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SUPREME COURT RULES ON THE CONSTITUTIONALITY OF THE AFFORDABLE CARE ACT

The Supreme Court issued its long-awaited decision on the constitutionality of the Affordable Care Act (ACA) on June 28, 2012. The decision (available here) addressed the constitutionality of two overarching aspects of the ACA:

1. the requirement that all individuals (with certain exceptions) procure a certain minimum level of health insurance coverage or pay a penalty (the individual mandate); and
2. the requirement that States add new categories of beneficiaries to their Medicaid programs or risk losing all their federal Medicaid funding (the Medicaid expansion).

The Court's rulings on these and other questions were the result of shifting coalitions of the nine Justices, as set forth in a vote chart available here and an opinion map available here. The net effect is that most of the Act, including the individual mandate, was upheld as constitutional. However, the Court held that the federal government could not condition continued receipt of a State's existing Medicaid funding on its agreement to implement the Medicaid expansion. The "withholding" provision whose application was narrowed by the Court was not part of the ACA but has been part of the general Medicaid statute since 1965.

As described in greater detail below:

- All nine Justices held that the Anti-Injunction Act did not preclude the Court from deciding the question of the constitutionality of the individual mandate, notwithstanding that no individual has yet been required to pay a penalty for failure to have health insurance.
- Five Justices, in two separate opinions, rejected the Administration's arguments that the individual mandate is constitutional as an exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause.
- Nevertheless, a different majority of five Justices found the individual mandate to be constitutional as an exercise of Congress's Taxing Power.
- Seven Justices concluded that the Medicaid expansion exceeded Congress's Spending Clause powers. However, three of the seven—plus two who thought the Medicaid expansion was constitutional—concluded that the rest of the Act could stand, as long as the Secretary of the Department of Health and Human Services (HHS) was precluded from withholding all funds for failure to implement the expansion.
- Four Justices would have struck down the Act in its entirety, including provisions not directly related to the individual mandate or the Medicaid expansion.

The Court's major holdings are discussed below.

I. THE ANTI-INJUNCTION ACT DOES NOT PRECLUDE THE COURT FROM CONSIDERING THE CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE.

The Anti-Injunction Act generally bars lawsuits "for the purpose of restraining the assessment or collection of any tax." In effect, the statute requires taxpayers who want to challenge a tax to first pay the tax and then sue for a refund. If the Anti-Injunction Act applied to the individual mandate, then courts could not have decided the constitutionality of the provision until it became enforceable in 2014 and the penalties for failing to have minimum essential coverage had been assessed. All nine Justices concluded that the Anti-Injunction Act did not preclude the Court from considering the constitutionality of the individual mandate.

In Part II of the lead opinion (written by the Chief Justice and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan), the Court concluded that Congress did not intend the shared responsibility payment (*i.e.*, the payment required of an individual who does not comply with the individual mandate) to be treated as a "tax" for purposes of the Anti-Injunction Act. In this context (unlike in the Taxing Power analysis discussed below), the Court found that the label that Congress attaches to a monetary exaction is determinative. Because Congress called the shared responsibility provision a "penalty," the Court held that the Anti-Injunction Act did not prevent the Court from resolving the merits.

The dissenters (Justices Scalia, Kennedy, Thomas, and Alito) concluded that the payment was, for constitutional as well as statutory purposes, a penalty that is not a tax and therefore not subject to the Anti-Injunction Act.

II. THE INDIVIDUAL MANDATE IS NOT A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER THE COMMERCE CLAUSE OR THE NECESSARY AND PROPER CLAUSE.

A majority of the Court (the Chief Justice and Justices Scalia, Kennedy, Thomas, and Alito), determined that the individual mandate is not a valid exercise of Congress's authority under the Commerce Clause or the Necessary and Proper Clause. There was, however, no opinion for the Court on this issue. The Chief Justice wrote an opinion for himself alone, while Justices Scalia, Kennedy, Thomas, and Alito wrote separately but made many of the same points. Justice Thomas also wrote a two-page separate opinion preserving his longstanding objection to the Court's current approach to determining Commerce Clause cases. Four Justices (Ginsburg, Breyer, Sotomayor, and Kagan) disagreed with the majority view, and would have upheld the mandate under the Commerce and Necessary and Proper Clauses.

