Health Advocate

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Litigation Update on the ACA's Medicaid Expansion

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Key Resources

- NHeLP's Supreme Court Brief on Medicaid
- NHeLP's Supreme Court Brief on Severability
- Comprehensive Chart of all Briefs, amici, an counsels of record in the ACA litigation
- 15 Reasons State Officials are Wrong about the Medicaid Expansion

Key Upcoming Dates

SCOTUS ACA argument schedule:

- *Monday, March 26, 2012, 10:00am* – Anti-Injunction Act Arguments (90 minutes)
- *Tuesday, March 27, 2012, 10:00am* – Minimum Coverage Provision Arguments (2 hours)
- *Wednesday, March 28, 2012, 10:00am* – Severability Arguments (90 minutes)
- *Wednesday, March 28, 2012, 1:00pm – Medicaid Arguments (1 hour)*

ACA Litigation by the Numbers

- Federal district court cases: **26**
- Federal circuit court cases: **12**
- Federal courts that have found the Medicaid expansion unconstitutional: **0**
- Most hours of argument heard by the Supreme Court in a single case since 1970: **5**
- Hours granted for ACA argument: **6**
- Amici supporting the constitutionality of the Medicaid expansion in the Supreme Court: **90**
- Uninsured individuals who would gain coverage through the Medicaid expansion: **16,000,000**
- Courts that will determine the future of the Medicaid expansion (the Supreme Court): **1**

Background of the cases

In late March, the Supreme Court will hear oral argument in Florida v. U.S. Department of Health & Human Services, a case challenging the constitutionality of the Affordable Care Act (ACA), also known as "health reform" or, for those who don't fully understand a president's limited role in passing legislation, "Obamacare."[1] The Court is going to consider four separate issues:

- the constitutionality of the individual responsibility requirement (also called the individual mandate);
- whether the Anti-Injunction Act bars hearing the individual responsibility requirement issue prior to implementation of the requirement in 2014;
- whether, if it is unconstitutional, the individual mandate is severable from the rest of the ACA; and
- the constitutionality of the Medicaid expansion.

The case—which is actually three cases combined—is brought by elected officials from 26 states, the National Federation of Independent Businesses, and two individuals. In part to ensure review by conservative judges, the case was filed in the Northern District Court of Florida and was then appealed to the 11th Circuit Court before arriving at the Supreme Court.[2]

The Medicaid expansion issue was raised at the district court level, where even conservative Judge Roger Vinson found it constitutional. On appeal to the 11th

[1] Patient Protection and Affordable Care Act, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) [hereinafter ACA].
[2] *Florida v. Dep't of Health and Human Services*, No. 11-400 (Sup. Ct. filed Sept. 27, 2011).

Circuit, the Medicaid expansion was again ruled constitutional by a conservative-leaning panel of judges. Despite the favorable rulings from both lower courts, the Supreme Court agreed to consider the Medicaid expansion issue. This was surprising not only because of the clear results in the lower courts, but also because other federal courts have consistently rejected similar challenges to other federal-state cooperative programs.

Legal background

Starting in 2014, all non-disabled, non-elderly individuals with incomes below 133% of the federal poverty level (FPL) will be eligible for Medicaid (previously, you had to be both low-income and fall into a particular category, such as child, pregnant, or person with a disability).[3] This coverage is mandatory, meaning that all states participating in Medicaid must cover the Medicaid expansion population; if they do not, they risk losing their federal Medicaid matching funds.

The legal question is whether Congress has the power to require states to cover the Medicaid expansion population in order to participate in Medicaid. Congress passed the Medicaid expansion through its "spending power"—the power given to it by the U.S. Constitution to tax and spend for the nation's general welfare.[4] The spending power is a broad constitutional power. Over the last century, the Supreme Court has repeatedly approved using the congressional spending power to address a number of diverse and large national problems, and it is has become one of the main sources of Congress's legislating authority.

The state officials' argument against the Medicaid expansion

The state officials argue that the Medicaid expansion radically changes the Medicaid program. They claim that even though Medicaid participation is voluntary, states have no choice but to implement the expansion. The states claim that the federal government is like a mobster that has given them "an offer they can't refuse." To support this claim of coercion, they make a few overlapping arguments.

They first say that Congress is compelling them to accept the Medicaid expansion because the expansion is the only avenue Congress has provided for low income people to meet the individual mandate. They also take the position that the sheer amount of federal Medicaid funding is so big that no state can afford to turn it down because a state that refuses to participate in the Medicaid expansion could lose *all* federal Medicaid funds. The state officials also imply that the expansion is unfair because the federal government is changing the terms of the Medicaid deal it had already made with the states.

Ultimately, the state officials assert that the spending power must have some limit and that the Medicaid expansion is beyond that limit. While Congress does have authority to use federal funding to *encourage* states to do things, they argue the Medicaid expansion *forces* states into action in violation of the spending power.

Why the Medicaid expansion is constitutional

In its brief, the federal government forcefully refutes the state officials' arguments, drawing on Supreme Court precedent and applying the controlling legal standard (known as the "*Dole* test") to explain why the officials' coercion argument fails as a matter of law. The federal government also points out that the state officials are asking the Court to reject an act of Congress without offering any real standard to measure the legality of this law or future laws.

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[3] 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

[4] Congressional spending power is authorized by Article I, Section 8 of the U.S. Constitution.

