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Eleventh Circuit Will Rule Soon on Constitutionality of Affordable Care Act



By **WEBB MILLSAPS AND J. PETER RICH**

Virtually every attorney in America knows that several legal challenges to the Affordable Care Act (ACA) are making their way through the federal appellate courts and that the legal issues will almost certainly be decided in the end by the U.S. Supreme Court. However, many busy practitioners, who are naturally focused on their own legal practices, may have only a limited awareness of the core legal questions involved in these ACA challenges. Perhaps the most significant of the pending cases is the one cur-

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rently before the U.S. Court of Appeals for the Eleventh Circuit. Oral arguments in that case were heard in early June and a decision is expected any time.

A salient reason why the Eleventh Circuit case is being watched closely is that the case involves more than half of the nation's states pitted on one side of the litigation against the federal government on the other side. By contrast, the ruling by the U.S. Court of Appeals for the Sixth Circuit on June 29, a 2-1 decision that upheld the constitutionality of the ACA, involved no states at all; the matter was originally brought solely by private parties, including the Thomas More Legal Center, which recently filed a *Petition for Writ of Certiorari* asking for U.S. Supreme Court review. Separately, two other cases¹ challenging the constitutionality of the ACA are pending appeal before the U.S. Court of Ap-

¹ See the district court opinion *Virginia v. Sebelius* *here* and see the district court opinion in *Liberty University v. Geithner*, in which the constitutionality of the individual mandate and the ACA was upheld, *here*

peals for the Fourth Circuit, but Virginia is the only state that is a party in either of those cases.

The Eleventh Circuit case is also of particular interest because the original U.S. district court decision that is being appealed was the only *opinion* delivered so far that struck down the ACA in its entirety. Specifically, on Jan. 31, Judge Roger Vinson of the U.S. District Court for the Northern District of Florida held that the “individual mandate” under the ACA is unconstitutional. He also held that the individual mandate could not be severed from the other provisions in the ACA, due to Congress’s decision to strip the original severability provision from the legislation, and that therefore the entire ACA is unconstitutional.

The only other U.S. district court judge to find the individual mandate unconstitutional is Judge Henry Hudson of the U.S. District Court for the Eastern District of Virginia; his *decision* is now on appeal to the Fourth Circuit. However, Judge Hudson decided that the individual mandate was severable from the remainder of the ACA, and consequently did not strike down any other provisions of the law.

The legal controversy in the Eleventh Circuit case is fundamentally about federalism: What authority does the federal government have under the Constitution to enact laws in certain spheres and what authority is reserved exclusively for the states and the citizens?

Accordingly, in order to properly comprehend the controversy, one first needs to understand some basics about the individual mandate provision within the ACA, which is the source of the controversy, as well as the constitutional issues being debated.

The ‘Individual Mandate’

President Obama called the individual mandate the “linchpin” of the ACA because, although the ACA includes numerous provisions that by their nature would otherwise tend to increase the cost of health insurance,² the individual mandate is the mechanism intended to at least offset the cost increases. In fact, the hope is that the individual mandate will not only work to offset the additional cost imposed by other provisions of ACA, but that, by forcing younger, healthier people to purchase health insurance, the individual mandate will even produce net cost savings, making health insurance relatively less expensive overall.

Prior to the passage of the ACA, policymakers and analysts concluded that “adverse selection” is a core problem that contributes to skyrocketing health insurance premiums, especially for individual and small group health insurance plans. The decision to purchase private health insurance currently is voluntary and under the current system people pay their own premiums. For this reason, older and sicker people are most likely to need and use health insurance, so they purchase health insurance in great numbers despite expensive health insurance premiums.

² For example, the ACA prohibits lifetime and annual limits on certain types of group health plans and individual and group health insurance coverage. See § 2711 of the Public Health Service Act as added by § 1001 of the ACA. This prohibition and other mandates under the ACA may result in unintended, negative consequences for group health plans and individual and group health insurance coverage. See, e.g., Turner, Grace-Marie, Negative Consequences of Health Law Force Health Insurers to Withdraw from Markets Across the Country, *The Galen Institute* (Feb. 5, 2011).

In contrast, younger and healthier people, who are sometimes referred to as “immortals” by those in the health insurance industry, are much more willing to gamble that they will not need to use health insurance benefits, and therefore they generally choose not to purchase it (unless they receive a subsidy, such as when an employer pays part of the cost, or are otherwise required to participate in a health insurance pool as part of an employer or union group health plan).

Two Problems Posed By ‘Free Riders.’ Those who choose not to purchase health insurance are viewed as “free riding” the system, and thereby causing two aggregate problems for the health insurance system, each of which increases costs for people who have insurance. The first problem relates to the “immortals” who gamble correctly that they will have no significant health-related costs. The individual who decided not to have health insurance may consider it a “win” if he or she remained healthy and had no significant health expenditures during the applicable period.

