STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

Briefing on Status of Current ACA Litigation

Presented to the Senate Committee on Public Health and Welfare
By Kansas Attorney General Derek Schmidt

February 6, 2020

Chairman Suellentrop and Members of the Committee:

Thank you for the opportunity to provide the committee with a status update on *State of Texas, et al. v. United States*, the ACA individual mandate case, and *State of Texas, et al. v. United States*, the Health Insurance Provider Fee case. This update is intended to be informational only.

***State of Texas, et al. v. United States of America, et al.*, in the United States Court of Appeals for the Fifth Circuit, Case No. 19-10011; on petition to the United States Supreme Court for a writ of certiorari, sub nom., *State of California, et al. v. State of Texas, et al.*, No. 19-840 and *U.S. House of Representatives v. State of Texas, et al.*, No. 19-841.**

In 2010, Congress passed the Patient Protection and Affordable Care Act ("ACA" or colloquially, "Obamacare"). The law commanded almost every American to buy "minimum essential [health-insurance] coverage." 26 U.S.C. §5000A. In 2012, the United States Supreme Court held that "[t]he Federal Government does not have the power to order people to buy health insurance." *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 575 (2012). The Court upheld the law because that mandate was attached to a revenue-producing penalty and thus could "reasonably be characterized as a tax." *Id.* at 574.

The express statutory goals of the ACA are (1) "near-universal [health-insurance] coverage," (2) "lower health[-]insurance premiums," and (3) "creat[ion] [of] effective health insurance markets." 42 U.S.C. § 18091(2)(D), (F), (I). Those features, which the D.C. Circuit referred to as a "three-legged stool," *Halbig v. Burwell*, 758 F.3d 390, 409 (D.C. Cir. 2014), *vacated on other grounds*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014), were: (1) a requirement that Americans buy minimum essential health-insurance, known as the "individual mandate"; (2) a guaranteed-issue provision; and (3) a community-rating provision. *Id.* As the D.C. Circuit recognized, if any one leg of the stool is removed, the ACA collapses. *Halbig*, 758 F. 3d at 409.

In December 2017, Congress enacted, and President Trump signed into law, the Tax Cuts and Jobs Act of 2017 ("TCJA"), which reduced the operative parts of 26 U.S.C. §5000A(c)'s tax penalty formula to "[z]ero percent" and "$0." This change was scheduled to apply after December 31, 2018.

After the TCJA, section 5000A still contains the individual mandate in subsection (a), requiring "[a]n applicable individual" to "ensure that the individual . . . is covered under minimum essential coverage," 26 U.S.C. § 5000A(a), but subsection (b)'s tax "penalty" for an individual who "fails to meet th[is] requirement" is now $0, meaning that it was repealed, *id*. § 5000A(b). The ACA also still contains the express legislative findings that the individual mandate—subsection (a)—is "essential" to the operation of the ACA, as those findings were untouched by the TCJA.

As it stands today, the U.S. Code includes the following: (1) a command to the American people to buy health insurance, (2) a penalty provision for failure to comply that raises no revenue, and (3) Congress's textual declarations that the individual mandate remains "essential" to the operation of the law.

In February 2018, two individuals and 18 states filed suit in the Northern District of Texas seeking to enjoin enforcement of the ACA. The plaintiffs asserted five claims arguing that the ACA, as amended, "forces an unconstitutional and irrational regime on the States and their citizens." Shortly thereafter, the federal government conceded that the minimum-essential-coverage requirement is unconstitutional. As a result, 17 states and the District of Columbia intervened to defend the law.

In December 2018, the district court granted a declaratory judgment finding that the individual mandate is unconstitutional and the rest of the ACA inseverable from the struck provision. 340 F. Supp. 665 (2018). The court concluded that the two individual plaintiffs had standing because they "are the object of the Individual Mandate" and had been financially harmed by buying insurance. Because Article III of the United States Constitution requires only one party to have standing, the district court did not address the question of whether the state plaintiffs also had standing.

On the merits, the court concluded that the individual mandate was unconstitutional because the saving construction adopted by *NFIB* was no longer fairly permissible after the TCJA. As to the remedy, the court noted that the two individual, and state plaintiffs, and the federal government "agree[d] . . . that the guaranteed-issue and community-rating provisions . . . are inseverable" from the individual mandate. The court issued a declaration that the remainder of the ACA was inseverable from the requirement as well. At the request of the state petitioners, the district court entered a partial judgment to allow immediate appeal and stayed the litigation regarding respondents' remaining claims pending the outcome.

On December 18, 2019 (later revised), the Fifth Circuit affirmed on everything except remedy. 945 F. 3d 355 (2019). In particular, the Fifth Circuit agreed that the individual plaintiffs have standing, and that the individual mandate is unconstitutional. The court further concluded that the state plaintiffs have standing based on "fiscal injuries as employers." *Id.* at 386. Without

reaching whether the mandate injured States' sovereign right to enforce their own laws, the Fifth Circuit concluded that "[t]he record is replete with evidence that the individual mandate itself has increased" States' compliance costs, which satisfies Article III. *Id.* at 384.

