

Overview to the Upcoming Supreme Court Decision on the ACA

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Background

The Patient Protection and Affordable Care Act (ACA) is comprehensive, market-based health reform legislation enacted on March 23, 2010. On that same day, lawsuits were filed across the country to challenge the constitutionality of various ACA provisions. The U.S. Supreme Court is reviewing the only appellate decision that finds a provision of the ACA unconstitutional, the Eleventh Circuit’s decision in *Florida v. U.S. Department of Health and Human Services*.¹

The Court heard six hours of oral argument in the case over a three day period from March 26-28, 2012—a modern day record for the Supreme Court. Over 140 briefs were submitted in the case—an all-time Supreme Court record. The Court is considering four questions:

- (1) Is the suit challenging the individual mandate barred by the Anti-Injunction Act?
- (2) Did the Commerce Clause of the Constitution authorize Congress to enact the individual coverage mandate?
- (3) If the individual mandate is unconstitutional, must the ACA be invalidated in its entirety or can all or part of the law be “severed” from the mandate and remain in effect?
- (4) Does the ACA Medicaid expansion (extending coverage to individuals with incomes below 133% of the federal poverty level) unconstitutionally coerce states into continuing their participation in the Medicaid program?

- The APHA joined two “friend of the court” briefs: one supporting *severability* of the ACA’s public health provisions if the Court finds the mandate unconstitutional and the other supporting the constitutionality of the *Medicaid* expansion.

A summary of each issue is provided below.

The Four Questions: Arguments Pro and Con

1. The Anti-Injunction Act (AIA): The Procedural Argument

¹ *Florida v. DHHS* is the short-hand reference to the three cases that were heard and appealed together from the 11th Circuit: *Florida v. DHHS*, *National Federation of Independent Businesses v. Sebelius*, and *DHHS v. Florida*.

The AIA provides that taxes can be challenged only after the tax has been assessed.

Argument for application of the AIA: The Affordable Care Act states that individuals who do not maintain minimum coverage must pay a “penalty.” However, Congressional labeling does not necessarily control, and the Court should look to the effect of the provision to determine whether it is a tax or simply a civil penalty. Here, the penalty is a tax because it will be enforced by the Internal Revenue Service and generate some revenue. As a tax, the individual mandate/penalty provisions are subject to the AIA and can be challenged only after the tax has been assessed (after 2014).

Argument against application of the AIA: The ACA describes the payment required from individuals who do not have minimum coverage as a “penalty.” Labeling is important, especially, here, where both Congress and the President were careful not to use the word “tax.” The purpose of the penalty is to give individuals an incentive to have minimum coverage, not to raise revenue.

- If the Court finds that the AIA applies, then it would not decide the constitutionality of the minimum coverage requirement until after 2014-15. To put it in legal terms, the Court would hold the minimum coverage issue is not yet “ripe” for review.
- If the Court finds that the AIA applies, it could still decide whether the Medicaid expansion is constitutional.
- The Eleventh Circuit held the AIA does not apply.
- By contrast, the Fourth Circuit Court of Appeals held the AIA does apply and vacated two lower court decisions on the constitutionality of the minimum coverage provision (one case going each way).
- Most constitutional scholars predict that the Court will hold that the AIA does not apply.

2. Minimum Coverage Requirement: The Commerce Clause Argument

The Commerce Clause authorizes Congress “to regulate commerce among the several states.”

Argument for the minimum coverage provision: Long-standing Court precedents recognize that the commerce clause provides expansive congressional authority to regulate even individual activity that, when viewed cumulatively, has a substantial effect on interstate commerce. There is no question that health care and the health insurance market involve interstate commerce. Health expenditures represent 17% of the GDP. Over 80% of Americans participate in the health care market annually. Health care consumption generates over \$43 billion in uncompensated health costs annually—costs that are shifted onto others and increase the average premiums that families pay for their health insurance by about a \$1000 each year. The ACA health insurance market reforms are clearly regulating commerce, and the individual mandate is a necessary and proper enactment. Other ACA provisions require insurance companies to issue policies regardless of an applicant’s health condition (guaranteed issue) and to avoid discriminatory pricing for people with pre-existing conditions (community rating). Without the minimum coverage requirement, these other provisions would allow individuals to wait until they are ill to obtain insurance—a situation

that would significantly increase health insurance premiums and make the system established by the ACA unworkable.

Argument against the minimum coverage provision: The individual mandate exceeds the authority given to Congress in the commerce clause and goes far beyond existing Supreme Court cases that recognize limits to that authority. The provision is not regulating “commerce among the several states” but rather individuals who are living in the United States, forcing them into the stream of commerce to purchase insurance. In other words, the individual mandate is regulating individual inactivity to require activity. If the Court allows the provision to stand, there will be no boundaries on Congressional authority, and Congress can require individuals to do increasingly specific things, such as purchase broccoli and health club memberships.

- If the Court holds the provision is unconstitutional, then it will have to decide whether the entire ACA falls or whether parts of the ACA remain in effect.
- The Eleventh Circuit held the minimum coverage requirement is unconstitutional.
- By contrast, well-respected conservative judges in the Sixth Circuit and D.C. Circuit Courts of Appeal wrote opinions holding the minimum coverage provision is constitutional.
- Supreme Court scholars believe that Chief Justice Roberts and Justice Kennedy are most “at play” on this issue.

