



2012

Affordable Care Act Litigation: The Supreme Court and the Future of Health Care Reform

Lawrence O. Gostin

Georgetown University Law Center, gostin@law.georgetown.edu

Kelli K. Garcia

Georgetown University Law Center, kkg28@law.georgetown.edu

Georgetown Public Law and Legal Theory Research Paper No. 12-010

© 2012 American Medical Association. All rights reserved.


This paper can be downloaded free of charge from:

<https://scholarship.law.georgetown.edu/facpub/742>

<http://ssrn.com/abstract=1993274>

307 JAMA 369-370 (2012)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Constitutional Law Commons](#), [Health Law and Policy Commons](#), [Health Policy Commons](#), and the [Insurance Law Commons](#)

Affordable Care Act Litigation

The Supreme Court and the Future of Health Care Reform

Lawrence O. Gostin, JD

Kelli K. Garcia, JD, PhD

NEARLY 30 YEARS AFTER PRESIDENT NIXON PROPOSED the first major overhaul of the health care system, comprehensive reform became a reality when President Obama signed the Patient Protection and Affordable Care Act (ACA) on March 23, 2010. The ACA is expected to cover 32 million currently uninsured people by expanding Medicaid, offering subsidies to purchase insurance, and prohibiting preexisting condition exclusions. Like Presidents Carter and Clinton before him, Barack Obama campaigned on a promise of health care reform.

Opposition to the ACA was immediate. At least 26 federal lawsuits were filed challenging its constitutionality.¹ Supreme Court review has been requested in 5 cases and the Supreme Court granted review in one, *Florida v HHS*,² a suit brought on behalf of 26 states. The FIGURE shows court holdings for cases in which the parties requested Supreme Court review. The Supreme Court has allotted an unprecedented 5-1/2 hours for oral arguments on 4 issues: the individual purchase mandate, severability, the Medicaid expansion, and the Anti-Injunction Act. This is a rare moment in the nation's history when the Court could determine whether the United States coalesces behind a historical health system reform or retreats from it.

The Individual Purchase Mandate

Integral to the ACA's conceptual design is the individual purchase mandate, which requires most individuals to pay an annual tax penalty if they do not have health insurance by 2014. Despite vociferous opposition, the mandate is the most market-friendly financing device because it relies on the private sector. Ironically, less market-oriented reforms such as a single payer undoubtedly would have been constitutional.

Congress' power to regulate interstate commerce appears to justify its regulation of the health insurance market, which has vast cumulative economic effects. Health care expenditures capture approximately 17% of the gross domestic product. Pharmaceutical products, medical equipment, electronic medical records, and insurance claims routinely move across state lines. The insurance industry, moreover, markets products, offers policies for sale, underwrites, and reimburses claims regionally and nationally. Out-of-pocket health care costs contribute to bankruptcies, unemployment, and reduced consumer spending—all of which affect interstate commerce.

See also p 367.

Figure. Cases for Which Parties Requested Supreme Court Review

	US District Court	Appellate Court
Supreme Court will review		
<i>Florida v Department of Health and Human Services</i>		
Individual purchase mandate	Unconstitutional Mandate not authorized under Congress' power to regulate interstate commerce; mandate not severable from the rest of the act, requires the whole law to be struck down	Unconstitutional Upheld district court's holding, but found that mandate could be separated from the rest of the law, which could stand
Medicaid expansion	Constitutional Medicaid expansion not unduly coercive to the states	Constitutional Upheld district court's decision
Supreme Court will not review		
<i>Thomas More v Barack Obama</i>		
Individual purchase mandate	Constitutional Mandate authorized under Congress' power to regulate interstate commerce	Constitutional Upheld district court's decision
<i>Liberty University v Timothy Geithner</i>		
Individual purchase mandate	Constitutional Mandate authorized under Congress' power to regulate interstate commerce	Dismissed Anti-Injunction Act bars courts from hearing the case until the law takes effect because the penalty amounts to a tax
<i>Virginia v Kathleen Sebelius</i>		
Individual purchase mandate	Unconstitutional Mandate not authorized under Congress' power to regulate interstate commerce; mandate could be separated from rest of law, which could stand	Dismissed Virginia did not have legal right to sue over the mandate
<i>Susan Seven-Sky v Eric H. Holder</i>		
Individual purchase mandate	Constitutional Mandate authorized under Congress' power to regulate interstate commerce	Constitutional Upheld district court's decision

Yet the states maintain that the ACA uniquely penalizes individuals for failing to buy insurance. They fear a slippery slope, allowing the federal government to force individuals to do anything, such as buy broccoli. Uninsured individuals, however, never really do nothing, but rather self-insure, rely on family, and cost-shift to hospitals, the insured, and taxpayers. In 2010, for example 8% of people with annual incomes of greater than \$75 000 chose not to purchase health insurance,³ but most will require uncompensated care. "Free riders" reduce the insurance pool and impose costs on everyone (\$62 billion in 2009) through higher taxes and insurance premiums.⁴

Although the ACA's mandate is unusual, it has precedents, such as mandatory worker contributions to Medicare—a compelled purchase of health insurance.⁵ The

Author Affiliations: O'Neill Institute for National and Global Health Law, Georgetown University Law Center, Washington, DC.

Corresponding Author: Lawrence O. Gostin, JD, O'Neill Institute for National and Global Health Law, Georgetown University Law Center, 600 New Jersey Ave NW, Washington, DC 20001 (gostin@law.georgetown.edu).

