Health Care Reform Update: Preparing for the Supreme Court Arguments About the Constitutionality of the *Affordable Care Act*

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On November 14, 2011, the Supreme Court granted *certiorari* in three cases which involve constitutional challenges to the *Patient Protection and Affordable Care Act ("Affordable Care Act")*. In recognition of the importance and complexity of those challenges, it also set aside an unprecedented six hours for oral argument.

Those arguments are scheduled for March 26-28, 2012, and the Court's decision is not expected before June 2012. Until then, a basic understanding of the questions the Court will consider, coupled with information about how those questions were briefed and decided by lower courts, may be the best way of predicting how the Court will rule.

Overview of the Affordable Care Act

Although passage of the *Affordable Care Act* marked an important time in American politics, national health care reform is not a modern concept. Rather, it is an idea that was borne from models that newly-industrialized countries in Europe first used in the late 1800's, and it has been a consistent piece of the American political dialogue since the early 1900's.

Over the past 100 years, virtually every American president has called for some type of health care reform. Some of those efforts were stalled by significant political opposition. Others were greatly hampered by a perceived need to contain the costs associated with existing federal programs. For any of several reasons, then, most of the earliest American health care reforms were modest in scope.

In contrast, the *Affordable Care Act* has been described as one of the most sweeping and far-reaching national reform acts since the *Civil Rights Act of 1964*. Indeed, it calls for numerous insurance reforms and creates state-run health benefit exchanges; it makes changes in the Medicare and Medicaid programs; it invests in and establishes standards for new care environments; it changes tax laws by giving certain credits, closing certain loopholes, and imposing new taxes and fees. Taken as a whole, the *Affordable Care Act* therefore promises to reform the national health care system in ways that will impact virtually every member of American society -- personally, financially and/or professionally.

The Individual Mandate

While many of the changes mandated by the *Affordable Care Act* are new, others are not. Rather, many of the *Affordable Care Act*'s provisions serve to give life to old ideas and programs that were considered (if not tried) in the past, and some serve only to expand the scope of existing programs. Perhaps for that reason, many of the pending legal challenges have focused on a controversial portion of the *Affordable Care Act* which is unique to that piece of legislation: the "individual mandate."

With some exceptions, all individuals will be required to obtain and maintain "minimal essential coverage" by January 2014. To satisfy that mandate, individuals will need to secure coverage through a government-sponsored program (such as Medicare, Medicaid, or CHIP); an employer-sponsored plan; a plan available in the individual market within a state; a grandfathered health plan; or a state's health benefit exchange.

Beginning in 2014, anyone who does not have minimum essential coverage in place will be required to make a "shared responsibility payment" as part of their federal income tax return. The amount of that shared responsibility payment will depend on household income: initially, it will be the greater of 1% of household income over the filing threshold or $95; beginning in 2016, those who do not have coverage will be required to pay the greater of $695 per person (up to a maximum of $2,085 per family) or 2.5% of household income. Nevertheless, the *Affordable Care Act* describes those shared responsibility payments as a "penalty" rather than as a tax.

Questions to be Decided by the Supreme Court

Since the *Judiciary Act of 1925* and the *Supreme Court Case Selections Act of 1988*, most cases cannot be appealed to the U.S. Supreme Court as a matter of right. A party who wants the Supreme Court to review a decision of a federal or state court must instead petition for writ of *certiorari*. When granting *certiorari*, the Supreme Court often identifies specific questions that it plans to decide. With respect to the trio of cases involving the *Affordable Care Act* as to which the Supreme Court recently granted *certiorari*, those questions include the following:

Question #1: Is the shared responsibility penalty a tax?

Subject to numerous exceptions, the *Tax Anti-Injunction Act* (26 U.S.C. Section 7421(a)) generally prohibits any suit which is filed for the purpose of restraining the assessment or collection of a tax. If the Court concludes that the shared responsibility penalty which the *Affordable Care Act* will impose on individuals who do not purchase minimum essential coverage is a tax, it also could conclude that no suit to restrain the assessment or collection of that tax is permissible. In that event, other authorities suggest the Court could review the constitutionality of the *Affordable Care Act* only as part of a suit for a tax refund. See, e.g., 26 U.S.C. Section 6532; 26 U.S.C. Section 7422(a); 28 U.S.C. Section 1346(a); 11 U.S.C. Section 505(a)(2).

