



Media Guide

The Supreme Court and the Health Care Case

Media briefing, presented by SCOTUSblog and Bloomberg Law, at the National Press Club, February 16, 2012.

This media guide was prepared by Lyle Denniston of SCOTUSblog. SCOTUSblog has published a ten-part series explaining in full the new health care law and the constitutional issues raised about it. See <http://www.scotusblog.com/category/special-features/affordable-care-act-in-depth/>. The blog also has case pages on the three petitions involved in the Supreme Court case, with links to all of the filings in the cases. See

- *U.S. Department of Health and Human Services v. Florida* http://www.scotusblog.com/case-files/cases/u-s-department-of-health-and-human-services-v-florida/?wpmp_switcher=desktop
- *Florida v. U.S. Department of Health and Human Services* <http://www.scotusblog.com/case-files/cases/florida-v-department-of-health-and-human-services/>
- *National Federation of Independent Business v. Sebelius* <http://www.scotusblog.com/case-files/cases/national-federation-of-independent-business-v-sebelius/>

Documents in the case are also available on the Supreme Court's website, <http://www.supremecourt.gov/>, and on a blog by Santa Clara law professor Brad Joondeph that is devoted entirely to the challenges to the new law: <http://acalitigationblog.blogspot.com/>.

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On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act – now commonly known as the Affordable Care Act, or simply as the new federal health care law. Within minutes after the President's signing ceremony, a lawsuit was filed in Pensacola, Florida, challenging the constitutionality of key provisions. Although nearly thirty challenges have been filed in federal courts across the country, it is only the Florida case that the Supreme Court has agreed to review.

Even before Congress finished writing the new law – and passing it with only Democrats voting for it in the House and Senate – the controversy surrounding the law made it clear that its constitutionality would be tested in the courts, and that the Supreme Court would have the chance to rule, because repeal by Congress – although threatened and attempted – was unlikely to succeed as long as President Obama was in the White House. A number of cases reached the

Supreme Court in 2011 after rulings in lower federal courts. On November 14, the Court announced that it would take on the controversy in the case from Florida. It did not agree to decide all of the issues raised.

The Court has scheduled three days of hearings on March 26-28. Seating in the courtroom for media reporters will be on a reserved basis, with the Court's Public Information Office controlling the allocation of seats. Reporters may wish to contact the Public Information Office soon (telephone: 202-479-3050) to seek a seat; there will be a heavy demand, and the seats are limited in number. As of now, coverage will rely heavily on written transcripts released by the Court's PIO within about an hour after each argument is finished. There will be no television broadcasting of the oral arguments; audiotapes of the arguments will not be released until the Friday following the arguments. The PIO will announce changes, if any are made prior to the arguments, in broadcast access or the release of audiotapes.

The Court's final decision or decisions probably will be announced before the Court recesses for the summer, most likely in late June. The Court issues its opinions at 10 a.m. on days scheduled for such releases. However, it does not announce in advance which cases will be decided before the rulings are actually released.

The issues before the Supreme Court:

The Affordable Care Act is some 2,700 pages in length, consists of nine major sections, and is exceedingly complex. For example, its most controversial provision – the requirement that nearly all Americans must obtain health insurance by the year 2014 or pay a financial penalty – is sometimes considered to be a tax law, and sometimes is not. The decision on what it affects the Court's power to rule upon that provision, and also could affect the ultimate decision on whether that "mandate" is constitutional.

Despite the length and complexity of the new law, the Supreme Court has limited its review to four constitutional issues:

- the constitutionality of the individual insurance-purchase mandate;
- the authority of the courts to decide the mandate issue;
- the fate of other parts of the law if the mandate is struck down; and
- the constitutionality of the expansion of the Medicaid program for the poor.

