



Fact Sheet:
The Supreme Court's ACA Decision & Its Implications for Medicaid¹
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Prepared by
Jane Perkins

The Patient Protection and Affordable Care Act (ACA) is designed to accomplish comprehensive, market-based health reform. The law seeks to increase the number of insured Americans by requiring those who can afford to do so to purchase health insurance or to pay a penalty (called the "individual mandate"). It provides for tax subsidies to enable individual to purchase policies. The ACA prohibits health insurers from discriminating on the basis of pre-existing condition or from imposing life-time limits on coverage. In addition, the law expands Medicaid coverage to individuals with incomes below roughly 133% of the federal poverty level. The ACA also includes numerous provisions designed to improve the public's health.

Since it was signed into law in March 2010, the ACA has been subjected to relentless litigation, with over two dozen federal court cases filed so far.² In *National Federation of Independent Business v. Sebelius*, Nos. 11-393, 11-398, 11-400, 2012 WL 2427810 (June 28, 2012) (*NFIB*), the Supreme Court decided its first ACA case.³ While potentially affecting the entire ACA, the case focused on two particular provisions: the individual mandate and the Medicaid expansion. This Fact Sheet summarizes the case, focusing on the holding that the Medicaid expansion is coercive on the states.

Overview of the case

The Court heard *NFIB* on appeal from the Eleventh Circuit Court of Appeals. As noted by the Court, there was a split among the federal circuits regarding the constitutionality of the individual mandate provision. Both the Sixth and D.C. Circuits had upheld the mandate as a valid exercise of Congress's authority under the Commerce Clause. See *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir.

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² For background, see National Health Law Program (NHeLP), *Q&A: Update on Litigation Challenging the Affordable Care Act* (Nov. 1, 2010); NHeLP, *Fact Sheet: Litigation Filed to Stop Health Reform* (Apr. 2010) (documents available at www.healthlaw.org).

³ *NFIB* is the short-hand reference for the three appeals from the 11th Circuit: *National Federation of Independent Business v. Sebelius*, *Florida v. DHHS*, and *DHHS v. Florida*.

2011), *pet. for cert. denied*, __ S.Ct. __, 2012 WL 2470097 (June 29, 2012); *Seven Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *pet. for cert denied*, __ S.Ct. __, 2012 WL 2470101 (June 29, 2012). However, the Eleventh Circuit ruled the provision was not authorized by the Constitution's Commerce or Taxing Clauses. See *Florida v. Sebelius*, 648 F.3d 1235 (11th Cir. 2011).

Over a three-day period from March 26-28, 2012, the Court heard six hours of arguments in the case—a modern day record for the Supreme Court. Over 140 *amicus* (friend of the court) briefs were submitted to the Court—an all-time record. The Court considered four questions:

- (1) Is the challenge to the individual mandate barred by the Anti-injunction Act?
- (2) Do the Commerce and/or Taxing Clauses of the Constitution authorize Congress to enact the individual mandate?
- (3) Does the ACA Medicaid expansion represent an unconstitutionally coercive condition on states' participation in the Medicaid program?
- (4) If a provision is unconstitutional, is the entire ACA invalid or can all or part of the remaining law be “severed” and remain good law?

As explained below, the Court's decision in *NFIB* is surprising not only for its legal reasoning but also because of how the Justices voted.

Holding #1: The Anti-Injunction Act does not bar review of the individual mandate issue.

As expected, the Court held that the Anti-Injunction Act (AIA) did not prevent it from determining the constitutionality of the individual mandate. This holding is the only unanimous decision in the case. *NFIB*, 2012 WL at 2427810, at *5.

The AIA prohibits litigation to enjoin the collection of taxes, thus generally allowing taxes only to be challenged by persons who have paid the tax and then sued for a refund. The question was whether the “shared responsibility payment” that individuals must pay for ignoring the individual mandate is a tax within the meaning of the AIA. If a tax, then the AIA would bar a challenge because the penalty provision does not become effective until 2014. *Id.* at *12.

The Court engaged in a straightforward reading of the ACA to find no AIA bar. According to Chief Justice Roberts,

Congress ... chose to describe the “[s]hared responsibility payment” imposed on those who forgo health insurance not as a “tax,” but as a “penalty.” ... Congress's decision to label this exaction a “penalty” rather than a “tax” is significant

because the Affordable Care Act describes many other exactions it creates as “taxes.”

