



Office of the Attorney General
Washington, D. C. 20530

June 7, 2018

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington, DC 20515

Re: *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex.)

Dear Madam Leader:

After careful consideration, and with the approval of the President of the United States, I have determined that, in *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex.), the Department will not defend the constitutionality of 26 U.S.C. 5000A(a), and will argue that certain provisions of the Affordable Care Act (ACA) are inseverable from that provision. Pursuant to 28 U.S.C. 530D, I am writing to advise you of this decision.

Prior to the Tax Cuts and Jobs Act (Jobs Act), most individuals were required to make a so-called “shared responsibility payment” each year if they failed to maintain minimum essential coverage under Section 5000A(a). 26 U.S.C. 5000A(b)–(c). Shortly after the ACA’s enactment, the constitutionality of Section 5000A(a)’s “[r]equirement to maintain minimum essential coverage” was the subject of several lawsuits. In *National Federation of Independent Business v. Sebelius* (*NFIB*), a majority of the Supreme Court concluded that this requirement to purchase health insurance could not be sustained as a valid exercise of Congress’s power under the Commerce Clause. 567 U.S. 519, 572 (2012). A different majority nonetheless upheld the constitutionality of Section 5000A(a) under Congress’s taxing power. *Id.* at 570.

On December 22, 2017, the Jobs Act amended Section 5000A(c) by eliminating (effective in 2019) the penalty imposed for noncompliance with Section 5000A(a). Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092. The Jobs Act did not, however, amend Section 5000A(a) itself. A coalition of 20 States and two individuals has now brought suit against the federal government, claiming that Section 5000A(a) is unconstitutional under *NFIB* in light of the Jobs Act’s amendment to Section 5000A(c).

I have determined that the plaintiffs in *Texas v. United States* are correct that Section 5000A(a) will be unconstitutional when the Jobs Act's amendment becomes effective in 2019. The Supreme Court in *NFIB* held that "our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity." 567 U.S. at 572. In his controlling opinion, Chief Justice Roberts acknowledged that Section 5000A(a) "reads more naturally as a command to buy insurance than as a tax." *Id.* at 574. But citing the duty to adopt a saving construction if "fairly possible," the Chief Justice held that Section 5000A(a) was "constitutional[] because it can reasonably be read as a tax." *Id.* at 574–575. Critical to the Court's ruling was its characterization of Section 5000A(a) as "yield[ing] the essential feature of any tax: it produces at least some revenue for the Government." *Id.* at 564. Beginning in 2019, however, Section 5000A(a) will produce no revenue for the Government. As a result, the *NFIB* Court's saving construction will no longer be available.

As you know, the Executive Branch has a longstanding tradition of defending the constitutionality of duly enacted statutes if reasonable arguments can be made in their defense. But not every professionally responsible argument is necessarily reasonable in this context, as "different cases can raise very different issues with respect to statutes of doubtful constitutional validity," and thus there are "a variety of factors that bear on whether the Department will defend the constitutionality of a statute." Letter to Hon. Orrin G. Hatch from Assistant Attorney General Andrew Fois at 7 (Mar. 22, 1996). Weighing those considerations here, I have concluded that this is a rare case where the proper course is to forgo defense of Section 5000A(a).

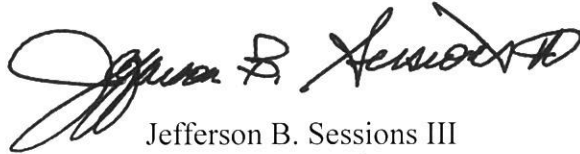
The Department in the past has declined to defend a statute in cases in which the President has concluded that the statute is unconstitutional and made manifest that it should not be defended, as is the case here. *See* Seth P. Waxman, *Defending Congress*, 79 N.C. L.Rev. 1073, 1083 (2001). My decision also adheres to the Department's longstanding respect for comity between the three branches of government. In *NFIB*, the Court concluded that Section 5000A(a) would be unconstitutional if it could not be construed as a tax. Five years later, Congress struck the financial penalty—deemed a tax by the Court—associated with Section 5000A(a). We presume that Congress legislates with knowledge of the Court's holdings. *See, e.g., United States v. Fausto*, 484 U.S. 439, 460 n.6 (1988); *cf. Harris v. United States*, 536 U.S. 545, 556 (2002) (refusing to apply the canon of constitutional avoidance where doing so would contradict the "respect for Congress" upon which "[t]he avoidance canon rests"). Moreover, the Department's decision not to defend Section 5000A(a)'s constitutionality will not prevent the court in *Texas v. United States* from resolving the question, given the posture of the case. For these reasons, the Department will decline to defend the constitutionality of 26 U.S.C. 5000A(a).

In their lawsuit, the plaintiffs further argue that Section 5000A(a) is also inseverable from the rest of the ACA, and therefore that the statute and all of its implementing regulations should be invalidated. In *NFIB*, the Department previously argued that if Section 5000A(a) is unconstitutional, it is severable from the ACA's other provisions, except those "guarantee[ing] issuance of coverage in the individual and group market" ("guaranteed issue"), 42 U.S.C. 300gg-1, 300gg-3, 300gg-4(a), and "prohibiting discriminatory premium rates" ("community rating"), *id.* 300gg(a)(1), 300gg-4(b). I concur in the Department's prior determination. Post-Jobs Act, Congress's express findings in the ACA continue to describe Section 5000A(a) as "essential" to the operation of the guaranteed-issue and community-rating provisions, because otherwise

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individuals could wait until they become sick to purchase insurance, thus driving up premiums for everyone else. *See* 42 U.S.C. 18091(2)(I). This question of statutory interpretation does not involve the ACA's constitutionality and therefore does not implicate the Department's general practice of defending the constitutionality of federal law. Outside of these two provisions of the ACA, the Department will continue to argue that Section 5000A(a) is severable from the remaining provisions of the ACA.

Sincerely,

A handwritten signature in black ink, appearing to read "Jefferson B. Sessions III". The signature is fluid and cursive, with a large initial "J" and a stylized "S".

Jefferson B. Sessions III
Attorney General