Texas Public Policy Foundation

September 14, 2020

Via Electronic Filing System and First-Class Mail
Hon. Scott S. Harris, Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

RE: *California, et al. v. Texas, et al.*, No. 19-840
Texas, et al. v. California, et al., No. 19-1019

Dear Mr. Harris:

I represent the individual respondents in No. 19-840, who are also conditional cross-petitioners in No. 19-1019. On August 25, 2020, we received copies of letters that the California Attorney General's Office and the U.S. House of Representatives sent to you voicing their opinions about the scope of the arguments in my clients' reply brief. But neither letter is a motion. Nor does either expressly request any form of relief. Given that posture, it is unclear whether a response to those letters is necessary or appropriate under this Court's rules.

Out of an abundance of caution, however, my clients respectfully submit that California and the U.S. House of Representatives have misread the Court's April 2, 2020, order authorizing Respondents' reply briefs in these consolidated cases. That order authorizes the conditional cross-petitioners "to file a reply brief limited to Question 2 presented by the petition for certiorari in No. 19-1019." And that second question presented asks "[w]hether the district court properly declared the ACA invalid in its entirety *and* unenforceable anywhere." Conditional Cross-Pet. i (No. 19-1019) (emphasis added). On its face, then, Question 2 uses the "coordinating conjunction" "'and,'" a word whose well-established "job" is to "link[] independent ideas." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011).

The Individual Respondents' reply brief does nothing more than follow this well-established usage by addressing the two ideas plainly linked in Question 2—did the district court correctly hold that the ACA is invalid in its entirety (because the individual mandate is not severable) *and* could not be enforced anywhere in the Nation? *See* Individual Respondents' Reply Br. 1–3 (addressing whether "the ACA is unenforceable nationwide"); *id.* at 3–11 (addressing whether the ACA "is invalid in its entirety"); *see also* Tex. Reply Br. 3–11 (addressing validity of ACA without individual mandate); *id.* at 12–19 (addressing geographic scope of district court's order).

Indeed, neither California nor the U.S. House of Representatives suggests how Respondents could have addressed whether the ACA is "invalid in its entirety"—as Question 2 and the Court's April 2 order expressly permit—*without* discussing severability principles. They do not because they cannot: Whether the district court correctly held the ACA "invalid in its entirety" hinges on whether it correctly interpreted the ACA's nonseverability provisions, *see* 42 U.S.C. §10891(2), in light of this Court's severability precedents.

Petitioners' objections are all the more surprising given the timing of the Court's most recent severability cases. The Court released two severability opinions at the end of last Term—after Respondents filed their opening briefs. *See Barr v. Am. Ass'n of Pol. Consultants*, 140 S.Ct. 2335 (2020); *Seila Law LLC v. CFBP*, 140 S.Ct. 2183 (2020). The principal thrust of Respondents' reply briefs on severability is that *Barr* and *Seila Law* support their earlier severability contentions, and the Court's rules allow Respondents "to present" such "late authorities" in a supplemental brief even without leave of Court. S.Ct. R. 25.6. Arguments plainly permissible in a supplemental brief do not become impermissible because Respondents instead made them in a reply brief that the Court expressly authorized for that purpose.

Very truly yours,

s/Robert Henneke
ROBERT HENNEKE
Texas Public Policy Foundation
Counsel for Respondents Neill Hurley and John Nantz

cc: Samuel P. Siegel (Counsel for State Petitioners)
Douglas N. Letter (Counsel for U.S. House of Representatives)
Jeffrey B. Wall (Counsel for Federal Respondents)
Kyle Hawkins (Counsel for State Respondents)