The individual mandate will not become effective until 2014. The Court's resolution of this first question therefore could delay a ruling on the constitutional challenges to the *Affordable Care Act* for at least another 3 years – after the penalty will first have been paid as part of an individual's 2014 federal taxes (and a request for refund rejected). The order granting *certiorari* in *Department of Health & Human Services v. Florida* therefore directed the parties to brief and argue the following question: "Whether the suit brought by respondents to challenge the minimum coverage provision of the *Patient Protection and Affordable Care Act* is barred by the *Anti-Injunction Act*."

Several lower courts already have considered that question.

In *Thomas More Law Center v. Obama*, 651 F.3d 529 (6th Cir. 2011) ("*Thomas More v. Obama*"), the Sixth Circuit noted that the government and the plaintiffs had agreed that the action was not barred by the *Tax Anti-Injunction Act*. The Court nevertheless independently considered the question and concluded that, because the *Affordable Care Act* consistently describes the shared responsibility payments as penalties, Congress did not intend for the case to be barred by a statute prohibiting litigation over taxes.

Although the issue arose in a different context, the Eleventh Circuit reached a similar conclusion in *Florida v. Department of Health & Human Services*, 648 F.3d 1235 (11th Cir. 2011) ("*Florida v. HHS*"). In that case, the government had asserted that the shared responsibility payments were taxes which had been validly enacted pursuant to the *Taxing and Spending Clause* (U.S. Constitution, Art. I, Sec. 8, Cls. 1). After reviewing the text of the *Affordable Care Act* and the legislative history, though, the Court found that Congress had repeatedly described the payments as penalties, had described certain other payments as taxes, and had purposefully deleted any references to the payments as taxes from the final bill. The Court therefore concluded that Congress had intended for the shared responsibility payments to be considered civil regulatory penalties, rather than taxes.

Numerous other cases are in accord. Indeed, with just one exception, every lower court which has considered the question of whether the shared responsibility payments are taxes has concluded that they are not. See, e.g., *Mead v. Holder*, 766 F. Supp. 2d 16, 40-41 (D.D.C., 2011); *Goudy-Bachman v. Department of Health & Human Services*, 764 F. Supp. 2d 684, 694-97 (M.D. Penn. 2011); *Liberty University v. Geithner*, 753 F.Supp.2d 611, 629 (W.D. Va 2010); *Florida v. HHS*, 716 F.Supp.2d 1120, 1130-41 (N.D. Florida 2010); *United States Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903, 921-22 (N.D. Ohio 2010); *Virginia v. Sebelius*, 728 F.Supp.2d 768, 786-88 (E.D. Va. 2010).

Only the Fourth Circuit's decision in *Liberty University, Inc. v. Geithner*, No. 10-2347, 2011 WL 3962915, at *1 (4th Cir. 2011) ("*Liberty University v. Geithner*") reached the opposite conclusion. In that case, the Court reasoned that a "tax, in the general understanding of the term," is simply "an exaction for the support of the government." *United States v. Butler*, 297 U.S. 1, 61 (1936). The Court then noted that, through the *Internal Revenue Code*, Congress had given the Secretary of the Treasury power to assess and collect numerous exactions, many of which included penalties. After reviewing several Supreme Court decisions, the Fourth Circuit surmised that the *Tax Anti-Injunction Act* did not simply bar cases involving the

assessment of taxes, but also barred cases involving the Secretary of the Treasury's efforts to assess and collect other types of exactions. The Court therefore concluded that, because the penalties to be imposed for a failure to comply with the individual mandate constitute a tax within the meaning of the *Internal Revenue Code*'s assessment provisions, they also should be considered a tax within the meaning of the *Tax Anti-Injunction Act*.

In light of that opinion, the Supreme Court's request for further briefing and argument on how (if at all) the *Tax Anti-Injunction Act* impacts the pending cases may involve more than the question of whether the shared responsibility payments are taxes. It also may raise the related question of whether the *Tax Anti-Injunction Act* bars litigation over the government's right to assess and collect exactions which are authorized by the *Internal Revenue Code* but which are not, themselves, a form of taxes.

Question #2: Does the individual mandate exceed Congress' powers under the Commerce Clause?

In the *Affordable Care Act*, Congress suggested that it had the authority to enact the individual mandate pursuant to the Commerce Clause (U.S. Const., Art, I, Sec. 8, Cl. 3). Indeed, the "findings" set forth in the *Affordable Care Act* recite details about how health care and health insurance affect the nation's economy, characterize them as "commercial and economic in nature," and assert that they substantially affect interstate commerce. Perhaps because Congress anticipated a constitutional challenge to the *Affordable Care Act*, the findings also expressly cite to a case in which the Supreme Court held that "insurance is interstate commerce subject to Federal regulation." *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 548(1944).