3. Severability: The Argument Over What Remains if the Mandate is Struck Down

Argument that the individual mandate can be severed from the rest of the ACA: There is a legal presumption in favor of severability; thus, the Court has the responsibility to upend as little of the law as possible. The ACA is broad legislation—2700 pages with numerous independently functioning provisions, most of which have little to do with health insurance and the mandate.

Argument that parts of the ACA fall: The minimum coverage, guaranteed issue and community rating provisions of the ACA are inextricably intertwined. Congress intended them to work together such that all three of these provisions must be declared void and unenforceable, if the individual mandate is held unconstitutional. These three provisions can be severed from the remainder of the ACA. This is the position taken by the U.S. Government.

Argument that the entire ACA falls: The ACA is one big piece of intertwined legislation, such that the entire law must be stricken if the mandate is unconstitutional. Furthermore, the ACA, unlike some other laws, does not contain a severability clause.

- A decision voiding the ACA would have broad repercussions. It would repeal provisions designed to bring health insurance and improved access to preventive care to 32 million uninsured Americans. It would void the Act’s public health provisions, including the Prevention and Public Health Fund. It would raise questions about the viability of actions taken by the President to implement ACA provisions pursuant to Executive Order, for example his creation of the National Prevention, Health Promotion, and Public Health Council (which released the first ever National Prevention Strategy in June 2011).

Provisions that affect health care delivery to most Americans would be repealed. Among these are provisions that are already in effect, including ones that close the Medicare “donut hole” for prescription drugs, allow young adults to remain on their parents’ insurance until age 26, provide insurance to individuals who are uninsurable because of pre-existing conditions (currently, about 62,000), require employers to provide privacy for breast feeding mothers at work, and authorize states to use Medicaid funds to create health homes for people living with chronic conditions.

- The Eleventh Circuit found the individual mandate provision was severable from the remainder of the ACA.
- During oral argument, some Supreme Court Justices wondered whether it would intrude less upon congressional authority to declare the entire ACA unconstitutional, as opposed to the Court picking and choosing among the various provisions and deciding which stand and which fall.

4. Medicaid Expansion: The Coercion Argument

Medicaid was enacted pursuant to Congress’ Spending Clause authority. A previous Supreme Court case mentioned the possibility that conditions on state participation in a Spending Clause program could be unconstitutionally coercive.

Argument for repealing the expansion: The expansion makes a radical change in the Medicaid program. Even though Medicaid participation is nominally voluntary, states have no choice but to participate in the program and implement the expansion. The sheer size of each state’s federal Medicaid funding has become so large that no state can afford not to participate. The expansion is coercive because failure to participate will cause a state to lose all federal Medicaid funds. Congressional authority to enact legislation pursuant to the Spending Clause must have some limit, and the Medicaid expansion is beyond that limit.

Argument for upholding the expansion: The Court has never held a Spending Clause enactment to be unconstitutionally coercive. The ACA is a particularly inappropriate basis for making such a holding because the expansion is fully consistent with the way Medicaid has worked over its entire 47-year history. The expansion is implemented in just the same way as previous Medicaid expansions, except that it is more generous to the states (offering them 100% federal funding, to be phased down to 90% over time). Over the entire history of the program, the federal government has taken a range of enforcement actions against states that are not complying with the federal law. The federal government has rarely, if ever, terminated all federal funding to a state. Although a state’s decision to withdraw from Medicaid would be a difficult ethical one, Medicaid has always been and remains a voluntary program.

- This is a “facial” challenge to the Medicaid expansion, meaning that the complaining state officials must show that there are no circumstances under which the Medicaid expansion would be constitutional. However, early implementation is already underway in CT, MN, and DC, and state legislators from all 50 states and DC filed a brief supporting the constitutionality of the expansion.
- The Medicaid program’s size is, for the most part, due to the actions of the states themselves. States have made exceptional use of Medicaid options to expand their

programs beyond the minimum requirements of the Medicaid Act, with over 60% of all Medicaid spending attributable to states' optional expenditures on mandatory populations and expenditures on optional populations.

- The Eleventh Circuit held the Medicaid expansion is not unconstitutional, as did Florida District Judge Vinson, who otherwise ruled against the ACA.
- If the Court finds the Medicaid expansion provision unconstitutional, it would have to decide whether it can be severed from remaining, constitutional provisions of the ACA. (*See* discussion at section 3, above).
- No federal court has accepted this argument in the context of the ACA or, indeed, with respect to any Spending Clause enactment. Thus, a finding of unconstitutionality would have repercussions not only for the Medicaid expansion but, potentially, other Medicaid provisions and Spending Clause enactments.

Conclusion

The Supreme Court is expected to issue its decision sometime this month. Barring instruction from the Court otherwise, there is a 25-day period during which a party may ask for rehearing. (The Court rarely grants rehearing.) Thereafter, the case will be returned to the lower courts, which will issue the necessary orders for the parties to comply with the ruling.

The decision will have a tremendous effect on health care delivery, health status, and constitutional law in the United States. The case will figure prominently in this year's election year politics. Regardless of what the Court decides, the U.S. Congress could amend and/or repeal all or part of the ACA.

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