

## ***Supreme Court Grants Review of Key Case Testing Constitutionality of Health Law***

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*By Mary Anne Pazanowski*

The U.S. Supreme Court Nov. 14 granted review of a decision from the U.S. Court of Appeals for the Eleventh Circuit that struck down a key provision of the federal health reform law (*National Federation of Independent Business v. Sebelius*, U.S., No. 11-393, review granted 11/14/11; *HHS v. Florida*, U.S., No. 11-398, review granted 11/14/11; *Florida v. HHS*, U.S., No. 11-400, review granted 11/14/11).

The court at its Nov. 10 conference considered three petitions for review of the case: one filed by a group representing small businesses, the National Federation of Independent Business; one filed by 26 state plaintiffs, including Florida; and one filed by the Obama administration.

The administration asked the court to review the Eleventh Circuit's ruling that Congress exceeded its powers under the Constitution when it enacted the individual mandate. The mandate, a provision of the Patient Protection and Affordable Care Act that would require virtually all citizens to purchase health insurance or pay a penalty, is scheduled to go into effect in 2014.

The Supreme Court will consider the question, along with the issue of whether the lawsuit challenging the mandate is barred by the tax anti-injunction act (AIA), 26 U.S.C. § 7421(a), in an extended three-hour argument. Two hours will be allotted to the constitutionality of the mandate, and the court will hear arguments on the AIA issue for the third hour, the court said.

Additionally, the court will consider an issue raised by the NFIB and the states as to whether the individual mandate can be severed from the remainder of PPACA. The Eleventh Circuit held that the individual mandate could be decoupled from the rest of the law. The high court consolidated the NFIB and states' cases for a 90-minute oral argument on this point.

Also, the court granted review of a second question raised by the states regarding the validity of PPACA's Medicaid expansion provision. The Eleventh Circuit rejected the

states' argument that the provision, which requires states to expand Medicaid coverage or forfeit their Medicaid funding, was unduly coercive.

### **'Most Significant Case Since Roe v. Wade.'**

Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute in Washington, told BNA the "Supreme Court has set the stage for the most significant case since Roe v. Wade."

In fact, he said, the litigation over the mandate might be even more important than Roe. "On both the individual mandate and the Medicaid coercion issues, the court will decide whether the Constitution's structure—federalism and enumeration of powers—is judicially enforceable or whether Congress is the sole judge of its own authority," Shapiro said.

Other legal experts contacted by BNA said they were not surprised by the Supreme Court's action. Stuart Gerson, at Epstein Becker Green (EBG) in Washington, said the Eleventh Circuit case was the one the U.S. solicitor general wanted the court to take, and it is the case that tees up the issues the best (see previous article). EBG attorney Shawn Gilman agreed.

The Eleventh Circuit is the only court of appeals so far to declare the individual mandate unconstitutional. The U.S. Courts of Appeal for the Sixth and District of Columbia Circuits have upheld the statute. The Fourth Circuit declined to reach the merits, saying the AIA prevented it from taking jurisdiction over the case.

### **Jurisdictional Question May Derail Review**

The AIA—also a hotly contested issue in the D.C. Circuit's oral argument—precludes courts from hearing pre-enforcement challenges to the assessment or collection of a tax. Gerson told BNA he would not be surprised if the Supreme Court invokes the AIA and finds the litigation challenging the individual mandate premature.

Adam Winkler, a professor at UCLA Law School in Los Angeles, agreed that the court's grant on the AIA issue sent a "signal" that, "despite all the attention on the individual mandate, the court will be very interested in jurisdictional issues."

Winkler told BNA that the court's grant of a full hour of oral argument on the AIA was significant, given the fact that all but one of the appeals courts held there was no jurisdictional bar. "If the justices believed the AIA was irrelevant or unlikely to be a significant issue, they would have given far less argument time to that question," he said.