Supreme Court has also approved congressional regulation of inactivity by upholding the Civil Rights Act requirement that hotel and restaurant owners serve blacks.⁶ Like the civil rights case, choosing not to purchase health insurance does not avoid participation in the commercial market, but rather is an implicit decision about when and how to pay for health care costs.

The necessary and proper clause may be the best argument in favor of the mandate, permitting Congress to pass laws rationally related to the exercise of federal powers. The ACA fundamentally reforms the insurance market by prohibiting coverage denials or charging higher premiums for individuals with preexisting conditions, and eliminating lifetime capitations on coverage. The mandate is necessary for these reforms to work effectively because it ensures that health insurance spreads the risk across the entire population. Risk pools function only if they include enough healthy individuals to keep overall expenditures lower than premium costs. The larger the pool, the more predictable and stable premiums will become.

Can the Mandate Be Severed From the Rest of the ACA?

If the Supreme Court were to strike down the mandate, it would then have to determine whether the mandate is severable from the rest of the ACA. The ACA did not explicitly state that if part of the act were deemed unconstitutional the rest would survive. Yet most ACA reforms are severable because they are unrelated to the mandate, such as funding for public health and community health centers. Some market reforms have already taken effect, such as eliminating lifetime coverage limits, appealing coverage denials, and requiring coverage of adult children on their parents' health insurance plans.

The more difficult question is whether the mandate is so deeply intertwined with the ACA's still unimplemented market reforms that the Court must strike them down. Indeed, the administration argued that "community-rating" (prohibiting insurers from charging differential premiums based on health status) and "guaranteed-issue" (requiring insurers to offer coverage to all applicants) cannot be separated from the individual mandate. If the Court strikes down these reforms, it would imperil effective implementation of the ACA.

Medicaid Expansion

The Supreme Court will review the constitutionality of expanding Medicaid to all individuals with household incomes below 138% of the federal poverty level. The expansion is critical to reform, covering an additional 16 million individuals. The states argue that Medicaid expansion is unduly coercive because they could lose all Medicaid funding—the amount of money at stake is too large and too important to vulnerable populations, so they would feel obliged to participate. The Supreme Court, however, is unlikely to uphold the coercion theory. State participation in Medicaid has always been optional, and in political debates some states have openly discussed exercising their option to discontinue the program. The 11th Circuit in *Florida v HHS* reasoned, "States bear little of

the cost of expansion," so the idea of state coercion is "more rhetoric than fact."² The federal government will pay 100% of expansion costs for 3 years, gradually decreasing to 90%. Moreover, the Secretary of the Department of Health and Human Services has discretion not to withdraw state funding.

The Supreme Court has long held that Congress' power to "provide for the common defense and general welfare" enables it to determine the receipt of federal funds. Congress has done so for a broad range of socially valuable purposes, such as prohibiting discrimination, increasing the drinking age, and increasing Medicare access. There is little to distinguish those cases from the current Medicaid expansion.

The Anti-Injunction Act

The Supreme Court will hear technical arguments concerning the Anti-Injunction Act (AIA), which prohibits lawsuits "for the purpose of restraining the assessment or collection of any tax." The 4th Circuit held that because Congress penalized individuals through the tax system, the AIA bars the suit from being heard until after the mandate takes effect in 2014.⁷ The Supreme Court, however, is unlikely to invoke the AIA because neither the administration nor the states contend that it applies.

The Future of Health Care Reform

Since 1971, when President Nixon and Senator Edward Kennedy proposed competing plans, health care reform has played a central role in politics and public policy. Yet, it took almost 30 years before a multifaceted health reform bill became law. The legal, political, and policy stakes of the Supreme Court's decision are vast. The ACA will achieve near universal coverage, something that seemed unimaginable just a short time ago. Health reform envisages a social contract in which everyone shares the cost, recognizing that virtually everyone will become ill one day. The ACA and its individual mandate are not unjustified limits on freedom, but rather are vital to a decent society. If the social contract must be accomplished through the private market, then the simple logic of insurance must prevail, which is to spread the risk among the rich and poor, healthy and sick, young and old alike.

Conflict of Interest Disclosures: The authors have completed and submitted the ICMJE Form for Disclosure of Potential Conflicts of Interest and none were reported.

REFERENCES

1. National Health Law Program, O'Neill Institute for National and Global Health Law. Health Law and Litigation Web site. <http://healthlawandlitigation.com/>. Accessed December 2, 2011.
2. *Florida v HHS*, 648 F3d 1235 (11th Cir 2011).
3. DeNavas-Walt C, Proctor BD, Smith JC; US Census Bureau. Income, poverty, and health insurance coverage in the United States: 2010. <http://www.census.gov/prod/2011pubs/p60-239.pdf>. Accessed December 1, 2011.
4. Holan G, Bowen G; Urban Institute. The cost of uncompensated care with and without health insurance: timely analysis of immediate health policy issues. http://www.urban.org/uploadedpdf/412045_cost_of_uncompensated.pdf. Accessed December 2, 2011.
5. Elhauge E. The irrelevance of the broccoli argument against the insurance mandate [published online December 21, 2011]. *N Engl J Med*. doi:10.1056/NEJMp1113618.
6. *Heart of Atlanta Motel v United States*, 379 US 241 (1964).
7. *Liberty University v Geithner*, 2011 US App LEXIS 18618 (4th Cir Va).