The deepest controversy over the ACA focuses on the mandate (technically called the "minimum coverage" provision) creating a legal duty for individuals to obtain health insurance by 2014. The two sides do not even agree on what Congress intended when it enacted this core provision of the law: the Obama Administration argues that Congress chose the mandate as a mechanism to regulate the economic enterprise of providing health insurance just as it often has chosen other means to regulate interstate commerce, while the law's opponents argue that Congress reached more deeply into individuals' personal lives than it ever has before,

compelling people to buy an economic product whether they want it or not. There is no question, though, that the provision is a novel one; even judges who have upheld it have treated it as unprecedented, and have said that it is close to the constitutional limit on Congress's legislative powers.

Congress, concluding that some fifty million Americans lack health insurance but also deciding that they should have it, was faced with choosing how to expand coverage and how to pay for it. It had three options: use taxpayer dollars to pay for the entire expansion, set up a government-run program like Social Security, or order the private insurance companies to provide much broader coverage without pushing them to the economic brink. It chose the third option; there was not enough support in Congress for public financing or for a new government-run "public option."

However the mandate that Congress chose is described, if upheld it would be expected to achieve a major overhaul of the way health insurance is designed and offered to the public. The insurance industry, in marketing health coverage as in selling other forms of protection, has always relied upon a pattern of "spreading the risk" – limiting its exposure to pay insurance claims that would overwhelm the policy premiums it charges, by excluding higher-risk customers. Under ACA, the health insurance companies can no longer do that: Congress aimed to create nearly universal coverage, and thus took away the option of denying policies to individuals with a history of serious medical problems, or with current medical conditions (heart disease, for example) that existed before the individuals sought insurance.

Together with the wide expansion of coverage, Congress also sought to ensure that premiums would be affordable. In other words, the companies could not offset their new legal duty to insure millions of additional individuals simply by raising premiums to cover the risk. The only offset, under the ACA, is that the companies would be guaranteed many more customers: that is the guarantee that comes through the requirement that most Americans must obtain health insurance by the year 2014 or pay a financial penalty to the IRS, beginning with the filing of tax returns in 2015.

In passing ACA, Congress concluded that some \$43 billion each year in health benefits are provided without being paid for by the individuals. That must be made up, Congress found, either by the hospitals and clinics that provide the care, or by insurance companies. The hospitals and clinics raise fees, which patients pay for out of their own pockets or with their insurance. The insurers, in turn, charge higher premiums from their policyholders.

Of course, the private insurance industry does not shoulder all of the ultimate cost of providing health care. Private insurance covers only about thirty-two percent of health care expenditures. Publicly subsidized programs – Medicaid for the poor, Medicare for the elderly and the disabled, and the "CHIP" program for children – cover forty-four percent. That leaves twenty-four percent of health care spending that is not covered by any insurance or program.

The insurance-purchase mandate is one of a handful of approaches that Congress adopted to fill the gap in insurance coverage. It is expected to assure coverage for sixteen million of the now-uninsured. The Medicaid expansion, also under review by the Supreme Court, is another of those mechanisms, as is a similar insurance mandate that is imposed on larger employers, to make sure their workers have affordable coverage; that provision, though, is not before the Supreme Court. Under the ACA, a wide variety of health plans will satisfy the mandate. Congress identified a package of health care coverage that it considered to be minimally essential.

For those covered by the mandate to obtain insurance (there are eight exceptions, but they are not a large group overall), an individual or a family must obtain – and keep in force every month into the future – a package of minimally essential insurance coverage.

If the new mandate survives the challenges, and goes into effect on January 1, 2014, insurance companies cannot turn away anyone or any employer who seeks a policy, and the premiums they will be allowed to charge will be capped according to formulas fashioned for specified geographic areas.

Failure to obey the mandate can be fairly costly. The government has estimated that the financial penalty for failure to have insurance, assessed on the basis of each month without coverage, can be as much as three thousand dollars per year. Congress repeatedly referred to this as a “penalty,” not as a “tax,” but the provision is written into the federal tax code, and the penalty will be collected by IRS just as it collects any other tax or tax-related penalty. One federal judge who voted to uphold the mandate, Circuit Judge Jeffrey Sutton of Columbus, Ohio, said that Congress knew the difference between a “penalty” and a “tax” and chose the former.