In contrast, the health insurance industry, viewing the situation as part of a collective action problem, sees these “winners” as detrimental to the health insurance system because those dollars that the healthy person kept in his or her pocket could have been used by the health insurance pool to subsidize the cost of covering health care services provided to older and less healthy people.

The second collective action problem arising from healthy individuals who forgo health insurance transpires because, as it turns out, some of these individuals have gambled incorrectly on their own health. When the gamble fails, these individuals end up using significant health care services, but do not have health insurance to help cover the costs. Health care providers are often not fully paid by such uninsured patients, and some uninsured patients do not pay at all.

For example, hospitals are required to examine and stabilize such patients by the Emergency Medical Treatment and Active Labor Act³ (“EMTALA”), but often do not get paid anything for such services, increasing hospital rates for everyone else, including health insurers in particular. In order to defray the losses from uninsured patients, hospitals and other health providers charge insured patients more than would otherwise be the case. The *Obama administration’s brief* in the Eleventh Circuit frames the issue as follows, “Millions of people without health insurance have consumed health care services for which they do not pay . . . [and] thereby shifted the uncompensated costs of their care—totaling \$43 billion in 2008. . .”

Modest Tax Penalties. Beginning in 2014, the individual mandate provision requires non-exempted individuals to purchase health insurance at a level approved by the federal government or to pay a tax penalty. Although not at the very heart of constitutional controversy, there are problems with the individual mandate that are “essential to understanding its full purpose and effect,” according to a *brief* filed in the Eleventh Circuit by certain private plaintiffs that have joined the 26 states challenging the individual mandate.

One problem with the individual mandate is that, because the tax penalties imposed are so relatively mod-

³ 42 U.S.C. 1395dd et seq.

est compared with the expense of health insurance, healthy individuals are likely to pay the tax penalties and forgo purchasing health insurance. Referencing a *CBO report*⁴, the private plaintiff's brief states that "roughly 4 million of the 8 million uninsured affected by the mandate will likely pay the penalty rather than purchase insurance. . ." This is, in part, because under the ACA health insurance companies must allow uninsured individuals to purchase health insurance at any time without pre-existing condition limitations, which effectively encourages healthy individuals to be more likely to gamble that they will not get sick and to simply purchase health insurance only if and when they do have an expensive illness.

The likely effect is to exacerbate the collective action problem that the individual mandate was supposed to solve and, as the private plaintiff brief argues, "the risk of 'free-riding' will substantially persist regardless [of whether the individual mandate is imposed]."

Federalism

Judge Vinson's opinion, now on appeal, states that the case is "not really about the health care system at all," but rather "principally about the federalist system" and the role of the federal government.

Individual states generally have the authority under state constitutions to pass laws compelling citizens to purchase insurance, as is the case in Massachusetts. The basic question in the Eleventh Circuit is whether the federal government has the authority under the Constitution to make a law imposing the individual mandate on all Americans. If Congress does not have such power, then the individual mandate provision of the ACA is unconstitutional and, if Judge Vinson's view is upheld that the individual mandate is not severable from the remainder of the ACA, the entire health reform law would be struck down.

The federal government derives its legal authority to make laws over states and citizens from the grant of that authority given to the federal government by the states in the U.S. Constitution. As is the case with most federal laws, there is no specific, enumerated power authorizing Congress to enact the individual mandate, and so the authority for Congress to legitimately enact the individual mandate exists only if the individual mandate is deemed to be grounded in one of the broader powers granted to the Congress under the Constitution, such as the power to tax and spend or to regulate interstate commerce under the commerce clause.

Lower courts that have ruled on the constitutionality of the ACA have generally agreed that the individual mandate is not a tax and therefore would not be constitutionally justified under the federal government's taxation authority. As a result, the controversy is whether the commerce clause, as it has been interpreted according to Supreme Court precedent, provides sufficient authority for Congress to impose the individual mandate. It is a close question.

For the first part of the nation's history, Congress seldom invoked the commerce clause as a basis for authority to make federal law. However, in 1937, as Judge Vinson's opinion states, "everything changed." Using the authority of the commerce clause, President Roosevelt

and Congress began enacting popular and sweeping federal legislation as part of the New Deal. Through 1936, however, the Supreme Court took a narrower view of the commerce clause than Roosevelt. For example, in the 1936 case of *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the high court struck down, in a 5-4 decision, a key provision in federal mining legislation on the grounds that mining did not constitute interstate commerce.

Recognizing that many of the Supreme Court decisions against the New Deal legislation were split 5-4, President Roosevelt planned to increase the size of the Supreme Court from nine justices to as many as 15 and to "pack the court" with justices whose legal views were accommodating to the New Deal legislation.⁵ The court-packing threat prompted Justice Owen Roberts to switch his judicial philosophy and to begin taking Roosevelt's side, resulting in case law that for decades following generally expanded the scope of the federal government's constitutional authority to enact legislation, including as a result of a dramatically expanded judicial interpretation of what constituted interstate commerce under the commerce clause. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and *Wickard v. Filburn*, 317 U.S. 111 (1942).

