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Florida v. HHS takes health care reform to high court

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The debate over health care reform appears poised to become an election-year nail-biter.

Almost two years after passage of the federal health care reform law spearheaded by President Obama, uncertainty still dominates.

Some government regulators, insurers and health care providers prepare for major changes the law will bring, while others resist such preparations, believing the law will be repealed or declared unconstitutional.

The law's fate now depends on the U.S. Supreme Court.

This commentary first outlines what the law includes. It then discusses the main, state-led suit challenging the law, *Florida v. U.S. Department of Health and Human Services*, and outlines the issues before the Supreme Court. Finally, it offers predictions about how the court might rule.

ABOUT THE AFFORDABLE CARE ACT

President Obama signed the Patient Protection and Affordable Care Act into law March 23, 2010.[1]

Much of the controversy caused by the law is attributed to the individual mandate, also called the minimum coverage provision.[2]

That provision requires nearly everyone in the U.S. to obtain minimum health insurance coverage — whether through an employer, through Medicare or Medicaid, or individually on the private market — or else pay a monetary penalty.

Notably, if a taxpayer fails to pay the penalty, the federal government's only remedy is to deduct the penalty from the person's federal tax return.[3] The government cannot impose a lien or bring any criminal charge for failure to pay the penalty.

Other notable provisions of the Affordable Care Act include:

- Creation of health insurance exchanges where consumers can compare and buy insurance.
- Expansion of Medicaid eligibility to those earning up to 133 percent of the poverty level.
- Subsidies to help individuals and families earning up to 400 percent of the poverty level purchase insurance.
- Monetary penalties on employers with 50 or more employees that do not offer health insurance to their workers.
- Guaranteed-issue requirements that prevent insurers from denying coverage because of a preexisting condition.
- Community-rating requirements that prevent insurers from varying premiums for individual and small group products within certain geographic areas based on health status and other factors.[4]

Although certain provisions of the law have already become effective, most go into effect Jan. 1, 2014.

FLORIDA LEADS CHALLENGERS INTO COURT

Just minutes after Obama signed the Affordable Care Act into law, then-Florida Attorney General Bill McCollum filed suit against the Department of Health and Human Services, the Department of the Treasury, the Labor Department and each department secretary.

The National Federation of Independent Businesses, two individuals and attorneys general from 25 other states joined Florida as plaintiffs in what has become the most successful suit challenging the law.

U.S. District Judge Roger Vinson of the Northern District of Florida granted summary judgment for the plaintiffs Jan. 31, 2011.[5]

He noted that the commerce clause[6] authorizes Congress to regulate economic activity having a substantial effect on interstate commerce, but he found that the decision to avoid purchasing insurance is not economic activity.

Therefore, Judge Vinson concluded that Congress exceeded its power when it enacted the individual mandate.

Additionally, he found that the individual mandate is not severable from the Affordable Care Act and, therefore, he ruled the entire law was unconstitutional.

In August the 11th U.S. Circuit Court of Appeals affirmed Judge Vinson's conclusion that the individual mandate exceeds Congress' commerce clause power.[7]

Unlike Judge Vinson, however, the appeals court ruled the individual mandate was severable from the statute and the remainder of the law was valid.

As of Nov. 14, the federal appeals courts have decided four other cases challenging the Affordable Care Act. Two decisions upheld the law, and two found no standing.

The two upholding the law are *Thomas More Law Center v. Obama*, 651 F.3d 529 (6th Cir. June 29, 2011), and*Seven-Sky v. Holder*, 2011 WL 5378319 (D.C. Cir. Nov. 8, 2011).

However, a 4th Circuit panel ruled in *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. Sept. 8, 2011), that Virginia, which had passed a law purporting to block an individual mandate in that state, lacked standing because the state would suffer no injury from the individual mandate and because a state has no right to insulate itself from federal law.

Judge Diana G. Motz wrote the opinion that Judges James A. Wynn Jr. and Andre M. Davis joined.

The same panel of judges also decided *Liberty University Inc. v. Geithner*, 2011 WL 3962915 (4th Cir. Sept. 8, 2011).