To be sure, Congress has broad implied powers under the Commerce Clause. See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). The Supreme Court also has held that Congress has authority under the Necessary and Proper Clause (U.S. Constitution, Art. I, Sec. 8, Cl. 18) to regulate local non-economic activities when the regulation "is a necessary part of a more general regulation of interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). However, those principles often are in tension with another tenet of constitutional law: that "[t]he powers of the legislature are defined and limited; and those limits may not be mistaken or forgotten." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). In past cases, then, the Supreme Court has struck a balance by limiting the constitutional exercise of Congress' powers under the Commerce Clause to three subjects: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that "substantially affect" interstate commerce." See, e.g., *Perez v. United States*, 402 U.S. 146, 150 (1971).

The individual mandate does not purport to regulate a channel of interstate commerce. Cf., *Gibbons v. Ogden*, 22 U.S. 1 (1824) [navigable waterways]. Likewise, it does not purport to regulate an instrumentality of interstate commerce. Cf., *Shreveport Rate Case*, 234 U.S. 342 (1914) [freight wagons]. The second question that the Supreme Court will consider therefore could be re-written as one asking whether the individual mandate regulates an activity which has a "substantial effect" on interstate commerce.

The mere fact that Congress asserts a particular activity substantially affects interstate commerce "does not necessarily make it so." *United States v. Morrison*, 529 U.S. 598, 614 (2000). In fact, the Court will not defer to Congress' judgment that there is a substantial effect on interstate commerce if there is no evidence of such substantial effect. In *United States v. Lopez*, 514 U.S. 549 (1995), for example, the Supreme Court concluded that a law prohibiting the carrying of guns near schools (the *Gun-Free School Zones Act of 1990*) was beyond Congress' power to regulate interstate commerce because there was no evidence that the law affected commerce or the economy in any meaningful way.

When deciding whether Congress has constitutionally regulated an activity which has a substantial effect on interstate commerce, the Supreme Court traditionally examines two issues: (1) whether Congress had a rational basis for finding that the regulated activity substantially affects interstate commerce; and (2) if a rational basis for that finding exists, whether the means selected to regulate the activity are reasonable and appropriate. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). The Supreme Court's decision, then, is best broken down into three sub-issues: (1) Whether Congress is regulating an "activity"; (2) whether the activity has a "substantial effect" on interstate commerce; and (3) whether the means selected to regulate the activity are reasonably adapted to the attainment of a legitimate end.

Related Question: Is Congress regulating activity?

In *Florida v. HHS*, the Eleventh Circuit observed that the Supreme Court "has never been faced with the type of regulation at issue here." *Florida*, 648 F.3d at 1286. As the district court in *Virginia v. Sebelius* further explained:

> "Neither the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market."

Virginia, 728 F.Supp.2d at 782. Stated simply, then, the individual mandate is unique because it requires that individuals make a purchase.

Perhaps for that reason, the Supreme Court's decisions under the Commerce Clause typically focus on the regulation of some type of activity. See, e.g., *Gibbons v. Ogden*, 22 U.S. 1 (1824) ["Commerce, undoubtedly, is traffic, but it is something more: it is intercourse . . . and is regulated by prescribing rules for carrying on that intercourse."]. However, the Supreme Court has never expressly required that "activity" be a prerequisite for a constitutional regulation of commerce. Indeed, the "activity/inactivity dichotomy . . . is nowhere to be found in the text of the Commerce Clause, nor in the jurisprudence surrounding it." *Florida*, F.3d at 1338.

Despite that fact, lower courts in at least two cases have commented on the question of whether the individual mandate is unconstitutional because it does not regulate activity.

In *Thomas More v. Obama*, the Sixth Circuit upheld the *Affordable Care Act* without deciding whether Congress can regulate inactivity. Instead, the Court reasoned that foregoing the purchase of health insurance is not "inactivity," but an affirmative decision to participate in

the health care market without health insurance. *Id.*, 651 F.3d 529 at 544. ["The activity of foregoing health insurance and attempting to cover the cost of health care needs by self-insuring is no less economic than the activity of purchasing an insurance plan."]. The Court therefore concluded that the individual mandate was a constitutional exercise of Congress' power under the Commerce Clause because it regulates "active participation in the health care market."