At times, however, the Obama Administration defends the mandate as a tax-related provision, as part of its alternative argument that Congress had the authority to enact the mandate and its attached penalty under its power to tax. But the Administration does not consider it to be a tax for purposes of the decision of whether anyone had a legal right to sue to stop the mandate. (That is the so-called Anti-Injunction Act issue.)

What the Court must decide:

In its November 14 order accepting the Florida case for review, the Court indicated that it would consider only issues that are closely related to the core question of Congress’s constitutional authority to enact the most basic provisions of the ACA. Here, in a nutshell, is what the Court will be weighing, with the issues listed here in the order in which they will be heard by the Justices at the March hearings:

Monday, March 26. The Anti-Injunction Act: The Court will decide whether a statute known as the Anti-Injunction Act, which traces its origins to 1867, bars anyone from challenging the individual insurance-purchase mandate before it takes effect, on the theory that the mandate and its attached penalty are a form of taxation. The 1867 law forbids any challenges to a tax law

until the law has gone into effect, on the ground that such lawsuits potentially could stop the IRS from collecting tax revenues. If the Court were to decide that the individual mandate cannot be challenged now, that would be the end of that part of the case, and the Justices would not rule on the mandate or on the severability issue. Such a ruling, though, would leave the mandate (if Congress did not repeal it in the meantime) subject to a constitutional challenge after it actually went into effect on January 1, 2014, and someone is subjected to a penalty for not obtaining insurance.

Tuesday, March 27. The individual insurance mandate: If the Court finds that it has the authority to decide the constitutionality of the mandate, because review is not barred by the Anti-Injunction Act, it would decide whether Congress had the authority under the Constitution to enact the mandate, relying either upon its power over interstate commerce or its power to tax.

Wednesday, March 28 (first issue). The “severability” question: If the insurance mandate is found to be unconstitutional, the Court will then have to decide whether all or any other part of the ACA will fall with it, on the theory that the parts of the law are closely linked to each other. The Court essentially would be making a guess about what parts of the law, if any, Congress would have preferred to remain in operation if it had known that it could not have the insurance mandate.

Wednesday, March 28 (second issue). The expansion of Medicaid for the poor. The Court will decide whether Congress had the authority under its power to spend money to require states, as a condition for continuing to take part in the Medicaid program, to agree to expand the number of people eligible for this assistance.

How the lower courts ruled on the four issues:

Lower courts have reached varying and sometimes conflicting decisions on some of the issues before the Court, but, because even adverse rulings have been put on hold while the Supreme Court reviews the case, no part of the new law has so far been blocked from continued enforcement or implementation. Any decision against any part of the law has been put on hold while the Supreme Court reviews the case before it. Thus, nearly every week, the Obama Administration’s health policy agencies are putting into effect, or making plans to do so, many parts of the law – even some of those that are not due to go into effect until two years from now. An example of an important provision that has already gone into effect is the requirement that insurance companies provide health coverage for dependent children up to age twenty-six.

The Anti-Injunction Act. As the lawsuits challenging the ACA began reaching the federal trial courts, the Obama Administration repeatedly argued that the Anti-Injunction Act barred the challenges to the individual insurance mandate because, government lawyers contended, it was a part of the federal tax code. But the U.S. District Court judges deciding the cases uniformly rejected the government’s argument. So, when the cases started moving up the judicial ladder into the federal Circuit Courts of Appeals, the Administration abandoned that argument, and conceded that the challenges to the mandate were not barred.

The Fourth Circuit Court of Appeals, based in Richmond, pressed the issue, however, and ruled that the Anti-Injunction Act barred challenges to the mandate. That decision conflicted directly with a ruling in another case by the Sixth Circuit Court of Appeals, based in Cincinnati.