2012 WL 2427810, at *12. Relying on the statutory maxim that Congress is presumed to act intentionally when using certain language in one part of a statute and different language in another, the Court concluded that Congress did not intend the penalty to be a tax within the meaning of the AIA.

Holding #2: The individual mandate is a valid exercise of Congress’s taxing power.

The parties argued over whether the individual mandate was a valid exercise of congressional authority under the Constitution’s Commerce Clause, Necessary and Proper Clause and/or Taxing Clause. Pre-decisional interest focused almost exclusively on the Commerce Clause. Indeed, at oral argument, the taxing argument was a secondary alternative for the federal government, representing only 217 lines in the voluminous transcript. In a surprise, however, the Court held that the individual mandate is a valid exercise of Congress’s power to tax.⁴ This holding could and, perhaps should, have ended the matter; however, a majority of the Court found Congress lacked authority to enact the individual mandate pursuant to the Commerce Clause. *Id.* at *20.

Legislating pursuant to the taxing power: In a part of the opinion joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, Chief Justice Roberts held the mandate is a valid exercise of Congress’s power to “lay and collect Taxes.” U.S. Const. Art. 1, § 8, cl. 1. They reached this conclusion despite the fact that the financial consequence imposed on an individual who does not purchase health insurance was labeled as a “penalty” in the ACA.

The Court decided the issue by concluding that the payment operates as a tax: It is paid to the Treasury when taxpayers file their tax returns; it does not apply to individuals who do not pay federal income taxes; it is determined by familiar factors such as number of dependents, taxable income and joint filing status; it is found in the Internal Revenue Code and enforced by the IRS; and it produces some revenue (expected to be about \$4 billion per year by 2017). 2012 WL at 2427810, at *24. The Court reasoned, as well, that the payment was not meant to be punitive, and the requirement to pay did not rest the intent not to purchase insurance:

In distinguishing penalties from taxes, [the] Court has explained that ‘if the concept of penalty means anything, it means punishment for an unlawful act or omission.’ While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful.

⁴ This conclusion seems at odds with the decision that the AIA does not apply. The opinion addresses the apparent contradiction stating that, while nomenclature is significant for determining the applicability of the AIA, an Act of Congress, it is not definitive in determining whether an exaction is a tax or a penalty for constitutional purposes. Rather, the important question is the manner in which an exaction functions. *Id.* at 2427810, at *12-13.

Neither the Act nor any other law attaches negative legal consequences to not buying health insurance beyond requiring a payment to the IRS.

Id. at *26 (internal citations omitted). The majority was not troubled by the fact that the individual mandate is intended to affect individual conduct, not just to raise revenue, noting that the use of taxes seeking to affect conduct is nothing new. For example, the substantial taxes imposed on the purchase of cigarettes are intended not just to raise money but also to encourage people to stop smoking. *Id.* at *25.

Thus, the Chief Justice concluded the mandate could stand under Congress's Taxing power. He warned, however, that "Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more." *Id.* at *30.

Legislating pursuant to the Commerce Clause and the Necessary and Proper Clause: As noted, given that the Court upheld the constitutionality of the mandate, it did not need to say more.⁵ Nevertheless, by a vote of 5-4, the Court stated the individual mandate was not valid under the Commerce Clause and could not be sustained under the Necessary and Proper Clause.

The Commerce Clause gives Congress the power to "regulate Commerce...among the several States." U.S. Const. Art. I, § 8, cl. 3. Over the last 80 years, these words have been expansively interpreted to allow Congress to regulate not just interstate commerce itself, but individual activities that, in the aggregate, "substantially affect" interstate commerce. 2012 WL 2427810, at *15. In *NFIB*, however, the Court discussed a significant boundary on congressional authority. According to the Chief Justice, as expansive as cases construing the commerce clause power have been, they uniformly describe the power as reaching "activity." *Id.* at *16. This contrasts, he said, with the individual mandate, which is an attempt to regulate "inactivity," i.e., the refusal to purchase health insurance.

The individual mandate ... does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority.

Id. at *16 (emphasis in original). The Chief Justice also found that the individual mandate amounts to an attempt to exercise "police power," which is exclusively vested in the States. *Id.* at *20. Returning to the familiar broccoli example, he posited that a decision allowing the mandate under the Commerce Clause would allow for legislation "ordering everyone to buy vegetables" to address the problem of unhealthy diets resulting in widespread obesity and increased health care costs. *Id.* at *17. "This is not

⁵ For Chief Justice Roberts' explanation of why he needed to address this issue, see 2012 WL at 2427810, at *30 (Part III.D.).

the country the Framers of our Constitution envisioned,” he said. *Id.* at *18. Because the individual mandate was an effort to regulate inactivity, it could not stand pursuant to the Commerce Clause. *Id.* at *20.