In *Florida v. HHS*, both the district court and the Eleventh Circuit took a different position. In its opinion, the Eleventh Circuit explained that:

> "[T]he Supreme Court's prior Commerce Clause cases all deal with already-existing activity -- not the mere possibility of future activity (in this case, health care consumption) that could implicate interstate commerce -- the Court never had to address any temporal aspects of congressional regulation. However, the premise of the government's position -- that most people will, at some point in the future, consume health care -- reveals that the individual mandate is even further removed from traditional exercises of Congress's commerce power."

Florida, F.3d at 1294. The district court separately cautioned that, if Congress "has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting . . . that compelling the actual transaction is itself 'commercial and economic in nature, and substantially affects interstate commerce,' it is not hyperbolizing to suggest that Congress could do almost anything it wanted." *Florida*, 780 F. Supp. 2d at 1286.

The constitutional challenges to the individual mandate therefore present the Supreme Court with an opportunity to reassess the reach of Congress' power under the Commerce Clause. Regardless of whether it adopts the broad definition of "activity" which was embraced by the Sixth Circuit in *Thomas More v. Obama* or the narrower meaning which produced the lower courts' rulings in *Florida v. HHS*, the Supreme Court may, in turn, be forced to better identify the ultimate limits of Congress' power under the Commerce Clause.

Related Question: Does the activity being regulated have a substantial effect on interstate commerce?

Even under exceptional circumstances, one individual's participation in the health care marketplace without health insurance is likely to have a negligible impact on interstate commerce. However, the government has suggested that "[i]t is inevitable . . . that every individual -- today or in the future -- healthy or otherwise -- will require medical care." *Virginia,* 728 F.Supp.2d at 775. If so, the collective impact of uninsured people on interstate commerce could be substantial. For that reason, the constitutional challenges to the individual mandate also involve important questions about the "aggregation theory."

The aggregation theory is based on the notion that, so long as the class of activities regulated by Congress has a substantial effect on interstate commerce in the aggregate, the law may be applied validly to any person whose individual activities have almost no impact on

interstate commerce. It was first recognized in *Wickard v. Filburn*, a case in which the Supreme Court upheld the power of Congress to regulate the personal cultivation and consumption of wheat on a private farm by reasoning that the consumption of such non-commercially produced wheat reduced the amount of commercially produced wheat purchased and consumed nationally, thereby affecting interstate commerce. *Id.*, 317 U.S. 111 (1942).

Two of the lower courts which considered challenges to the individual mandate used the aggregation theory when concluding it was constitutional. *Liberty University v. Geithner* [". . . there is a rational basis for Congress to conclude that individuals' decisions about how and when to pay for health care are activities that in the aggregate substantially affect the interstate health care market."]. See, *Thomas More v. Obama* ["Congress had a rational basis for concluding that leaving those individuals who self-insure for the cost of health care outside federal control would undercut its overlying economic regulatory scheme."].

Similarly, the government argued in *Virginia v. Sebelius* that the aggregation theory requires the court to consider the overall regulatory scheme of which the challenged measure is part. In turn, the government offered that the prospect of "adverse selection" makes the individual mandate "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." Citing congressional testimony, the government added that the individual mandate substantially affects interstate commerce in the aggregate because "without full market participation, the financial foundation supporting the health care system will fail, in effect causing the entire health care regime to 'implode'." *Virginia*, 728 F. Supp. 2d at 776.

In contrast, the Eleventh Circuit expressed concern in *Florida v. HHS* about the limits of Congress' power under the Commerce Clause if the aggregation doctrine were applied to "'economic and financial decisions' to avoid commerce." As that Court reasoned:

> "Applying aggregation principles to an individual's decision not to purchase a product would expand the substantial effects doctrine to one of unlimited scope. . . . If an individual's mere decision not to purchase insurance were subject to *Wickard*'s aggregation principle, we are unable to conceive of any product whose purchase Congress could not mandate under this line of argument. Although any decision not to purchase a good or service entails commercial consequences, this does not warrant the facile conclusion that Congress may therefore regulate these decisions pursuant to the Commerce Clause."

Florida, 648 F. 3d at 1292-93. In other words, the Court reasoned that the mere fact that conduct could ultimately have a commercial consequence does not necessarily make it subject to regulation under the Commerce Clause.

