Health Law Advisory

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Florida v. HHS Raises Key Constitutional Issues Related to Health Care Reform

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The Affordable Care Act (ACA) has garnered significant national attention. It makes several fundamental reforms to the nation's health care system — including major changes affecting the country's health insurance markets. Reflecting considerable controversy over the law, opponents have fought vigorously since its passage to have it declared unconstitutional by the courts.

Path to the Supreme Court

The Supreme Court will hear oral arguments addressing these issues on March 26, 27, and 28. While it usually takes several years for cases to get to the Supreme Court, many of the courts at the lower levels have fast-tracked cases relating to the ACA because some of the law's most controversial reforms are being implemented over the next 22 months and have the potential to have wide-ranging effects on the states and U.S. citizens. So as the ACA celebrates its two-year anniversary, issues key to its survival will be argued in front of the Supreme Court.

Justices of the Supreme Court

JUSTICE	APPOINTING PRESIDENT
John Roberts (Chief Justice)	George W. Bush (2005)
Antonin Scalia	Ronald Reagan (1986)
Anthony Kennedy	Ronald Reagan (1988)
Clarence Thomas	George H.W. Bush (1991)
Ruth Bader Ginsburg	Bill Clinton (1993)
Stephen Breyer	Bill Clinton (1994)
Samuel Alito	George W. Bush (2006)
Sonia Sotomayor	Barack Obama (2009)
Elena Kagan	Barack Obama (2009)

Over 20 cases have been filed challenging the constitutionality of the ACA for one reason or another. The seven cases shown in the chart below have received particular focus from commentators and the media.

KEY COURT DECISIONS	DISTRICT COURT	APPELLATE COURTS	SUPREME COURT

Baldwin v. Sebelius	Dismissed (8/27/2010)	Dismissed (8/17/2011)	
Thomas More Law Center v. Obama	Upheld (10/7/2010)	Upheld (6/29/2011)	
Liberty University v. Geithner	Upheld (11/30/2010)	Dismissed (9/8/2011)	
New Jersey Physicians v. President	Unconstitutional (12/8/2010)	Dismissed (8/3/2011)	
Virginia v. Sebelius	Unconstitutional (12/13/2010)	Dismissed (9/8/2011)	
Florida v. HHS	Unconstitutional (1/31/2011)	Unconstitutional (8/12/2011)	Will hear 3/26/12
Seven-Sky v. Holder	Upheld (2/22/2011)	Upheld (11/8/2011)	

The case currently before the Court, *Florida v. HHS,* is a consolidation of two separate lawsuits from the 11th Circuit Court of Appeals: *The National Federation of Independent Businesses [NFIB] v. Sebelius* and *Florida et al. v. HHS.* In the first case, two individuals and the NFIB, a nonprofit organization that represents small businesses, sued the Secretary of Health and Human Services, Kathleen Sebelius, arguing that the Constitution does not give Congress the authority to enact the individual mandate provisions of the ACA. In the second case, Florida and twenty-five other states sued, arguing that the ACA's Medicaid expansion is unconstitutionally coercive on state governments.

The United States Department of Justice, the states' Attorneys General, and the NFIB have written briefs detailing their legal arguments and will argue the issue in front of the Supreme Court in late March. Numerous other parties who are interested in the outcome have also written briefs as "friends of the court" or *amici curiae* to help persuade the Supreme Court justices to side one way or another.

Key Issues in the Case

The Supreme Court is set to address a number of questions before it. Even before getting to the fundamental merits questions, the Court must decide whether it is appropriate at this time to decide the question of the constitutionality of the individual mandate. In all, the Supreme Court has agreed to hear arguments related to four separate issues.

1. The Initial Barrier – the Anti-Injunction Act

Before even getting to the other issues, the Court must determine whether it can lawfully make a decision on the individual mandate at this time. The key question is whether the financial penalty taxpayers must pay if they do not comply with the mandate is a "tax." The Tax Anti-Injunction Act (AIA), a little-known law dating back to the 1800s, provides that the legality of a tax cannot be challenged in court until after the tax has been assessed. Thus, if the Court decides that the penalty under the ACA falls within the definition of a "tax," it could be prohibited from hearing the case until the first penalties were imposed — which would not occur until 2014.

It is worth noting that both sides of the case — the plaintiffs and the government — have argued that the Court should hear and decide the case now. However, the Supreme Court has, at its own initiative, raised this as an important issue and even appointed special counsel to argue the issue.

It is also worth noting that the briefs and question posed by the Court on the issue of the application of the AIA appear focused around the individual mandate, but do not appear to address directly the question of what would happen with the other issues before the Court if the AIA applies.

2. The Individual Mandate – Can the Government Require Individuals to Get Health Insurance?

The ACA requires people to obtain health care insurance coverage by 2014 or face a financial penalty. Opponents of the ACA have argued that the Constitution does not give Congress the authority to enact such a requirement. The Constitution defines the federal government as a government of "enumerated powers." That is, the Constitution gives a list of specific powers to Congress. For any law Congress wishes to enact, it must first determine that it has authority under the Constitution to enact the law. If the law is not based on one of Congress's enumerated powers, it can be invalidated by the courts.