Washington & Lee University Law School professor Timothy S. Jost also said the AIA poses a serious question for the court. Judge Brett M. Kavanaugh's dissenting opinion in the D.C. Circuit (see related item in this issue) made a convincing argument for finding that the AIA barred consideration of the constitutional issue at this time, he said.

Still, Jost told BNA, although it is possible that the court might be convinced to apply the AIA bar, it is “unlikely.”

### **'Disappointed' in Grant on Medicaid Issue**

If there was any surprise on the orders list, it was the court's grant of review on whether PPACA's Medicaid expansion provision is invalid as unduly coercive.

Jost told BNA he was “disappointed” in the court's decision. There were no circuit splits on this issue, he noted. In fact, he said, no court, including the Eleventh Circuit, ever has invalidated a federal spending provision on the basis of coercion.

The court may have granted review of the issue “simply to put it to bed,” Jost said. On the other hand, if the justices invalidate the Medicaid expansion provision, they would open the door to “calling into question any federal spending program,” he said. That “would be a very dangerous place to go,” Jost told BNA.

Families USA Executive Director Ron Pollack also called the decision to review the Medicaid question surprising and troublesome. Since its enactment in 1965, the Medicaid program has been expanded several times without court objection, he said in a written statement.

“It is particularly disingenuous for the states bringing the case to object to this expansion of Medicaid as ‘coercive,’ because the Affordable Care Act specifies that between 90 and 100 percent of the costs of this expansion will be paid for by the federal government,” Pollack said. “Striking down this Medicaid expansion provision would jeopardize health care for millions of Americans at a time when they can least afford it,” he said.

Jost added that the potential loss of the Medicaid expansion provision is “more of a threat to the implementation of PPACA than the individual mandate.” The next seven months are “prime time” for states to work on implementing the statute, he said. The court's grant of review means that millions of people who would be covered as a result of the expansion, at the very least, will have to wait for coverage.

### **Historical Amount of Time**

Another surprise was the amount of time the court is devoting to oral argument, Gerson said. At more than five hours, this is the longest oral argument the court has scheduled in recent memory, he said. It is a throwback to the early days of the Supreme Court, when an oral argument could go on for days, Gerson said.

Winkler said the court's decision to allow five-and-a-half hours of argument time is “unprecedented” and “extraordinary.” The modern court “usually only allows one hour for even the most contentious issue,” he said. “The last time the justices allowed anything close to that was in 2003, when the court ruled on a host of issues arising from a campaign finance law.”

“The extended period of time is a sign of the significance of the case,” Winkler told BNA.

With the extended argument period, there is no doubt the court will have a comprehensive view of all the issues involved in the litigation, Gerson added.

### **Severability Question to Be Resolved**

Many legal experts, including Jost, do not believe the court will strike down the individual mandate and so will never reach the severability issue on which it granted review.

Gerson said that, if the court reaches the question, it will have set itself upon an “impossible” task. The Obama administration, he said, asked the court to parse the statute and determine which provisions, if any, could survive without the individual mandate.

The statute is more than 1,000 pages long and contains many sections that obviously would not be affected either way if the mandate fails, he said. Other provisions, however, present questions not so easily resolved.

If the court strikes the individual mandate, it would have a “Herculean task” before it in trying to determine what parts of PPACA could be severed, Gerson told BNA. Instead of trying to decide on its own, the court could request an independent report or remand the case to the lower court to determine which parts of the statute would survive, he said.

### **Oral Argument Unlikely Before March**

The oral argument date has not been set, but it is not likely to be before late March, the experts said.

The court took no action on the other PPACA petitions scheduled to be considered at the Nov. 10 conference, *Thomas More Law Center v. Obama*, No. 11-117, and *Liberty University Inc. v. Geithner*, No. 11-11-438.

Another petition, filed by the Commonwealth of Virginia in *Virginia ex rel. Cuccinelli v. Sebelius*, U.S., No. 11-420, was distributed for conference on Nov. 22.