From here, the majority easily concluded that the Necessary and Proper Clause did not apply. The Government argued that the individual mandate was a Necessary and Proper component of reforming the market for health care through insurance reforms such as guaranteed issue and community rating. *Id.* at *21. The Court found application of the Necessary and Proper Clause to be limited to laws that “involve exercises of authority derivative of, and in service to, a granted power.” *Id.* The mandate could not be upheld as a necessary and proper component of insurance reform because the Commerce Clause did not authorize the mandate. *Id.* at *22.

Notably, the dissenting justices, Kennedy, Scalia, Alito, and Thomas, would have found the mandate unconstitutional and ruled that the entire ACA was invalid. *Id.* at *72-105.

It remains to be seen whether the Court’s discussion of the Commerce Clause will lead to a significant limitation of Congress’s power under the Commerce Clause or whether, in light of the unique characteristics of the health care market and individual mandate, it will be interpreted narrowly.

Holding #3. The Medicaid expansion is unduly coercive on the States, and the remedy for the coercion is to preclude the Federal government from terminating existing federal funding to a State that does not implement.

The Spending Clause of the Constitution, Art. I, § 8, cl.1, empowers Congress to tax and spend to provide for the general welfare. Over the years, Congress has used the authority to address national issues by offering federal funds to states in return for their agreement to abide by the standards set by the federal government as a condition of receiving the funding. For the first time ever, a federal court has found Congress’s exercise of Spending Clause authority to be unduly coercive. The Supreme Court’s actions, both in agreeing to consider the question and finding a constitutional bar, are unprecedented. It is also surprising that seven of the Justices agreed that the expansion is unduly coercive, with only Justices Ginsburg and Sotomayor dissenting. Of equal interest is how the Chief Justice, joined by Justices Breyer and Kagan, crafted a remedy for the violation that gained the support of Justices Ginsburg and Sotomayor to form a 5-4 majority.

By a 7-2 margin, the Court accepted the argument from 26 State officials that they were being unduly coerced into accepting the ACA’s requirement to expand Medicaid to individuals with incomes below roughly 133% of the federal poverty level. The ACA inserted the expansion provision into the existing Medicaid statute, which includes a long-standing provision authorizing the Secretary of Health and Human Services (HHS) to terminate all federal funding to a state that does not comply with a mandatory federal requirement. Thus, the state officials argued, if they did not

implement the expansion, they would lose all federal funds and, thus, as a practical matter, they had no choice but to participate.

Accepting this argument at face value without evidence of actual coercion, Justice Roberts' opinion rests on three premises. First, according to the Chief Justice, the Medicaid expansion "accomplishes a shift in kind not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children." 2012 WL 2427810, at *35. Previous Medicaid amendments and expansions, such as those in the 1980s and 90s, concerned only these populations. By contrast, the ACA Medicaid expansion mandated inclusion of an entirely new group, an action that Chief Justice Roberts decided "transformed" Medicaid from a program serving designated population groups to "a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the federal poverty level." *Id.* He concluded that the ACA expansion made Medicaid "no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage." *Id.*

Second, the Chief Justice found that States were being treated unfairly because they had inadequate notice that the new expansion program would be a part of the Medicaid deal. *Id.* at *36. Previous Supreme Court cases (that did not address coercion) have noted that Spending Clause programs are similar to contracts. Thus, Congress must establish clear notice of Spending Clause requirements so that States will know what they are getting themselves into if they decide to participate. According to Roberts, when States first decided to participate in Medicaid, they did not foresee a requirement to include everyone below a certain percentage of poverty.

Finally, likening the situation to "a gun to the head," Justice Roberts found that Congress was forcing the States to accept the unanticipated new program by threatening them with the loss of all federal funding for the old one. *Id.* at *34. "The threatened loss of over 10% of a State's overall budget ... is economic dragooning that leaves the states no real option but to acquiesce in the Medicaid expansion." *Id.*

The next question facing the Court was what to do about the Medicaid expansion. Since its enactment, Medicaid has included a provision that allows the Secretary of HHS to deny all or part of a non-compliant State's federal Medicaid funding, 42 U.S.C. § 1396c. Although the provision has never been used to terminate the entirety of a State's funding, the Chief Justice turned to it, and a 5-member majority agreed to Chief Justice Roberts' deft conclusion: The constitutional violation is "fully remedy[ed]" by prohibiting the Secretary of HHS from terminating existing federal Medicaid funding of a State that does not implement the expansion. *Id.* at *37. This is a carefully crafted holding is meant to be narrow:

Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What

Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.

