A Comparative Look at the Patient Protection and Affordable Care Act of 2010

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I. What Is the Patient Protection and Affordable Care Act?

On March 23, 2010, Congress enacted the Patient Protection and Affordable Care Act ("PPACA" or the "Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). PPACA represents an enormous effort to reform the health insurance market and expand coverage for Americans. PPACA essentially requires health insurers to provide coverage for all applicants, and essentially eliminates the insurer's ability to discriminate against those with preexisting conditions by imposing higher premiums. However, these laws and regulations expose insurers to the risk of insuring a more unhealthy pool of insureds, especially in that healthy people would have the incentive to wait until they are diagnosed with a condition before applying for health insurance. According to Congressional comments, without other measures taken by Congress, the business costs for health insurers would climb to such a level that health insurers would likely go out of business. 42 U.S.C. §18091.

To prevent the loss of the health insurance market, PPACA includes a Minimum Essential Coverage Provision, commonly called the "individual mandate," which requires most Americans to either purchase health insurance, or pay a "shared responsibility payment," which is a penalty equaling the greater of 2.5 percent of a household's taxable income or $695 per person. 26 U.S.C. §5000A.

To assist those who cannot afford health insurance, PPACA also seeks to expand the coverage offered by the states' Medicaid programs by requiring states to insure adults with incomes up to 133 percent of the poverty level. States will receive 100 percent federal funding for the cost of increasing payment rates for 2013 and 2014; that percentage will drop gradually until reaching 90 percent in 2020.

II. History of Enactment and Litigation

Congress' votes on PPACA were almost entirely partisan, passing both houses with all Republicans voting against it. Many Republicans remain adamantly opposed to the Act, leading the Republican-controlled House to a vote to repeal it in January 2011. However, the largely symbolic vote was never seriously considered by the Democratic-led Senate. After two years, the Act has remained the subject of much controversy and litigation, with polling showing only 34 to 37 percent of Americans having a favorable view of the Act.

The Act has been the subject of about thirty constitutional challenges. Central to much of the litigation is whether, in passing the individual mandate, Congress exceeded its power under the Commerce Clause of the Constitution "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." These cases focus on the second power—the "Interstate Commerce Clause."

The Interstate Commerce Clause allows Congress to regulate "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Florida v. United States DHHS*, 780 F. Supp. 2d 1256, 1273 (N.D. Fla. 2011) (quoting *United States v. Lopez*, 514 U.S. 549 (1995)). Congress has used the Commerce Clause to authorize its most expansive regulations. *See, e.g., Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding a federal law against intrastate marijuana use because it was part of a genuine federal scheme to regulate the (illegal) interstate marijuana market); *Wickard v. Filburn*, 317 U.S. 11 (1942) (upholding a federal law preventing a wheat farmer from growing 12 acres of wheat for personal consumption because the law set acreage allotments for wheat farmers in an effort to control the price). Although the Commerce Clause has been interpreted to grant broad power

to Congress, opponents of the Act believe the individual mandate uses the Commerce Clause in an unprecedented way, allowing Congress to penalize individuals for not entering a market, as opposed to regulating an individual who has voluntarily entered the market.

Five cases reached the federal courts of appeals. In *Thomas More Law Center v. Obama*, 651 F.3d 529 (6th Cir. 2011), a public interest law firm, on behalf of its members, and four individuals challenged the individual mandate. The appellate court held that plaintiffs had standing to bring the suit and that the Anti-Injunction Act did not bar the action because the lawsuit would not interfere with the government's need to assess and collect taxes as expeditiously as possible. In a plurality opinion, the Sixth Circuit determined that the individual mandate was not unconstitutional.

Two cases were appealed to the Fourth Circuit: *Liberty University, Inc., v. Geithner*, 2011 U.S. App. LEXIS 18618 (4th Cir. 2011), and *Commonwealth ex rel. Cuccinell v. Sebelius*, 656 F. 3d 253 (4th Cir. 2011). In *Liberty University*, the Fourth Circuit determined that the plaintiffs could not maintain their action because it was barred by the Anti-Injunction Act, which prevents any pre-enforcement actions pertaining to the constitutionality of taxes. In *Commonwealth*, the 4th Circuit determined that the State of Virginia lacked standing to maintain an action against the government pertaining to the individual mandate.

