the mandate was unconstitutional and that it was not severable, but disagreeing with Texas, et. al., as to remedy. The House of Representatives intervened on appeal, supporting California, et. al.

So, enough with the suspense (aka Frequently Asked Questions)

1. Will the Supreme Court take the case?

Yes! After reviewing the case in conference on February 21, and considering it again in conference on February 28, the Court announced on March 2 it would hear the case. The Court set a briefing schedule on April 2, 2020, and the House and Democratic Attorneys General filed their opening briefs on May 6, 2020, with the plaintiff states and DOJ's opening briefs due on June 25, 2020. The Court is also accepting voluminous amicus briefing, reflecting the case's importance and potential impact. News reports have indicated that there has been disagreement within the Administration as to whether to modify the DOJ's position: so far, however, it appears that President Trump remains committed to overturning the ACA in its entirety. *See, e.g.*, Susannah Luthi, Politico, *Trump will urge Supreme Court to strike down Obamacare* (May 6, 2020).

2. When will the Court hear the case?

We expect this case to be argued in the fall (likely in October 2020). Oral arguments will be for one hour.

3. When will we have a decision?

A decision could come at any time after it is heard, but the decision would be expected to be announced at the latest by the end of the term – June 2021.

4. What is the Court actually deciding?

Okay, this isn't a frequently asked question, unless you follow the Supreme Court docket, but it is important. Generally, the Supreme Court does not just accept a case for appeal. Instead, when it announces it will hear a case, it also announces the "questions presented"—those legal questions raised by the case that the Supreme Court is interested in hearing. So what questions are presented here?

- Whether Texas, et. al., had the legal right to sue regarding the constitutionality of the individual mandate;
- Whether reducing the individual mandate to zero rendered it unconstitutional;
- If so, whether the individual mandate is severable from the rest of the ACA, and;
- Whether the district court properly declared the ACA invalid in its entirety and unenforceable anywhere.

5. What will the Court decide?

¯_(ツ)_/¯. The Court could decide that neither Texas (nor the states that joined it) nor the individuals that sued had standing, and therefore, that this case should have been dismissed from the beginning. The Court could decide that, although the individual mandate no longer raises revenue for the United States, it is still a "tax" and therefore, still constitutional under *NFIB*. Although unlikely, we suppose the Supreme Court could change its mind and decide it should not have taken the case (that certiorari was "improvidently granted"), and dismiss, or even agree with the Fifth Circuit that someone else needs to "do the necessary legwork of parsing through the over 900 pages of the post-2017 ACA, explaining how particular segments are inextricably linked to the individual mandate."

That all said, assuming the composition of the Court remains the same, we think the *most likely* outcome is that the Court strikes down the individual mandate on the basis that it is no longer a constitutionally permitted tax, but severs the mandate from the statute, allowing implementation of the law to proceed essentially as it is now. Here's why:

- It is actually a supportable decision (at least as to severability)! Since severability is fundamentally a question of Congressional intent, it seems unlikely that the Court will hold that, when the 2017 Congress zeroed out the individual mandate, it also impliedly repealed the entire statute, or that Congressional intent in 2010 somehow circumscribed a later Congress's ability to amend the ACA.
- While speculation on our part, it is hard to see Chief Justice Roberts siding with the other conservatives on the Court after siding with the liberals twice to save it. This point may apply with particular force in the midst of (or just after) a global pandemic and resulting economic crisis.
- Chief Justice Roberts will likely side with the other conservative Justices on the mandate no longer being a tax. This will be a "victory" for conservatives who take the long view on these matters – much like the Court finding that the authority for the individual mandate was not within the power of the Commerce Clause in *NFIB v. Sebelius* and that Chevron deference did not apply to important matters of statutory interpretation in *King v. Burwell*.
- In *NFIB v. Sebelius*, Chief Justice Roberts sided with the liberals in saving the ACA's expansion of Medicaid on severability grounds. The Chief Justice may follow the same approach here.

That's our bet, but it's been pretty tough predicting ACA litigation, so we suggest you stay tuned for more updates as we continue to follow this landmark challenge to the ACA.