Id. Thus, the decision remedies the undue coercion by curbing the power of the federal government to enforce the Medicaid expansion but maintains the ACA and the Medicaid Act in all other respects.

The following chart summarizes the vote count on each issue.

Opinion of the Court				
Justice	Anti-Injunction Act	IM-Taxing Power	IM-Commerce Clause	Medicaid Expansion
Roberts	Does not apply	Constitutional	Unconstitutional	Unduly coercive, HHS cannot withhold all existing Medicaid funds for failure to implement
Scalia	Does not apply	Does not apply	Unconstitutional strike ACA	Unconstitutional strike ACA
Thomas	Does not apply	Does not apply	Unconstitutional strike ACA	Unconstitutional, strike ACA
Kennedy	Does not apply	Does not apply	Unconstitutional strike ACA	Unconstitutional, strike ACA
Alito	Does not apply	Does not apply	Unconstitutional strike ACA	Unconstitutional, strike ACA
Kagan	Does not apply	Constitutional	Constitutional	Unduly coercive, HHS cannot withhold all existing Medicaid funds for failure to implement
Sotomayor	Does not apply	Constitutional	Constitutional	Constitutional, as is penalty scheme
Ginsburg	Does not apply	Constitutional	Constitutional	Constitutional, as is penalty scheme
Breyer	Does not apply	Constitutional	Constitutional	Unduly coercive, HHS cannot withhold all existing Medicaid funds for failure to implement
Totals	9-0 No AIA Bar	5-4 Constitutional	5-4 Unconstitutional	Plurality disallows funding termination to States that do not implement, expansion provision survives

Source: Based upon Chart Developed by Geo. Wash. Univ. Dep't of Health Pol. (July 2012).

Implications for the Medicaid Expansion and Medicaid in General

NFIB is sure to spark litigation by individuals and entities that want to curb Spending Clause enactments. The Supreme Court has provided no standards for determining when a Spending Clause condition is coercive; it merely said that, in this case, the line was clearly crossed. As a result, the lower courts are likely to be struggling with coercion claims in years to come.

Not surprisingly, *NFIB* is already raising questions about implementation of Medicaid and the ACA. Many of these will need to be addressed through policy clarifications from the White House and HHS. However, based upon our reading of *NFIB* and understanding of the ACA, we believe that:

- *NFIB* does not make the Medicaid expansion optional for the States. The Court did not strike the Medicaid expansion from the Medicaid Act, and the provision continues to be listed in 42 U.S.C. § 1396a(a)(10)(A)(i), which describes the mandatory Medicaid eligibility groups. *NFIB* is a narrow holding that it was unduly coercive for Congress to force States to make the expansion or lose all existing federal funding for the “old” program. *NFIB* fully remedies the problem by holding that the Secretary of HHS cannot terminate existing Medicaid funding for a State that does not implement the expansion. It may be that, in practice, HHS cannot or will not punish states for failing to implement the Expansion, but that does not change the letter of the law.
- The federal matching provisions of the ACA are not affected by the decision. States that implement the Medicaid expansion will receive historically generous federal funding: 100% federal funding, to be phased to 90% over time. This compares with, on average, 57% federal funding for most Medicaid services.
- States that implement the Medicaid expansion must comply with all mandatory provisions of the Medicaid Act. As Justice Roberts said, “Nothing in our opinion precludes Congress from ... requiring that states accepting such funds comply with the conditions on their use.” 2012 WL 20128910, at *37. Thus, for example, beneficiaries covered through the Medicaid expansion will be protected by provisions requiring medical assistance to be provided with reasonable promptness, see 42 U.S.C. § 1396a(a)(8), and due process to be accorded when assistance is denied, reduced or terminated, *Id.* at § 1396a(a)(3).
- *NFIB* does not authorize States to receive 100%/90% federal funding for implementing less than the full Medicaid expansion. The Medicaid Act still requires States to cover “all individuals” with incomes below 133% of the poverty line by January 1, 2014. 42 U.S.C. § 1396a(a)(10)(i)(VIII). Thus, as written, the law does not allow a State to implement the Medicaid Expansion to 75% or 100% of the federal poverty level and receive 100% federal funding. It is possible that the Secretary of HHS could interpret her authority under section 1115 of the Social Security to allow a State to implement such a program. However, a

“waiver” of the requirements of 1396a would be possible only if the State established an “experimental, pilot or demonstration” basis for the program after obtaining extensive public comment. See 42 U.S.C. § 1315(a) (§ 1115 of the Social Security Act). Presumably, the long-standing requirements for budget neutrality would also be applied.