The Commerce Clause permits Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. The Necessary and Proper Clause permits Congress to "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated Article I powers. *Id.*, Art. I, § 8, cl. 18.

The challenge to the individual mandate presented what the majority of Justices framed as a novel Commerce Clause issue for the Court: whether Congress has the authority to regulate an individual's *failure* to engage in commercial activity because of the effect that failure to act has on interstate commerce. The Justices in the majority rejected the idea that the Commerce Clause permits Congress to require that individuals buy health insurance. They drew a distinction between regulating commerce (expressly authorized by the Commerce Clause) and "creating" commerce (which they found is not authorized under the Commerce Clause). The five Justices also agreed that if Congress cannot mandate the purchase of health insurance under the Commerce Clause, it cannot bootstrap the constitutionality of the mandate by way of the Necessary and Proper Clause.

The Chief Justice opined that the mandate is not a valid exercise of Congress's Commerce Clause power because it "forces individuals into commerce precisely because they elected to refrain from commercial activity," and would "fundamentally change[]the relation between the citizen and the Federal government" by regulating "what we do not do." Roberts, C.J. at 27, 23-24. Because the mandate is targeted at healthy individuals who are "not currently engaged in any commercial activity involving health care," it is targeted at "a class whose commercial inactivity rather than activity is its defining feature." *Id.* at 25.

The Chief Justice also rejected the government's argument that health insurance is not like other products, such as cars and broccoli, because it is purchased not "for its own sake," but to cover the "universal" risk of incurring health care costs, and thus is part of the same market as the market for health care services. *Id.* at 27 (quoting Brief for the United States). In the Chief Justice's view, however, "health insurance and health care consumption. . . are not the same thing," and "involve different transactions, entered into at different times, with different providers." *Id.* at 27.

The Chief Justice's opinion on the Necessary and Proper Clause rejected the argument that Congress could enact the individual mandate as an "integral part of a comprehensive scheme of economic regulation—the guaranteed issue and the community-rating insurance reforms," which no one disputed were within Congress's authority to enact. *Id.* at 27-28 (internal quotation marks deleted). The Chief Justice recognized that the Court's prior decisions have been "very deferential to Congress's determination that a regulation is necessary." *Id.* at 28. However, he also opined that for a law to be "proper" it must be an exercise of authority "derivative of, and in service to, a granted power." A "proper" law would not "create the necessary predicate to the exercise of an enumerated power," as he thought the individual mandate would do. *Id.* at 29. Thus, in the Chief Justice's view, the individual mandate was not "proper" because it would remove all limits on Congress's Commerce Clause authority. *Id.* at 29-30.

Justices Scalia, Kennedy, Thomas, and Alito agreed that the individual mandate "directs the creation of commerce" rather than regulating it, that "[i]f all inactivity affecting commerce is commerce, commerce is everything," and that if the mandate were upheld there would therefore be no limit on Congress's Commerce Clause authority. Scalia, J., et.al, dissenting at 5, 13. (joint dissent). These Justices also agreed that "the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of Commerce." *Id.* at 9. In their view, Congress could have chosen "many ways other than this unprecedented Individual Mandate" to effect the ACA's insurance-market reforms, such as denying non-purchasers of health insurance a tax credit, or levying a surcharge upon them when they enter the market. *Id.* at 10.

Justice Ginsburg's dissenting opinion (which was joined by Justices Breyer, Sotomayor, and Kagan) refused to frame the issue as one involving congressional regulation of inaction. Rather, she agreed with the federal government that refusing to buy health insurance is tantamount to economic activity, in light of the fact that every individual will at some point need health care services. Justice Ginsburg's opinion also takes issue with the Chief Justice's definition of the relevant market, noting that "it is Congress's role, not the Court's, to delineate the boundaries of the market the Legislature seeks to regulate." Ginsburg, J., concurring and dissenting, at 20.

In response to the argument that allowing the individual mandate to stand under the Commerce Clause would open the door to Congress's requiring individuals to purchase broccoli, cars, and other consumer goods, Justice Ginsburg observed that "Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law," *id.* at 28, and that other provisions of the Constitution and the democratic process would check Congress. Moreover, Justice Ginsburg found that the individual mandate is so essential

to the undisputed guaranteed issue and community rating reforms that, under a Necessary and Proper Clause analysis, its "constitutionality becomes even plainer." *Id.* at 31. In Justice Ginsburg's view, the Chief Justice's Necessary and Proper Clause discussion was "long on rhetoric" but "short on substance," and did little to inform Congress or future courts when a law could be considered "proper." *Id.* at 33-36.

