The ACA Cases Continue

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On July 9, at 1pm Central time, the U.S. Court of Appeals for the Fifth Circuit will hear oral argument in *Texas v. United States*, the latest effort to have the Affordable Care Act struck down in federal court. The panel hearing the case (announced this morning) consists of Senior Judge Carolyn Dineen King, Judge Jennifer Walker Elrod, and Judge Kurt D. Englehardt. Audio of the oral argument should be posted later that afternoon.

Many commentators have evaluated this case through a partisan prism, assuming that the best way to predict the outcome is simply by looking at the partisan affiliation of the Presidents who nominated the judges. I think this is mistaken for multiple reasons.

First, unlike the prior ACA cases to reach the Supreme Court, the underlying arguments advanced by the plaintiffs are not well grounded in conservative jurisprudential principles. Whereas the arguments in *NFIB* and *King* were rooted in aggressive enumerated powers and textualist jurisprudence, the arguments here actually cut against traditional conservative approaches to justiciability (standing in particular) and severability. As a consequence, there is less fertile ground in which the case can take root.

Second (and somewhat related), the arguments advanced by the red-state plaintiffs have not garnered support within the conservative legal or political establishment. Conspicuously absent from the filings before the Fifth Circuit are briefs from Republican lawmakers or the conservative legal intelligensia. Even more conspicuously, prominent conservative political and legal figures—including Michael McConnell and Ohio AG Dave Yost—have filed briefs on the other side. At the same time, noted ACA critics, such as the Cato Institute's Michael Cannon, have also been quite critical of the red-state arguments. This is further evidence of the weak and unorthodox nature of the plaintiffs' arguments, and this fact is unlikely to be lost on the judges hearing the case. What this means is that *Texas v. US* is more like the Origination Clause challenge to the ACA than it is like *NFIB* or *King*.

As regular VC readers know, I've blogged on this litigation extensively and contributed to amicus briefs before the district and circuit courts. Here's a listing of my prior posts on this litigation:

- The Clever Red State Lawsuit Against the Individual Mandate, and the Justice Department's Disappointing Response—6/11/18

- Strange Bedfellows Join on Severability in the Latest ACA Case—6/14/18
- How Do the States Have Standing to Challenge an Unenforced and Unenforceable Mandate?—6/15/18
- Meanwhile, in a Texas Courtroom, Is the ACA in Trouble?—9/6/18
- BREAKING: District Court Judge in Texas Holds ACA Is Unlawful—12/14/18
- Understanding Why Judge O'Connor Was Wrong to Conclude Plaintiffs Had Standing to Challenge the Penalty-Less Individual Mandate—12/21/18
- Court Stays Ruling Invalidating the Affordable Care Act Pending Appeal—12/31/18
- Justice Department Revises Its Position in Texas ACA Case—3/25/19
- Does Anyone Support DOJ's Position in the Texas ACA Case?—3/29/19
- Another Round of Strange Bedfellows on Severability in Texas v. U.S.—4/1/19
- Fifth Circuit Adds New Wrinkle to Texas ACA Case—6/26/19

I've also co-authored two *New York Times* op-eds on the case with Abbe Gluck, available here and here.

Texas v. US is not the only ACA case in town. While folks were focused on the Census, redistricting, and cross cases, the Supreme Court accepted certiorari in a trio of casesconcerning whether the federal government owes health insurance companies risk corridor subsidy payments. The ACA declares that insurance companies are entitled to such money, but Congress pointedly refused to appropriate the money, and adopted an appropriations rider saying no money could be spent to fulfill this obligation. A divided U.S. Court of Appeals for the Federal Circuit rejected the insurance companies' claims. At stake is a good bit of money—$12 billion—in addition to broader principles about appropriations law, and the ability of Congress to use appropriations riders to alter legal or financial obligations contained in previously enacted statutes.

Nicholas Bagley has more background on these cases here.