Judge Motz again wrote the opinion, concluding the plaintiffs there lacked standing because the individual mandate's penalty is a tax and the federal Anti-Injunction Act[8] bars preemptive suits challenging taxes. In that case, however, Judge Wynn wrote a concurrence, and Judge Davis filed a dissent.

FLORIDA CASE PRIMED FOR SUPREME COURT REVIEW

Both the plaintiffs and defendants in *Florida* filed petitions for writs of *certiorari* with the Supreme Court Sept. 28, and the court granted review Nov. 14.

Both sides case appear eager to speed the case along. The parties filed their response briefs early, and if they file their merits briefs ahead of schedule, oral argument will likely take place in March.

A decision can be expected by the end of the court's term in June, just months away from the 2012 elections. Regardless of the court's ruling, its decision will likely leave its mark on voters.

While the Supreme Court may consider other issues, the most likely issues appear to be standing, the limits of commerce clause power and severability. Each is explained in turn.

ISSUE BEFORE THE COURT: STANDING

The Anti-Injunction Act states that no person may bring suit to preemptively challenge the assessment or collection of any tax.

In the District Court, the government argued that the individual mandate imposes a tax, not a penalty, and so the AIA bars plaintiffs' claims.[9] The District Court disagreed, finding the "penalty" language in the Affordable Care Act clear.[10]

The 11th Circuit did not rule on the AIA issue, but the government asked the Supreme Court to direct the parties to address the issue in their briefs. [11]

If the Supreme Court rules that the AIA applies, the plaintiffs have no standing to challenge the individual mandate before it goes into effect in 2014.

ISSUE BEFORE THE COURT: COMMERCE CLAUSE

Assuming the plaintiffs have standing, their headline argument is that the individual mandate exceeds Congress' power to regulate interstate commerce by compelling Americans to participate in commerce, thereby regulating the economic inactivity of choosing not to purchase insurance.[12]

To support their argument, the plaintiffs rely on *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000).

In *Lopez*, the Supreme Court ruled that Congress lacked authority under the commerce clause to impose criminal penalties for possession of a firearm in a school zone because the regulated activity did not have a substantial effect on interstate commerce.

The court reasoned that allowing Congress to impose such regulations would impermissibly broaden the scope of the commerce clause and allow Congress to regulate nearly any activity.

For the same reasons, the Supreme Court in *Morrison* struck down a federal law creating a civil remedy for gender-motivated violence.

Conversely, the federal government argues that the individual mandate regulates the delivery of free health care services to the uninsured — rather than regulating a person's decision not to purchase insurance — and has a direct effect on interstate commerce.[13]

The government relies on *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005).

In *Wickard*, the Supreme Court ruled that Congress could regulate the wheat that a farmer grew and consumed entirely on his farm because consuming one's own wheat reduces the wheat bought on the market and, thus, has an aggregate effect on interstate commerce.

In *Raich*, the Supreme Court held that Congress could criminalize the growth and use of marijuana wholly within a state that had legalized medical marijuana because such activity has a substantial effect on the interstate market.

ISSUE BEFORE THE COURT: SEVERABILITY

If the Supreme Court finds a provision of the Affordable Care Act unconstitutional, it must then decide whether the offending portion is severable or if the whole law must fall.

A provision is severable if a court finds Congress would have passed the law without the provision *and* if the remainder of the law is operative without the provision.[14]

The Affordable Care Act lacks a severability clause that could provide guidance, so the Supreme Court will have to discern legislative intent.

To that end, the federal government has conceded in its filings that the guaranteed-issue and community-rating provisions are dependent on the individual mandate.[15] This suggests to the court that Congress did not intend some parts of the Affordable Care Act to operate without the individual mandate.

PREDICTING THE MERITS: STANDING

The Anti-Injunction Act will prevent standing if the Supreme Court finds that the individual mandate imposes a tax. Instead, if the plaintiffs show that the mandate is a penalty, not a tax, the AIA will not apply.