On February 15, NHeLP filed an amicus brief (also known as a "friend of the court" brief) in support of the constitutionality of the Medicaid expansion. A number of national organizations signed on to the brief, including the American Academy of Pediatrics, AARP, Association for Community Affiliated Plans, Easter Seals, Inc., National Association of County and City Health Officials, National Association of Local Boards of Health, and Families USA.[5]

In its brief, NHeLP takes on the state officials' arguments with law, history, and logic.

History. There is nothing new here. The Medicaid expansion is hardly unusual, much less radical. The Medicaid program has had exactly the same structure since it was created in 1965: the federal government sets mandatory categories of coverage, and states have the flexibility to add optional categories (which the federal government also helps fund). Congress has expanded the coverage requirements (for both populations and services) at numerous points over the last 47 years—just like it did in the ACA. The new Medicaid expansion category is just one more in this series. While states have always had to meet these requirements to get their Medicaid funding and the federal Medicaid agency has always had the authority to cut off federal funding to a state that is not obeying the rules, that harsh punishment has rarely, if ever, been used. Instead, the federal government uses other enforcement tools to encourage states to follow the rules.

The only significant historical difference with the new Medicaid expansion is that Congress will give states unusually generous federal funds for the Medicaid expansion: the federal government will initially pay 100% and, later, 90% of the costs, instead of the usual 50-83%.

Policy. In their argument, the state officials reject the basic way federal-state programs work, with huge implications. Their argument, in essence, is that as the federal financial contribution *increases,* the federal government's ability to condition and control the funding *decreases*. This logic makes no sense, and it would leave the federal government with only two choices. On one hand, the federal government can limit itself to tiny low-budget national projects that provide states with little money to participate (hardly an incentive); or on the other hand, if all 50 states agree, the federal government can provide the states with large sums of money but have no say over how that money is spent. In either case, the result is the same: the power of the federal government to address issues affecting the national welfare would be decimated, and federal-state cooperative "partnerships" wouldn't really work.

Irony. On one level, it is remarkable that the states are complaining at all. The majority of the 26 states involved have already chosen to participate in optional Medicaid expansions to covered populations with incomes well above 133% FPL, and many states—including some of the states bringing the lawsuit—have already been providing Medicaid to non-disabled, non-elderly adults with incomes above133% FPL, the same population covered by the "radical" expansion. In fact, all of these states are spending more Medicaid money on *optional* populations and services than on the *mandatory* spending required by the federal law. (Some of the state officials are from states that are spending 75% or more of their program funds on options). That's right: many of these 26 states who are claiming they are coerced into all of this spending actually *voluntarily* made their Medicaid programs twice as big as they had to and *already* cover many of the new Medicaid expansion individuals. Under these facts, the state officials' complaints ring hollow. Their true objection is a political, not a legal, one.

[5] Available at: http://www.healthlaw.org/images/stories/2012_NHeLP_ACA_Brief.pdf.

One additional strategic gambit

The state officials make one additional argument against the Medicaid expansion. They say the Medicaid expansion and the individual responsibility requirement are connected. They note that both initiatives start at the same time (in 2014) and they make the following argument to try and prove the Medicaid expansion is coercive: The individual responsibility requirement calls for individuals to get health insurance coverage or face penalties. To afford coverage, lower-income individuals will depend on subsidies, but the ACA doesn't allow people who qualify for the Medicaid expansion to get those subsidies; so the ACA forces states to cover people using the Medicaid expansion to avoid forcing them to face the tax penalties.[6]

This logical chain is quickly broken down by the facts. To begin with, Medicaid is not the only vehicle for low-income people (who also include veterans and those on Medicare) to obtain qualifying coverage. Also, according to the ACA, individuals don't have to obtain coverage if they are too poor to file taxes, would need to spend more than eight percent of their income on insurance premiums, or can meet special exceptions for hardship.[7] More obviously, if the federally-funded subsidies were available for the low-income state Medicaid enrollees, then states would have a huge incentive to drop their Medicaid coverage and make the federal government pay the whole cost of their coverage through subsidies. This is not as fair as it is in Medicaid, where the federal and state governments share the cost. (And remember that in the Medicaid expansion, the states will get sweet deal—their share of the spending is only 10% of the costs!)

Why this case is so important

Even though they fly in the face of history and precedent, don't discount state officials' arguments against the Medicaid expansion: the stakes of the argument are huge; much bigger than just the Medicaid expansion. A negative ruling on congressional spending power is sure to affect the entire Medicaid program (even the parts not being challenged), as well as dozens of other laws created using the same authority—for example, the Individuals with Disabilities Education Act and the Rehabilitation Act (two laws supporting rights and programs for individuals with disabilities and the elderly), as well as education, transportation, and law enforcement programs.

At its core, this litigation is an attack on the ability of the federal government to create national programs and national standards to address complex national problems. The ACA is just one of many potential targets. NHeLP will continue to fight in and out of court to protect the ACA and the Medicaid program, and in support of other federal initiatives serving low-income individuals that are threatened by anti-ACA litigation.

[6] *See* Internal Revenue Code of 1986, § 5000A and § 36B(c)(2)(B).
[7] Internal Revenue Code of 1986, §§ 5000A(e)(1), (e)(2) and (e)(5).

About Us

The National Health Law Program protects and advances the health rights of low income and underserved individuals. The oldest non-profit of its kind, NHeLP advocates, educates and litigates at the federal and state levels.

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