Florida v. United States Department of Health and Human Services was brought by 26 states, the National Federation of Independent Business ("NFIB"), and individual citizens, challenging the constitutionality of the individual mandate and the Medicaid expansion requirements for the States. The Northern District of Florida granted the plaintiff's motion for summary judgment on the issue of the individual mandate, holding that it was unconstitutional. The district court also determined that the individual mandate could not be severed from the rest of the Act, rendering the entire Act unconstitutional. The Eleventh Circuit affirmed the district court's determination that the individual mandate was unconstitutional, but determined that the individual mandate could be severed from the rest of the Act. Therefore, the Eleventh Circuit considered the constitutional challenge to the Medicaid expansion, and determined that, although it was a close call, the Medicaid expansion was within Congress's spending powers under the Constitution.

Lastly, the D.C. Circuit considered a constitutionality challenge in *Seven-Sky v. Holder*, 661 F.3d 1 (2011). The court of appeals determined the threshold issue that the Anti-Injunction Act, which deals with taxes, was inapplicable to the penalty imposed on individuals who fail to comply with the individual mandate. Next, the court concluded that the individual mandate was within Congress' powers under the Necessary and Proper Clause as a regulation of economic activity that substantially affects the health insurance and health care markets and as an essential element of a broader regulatory scheme. The court of appeals also affirmed the district court's rejection of the plaintiffs' Religious Freedom Restoration Act claim.

III. PPACA Goes to Washington

The Supreme Court granted *certiorari* the Eleventh Circuit's decision in *Florida*, the only one so far striking down the mandate. The Supreme Court granted *certiorari* on the following issues: (1) whether the Anti-Injunction Act bars a pre-enforcement challenge to the individual mandate; (2) whether the individual mandate is unconstitutional; (3) whether the individual mandate is severable from the rest of the Act; and (4) whether the Medicaid expansion exceeds Congress's spending powers under the Constitution. On March 26, 27, and 28, the Supreme Court will hear a total of five and a half hours of argument on PPACA.

A. Anti-Injunction Act

On March 26, the Supreme Court will hear argument on the threshold issue of whether the Anti-Injunction Act, 26 U.S.C. §7421(a) ("AIA"), bars a pre-enforcement challenge to the individual mandate. Sub-

ject to certain exceptions, the AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

In the district court, the Department of Justice ("DOJ") moved to dismiss the action under the theory that the AIA bars all pre-enforcement challenges to the individual mandate. The plaintiff-States in *Florida* argued that the DOJ's argument fails for the reasons that (1) it is not clear that the AIA applies to states, as it bars suits brought "by any person" and must be read against the longstanding presumption that a "person" does not include a sovereign, and (2) Congress did not intend to prevent States from challenging taxes on individual taxpayers, since the States would have no post-assessment means by which to challenge the tax.

The Northern District of Florida denied the DOJ's motion to dismiss under the AIA, and the DOJ appeals on those grounds. The oral argument will last for one hour.

B. Minimum Coverage Provision

On March 27, the Supreme Court will hear argument on the issue of whether enactment of the Minimum Essential Coverage Provision, or the "individual mandate," violated the Constitution. In *Florida*, Senior U.S. District Judge Roger Vinson granted plaintiffs' motion for summary judgment as to their request for a declaratory judgment that the individual mandate was unconstitutional. Judge Vinson held that the Commerce Clause did not authorize the federal government to require an individual to purchase health insurance. In previous cases interpreting the Commerce Clause, "the individuals being regulated…had the choice to discontinue that activity and avoid penalty….Here, people have no choice but to buy insurance or be penalized." *Florida v. United States DHHS*, 780 F. Supp. 2d 1256, 1284 n. 14 (N.D. Fla. 2011).