While a majority of Justices would not extend Congress's Commerce Clause authority to regulating "inaction," the practical effect of that limitation on future Congressional legislative activity is not clear. Much of the decision turned on how the Justices framed the activity targeted by the individual mandate, and, with the possible exception of insurance markets, it would not be difficult for Congress to define the target of most future legislation as "action" rather than "inaction." And it would be unlikely for Congress to enact the kinds of laws that the Justices in the majority feared might be enacted, such as a broccoli mandate (*see* Roberts, C.J. at 22-23; Scalia, et al., dissenting at 15-16). None of the Justices (with the exception of Justice Thomas) would have overruled prior Commerce Clause precedent. Moreover, in light of the fact that there was no majority opinion on the Commerce Clause part of the decision, it is unclear whether or how the Court's separate opinions will control future cases.

III. THE INDIVIDUAL MANDATE IS A VALID EXERCISE OF CONGRESS'S TAXING POWER.

Although a majority of the Justices concluded that the individual mandate exceeded Congress's authority under the Commerce Clause and the Necessary and Proper Clause, a different majority held that the provision was nonetheless constitutional. In Part III-C of his opinion, the Chief Justice concluded that the individual mandate was authorized by Congress's Taxing Power. Justices Ginsburg, Breyer, Sotomayor, and Kagan joined this section of the Chief Justice's opinion.

The Court held that the shared responsibility payment—the payment required of those who do not purchase an insurance policy providing minimum essential coverage—is a tax and that the individual mandate is therefore constitutional under the Taxing Power. The Court explained that Congress's decision to label the shared responsibility payment a "penalty" instead of a "tax" does not prevent the payment from being classified as a tax for constitutional purposes. The Court found that it must instead evaluate whether the shared responsibility payment functions as a tax.

The shared responsibility payment does function as a tax under the Taxing Clause powers, the Court concluded, because (1) the payment is too small to be considered punitive, (2) the provision contains no *scienter* requirement, and (3) the tax will be collected by the Internal Revenue Service through the normal means of taxation, but without the use of the means most suggestive of a punitive sanction. Roberts, C.J. at 36-37. The Court also found it significant that there was no consequence of failing to comply with the mandate other than the payment of the tax, and that Congress expected many individuals to pay the penalty rather than purchase insurance. *Id.*

The Court addressed the perceived inconsistency in finding that the individual mandate was not a tax for purposes of the Anti-Injunction Act, but could be found to be constitutional as an exercise of Congress's Taxing Power. It explained that the two statutes (*i.e.*, the Anti-Injunction Act and the ACA) are "Congress's own creation" and "[h]ow they relate to each other is up to Congress and the best evidence of Congress's intent is the statutory text." *Id.* at 13. On the other hand, "Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it one way or the other." *Id.* at 12 (emphasis in original).

Having ruled that the shared responsibility payment could be construed as a tax, the Court then addressed whether such a tax was nevertheless unconstitutional. First, the Court dismissed the

argument that treating the shared responsibility payment as a tax would violate the Constitution's requirement that any "direct Tax" be apportioned so that each State pays in proportion to its population. Second, the Court explained why the Commerce Clause concerns about congressional overreach that led five justices to conclude that the mandate is not a valid exercise of the Commerce Power do not apply with the same force to the Taxing Power. With these objections out of the way, the Court concluded that Congress was validly exercising its Taxing Power when it enacted the individual mandate and the shared responsibility payment.

In dissent, Justices Scalia, Kennedy, Thomas, and Alito argued that the shared responsibility payment is a penalty and therefore cannot be sustained under the Taxing Power. They noted that Congress itself labeled the payment a "penalty" and argued that, as a practical matter, the statute imposes a penalty on those who violate the individual mandate. Because, in their view, an exaction cannot be both a penalty and a tax, the dissent concluded that the law is not a valid exercise of the Taxing Power.