Two recent Supreme Court cases provide some support for that position. In *United States v. Lopez*, the Supreme Court concluded that a law prohibiting the carrying of guns near schools was beyond Congress' power to regulate interstate commerce because there was no evidence that the law affected commerce or the economy in any meaningful way. Similarly, in

United States v. Morrison, the Supreme Court found unconstitutional the *Violence Against Women Act of 1994*, explaining that Congress cannot regulate “noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.” *Id.*, 529 U.S. 598, 617 (2000). Applying the reasoning of those two decisions, the Eleventh Circuit held that -- even if there is some aggregate effect on interstate commerce -- there must still be some connection between the regulated activity and interstate commerce.

Although the individual mandate seems much closer to economic activity than violent criminal conduct or the carrying of a gun to a school, the Eleventh Circuit found it lacks a sufficient connection to interstate commerce to be saved by the aggregation theory:

> “What matters is the regulated subject matter's connection to interstate commerce. That nexus is lacking here. It is immaterial whether we perceive Congress to be regulating inactivity or a financial decision to forego insurance.”

Florida, 648 F. 3d at 1293. To find that the individual mandate is constitutional, the Supreme Court therefore may need to either articulate how that nexus is present or explain why it is not required under the Commerce Clause.

Related Question: Is the individual mandate reasonably adapted to a legitimate end?

The Supreme Court always has rejected readings of the Commerce Clause that would permit Congress to exercise a police power. *U.S. v. Lopez*, 514 U.S. 549, 584 [“…our cases are quite clear that there are real limits to federal power.”]. Therefore, even if the Supreme Court concludes that Congress had a rational basis for concluding the individual mandate regulates conduct that has a substantial effect on interstate commerce, it is likely to separately examine “whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end.” *Gonzales v. Raich*, 545 U.S. 1, 37 (2005).

The government has argued that the individual mandate satisfies that requirement because it is reasonably adapted to Congress’ goal of reforming the American health care system. In *Virginia v. Sebelius*, the Eastern District of Virginia explained that the government’s argument flows from an implied premise that “[i]t is inevitable . . . that every individual – today or in the future – healthy or otherwise – will require medical care.” *Virginia*, 728 F.Supp.2d at 775. In *Florida v. HHS*, the Eleventh Circuit summarized the argument which flows from that premise as follows:

> “. . . the government submits that Congress’s insurance industry reforms – specifically, its community-rating and guaranteed issue reforms – will encourage individuals to delay purchasing private insurance until an acute medical need arises. Therefore, the government argues that unless the individual mandate forces individuals into the private insurance pool before they get sick or injured, Congress’s insurance industry reforms will be unsustainable by the private insurance companies.”

Florida, 648 F. 3d at 1309. The plaintiffs generally argue that "if Congress has the constitutional authority to enact the individual mandate, then there is virtually no limit on its authority, and [the Commerce Clause] (whether standing alone or in concert with the Necessary and Proper Clause) would be transformed into a grant of general police power." *Florida*, 648 F. 3d at 1350. The Necessary and Proper Clause gives Congress the power to make all laws necessary and proper for carrying out into execution its enumerated powers – in this case the Commerce Clause power. The Supreme Court will need to strike a balance and determine the breadth of Congress's powers under the Commerce Clause and the Necessary and Proper Clause.

The lower courts have sided with the plaintiff's on this issue. In *Virginia v. Sebelius*, the District Court concluded that creating an affirmative duty to buy health insurance was not reasonably adapted to Congress's goal of health care reform, and concluded that "an individual's personal decision to purchase—or decline to purchase—health insurance from a private provider is beyond the historical reach of the Commerce Clause, the Necessary and Proper Clause does not provide a safe sanctuary." *Virginia*, 728 F. Supp. 2d at 782.

Similarly, the Eleventh Circuit, in *Florida v. HHS* concluded that rather than enable the execution of the Affordable Care Act's regulations, the individual mandate operates to counteracts the costs on insurance companies. The Court therefore held that it was not reasonably adapted to Congress's goal of health care reform. The Court acknowledged that the individual mandate's effect on cost is "a relevant political consideration," but concluded that it "does not convert an unconstitutional regulation (of an individual's decision to forego purchasing an expensive product) into a constitutional means to ameliorate adverse cost consequences on private insurance companies engendered by Congress's broader regulatory reform of their health insurance products." *Florida*, 648 F. 3d at 1310.

Question #3: Is the individual mandate severable?

The House version of the *Affordable Care Act* had a severability clause, but the Senate version that ultimately was signed into law did not. If the Supreme Court determines that the individual mandate is unconstitutional, it therefore must then decide whether the rest of *Affordable Care Act* can stand without the individual mandate.