- States that do not implement the Medicaid expansion but that choose to continue to participate in Medicaid must comply with all other provisions of the Medicaid Act or risk losing all federal Medicaid funding.
- The ACA’s other newly added Medicaid provisions continue in full force and effect in all States, including requirements for coverage of young adults leaving the foster care system, Medicare-Medicaid rate parity for primary care providers and options for expanding coverage of community-based services and supports for people with disabilities and the elderly.
- Whether or not a State implements the mandatory Medicaid expansion, the ACA’s maintenance of effort (MOE) provision will continue to apply. This provision requires States to maintain their Medicaid eligibility as it stood on March 23, 2010, the date the ACA was enacted until “the State has an exchange approved by the Secretary.” 42 U.S.C. § 1396a(gg).
- Whether or not a State implements the Medicaid expansion, the modified adjusted gross income (MAGI) provisions for determining Medicaid eligibility will continue to apply. On its face, the ACA (§ 2002) applies to most categories of non-disabled children and adults under 65, even without the Medicaid expansion.
- Needy people will be left without health insurance if the State does not implement the Medicaid expansion. The ACA insurance exchanges will be offering subsidies to help people with limited incomes to purchase health insurance beginning in January 2014. However, only those with incomes at or above 100% FPL or those individuals below 100% FPL who do not qualify for Medicaid due to their immigration status are eligible to receive subsidies. Uninsured people with incomes below the FPL will be left out in the cold.
- Congress maintains its authority to implement publicly funded health coverage expansions through the Spending Clause.

Conclusion

The Supreme Court’s *NFIB* decision has left most all of the ACA intact, including centerpiece provisions requiring individuals to have adequate insurance coverage and insurance companies to abandon pre-existing condition exclusions and lifetime caps on coverage. The battles over health reform are far from over, however. Advocates should, therefore:

1. Determine what the Medicaid expansion means to your state. State officials will now have to decide whether to comply with the Medicaid Act and implement the Medicaid expansion. Already, the governors of some states (e.g. SC, TX) have stated they do not intend to implement it. It will be important to educate state policy makers and the public about the role of the Medicaid expansion. Among other things, a State that refuses to comply with the Medicaid expansion will lose 100% federal funding to cover the costs of the expansion population. These States will be unable to shift significant state-only spending in areas such as mental health and substance abuse services into the Medicaid program (and thus unable to free up these State dollars for other budgetary needs). With the expansion, working poor, women, veterans and individuals with chronic illnesses will lose their pathway to health insurance coverage. Individuals with incomes below the federal poverty level will remain uninsured because they will not be able to afford to purchase insurance and, as the law is currently written, do not have access to subsidized insurance through an exchange. Uninsured, these individuals will be more dependent on expensive emergency and urgent care.

2. Monitor information from the Centers for Medicare & Medicaid Services. In the coming months, CMS will have to provide information to the States to implement the expansion in light of *NFIB*, and advocates should monitor what CMS is doing. Given the wording of the Medicaid Act, which requires states to have a state Medicaid plan describing their program and approved by the Secretary, it would appear that States will need to submit a state Medicaid plan amendment addressing coverage of the Medicaid expansion population. However, the Secretary could select another procedure.

3. Monitor ongoing litigation. The *NFIB* decision will not bring an end to litigation against the ACA. Those who oppose the ACA will determine whether *NFIB* opens the door to new legal theories for attacking the ACA. There are also a number of pending ACA challenges that were stayed while the Court considered the Florida cases. Some of these cases involve targeted questions that were not decided by the Supreme Court, for example, claims that the ACA infringes religious freedoms and illegally establishes an independent Medicare payment advisory board. These cases will now move forward. *NFIB* is also sure to raise questions about the constitutionality of other existing laws that Congress enacted pursuant to the Commerce and Spending Clauses.

4. Monitor the upcoming elections. Attacks on the ACA will be a significant factor in the November elections.

5. Let us know how we can help you!