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Special Edition: Health Care ADVISORY

June 29, 2012

Supreme Court Decision on the Affordable Care Act

On June 28, the much-anticipated decision in *National Federation of Independent Business v. Sebelius* was released by the Supreme Court.[1] The headline news (at least after some initial erroneous reports by major news outlets were corrected) was that the Court upheld the Affordable Care Act's (ACA's) "individual mandate," which requires almost all Americans to obtain health insurance or face a penalty. While that view is generally accurate, the decision itself is more complex and was surprising to many observers. In particular, although the individual mandate was upheld, a majority of the Court did hold that that the mandate was constitutionally impermissible as an exercise of Congressional authority under the Commerce Clause of the U.S. Constitution, which is the area where most of the pre-opinion discussion focused. Indeed, Chief Justice John Roberts even favorably referenced the frequently discussed analogy used by mandate opponents that a federal mandate to buy health insurance was no different (and no more permissible constitutionally) than a federal mandate compelling citizens to buy vegetables. But even though mandate opponents prevailed regarding the mandate's permissibility under the Commerce Clause, their victory was short-lived, because a 5-4 majority of the Court also found that the mandate could be characterized as a "tax" on not buying health insurance and it is permissible as an exercise of Congressional taxing power. Thus, the individual mandate survived, sparing the Court the burden of determining which parts, if any, of the ACA could operate if the mandate were struck down and how such a decision would impact activities already carried out under the ACA.

The Court also addressed the ACA's provisions related to Medicaid expansion, which threatened states with loss of all federal Medicaid funding unless state Medicaid programs were expanded to cover all people (not just the elderly, blind, pregnant women and children) below a certain income level. Seven justices found that the threatened loss of all federal Medicaid dollars to induce expansion was so coercive as to violate the Spending Clause of the U.S. Constitution and exceeded federal authority to encourage states to regulate.

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1 567 U.S. __ (2012).

This holding is significant because, although the Court has long suggested that there are limits to the federal government's ability to condition grants to the states on the state's compliance with federal requirements, this case marks the first time that a statute was held to be unconstitutional under the Spending Clause. As with the mandate, however, the Court's holding that Congress had exceeded its powers did not prove fatal: the Court also held that the remedy for the violation was that the federal government could permissibly withhold *new* federal funding—i.e., funding tied to the expansion—from states unwilling to expand Medicaid as contemplated by the ACA. States, however, cannot be threatened with loss of existing Medicaid funding if they do not expand Medicaid.

Parsing the opinions issued (just short of 200 pages) also is somewhat of a challenge. Although four opinions were issued, only selected portions of the Chief Justice's opinion were written "for the Court" (meaning that four other justices expressly joined his opinion in those sections). For the majority of issues decided, determining a "holding" requires reading all of the decisions and, for each proposition, determining which propositions are agreed to by shifting alliances of five or more justices. For example, although the opinion of Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas and Samuel Alito is described as a "dissent," it is this opinion, paired with the Chief Justice's opinion (writing only for himself), that provides the "holding" of the Court on the Commerce Clause issue. Similarly, there is no one opinion joined by five justices addressing the Medicaid issue. Rather, the holding is determined by grouping the Chief Justice's opinion that the Medicaid expansion provision is unconstitutional as written (which was joined by Justices Stephen Breyer and Elena Kagan, thus garnering three votes) with the joint dissent's opinion (which garnered four votes) reaching the same conclusion. Because the joint dissent would have struck the entirety of the Medicaid expansion as a result of the unconstitutionality of the undue coercion of the states, one must look to a different grouping of five justices to support the Court's holding that the provision can survive if only "new" Medicaid funding is threatened by a state's failure to expand the program. For this proposition, the Chief Justice's opinion (and its three votes on this point) is grouped with the opinion of Justice Ruth Bader Ginsburg, who was joined by Justice Sonia Sotomayor. Thus, although Justices Ginsburg and Sotomayor disagreed with the other seven justices that Medicaid expansion violated the Constitution, they agreed with the Chief Justice on the proper remedy if there were a Constitutional violation, thereby providing the fourth and fifth votes on that point.

In this advisory, we provide highlights of the Supreme Court's decision and an initial analysis of the major holdings. We then analyze the opinion's likely impact on state Medicaid programs and state health insurance exchanges, as well as other key stakeholders. We also review the likely political impact of the Court's decision. This is a preliminary examination of the Court's decision, and we will continue to study and analyze the opinion in the coming weeks. We also will continue to monitor the Congressional and political responses to the Court's decision.

What Did the Court Decide?

The Supreme Court found that Congress exceeded its Commerce Clause powers, yet upheld the individual mandate under Congress's taxing power.