In the absence of an express statement of Congress' intent, the Supreme Court must determine whether Congress would have enacted the legislation without the unconstitutional provision. *Alaska Airlines v. Brock,* 480 U.S. 678, 684 (1987) ["Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."]. Given "the vagaries of the legislative process, 'this inquiry can sometimes be elusive'." *Free Enterprise Fund v. Public Company Accounting Oversight Board.* 130 S. Ct. 3138 (2010). In connection with the *Affordable Care Act*, though, those challenges might seem especially daunting. Indeed, as the district court stated in *Virginia v. Sebelius* :

> "[G]iven the haste with which the final version of the 2,700 page bill was rushed to the floor for a Christmas Eve vote… [i]t would be virtually impossible within the present record to determine whether Congress would have passed this

bill, encompassing a wide variety of topics related and unrelated to health care, without Section 1501," the individual mandate.

Virginia, 728 F.Supp.2d at 789. Rather than attempt such an analysis, then, the court in *Viginia v. Sebelius* elected to limit the impact of its ruling by severing the individual mandate (and those provisions making direct reference to it) from the rest of the *Affordable Care Act*.

In contrast, the district court in *Florida v. HHS* purported to analyze the individual mandate's severability, ultimately concluding that the rest of the *Affordable Care Act* should not stand without it. In part, the district court reasoned that "the individual mandate was an essential and indispensable part of the health reform efforts, and that Congress did not believe other parts of the Act could (or it would want them to) survive independently." *Id.* 780 F. Supp. 2d at 1305. The district court therefore held that the individual mandate could not be severed because "the individual mandate and the remaining provisions are all inextricably bound together in purpose and must stand or fall as a single unit."

If the Supreme Court concludes that Congress purposefully omitted the severability provision, there is a presumption against severability. *Russello v. United States*, 464 U.S. 16, 23-24 (1983). Otherwise, there is a presumption in favor of severability, and the Supreme Court has instructed that courts must "strive to salvage" acts of Congress by severing any constitutionally infirm provisions "while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 239-30 (2006). The Supreme Court therefore has opted to sever constitutionally defective provisions from the remainder of a statute in the overwhelming majority of cases. The Eleventh Circuit therefore concluded in *Florida v. HHS* that the district court had erred in its decision to invalidate the entire act, reasoning that excising the individual mandate would not prevent the remaining provisions from being "fully operative as a law." *Id.,* 648 F. 3d at 1321.

To suggest otherwise, a group of 103 economists led by former Congressional Budget Office Director Doug Holtz-Eakin and including two Nobel Prize winners have filed an amicus brief which purports to demonstrate "the economic reality that the individual mandate is intertwined with a host of ACA provisions, not simply the core insurance reforms." Brief for Amici Curiae Economists, No 11-393, 11-400, 23. The economists' brief begins by offering that the *Affordable Care Act* will increase health care costs by prompting increased enrollment in insurance coverage. It then argues that the individual mandate is designed to secure the financial resources necessary to cover those new costs (estimated to total $360 billion between 2012 and 2021). The economists therefore assert that the individual mandate should not be severed because the premiums paid by healthy enrollees -- those targeted by the individual mandate – are necessary to help keep insurance companies solvent.

A contrary conclusion could leave unaffected two private insurance industry reforms with which the individual mandate is closely related: guaranteed issue, and the prohibition on preexisting condition exclusions. Because those portions of the *Affordable Care Act* could prompt people to wait until they need insurance before buying it, the government has suggested that allowing them to stand without the individual mandate "will be unsustainable by the private

insurance companies." *Florida*, 648 F. 3d at 1309. In *Florida v. HHS*, the Eleventh Circuit nevertheless reasoned that:

> "Just because the invalidation of the individual mandate may render these provisions less desirable, it does not ineluctably follow that Congress would find the two reforms so undesirable without the mandate as to prefer not enacting them at all. The fact that one provision may have an impact on another provision is not enough to warrant the inference that the provisions are inseverable. This is particularly true here because the reforms of health insurance help consumers who need it the most."

Florida, 648 F. 3d at 1328. In part, the Eleventh Circuit's opinion also suggested that principles of comity contributed to its reluctance to sever the individual mandate. *Id.*, at 1303-04 [". . . having to re-balance a statutory scheme by engaging in quasi-legislative 'line drawing' is a 'far more serious invasion of the legislative domain' than courts should undertake."]. With respect to the question of severability, then, the Supreme Court could simply conclude that "[i]t is Congress that should consider and decide these quintessentially legislative questions, and not the courts." *Id.*, at 1305.