The government has argued that Congress has the authority to impose this requirement under two separate Constitutional clauses — the Constitution's "Commerce Clause" and its power to "Tax and Spend" for the "general welfare."

The Commerce Clause gives to Congress the authority to regulate "interstate commerce." Another clause of the Constitution gives Congress the authority to enact laws that are "Necessary and Proper" for carrying out this authority. Taking these two clauses together, the Supreme Court has previously ruled that Congress can regulate virtually any activity, even activity that is not "interstate" itself, that has an effect on interstate commerce. Because of this broad interpretation, Congress has used the Commerce Clause to enact a wide range of regulation, some of it arguably only remotely related to interstate commerce. Historically, such regulation has been almost universally upheld by the Supreme Court — although more recently the Court has begun to draw some lines around what constitutes interstate commerce.

The government's argument is that, because health care insurance has such a large economic impact on Americans, nearly all individuals utilize health care at one time or another such that those with coverage subsidize those without, and because the economic impact can cross state boundaries, Congress has the authority to regulate it under the Commerce Clause. But the challengers argue that a mandate requiring individuals to purchase a product from a private entity is outside of the Commerce Clause's reach. A decision not to purchase insurance is not economic activity subject to regulation; rather, it is "inactivity." Opponents also argue that such a use of the Commerce Clause violates principles of individual liberty and opens the door for the government to force people to buy things that they do not want or need.

The government has also made a second argument supporting Congress's authority to implement the mandate. This argument points out that the penalty under the mandate is structured essentially as a tax.[1] Congress has broad power to tax individuals. Rather than "mandating" that individuals purchase coverage, the rule can be seen as imposing a tax that can be avoided by taking certain actions. So far, none of the courts that have heard this issue have agreed with the government's position, largely because the language of the ACA indicates that Congress did not see it as a "tax" but as an obligation with a penalty attached.

3. Severability — Can the Rest of the ACA (In Whole or In Part) Stay Intact if the Individual Mandate Fails?

The Supreme Court has ruled that, when the courts strike down one part of a large statute as violating the Constitution, they should, if at all possible, preserve other parts of the law that do not violate the Constitution. There are times, however, when multiple parts of a law are so "inextricably intertwined" that a court will find them to be "non-severable" — and all of these provisions must fall together.

The 11th Circuit Court of Appeals ruled that the individual mandate was unconstitutional, but that the rest of the ACA could be implemented without it.[2] The 26 states and NFIB, however, argue on appeal that the individual mandate is inextricably intertwined with the ACA's other provisions, so the entire law must be overturned if the Court invalidates the mandate. The government argues that most of the law is severable from the individual mandate and thus should remain in place, even if the mandate is struck down. The government's position, however, is that the insurance market reform provisions of the law — including provisions requiring insurers to issue coverage to all applicants and limiting insurers' ability to vary premiums based on health status and other related factors — are so

closely tied to the individual mandate that they must also be invalidated and struck from the statute should the mandate be found to be unconstitutional.

Other courts that have found the individual mandate to be unconstitutional have ruled differently than the 11th Circuit on the issue of severability. Thus far, only Judge Vinson in Northern District of Florida[3] has ruled that the mandate is unconstitutional and completely non-severable such that the entire ACA must fall. Judge Conner of the Middle District of Pennsylvania has found the individual mandate to be unconstitutional and partially severable, such that the "guarantee issue" and "adjusted community rating" insurance market reform provisions mentioned above must also be struck from the ACA.[4]

4. Medicaid Expansion – Can the Government Require States to Expand Medicaid as a Condition of Receiving Federal Health Care Funding?

The final issue is whether the Constitution allows the federal government to require states to adopt the ACA's eligibility expansions to Medicaid in order to remain eligible for federal Medicaid funds. The Constitution does not allow the federal government to require state governments to take specific actions. Congress can, however, make the receipt of federal funds dependent on the states' complying with certain conditions, and thus indirectly incentivize certain actions. For example, the Court has found that, although Congress cannot require states to pass laws raising the drinking age to 18, it can make a state's eligibility for federal highway funds conditional on having such laws. Thus, Congress cannot coerce states, but it can incentivize states.

With purely federal programs, this is not an issue. For example, Medicare is run entirely by the federal government and requires essentially no participation by the states. Medicaid, on the other hand, is a joint federal-state program. While much of the funding comes from the federal government with states matching a percentage of the funding, most of the implementation is done at the state level. The federal government sets certain rules about whom the states must cover and what services must be provided. This has been considered constitutional because state participation in Medicaid is voluntary. Although all states currently have Medicaid programs, they could, theoretically, drop their programs at any time — if they were willing to forego federal funding.

While the Supreme Court has ruled that, in general, such spending incentives are allowed, it has also stated that there may be a point when the spending program is so large that it effectively "coerces" the state into participating. That is what the states argue is happening here. Under the ACA, states are required to greatly expand Medicaid eligibility. States not complying with the expansion risk losing all federal Medicaid funds. Furthermore, a state's residents with household incomes below 100% of the Federal Poverty Level do not qualify under the ACA for premium tax credits offered in conjunction with exchange coverage, because the ACA anticipates that these individuals with receive coverage through Medicaid.