After 1937, the Supreme Court refused for nearly 60 years to strike down any federal law on the ground that Congress had exceeded its authority under the commerce clause. Then in 1995, in *United States v. Lopez*, 514 U.S. 549, the high court struck down the Gun-Free School Zone Act of 1990, a federal gun law that was narrow in scope, because that law was deemed insufficiently related to interstate commerce under the commerce clause. In 2000, in *United States v. Morrison*, 529 U.S. 598 (2000), the United States struck down a second federal statute on the ground that Congress had exceeded its authority under the commerce clause.

Some observers have seen the Lopez and Morrison decisions as potentially marking the beginning of a "New Federalism" in which the Supreme Court pushes back against the expansive precedent that nearly everything constitutes interstate commerce under the commerce clause. The states and other plaintiffs challenging the individual mandate of the ACA argue, among other things, that Lopez and Morrison demonstrate that precedent exists, even since the New Deal, setting some outer limits to the legal definition of what constitutes interstate commerce under the Constitution.

Legislating 'Inactivity.' The challengers to the ACA assert that the individual mandate is an unprecedented and unconstitutional attempt by the federal government to legislate against "inactivity." In the district court opinion now on appeal, Judge Vinson found that it would be "a radical departure from existing case law to hold that Congress can regulate inactivity [i.e. an individual's decision to not purchase health insurance] under the Commerce Clause." In their *brief* filed before the Eleventh Circuit, the 26 states challenging the individual mandate quote the Congressional Budget Office's statements that a "mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action" and that the federal government "has never required people to buy any

⁴ CBO, *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act*, 1 (April 30, 2010).

⁵ Parrish, Michael E. (2002). *The Hughes Court: Justices, Rulings, and Legacy*. Santa Barbara: ABC-CLIO Inc., p. 24.

good or service as a condition of lawful residence of the United States.”

In contrast, in its brief filed with the Eleventh Circuit, the administration refers to the individual mandate as “a quintessential exercise of the commerce power, which allows Congress to regulate not only interstate commerce but also conduct that substantially affects interstate commerce.” The administration regards the “inactivity” distinction made by the challengers as merely a “formalistic” distinction, and asserts in its brief that “[p]eople without insurance are not ‘inactive’; they actively participate in the market for health care services.”

The administration also argues in its brief that “the [individual mandate] regulates economic activity—how participants in the national health care market pay for their services—that substantially affects interstate commerce.”

If the Eleventh Circuit upholds the lower court opinion that the individual mandate improperly regulates “inactivity” and is therefore unconstitutional, the Eleventh Circuit must also determine if Judge Vinson was correct in finding that the whole of the ACA must be struck down as a result. Judge Vinson’s opinion found that the individual mandate is “indisputably necessary to [the health reform law’s] insurance market reforms, which are in turn, indisputably necessary to the purposes of the [health reform law].” The administration disputes that conclusion, arguing before the Eleventh Circuit that much of the ACA can stand alone and so should be allowed to remain in force even if the individual mandate provision is found to be unconstitutional.

Final Arbiter: U.S. Supreme Court. Virtually all observers agree that the Supreme Court will be the final arbiter of whether the individual mandate is constitutional. Given the recent decision in the Sixth Circuit in favor of the administration’s position, a decision by the Eleventh Circuit siding with the states obviously would create a split of opinion between those two federal Circuit Courts of Appeal, making it highly likely that the Supreme Court will review the constitutionality of the ACA sooner rather than later.

As has been the case with the lower courts’ judges, each Supreme Court justice has a view of how broadly or narrowly the commerce clause should be interpreted in light of the Constitution and Supreme Court case precedent.

The Supreme Court’s ultimate decision will almost certainly have major repercussions for the future of federalism. That decision may well be by a 5-4 vote. Weighing on the justices will be the knowledge that if the Supreme Court strikes down the individual mandate, the nation’s attempted reform of the health insurance markets will be sent back to square one, which may mean that there is not even another attempt at a broad solution for years to come. On the other hand, the justices will also be circumspect about upholding the individual mandate because they will be well aware that such a decision is likely to significantly, perhaps irreversibly, increase federal power to an unprecedented degree.

If the individual mandate is upheld, it may mean that there is virtually nothing that the federal government cannot do under the commerce clause. In this regard, the states’ brief argues that upholding the individual mandate “would vastly expand congressional power at the expense of our states and our system of dual federalism.” Arguing that the federal government’s power would become virtually limitless, the states’ brief goes on to say that there “is no logical reason why such regulation would have to be limited to the decision of whether to purchase health insurance. . .” and that by extending the logic of the administration’s argument, Congress would have “authority to order individuals to eat more vegetables and fewer desserts, to exercise at least 45 minutes per day, to sleep at least eight hours per day, and to drink one glass of wine a day but never any beer.”

In contrast, the Obama administration argues in its brief that these “imagined horrors” are hypothetical, and that in any event health insurance is so important it should be distinguished from less significant mandates. We will likely know within the next 12 months which of these arguments has persuaded a majority of the Supreme Court.