Question #4: Does the expansion of Medicaid violate state sovereignty?

Enacted in 1965, *Medicaid* is a program that is jointly funded by the state and federal governments and provides health care for people and families with low incomes. If a state program meets the eligibility and coverage requirements set by federal law, federal funds are provided for a percentage of state costs. Although the exact amount is determined by a statutory formula, the federal government generally pays for between 50 and 77 percent of the total program costs in each state.

The *Affordable Care Act* provides for a substantial expansion of the population that states "must cover." Specifically, the *Affordable Care Act* requires States to cover anyone from a family with an income below 133% of the federal poverty line, including adults without dependent children. Under the *Affordable Care Act*, the federal government will pay the entire cost of coverage for those who are newly eligible from 2014 until 2016, before dropping its coverage in stages (i.e., to 90% in 2020). The states will thereafter be required to pay as much as 10% of the additional costs.

The Congressional Budget Office has projected that, by 2015, the *Affordable Care Act* will increase Medicaid enrollment by 24 million people. The Centers for Medicare and Medicaid Services therefore has estimated that the *Affordable Care Act* will impose between $20 and $42 billion in additional costs on the states by 2020, even after counting the federal financing for Medicaid.

The constitutional question involves the consequences to a state which declines to pay for its portion of the Medicaid expansion. Specifically, the *Affordable Care Act* provides that such a state would lose all of its federal Medicaid funding. Several states therefore have

objected that the *Affordable Care Act* "coerces" them into compliance with a federal objective and violates the "coercion doctrine."

The Supreme Court first discussed the coercion doctrine in *Steward Machine v. Davis*, where an employer challenged a new employment tax under the *Social Security Act*. The Supreme Court found no coercion, but expressed that "the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact." *Id.*, 301 U.S. 548, 590 (1937).

The Supreme Court next considered whether the threat of withholding federal funds is excessively coercive in the landmark case *South Dakota v. Dole* ("*Dole*"). That case involved a state's challenge to the *National Minimum Drinking Age Act*, withheld 5 percent of federal highway funding from states that did not raise their drinking ages to 21. The Supreme Court, in a 7-2 decision, ruled that the *Drinking Age Act* did not pass the point where pressure turned into compulsion, given that it only cost the state a small percentage of highway funds. In the process, the Supreme Court also established four primary restrictions on legislation under the Spending Clause: (1) Spending must be in pursuit of the general welfare; (2) Conditions on spending must be reasonably related to the legislation's stated goal; (3) Conditions must be unambiguous so that states can knowingly choose whether to participate; and (4) Conditions cannot induce state activities which are unconstitutional. *Id.* 483 U.S. 203 (1987).

Unlike federal highway subsidies, Medicaid is one of the largest items on the budgets of most states. A loss of federal funds would require states to either drastically cut health coverage for the poor or dramatically increase taxes -- by over 30% based on some figures. Amicus briefs have argued that, because these two options are not true alternatives, the *Affordable Care Act* is not merely applying "pressure" as in *Dole* but is unconstitutionally violating state sovereignty.

Despite the restrictions established in *Dole*, lower courts have had a difficult time applying the coercion theory. In *Kansas v. United States*, for example, the Tenth Circuit explained that:

> "The cursory statements in *Steward Machine* and *Dole* mark the extent of the Supreme Court's discussion of a coercion theory. The Court has never employed the theory to invalidate a funding condition, and federal courts have been similarly reluctant to use it."

Id., 214 F. 3d 1196, 1200 (2000). In *Nevada v. Skinner,* the Ninth Circuit separately identified several issues that the Supreme Court has thus far left unanswered: "Does the relevant inquiry turn on how high a percentage of the total programmatic funds is lost when federal aid is cut-off? Or does it turn, as Nevada claims in this case, on what percentage of the federal share is withheld? Or on what percentage of the state's total income would be required to replace those funds?" The Court then asked a fundamental question: "[C]an a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds — or is the state merely presented with hard political choices?" *Id.*, 884 F. 2d 445, 448 (1989).