The Eleventh Circuit upheld the district court's determination that the individual mandate was unconstitutional. *Florida v. United States HHS*, 648 F.3d 1235 (11th Cir. 2011). The Eleventh Circuit called the individual mandate "woefully overinclusive," "conflat[ing] those who presently consume health care with those who will not consume health care for many years to come." *Id.* at 1293, 1295. The court stated that the DOJ argument essentially concluded that "the mere fact of an individual's existence substantially affects interstate commerce, and therefore Congress may regulate them at every point of their life." *Id.* at 1295. Finding that this "theory affords no limiting principles in which to confine Congress's enumerated power," the majority affirmed the district court's holding that the individual mandate was unconstitutional. *Id.*

In its petition for certiorari, the DOJ argues that the Eleventh Circuit's decision denies Congress the broad deference it is due in enacting laws to address the nation's most pressing economic problems and set tax policy. The DOJ argues that the individual mandate prescribes a rule that governs the manner in which individuals finance their inevitable participation in the health care market through insurance, which is the predominant means of financing in the health care market. The DOJ further explains that the individual mandate directly addresses the consequences of economic conduct that distorts the interstate markets for health care and health insurance—namely, the attempt by millions of Americans to self-insure or rely on the back-stop of free care, and the billions of dollars in cost-shifting produced each year when the uninsured do not pay for the care they inevitably need and receive. Thus, in the DOJ's view, Congress' enactment of the individual mandate rests upon its direct, tangible, and well-documented economic effects on interstate commerce.

However, the individual plaintiffs argue that Congress' commerce power presupposes that economic activity exists to regulate, and that the regulated conduct in this case is the absence of commerce, because individuals who have chosen not to purchase healthcare have not entered into the stream of commerce for the health insurance market. In short, the individual plaintiffs argue that compelling commerce is not regulating

commerce, and that there is no basis for Congress to compel individual participation in commerce simply to benefit voluntary market participants or to mitigate the costly burdens of its own federal scheme.

The argument on this issue will last 2 hours.

C. Severability

On March 28, the Supreme Court will hear oral argument on the issue of severability. In *Florida*, the district court declared the entirety of PPACA unconstitutional, reasoning that "Congress has…acknowledged in the Act itself that the individual mandate is absolutely 'essential' to the Act's overarching goal of expanding the availability of affordable health insurance coverage and protecting individuals with pre-existing medical conditions…." *Florida v. United States DHHS*, 780 F. Supp. 2d 1256, 1303 (N.D. Fla. 2011). However, the Eleventh Circuit reversed the decision, citing the strong presumption of severability in federal laws, and reasoning that "wholesale invalidation" would be improper "in light of the stand-alone nature of hundreds of the Act's provisions and their manifest lack of connection to the individual mandate." *Florida v. United States HHS*, 648 F.3d 1235, 1323 (11th Cir. 2011).

In its petition for certiorari, the NFIB explains that the Act imposes new "guaranteed-issue" and "community-rating" insurance requirements, which almost entirely prevent insurers from considering health status when offering or pricing health insurance. These regulations significantly increase the business costs of insurers because they require private insurers to cover the unhealthy, but forbid pricing of that coverage based on actuarial risks. The Act also exposes insurers to the economic risk that healthy people will wait until they are sick to obtain insurance, knowing they cannot be turned away. Thus, Congress imposed the individual mandate to offset the new costs imposed on insurers, and ensured compliance by imposing a penalty on all taxpayers who fail to meet the requirements of the individual mandate. The NFIB argues that the mandate primarily forces healthy and voluntarily uninsured individuals to purchase insurance from private insurers and pay premiums now in order to subsidize the private insurer's costs in covering more unhealthy individuals under the Act's reforms.

In its brief, the NFIB argues that it is beyond evident that PPACA's new insurance regulations cannot operate independently of the mandate in a manner consistent with Congress' intent. In the NFIB's view, voiding the mandate and its regulations so affects the dominant aim of the whole statute as to carry it down with them.