When the cases began arriving at the Supreme Court, none of the parties would argue that the Anti-Injunction Act did bar the challenges to the individual mandate. The Obama Administration, however, urged the Court to take on that question, too, and the Court agreed to do so. Since there was no one on either side to argue the point, the Court appointed Washington attorney Robert A. Long to appear in the case to contend that the challenges to the mandate were legally barred.

The individual insurance mandate. In the Florida case, the Eleventh Circuit Court of Appeals struck down the individual insurance provision, concluding that Congress did not have the constitutional authority to enact this measure, under the Commerce Clause, the Necessary and Proper Clause, or the tax-writing power under the General Welfare Clause. This conclusion conflicted with rulings in favor of the mandate by the Sixth Circuit Court of Appeals and by the D.C. Circuit Court of Appeals.

The severability issue. In the Florida case, the Eleventh Circuit Court of Appeals ruled that, even though the individual insurance mandate was unconstitutional, every other part of the Affordable Care Act could be enforced. It applied the two-step process that has long been used in deciding this question in federal cases: first, whether other parts of a law can actually function as Congress intended if a key part is nullified; and, second, whether Congress would have preferred to keep any of the remaining parts of the law. The Eleventh Circuit decision directly conflicted with an earlier ruling in the Florida case by Senior U.S. District Judge Roger Vinson of Pensacola, who had concluded that no part of the law could survive without the individual mandate.

Because no one in the case supports the view that all of the remaining parts of the ACA can survive even without the individual mandate, the Supreme Court appointed Washington attorney Bartow Farr to brief and argue that point.

The Medicaid expansion. No federal court, in any of the cases decided so far, has ruled that Congress lacked the authority to expand the Medicaid program for the poor. The theory that Congress did not have the power to approve that provision is one that the Supreme Court has carefully examined only twice – in 1937 and in 1987 – but has never actually applied to strike down any federal spending program. It is called the “coercion theory,” and its premise is that Congress in attaching conditions to states’ receipt of federal funds for a government program can make those conditions so onerous that states will be harmed by them, but will nonetheless have no choice but to give in because they need the federal money and need to stay in the program.

In the Florida case, as courts in all other cases did, the Eleventh Circuit Court rejected the theory and upheld the Medicaid expansion. Since there was no conflict among the lower courts

on this issue, it was something of a surprise when the Supreme Court agreed to decide it. Most of the time, the Court will take on an issue only when lower courts are split on it.

The challenged issue that the Supreme Court will not review:

In passing the Affordable Care Act and imposing on individuals the legal duty to obtain health insurance by the year 2014, Congress also imposed a similar mandate on employers – in the private and state and local government sectors – to provide health insurance for their employees at affordable rates. For employers with fifty or more full-time employees, the employer must provide minimum essential coverage – a reference to the type of plans that will satisfy the insurance mandate. The employer must pay for sixty percent of the actual costs of benefits, with employees’ share no more than forty percent. Small employers are not covered by this mandate; they are allowed to band together to shop for plans in a health insurance exchange to be set up and run by state governments.

In the Florida case, the Eleventh Circuit Court of Appeals upheld this mandate. That was challenged in the Supreme Court by the twenty-six states, so far as it applied to them as employers. The Justices chose not to review it and, as is customary, gave no reason for the refusal. However, if the Court were to strike down the individual mandate, it would then have to decide whether the employer mandate would fall, too.

The parties in the Supreme Court case, and their basic positions:

Briefing and argument in the Florida case involve twenty-six states and four individuals who do not have health insurance and do not plan to obtain it, the National Federation of Independent Business (a trade group of small businesses), the federal government, and two “friends of the Court” (*amici*) appointed by the Supreme Court to defend positions that no one else will defend. There will also be hundreds of separate *amici* who file briefs attempting to influence the decision, but none of them will be permitted to present argument.