The Court's holding is somewhat surprising, given the scant attention that the Taxing Power received from the parties and the lower courts. And, as noted by the dissenting Justices, no federal court has sustained the individual mandate as a valid exercise of the Taxing Power "until today."

IV. IT WOULD BE UNCONSTITUTIONAL TO WITHDRAW ALL MEDICAID FUNDING FROM A STATE THAT DECLINED TO PARTICIPATE IN THE MEDICAID EXPANSION.

Seven Justices concluded that the Medicaid expansion overstepped the boundaries of Congress's Spending Clause powers. This decision marks the first time that the Court has ever invalidated Spending Clause legislation like Medicaid on the ground that Congress was effectively coercing State regulation.

Prior to the ACA, to be eligible for Medicaid, an individual had to not only be low-income, but also meet standards for "categorical eligibility." These categories include children, parents, pregnant women, senior citizens, and the disabled. The ACA's Medicaid expansion requires States to cover *all* adults under age 65 who do not have Medicare, up to 133% of the federal poverty level (FPL) (approximately $31,000 for a family of four).

Section 1904 of the Social Security Act, which has been part of the law since 1965, allows the Secretary to withhold all federal Medicaid funding to a State in the event that the State is out of compliance with federal requirements governing the Medicaid program. Therefore, looking at the ACA provisions in the context of Medicaid as a whole, States that do not comply with the Medicaid expansion by 2014 risk losing all of their Medicaid funds.

A consortium of 26 States challenged the Medicaid expansion, claiming that it exceeds Congress's Spending Power. The States argued that the threat of losing all of their Medicaid funds for refusing to expand the program according to the new federal guidelines constitutes undue coercion and is therefore an unconstitutional exercise of federal power.

In prior decisions, the Court had found that Congress may use its Spending Power to incentivize States to act in accordance with certain federal guidelines. However, the Court had indicated that this power is not unlimited. The Court has said that federal restrictions on State funds would be invalid if the "inducement offered by Congress [is] so coercive as to pass the point at which 'pressure turns into compulsion.'" In the seminal case on the matter, the Supreme Court upheld a statute that required States to raise the drinking age to 21 or risk losing 5% of their federal highway funds. *South Dakota v. Dole*, 483 U.S. 203 (1987). The Court explained that such a restriction was a

"relatively mild encouragement to the States," noting that South Dakota, the State challenging the law, would lose less than half of one percent of its budget. *Id.* at 211.

With respect to the ACA Medicaid expansion, the Court ruled, in a 5-4 decision, that the Medicaid expansion is constitutional. However, the Court found that, in the event that a State does not implement the expansion, it would be unconstitutional to apply Section 1904's enforcement mechanism to withdraw all Medicaid funding from that State.

The Court's decision regarding Medicaid was divided and complex. In all, seven Justices agreed that Medicaid expansion was unconstitutionally coercive. Only two Justices, Ginsburg and Sotomayor, voted to uphold the expansion in full. However, the other seven were split on the question of what remedy to apply. Four Justices (Kennedy, Scalia, Thomas, and Alito) voted to strike down the entirety of the Medicaid expansion. The other three Justices (the Chief Justice and Justices Breyer and Kagan) voted to invalidate only Section 1904 as applied to conditioning the entirety of a State's Medicaid allotment on expansion. In the end, Justices Ginsburg and Sotomayor joined the Chief Justice and Justices Breyer and Kagan to form a 5-4 majority for the holding that the proper remedy is to invalidate Section 1904 as applied to the withholding of all of a State's Medicaid funds, thereby allowing the law to stand.

While there was no majority opinion on this issue, the views that are likely to guide future challenges under the Spending Clause are the ones expressed by the Chief Justice for himself and Justices Breyer and Kagan. The opinion rests on two main points. First, the Chief Justice noted that the sheer amount of federal dollars at risk goes far beyond what was at stake in cases like Dole. The Chief Justice noted that Medicaid spending accounts for over a fifth of an average State's total budget and receives a federal match at a rate between 50 to 83% (depending on the State). States have developed intricate and complicated statutory and administrative schemes to implement Medicaid. The loss of *all* of a State's Medicaid funding, which may make up over 10% of a State's overall revenues, the Chief Justice wrote, "is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." Roberts, C.J. at 52.