In *Florida v. HHS*, the Eleventh Circuit acknowledged the limited case law on the coercion doctrine, as well as the fact that the Supreme Court has never devised a test to apply it. Nonetheless, the Eleventh Circuit wrote that "this does not mean that we can case aside our duty to apply it; indeed, it is a mystery to us why so many of our sister circuits have done so." *Id.*, 648 F. 3d 1266. The Eleventh Circuit then identified four reasons that the Affordable Care Act's expansion of Medicaid was not unconstitutionally coercive: (1) Congress reserved the right to make changes to the program; (2) The federal government will bear nearly all the costs associated with the expansion; (3) The states had plenty of notice – nearly four years from the date the bill was signed into law -- to decide whether they will continue to participate in Medicaid by adopting the expansions; and (4) There is no certainty that states will lose their Medical funding if they don't comply with the law. *Id.* at 1268.

In the Eleventh Circuit's view, the *Affordable Care Act* gives states a "real choice – not just in theory but in fact – to participate in the Act's Medicaid expansion. Where an entity has a real choice, there can be no coercion." *Id.* After "serious thought and some hesitation," the Eleventh Circuit therefore concluded that the *Affordable Care Act*'s expansions of Medicaid were not unduly coercive. *Id.,* at 1267.

The Supreme Court likely recognizes that it has poorly articulated a judicial test for federal-state coercion. Regardless of whether it finds the Affordable Care Act's expansion of Medicaid to pass constitutional muster, the Supreme Court therefore may use this opportunity to articulate a clear test for prohibiting Congressional coercion in the future.

Questions the Supreme Court will <u>not</u> Decide

When the Supreme Court granted *certiorari* in three cases involving constitutional challenges to the *Affordable Care Act*, it elected not to take action on petitions for *certiorari* which had been filed in three other appeals.

The issues in two of these cases (*Thomas More v. Obama* and *Virginia v. Sebelius*) are largely duplicative of questions presented by the cases in which the Supreme Court has asked for oral argument. However, the issues raised in the third case were different.

Among other things, the plaintiffs in *Liberty University v. Geithner* challenged a provision in the *Affordable Care Act* which, when it goes into effect in 2014, will require employers with more than 50 full-time employees to either provide the employees with "minimum essential" health insurance coverage or pay significant penalties. The district court did not believe that the "employer mandate" requires employers to purchase a product against their will. Instead, it reasoned that "[t]he opportunity provided to an employee to enroll in an employer-sponsored health care plan is a valuable benefit offered in exchange for the employee's labor, much like a wage or salary" such that it is rational for Congress to mandate that employers provide such insurance coverage to employees. *Liberty University,* 753 F. Supp. 2d 611, 635 (W.D.Va. 2010). The district court therefore held the employer mandate is constitutional under the Commerce Clause because it "regulat[es] the terms of the employment contract." *Id.* at 636.

The plaintiffs In *Liberty University* also objected that the *Affordable Care Act* violates the free exercise of religion under the First Amendment and the *Religious Freedom Restoration Act* because the mandatory insurance payments for which it provides could be used to fund abortions. However, the district court dismissed that claim, explaining that "[p]laintiffs fail to allege how any payments required under the Act, whether fines, fees, taxes, or the cost of the policy, would be used to fund abortion." *Liberty University*, 753 F. Supp. 2d at 648.

On appeal, the Fourth Circuit simply dismissed the lawsuit on the grounds that the *Anti-Injunction Act* deprived it of jurisdiction to proceed. The Supreme Court's failure to grant *certiorari* in *Liberty University* therefore might not represent a tacit agreement that the employer mandate is constitutional or that the *Affordable Care Act* does not violate the Freedom of Religion. Instead, it may simply reflect the Supreme Court's opinion that a decision about those constitutional questions should be deferred until both the impact of the *Anti-Injunction Act* and the *Affordable Care Act*'s ability to survive without a constitutionally infirm provision have been determined.

Conclusion

Whether you are a historian, a political observer or a constitutional scholar, the Supreme Court's ruling on the constitutionality of the *Affordable Care Act* will be a landmark decision. Indeed, if the *Affordable Care Act* is upheld – whether in its entirety, or only in part – its comprehensive provisions promise to significantly impact the health care and health insurance industries for decades to come. Conversely, a Supreme Court ruling which invalidates the *Affordable Care Act* as unconstitutional will likely cause the perceived need to substantially reform the American health care system to once again take a prominent place in public debates – while, at the same time, announcing new limits to the power Congress has to pursue that end. Regardless of how the Supreme Court rules, the potential ramifications for individuals, employers, health care providers and health insurers therefore will be substantial and far-reaching.

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