The Fifth Circuit declined to affirm, however, the district court's conclusion that the remainder of the ACA is inseverable from the unconstitutional mandate. The court noted that the United States "ha[d] shifted their position on [severability and remedy] more than once." At oral argument, the United States argued that under *Gill v. Whitford*, 138 S. Ct. 1916 (2018), remand was necessary because the remedy "should only reach ACA provisions that injure the plaintiffs." Because this remedial argument "came as a surprise" to the state plaintiffs, the Fifth Circuit ordered the district court to consider this new argument—including whether it was "timely raised"—in the first instance. *Id.* at 403.

Two sets of intervenors, the California-led coalition of states and the U.S. House of Representatives, filed petitions for certiorari and motions to expedite with the United States Supreme Court on January 3, 2020. The Supreme Court denied the motions to expedite and ordered the state plaintiffs and the federal government to file briefs in opposition, which were filed on February 3, 2020. It seems likely that the Court will decide whether to take the case before the end of the present term. If the Court ultimately denies the petitions for certiorari, the case will return to the Northern District of Texas for further proceedings in accordance with the Fifth Circuit's remand order.

***State of Texas, et al. v. United States of America, et al.*, in the United States Court of Appeals for the Fifth Circuit, Case No. 18-10545**

In 2015, the States of Kansas, Texas, Louisiana, Indiana, Nebraska, and Wisconsin filed suit in the United States District Court for the Northern District of Texas seeking a court order that prevented the federal government from collecting the Health Insurance Provider (HIP) fees assessed against companies that manage state Medicaid or Children's Health Insurance programs. The states alleged that the HIP fees, which are required by the Affordable Care Act and are required to be passed on to the states by regulation, constitute a *de facto* tax on state treasuries. The states argued that the federal government does not have legal authority to tax the states to raise money for the federal treasury under the Tenth Amendment to the United States Constitution and the doctrine of intergovernmental tax immunity.

On August 21, 2018, United States District Judge Reed O'Connor ruled that the HIP fees were unlawfully collected from the respective state treasuries in states like Kansas that contract with private managed care organizations (MCOs) to operate their Medicaid programs. Judge O'Connor found that the federal government unlawfully required the plaintiff states to account for and pay the HIP fees in their MCO capitation rates and thus has no right to retain those funds that properly belong to the states. The Court found that the nature of the case required the imposition of equitable relief and ordered the federal government to disgorge the improperly collected HIP fees. The Court did not assess actual damages in its 2018 ruling. Thereafter, the federal government filed an appeal in the United States Court of Appeals for the Fifth Circuit challenging its obligation to disgorge the HIP fees collected from the states.

The District Court's 2018 ruling applied to a three-year period for Fee Years 2014-2016. The HIP fee was not collected in Fee Year 2017. The state has additionally claimed return of the HIP fees collected in Fee Year 2018 going forward, and that claim remains open.

On July 30, 2019, Judge O'Connor entered a final judgment ordering the federal government to disgorge to Kansas $13,657,121 for Fee Year 2014, $22,495,820 for Fee Year 2015, and $20,403,057 for Fee Year 2016, for a total of $56,555,998. In an earlier ruling, the District Court denied the states' request for the imposition of prejudgment and post-judgment interest. The federal government has agreed not to challenge the amount of money to be returned to Kansas under the final judgment, but reserved the right to challenge whether the payment must be made at all. The District Court has temporarily stayed the execution of the judgment pending the outcome of the appeal.

In its appeal, the federal government argues that even if the fee was illegally collected it is not liable to return the illegally collected funds to the states. The plaintiff states (except for Wisconsin) have filed a cross-appeal in the Fifth Circuit on the issues that were decided unfavorably to the states, including the right to interest.

The opening brief for the federal government was filed on November 20, 2019. The plaintiff states filed our opening brief on January 29, 2020. Oral argument will be heard on or before June 10, 2020. It will likely be months before there is a final determination of the federal government's obligation to repay the amounts wrongfully collected. This includes Kansas's HIP fee claims for Fee Years 2018 forward.

There is one other matter that we wish to bring to the Committee's attention.

Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, in the United States Supreme Court, No. 19-431(consolidated with ***Trump v. Pennsylvania***, No. 19-454)

The United States Supreme Court has agreed to hear – but has not yet scheduled – two cases involving the interplay between the ACA and the Religious Freedom Restoration Act of 1993 ("RFRA"). Since 2011, the federal courts have repeatedly considered whether forcing religious objectors to provide health plans that include contraceptive coverage violates the Religious Freedom Restoration Act. The courts consistently have failed to provide definitive guidance in their rulings. After the 2016 election the federal government acknowledged the RFRA problems with the regulatory mechanism and changed its rules to provide the full religious exemption that some parties had been seeking for years, while expanding the provision of contraceptives in other ways. However, certain states, led by Pennsylvania, challenged the new rules and have asserted that RFRA does not allow the government to promulgate a broader religious exemption to protect religious objectors like the Little Sisters of the Poor. Among the questions that the Supreme Court has agreed to hear is whether the federal government lawfully exempted religious objectors from the regulatory requirement to provide health plans that include contraceptive coverage.

Kansas has joined an amicus brief filed by sixteen states that asserts that the current religious exemption rules ensure that proper respect is afforded to sincerely held religious objections to rules governing this area of health insurance and coverage, with minimal impact on the government's decision to otherwise require health insurance contraceptive coverage.

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