Second, the Chief Justice wrote that the Medicaid expansion is not merely an alteration to an existing federal program, but a more dramatic change that, in effect, creates an entirely new federal program. The Chief Justice pointed to the fact that Congress created a new funding provision with a distinct federal match rate to cover costs of newly eligible individuals, as well as a different benefits package (called benchmark coverage). He concluded that the expansion is so significant that a State could not have anticipated that Congress's right to "alter" or "amend" the Medicaid program would include such drastic changes.

The Chief Justice wrote that, while Congress has the power to condition the receipt of federal funds on the States' compliance with restrictions on the use of those funds, it cannot condition "other significant independent grants" on the States' compliance. Roberts, C.J. at 50. Because the Chief Justice found that the expansion is akin to a new program, not a "mere alteration" to the existing Medicaid program, he concluded that Congress cannot withdraw funds from the *existing* Medicaid program if a State is not in compliance with the expansion provisions. *Id.* at 54-55.

The Chief Justice (joined by Justices Breyer and Kagan) found that the threatened penalty for failure to comply with ACA's Medicaid expansion is severable from the rest of the Act. While the ACA does not contain a severability clause, the Court noted the existence of a severability clause elsewhere in the Social Security Act, at Section 1103. In light of that clause, the Court applied its traditional test of severability, finding that "Congress would not have wanted the whole Act to fall, simply because some may choose not to participate." *Id.* at 58.

While there were only three votes for the view that the Medicaid expansion (under threat of loss of all funds) was unconstitutional but severable, Justice Ginsburg (joined by Justice Sotomayor) joined the part of the opinion concluding that the remedy was to preclude application of Medicaid's total withholding provisions to the Medicaid expansion mandate, in order to have five votes for severability. On the merits, however, she and Justice Sotomayor dissented from the conclusion that tying existing Medicaid funds to expansion is unconstitutional, arguing that Medicaid, as amended and expanded by the ACA, should be treated as one single program. Justice Ginsburg argued that both Medicaid and the ACA expansion serve the same aim: providing health care coverage to the needy. She argued that States expressly agreed to participate in Medicaid on the assumption that Congress would change the rules, and the ACA's expansion is not outside the scope of that understanding.

Justices Scalia, Kennedy, Thomas, and Alito also addressed the Medicaid expansion in their joint dissent. They focused less on the penalty for the expansion and more on the vast nature of the federal grant, making it almost impossible to turn down and limiting the States' abilities to craft their own programs. They observed that "there can be no doubt" that Medicaid expansion crosses the line from enticement to coercion, noting the huge role Medicaid plays in States' budgets and revenues. Scalia, et al., dissenting at 38. Furthermore, because federal subsidies to purchase insurance are available only for those with incomes over 100% of the FPL, the dissent notes that the ACA provides no coverage alternative for individuals under 100% of the FPL, other than Medicaid. They observed that the fact that Congress did not design any alternative for uninsured individuals living in poverty indicates how certain Congress was that no State "in its right mind" would decline to participate in the Medicaid expansion. *Id.* at 45.

The immediate and long-term impact of this part of the Court's decision is uncertain. Approximately half of the uninsured who are expected to be covered under the ACA were to be covered under the Medicaid expansion. Several States have already elected "early expansion" to extend Medicaid coverage to adults up to 133% of the FPL (which is an option under the ACA). For those that have not, it is likely to be difficult for States to reject the 100% federal funding that will be available for new eligibles from 2014 to 2016.

If a State chooses not to expand Medicaid eligibility, there will be a coverage gap in that State. Although individuals who do not qualify for Medicaid are subject to the ACA requirement to purchase health insurance coverage, they will be excluded from the penalty if their income is below the threshold requiring them to file a tax return. If their income is below 100% of the FPL, those individuals will not be entitled to federal subsidies for the purchase of health insurance coverage through the state health exchange. Those subsidies are available only to individuals with incomes between 100% and 400% of the FPL (except for lawful permanent residents not eligible for Medicaid, who can receive subsidies at incomes below 100% of the FPL).

The decision leaves unanswered whether States could elect to implement the expansion in part (*i.e.*, covering individuals up to 100% of the FPL); whether States can implement an expansion and then withdraw when the federal funds start to taper down; and whether there are other Medicaid mandates that will now be questioned as unconstitutional exercises of the Spending Clause authority. There may well be litigation on some of these questions in the future.

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