Of the five cases to reach a circuit court decision, only one court, the 4th Circuit in *Liberty University v. Geithner*, concluded the AIA bars review.

The government has long argued the individual mandate is independently authorized by the taxing and spending clause ("The Congress shall have power to lay and collect taxes"[16]).

However, few of the lower courts have found this argument plausible because other portions of the Affordable Care Act use the term "tax," while the individual mandate uses the term "penalty."

Also, while the Internal Revenue Service is tasked with collecting the penalty by withholding it from tax returns, the enforcement is "toothless"[17] because the IRS may not use the criminal penalties, liens or levies it uses to collect other overdue taxes.

For these reasons, the Supreme Court will likely find the penalty is not a tax and, thus, that the AIA cannot prevent standing.

PREDICTING THE MERITS: COMMERCE CLAUSE

Whether the individual mandate is constitutional will turn on how broadly the Supreme Court interprets Congress' power under the commerce clause. If the court takes a broad interpretation and upholds the individual mandate, it must find a way to do so without rendering the commerce clause meaningless.

Simply holding that the commerce clause allows Congress to regulate economic inactivity would be a broad expansion of power.

Such an expansion could let Congress, as Judge Vinson colorfully put it, require Americans — all of whom must participate in the food market — to purchase and eat broccoli in order to improve the interstate vegetable market or to make us healthier so we put less strain on the interstate health care market.[18]

Judge Vinson’s fear, in other words, is that no boundaries would be left to constrain the commerce clause power.

Instead, the court could redefine the meaning of economic activity to include a taxpayer's abstinence from the health insurance market. Then, Congress may lawfully regulate the failure to purchase insurance.

For example, the court could reason that choosing to forgo insurance is an economic decision to self-insure or an economic decision to impose the cost of your uninsured care on taxpayers.

Alternatively, the court could agree that choosing not to obtain insurance is inactivity but carve an exception to current doctrine based on the uniqueness of the health care market.

Interestingly, at least two scholars claim the commerce clause power instead should be defined by whether the regulated activity is private, individual action or collective action whereby persons who fail to take a certain action create a free-rider problem and impose a cost on others across state boundaries.[19]

While the Supreme Court could well consider the free-rider problem in addressing the uniqueness of the health care market, given existing commerce clause precedent, the court is likely to frame its opinion in terms of the current doctrine's requirement for economic activity rather than redefine the ground rules completely.

Judging by precedent, it can be expected that Justices Ruth Bader Ginsburg and Steven Breyer will conclude the individual mandate is within commerce clause power, as they joined the majority in *Raich* and the dissents in *Lopez* and *Morrison*.

Conversely, Justice Clarence Thomas will likely vote to strike down the mandate because he dissented in *Raich*and joined the majorities in *Lopez* and *Morrison*.

Justice Antonin Scalia, who dissented in *Lopez* and *Morrison* and is known for his originalist interpretation of the Constitution, is also likely to find the individual mandate exceeds the commerce clause power.

Justice Anthony Kennedy's vote is more difficult to predict. He joined the majorities in *Raich,* as well as in *Lopez*and *Morrison*, and his recent opinion in *Bond v. United States*, __ U.S. __, 131 S. Ct. 2355 (June 16, 2011), has several legal scholars questioning how he will view the Affordable Care Act's effect on state sovereignty.[20]

In *Bond*, Justice Kennedy wrote of the Tenth Amendment claim, "Federalism also protects the liberty of all persons within a state by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions."

Less is known about how Chief Justice John Roberts and Justices Samuel Alito, Sonya Sotomayor and Elena Kagan might rule.

Aside from the merits, political scientists have shown a correlation between the political party of a nominating president and Supreme Court justices' voting behavior in economic and civil liberties cases.[21]

The court has five justices who were nominated by Republican presidents (Scalia, Kennedy, Thomas, Roberts and Alito) and four nominated by Democratic presidents (Ginsburg, Breyer, Sotomayor and Kagan).

If the justices' political backgrounds foreshadow the eventual ruling, the outcome could depend on frequent swing voter Justice Kennedy.