The twenty-six states challenge the individual insurance mandate and its financial penalty. They argue that the entire Affordable Care Act must be nullified if the insurance mandate is struck down, and they contend that the Medicaid expansion is a form of unconstitutional coercion against participating states. They contend that the Anti-Injunction Act did not bar their challenge, arguing that the Act does not even apply to states. On their claim that all of the remainder of the ACA is void if the mandate fails, the states contend that the interlocking parts of the entire law make all of it depend upon the flow of millions of new paying customers as insurance policyholders. The National Federation of Independent Business argues that the entire Act must be nullified if the individual mandate is struck down. It supports the state’s view on the other issues.

The federal government argues that the individual insurance mandate is constitutional as a form of regulation of commerce; alternatively, it is either necessary to the regulation of

commerce or valid under the taxing power. It asserts that, if the individual mandate is struck down, only two other provisions of the ACA would fall with it: the requirement that insurance companies must sell insurance to anybody who seeks it even if that individual has a preexisting medical condition that would otherwise make them ineligible to be insured, and the ban on insurance companies charging higher premiums based on a policy holder's medical history. The government contends that those provisions depend very heavily upon the ACA's guarantee to insurance companies that they will have sufficient new policy-holding customers to offset the coverage requirements without hiking premiums beyond what many consumers could afford. It argues that the Medicaid expansion is constitutional. And it contends that the Anti-Injunction Act does not bar challenges to the individual mandate.

Washington attorney Robert A. Long is an *amicus* in the case, appointed by the Supreme Court to make the argument that the challenges to the individual mandate are barred by the Anti-Injunction Act.

Washington attorney Bartow Farr is an *amicus* in the case, appointed by the Supreme Court to make the argument that, if the insurance mandate is nullified, all other parts of the ACA may remain operative.

The timing of a final ruling:

The Court is reviewing the ACA's constitutionality under an accelerated schedule, and it thus is expected to announce its final ruling during the current Term, although it has no binding legal obligation to decide it by then. With the complexity of the issues, and their importance, a quick decision after the hearings would be most unlikely. That is why it is commonly expected that the decision, if made this Term, would not come until close to the summer recess, which usually begins around July 1.

Once the hearings conclude on March 28, the Justices at a private Conference will cast their initial votes on each of the four issues.

Generally, those initial votes are simply to affirm or to reverse what a lower court has decided. But when the Justices vote initially on the Anti-Injunction Act question, they will be voting on a basic issue that every federal court must first decide before it turns to any other legal issue: did it have the jurisdiction to decide the legal issue at stake – in this case, the constitutionality of the individual mandate.

On that point, the Justices will vote on whether the mandate is properly considered to be a part of tax law and, if it is tax-related in that sense, it is the kind of assessment that the Anti-Injunction Act insulates from legal challenge, before it goes into effect. Once they have voted



on that, their decision would determine whether the Court moves on to the validity of the individual mandate and then the severability issue. On those points, the Justices will be voting to affirm or reverse what the Eleventh Circuit Court decided. It will do the same when it faces the question of the constitutionality of the Medicaid expansion.

Once those initial votes have been cast, the Justices will then turn to assigning the authors for the Court's opinion (or opinions). The power to assign opinions belongs to the senior Justice in the majority; it would therefore fall to Chief Justice John G. Roberts, Jr., if he has voted with a majority of the Justices. The Chief Justice could assign the opinion to himself or to another Justice in the majority.

No one outside the Court can predict, with any real accuracy, when the Court will reach and announce its final decision. Although it is assumed that it will decide the case before it recesses, probably in late June, the Court does have the option of deciding to put over the controversy for another look in the next Court Term, starting next October. If it did that, the ACA's fate would not be decided until after the presidential and congressional election in November. After that, depending upon the election outcome, the fate of the ACA may be as much in Congress's hands as in the Court's.

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SCOTUSblog is devoted to comprehensively covering the U.S. Supreme Court. Established in 2002 by Tom Goldstein and Amy Howe (who remain as the blog's Publisher and Editor, respectively), the blog provides coverage of individual cases, a daily aggregation of Supreme Court writings, archives, and analytic features to a readership of attorneys, law students, academics, business leaders and the general public.

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