The states challenging the ACA contend that Medicaid has become such a fundamental part of states' health care systems that it is no longer truly "voluntary." Although states can, in theory, opt out, the loss of federal funding would be so massive that no state would — or could — ever do so. Thus, by requiring states to expand their coverage in order to get federal funding, the government is, in effect, coercing the states.

All of the District and Circuit Courts of Appeals have rejected this argument, and many scholars were surprised that the Supreme Court agreed to hear the argument at all. It is not clear why the Court accepted the case. This could indicate that the Court takes the argument very seriously and could find that the Medicaid expansion is invalid, though many scholars think that is improbable. It could also be that the Court does not intend to invalidate the expansion in this case, but hopes to use this as an opportunity to set some clear "ground rules" for what does or does not constitute coercion.

Oral Argument and Briefs

Each side will present their oral arguments regarding the issues between March 26-28, 2012, according to the following schedule:

ISSUE	DATE	TIME FOR ARGUMENT (6 HRS TOTAL)
Anti-Injunction Act ("Tax Versus Penalty")	March 26	1.5 hours
The Individual Mandate	March 27	2 hours
Severability	March 28	1.5 hours
Medicaid Expansion	March 28	1 hour

In addition to briefs from the parties, the Supreme Court has also accepted over one hundred briefs from amici curiae (friends of the court), independent parties who submitted briefs arguing for a particular outcome or illustrating particular facts. Parties that have filed briefs include hospitals, nonprofit organizations, political advocacy groups, state legislators and executive officials, small businesses, trade organizations, religious groups, U.S. congressional representatives, economists, actuaries, and other parties.

Lower Court Decisions and Potential Supreme Court Decisions

The lower courts have come to many different conclusions on several of the issues before the Court. Of the seven cases to go to the appeals court, two have held that the individual mandate is constitutional; one has held that it is unconstitutional, one has held that the lawsuit is barred by the Anti-Injunction Act, and three have been dismissed for other reasons. None have held that the Medicaid expansion is unconstitutional.[5]

There are numerous possible outcomes to the case. These outcomes include:

- The Court decides that it cannot address the merits of the constitutionality of the individual mandate question until 2014 or 2015 because it is barred by the Anti-Injunction Act.
- The Court decides that the Medicaid expansion is unconstitutional, but the rest of the ACA is constitutional.
- The Court decides that the individual mandate is unconstitutional, and that the mandate is fully severable from the rest of the ACA such that the rest of the law may survive.
- The Court decides that the individual mandate is unconstitutional, and that some (or even all) of the ACA's other provisions must also be struck down because these provisions are inextricably linked to the individual mandate (with particular focus on the insurance market reforms, including those requiring guarantee issue and adjusted community rating).

It has been very difficult to predict how the Supreme Court will rule. While some scholars attempt to guess what each justice will do based on his or her previous voting record, nearly all agree that even the most thoughtful of predictions are effectively speculative. Even in the lower court decisions, judges who were considered reliably "conservative" nevertheless voted to uphold the ACA.

With the wide range of opinions coming from the lower courts, and given the national importance of these issues, the one safe bet is that all eyes will be focused on the oral arguments made before the Court and its ultimate decision expected this summer.

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» Addendum: Where to Read More About the Cases and Perspectives

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Endnotes

1 Note that the definition of a "tax" for the purposes of considering the constitutionality of the mandate may be narrower than the definition of "tax" for purposes of the Anti-Injunction Act, which has been interpreted in past case law to include "penalties." The Fourth Circuit court noted that the "Supreme Court has concluded that the AIA uses the term 'tax' in its broadest possible sense," and that in recent years the Court has reiterated that the term "tax" in the AIA encompasses penalties that function as mere "regulatory measure[s] beyond the taxing power of Congress" (citing *Bob Jones Univ. v. Simon*, 416 U.S. 725, 740). *See Liberty University, et al., v. Timothy Geithner, et al.*, No. 10-2347. (4th Cir. Sept. 8, 2011), pp. 18-19.

2 *Florida v. HHS*, 648 F.3d 1235 (2011).

3 *Florida ex rel Bondi v. HHS*, 780 F. Supp. 2d 1256 (2011).

4 *Goudy-Bachman et al. v. HHS*, 764 F. Supp. 2d 684 (2011).

5 The ACA related question before the Court deals with Medicaid expansion, but in *Douglas v. Independent Living Center,* 132 S.Ct. 72 (2012), the Supreme Court recently heard a case about reductions in provider payments and related issues related to whether there is a private right of action under the Constitution's Supremacy Clause to challenge state statutes as inconsistent with Federal Medicaid law. Because the Federal government approved the reductions changing the posture of the case pending its consideration by the Court, the Court in a 5-4 decision vacated the judgments of the lower court and remanded the case to the Ninth Circuit Court of Appeals so that the parties had the opportunity to address the issue in the first instance in light of the changed circumstances.