PREDICTING THE MERITS: SEVERABILITY

Severability is generally presumed unless the court finds enough evidence of legislative intent to deem a provision non-severable.

The government's concession that the guaranteed-issue and community-rating provisions were not intended to stand without the individual mandate shows at least some of the provisions are intended to stand or fall together.

Overcoming the presumption of severability is a tall order, however, and thus less probable, especially given that the Affordable Care Act contains many unrelated provisions that could stand without the individual mandate, such as an excise tax on indoor tanning and required work breaks for nursing mothers.

CONCLUSION

Supreme Court scholars are largely divided about whether the Affordable Care Act is constitutional.

Upholding the law would mean a continuation of the expanded commerce clause interpretation begun by*Wickard*.

Striking it down could signal a renewed emphasis on federalism and leave a historical mark on commerce clause jurisprudence.

Whatever the outcome, *Florida v. U.S. Department of Health and Human Services* will very likely redefine the boundaries of federal power.

NOTES

1 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

2 26 U.S.C. § 5000A.

3 See David Newman, Cong. Research Serv., *Individual Mandate and Related Information Requirements Under PPACA*, R41331 (Aug. 22, 2011).

4 Respectively, 42 U.S.C. § 18031(b); 42 U.S.C. § 1396a(a)(10)(A)(i)(VII); 42 U.S.C. § 18071; 26 U.S.C. § 4980H; 42 U.S.C. § 300gg-1; and 42 U.S.C. § 300gg.

5 *Florida v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011).

6 U.S. Const. art. I, § 8 cl. 3.

7 *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011).

8 26 U.S.C. § 7421(a).

9 Memorandum in Support of Defendant's Motion to Dismiss at 33-34, *Florida v. U.S. Dep't of Health & Human Servs.*, No. 10-00091 (N.D. Fla. 2011).

10 Order and Memorandum Opinion at 7-30, *Florida v. U.S. Dep't of Health & Human Servs.*, No. 10-00091 (N.D. Fla. 2011).

11 *U.S. Dep't of Health & Human Servs. v. Florida*, No. 11-398, *petition for cert. filed* (U.S. Sept. 28, 2011).

12 Response Brief of Appellee at 19, *Florida v. U.S. Dep't of Health & Human Servs*, Nos. 11-11021 and 11-11067 (11th Cir. 2011).

13 Brief for Appellants at 24-28, 45-49, *Florida v. U.S. Dep't of Health & Human Servs*, Nos. 11-11021 and 11-11067 (11th Cir. 2011).

14 *SeeFlorida v. U.S. Dep't of Health & Human Servs*, 648 F.3d 1235, 1321 (11th Cir. 2011).

15 *U.S. Dep't of Health & Human Servs. v. Florida*, No. 11-398, *petition for cert. filed* (U.S. Sept. 28, 2011), at 25.

16 U.S. Const. art. I, § 8 cl. 1.

17 *Florida v. U.S. Dep't of Health & Human Services*, 648 F.3d 1235, 1311 (11th Cir. 2011).

18 *Florida v. U.S. Dep't of Health & Human Services*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011).

19 Posting of Neil S. Siegel to SCOTUSblog, http://www.scotusblog.com/2011/08/free-riding-on-benevolence-why-the-mandate-is-within-the-scope-of-the-commerce-power/ (Aug. 16, 2011).

20 See, e.g., posting of Ilya Shapiro to SCOTUSblog, http://www.scotusblog.com/2011/08/the-individual-mandate-an-unprecedented-expansion-of-federal-power/ (Aug. 3, 2011); Posting of Cory Andrews to SCOTUSblog, http://www.scotusblog.com/2011/08/reading-the-constitutional-tea-leaves-how-will-the-supremes-vote-on-the-affordable-care-act/ (Aug. 8, 2011).

21 *See* C. Neal Tate, *Personal Attribute Models of the Voting Behavior of US Supreme Court Justices: Liberalism in Civil Liberties and Economic Decisions, 1946-1978*, 75 Am. Pol. Sci. Rev. 355 (1981).

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