The DOJ argues that the Eleventh Circuit's opinion was correct, that the remainder of PPACA can be severed from the individual mandate. In its brief, the DOJ argues that the Supreme Court has repeatedly held that when confronting a constitutional flaw in a statute, a court must try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact. Many of the Act's provisions are wholly unrelated to the minimum coverage provision, such as the provision that requires employers to provide break times for nursing mothers. The DOJ argues that the petitioners cannot meet their burden to show that, absent the minimum coverage provision, Congress would not have enacted those unrelated provisions, many of which are already in effect.

The argument on the issue of severability will last 90 minutes.

D. Medicaid Expansion

On March 28, the Supreme Court will also hear argument on whether the Medicaid expansion exceeds Congress's spending powers. The 26 State plaintiffs challenged the constitutionality of the Medicaid expansion under the Act, which requires states to insure adults with incomes up to 133 percent of the federal poverty level. The states argued that this expansion "coerced" the states into compliance with the federal

objective by removing state choice and compelling the state to act because it has no other option. The Eleventh Circuit determined that the Medicaid expansion was not unconstitutional.

Precedent states that "Congress cannot…threaten the loss of funds so great and important to the state's integral function…as to compel the state to participate in the 'optional' legislation." *Florida v. United States HHS*, 648 F.3d 1235, 1267 (11th Cir. 2011). The Eleventh Circuit stated that "it is not without serious thought and some hesitation that we conclude that the Act's expansion of Medicaid is not unduly coercive." Id. The holding was supported, in part, by the fact that has Congress reserved the right to make changes to Medicaid, and in the numerous amendments since 1965, the states have been given the option to comply with the changes, or lose all or part of their funding. Additionally, the federal government will bear nearly all the costs associated with the expansion.

In their petition for certiorari, the States urged that its coercion claim is one of the strongest ever presented, showing that the majority of States receive over $1 billion annually in Medicaid funding, which often covers half of the State's Medicaid budget. The States argue that the Act's expansions to Medicaid were expressly crafted to exploit the threat of that devastating loss by putting all of the Medicaid funding—not just a distinct pot of newly available funds—on the line. In the past, when Congress sought to expand Medicaid coverage, it offered additional funding, without threatening existing funding of States that did not agree to the additional obligations. Under the Act, however, rather than offering increased funding to States willing and able to increase eligibility and coverage, Congress has made PPACA's expansions a mandatory condition of continued participation in Medicaid. The States characterize this as "essentially hold[ing] the States hostage based on their earlier decision to establish a Medicaid infrastructure and accept federal funds subject to different conditions." In the States' view, this amounts to coercion that violates Congress' spending powers.

The DOJ argues the Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States," and that incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further policy objectives by conditioning receipt of federal moneys upon compliance with federal statutory and administrative directives. The DOJ notes that every court of appeals that has considered a coercion challenge has rejected it, suggesting that the bar for a successful coercion challenge is extraordinarily high. Because, the DOJ argues, the expansions do not differ materially from the structure of the prior Medicaid amendments, and because the Medicaid program is voluntary, the States cannot meet this high burden and show that PPACA's Medicaid expansion amounts to unconstitutional coercion.

This argument will last for one hour.

IV. Conclusion

An opinion from the Supreme Court is expected by the end of June. One possible outcome of the Supreme Court's decision is that the entire Act will be struck down, because it cannot be severed from the unconstitutional individual mandate. However, many expect that the Supreme Court decision will not wholly dispose of PPACA, leaving many issues to be litigated into the future as the Department of Health and Human Services reveals its regulations and other plans to implement PPACA, including, for instance, the recent uproar regarding mandatory contraceptive and sterilization coverage in health care plans offered by employers, including Catholic employers who are doctrinally opposed to such measures. From a political standpoint, it is not certain that PPACA will survive the first term of a Republican president if President Obama does not win the election. Without a doubt, however, PPACA has inspired many Americans to dust off their Constitutions and pay close attention to the Supreme Court.