A five-justice majority of the Court, consisting of Chief Justice Roberts writing on his own behalf, and Justices Scalia, Kennedy, Thomas and Alito, who issued a joint dissent, held that Congress exceeded its regulatory powers under the Commerce Clause when it adopted the individual mandate.[2] They reasoned that the mandate expanded Congress's powers under the Commerce Clause to include the authority to compel the purchasing of health insurance. As Chief Justice Roberts explained, this expansion surpassed the Court's precedent limiting the Commerce Clause powers to the regulation of economic activity:

> … [O]ur cases have "always recognized that the power to regulate commerce, though broad indeed, has limits." The Government's theory would erode those limits… Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate *what we do not do*, fundamentally changing the relation between the citizen and the Federal Government.[3]

He stressed that a country in which Congress can "use its commerce power to compel citizens to act … is not the country the Framers of our Constitution envisioned."[4]

> The majority soundly rejected the federal government's argument that the mandate regulates commerce since all citizens use health care services at some point in their lives. The joint dissent wryly observed that "[i]f every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end."[5] The joint dissent and the Chief Justice likewise dismissed as wordplay the argument that the mandate regulates "the self-insurance market." The Chief Justice further commented that "[i]ndividuals are no more 'activ[e] in the self-insurance market' when they fail to purchase insurance … than they are active in the 'rest' market when doing nothing."[6]

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2 Although the Chief Justice was writing only for himself in Part IIIA of his opinion, the proposition that the mandate exceeded Congressional authority under the Commerce Clause is properly described as a holding of the Court because the joint dissent of Justices Scalia, Kennedy, Thomas and Alito, who did not join the Chief Justice's opinion, also applied similar reasoning and found that the mandate exceeded Congressional authority. *Compare* Opinion of Roberts, C.J., at 30 ("The commerce power thus does not authorize the mandate.") with joint dissent at 4-13 (discussing Commerce Clause authority and concluding that the individual mandate "exceeds federal power." *Id*. at 13.). Under these circumstances, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 2923 (1976)).

3 Roberts Opinion at 23-24 (emphasis added).

4 *Id*. at 23.

5 Dissent at 12.

6 Roberts Opinion at 24, n.6.

A majority of the Court also declined the government's invitation to uphold the mandate under the Necessary and Proper Clause, rejecting the argument that the mandate was an integral part of a comprehensive scheme of economic regulation.[7] The joint dissent found that the mandate exceeded the scope of the Necessary and Proper Clause, as it violated the Constitution's "principle of enumerated (and hence limited) federal power" by "convert[ing] the Commerce Clause into a general authority to direct the economy."[8] The Chief Justice agreed that the government's use of the Necessary and Proper Clause would distort the Constitution's framework by expanding the Commerce Clause into the new field of inactivity:

> … [S]uch a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. … Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. Even if the individual mandate is "necessary" to the Act's insurance reforms, such an expansion of federal power is not a "proper" means for making these reforms effective.[9]

In reaching this holding, both the Chief Justice and the joint dissent distinguished *Gonzales v. Raich*[10] on the ground that *Raich* did not expand Congress's Commerce Clause power to include the authority to compel economic activity.

After concluding that Congress exceeded its Commerce Clause power by adopting the individual mandate, the Chief Justice, writing for the Court in a portion of his opinion joined by Justices Breyer, Kagan, Ginsburg and Sotomayor, found that the "requirement that certain individuals pay a financial penalty … may reasonably be characterized as a tax."[11] While "the Act describe[d] the payment as a 'penalty,' not a 'tax,'" the Court took a "functional approach" to the payment by "'[d]isregarding the designation … and viewing its substance and application.'"[12]

Under the functional approach, three considerations warranted treating the payment as a tax and not a penalty:

> First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance…. Second, the individual mandate contains no scienter requirement. Third, the payment is

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7 The Necessary and Proper Clause states "The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

8 Dissent at 9.

9 Roberts Opinion at 30.

10 Dissent at 9. In *Raich*, the Court held that Congress had the power under the Necessary and Proper Clause to prohibit intrastate cultivation and possession of marijuana because the intrastate prohibition enabled Congress's interstate regulation of marijuana. *Gonzales v. Raich*, 545 U.S. 1 (2005).

11 Roberts Opinion at 44.

12 Roberts Opinion at 33-34. While the Court used a functional approach for its constitutional analysis, it construed the payment as a penalty and not a tax when analyzing the application of the Anti-Injunction Act (AIA). *Id.* at 12-13. The AIA bars actions to enjoin or otherwise obstruct the collection of taxes, and thus requires taxpayers to challenge taxes by paying them and then suing for a refund. The Court held that the AIA did not apply because "[t]he Anti-Injunction Act and the Affordable Care Act … are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text." *Id.*

collected solely by the IRS through the normal means of taxation—except that the Service is not allowed to use those means most suggestive of a punitive sanction, such as a criminal prosecution.[13]

In the Court's view, the fact that the payment could impact individual conduct does not affect the payment's function as a tax. The Court explained that "taxes that seek to influence conduct are nothing new" and pointed to taxes on cigarettes, marijuana and sawed-off shotguns as examples of lawful taxes that influence individual conduct without being transformed into penalties.[14]

The Court also rejected the argument the payment runs afoul of the Direct Tax Clause, which prohibits the levying of capitation taxes without apportionment.[15] Capitation taxes are paid "without regard to property, profession, or *any other circumstances*."[16] Because the payments required under the individual mandate are triggered by earning a certain level of income and then failing to buy health insurance, the Court found that such payments are not, by definition, capitation taxes.

In light of the Chief Justice's opinion and the joint dissent's prior holding on the Commerce Clause power, the Court considered whether "it should be similarly troubling to permit Congress to impose a tax for not doing something." The Court explained that "[t]hree considerations allay this concern. First, and most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity."[17] Second, the Court polices the taxing power's outer limits, and will invalidate a "so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."[18] Third, "the taxing power does not give Congress the same degree of control over individual behavior."[19] That is, Congress's taxing power only authorizes Congress to require individuals to pay money. It does not permit Congress to fine or imprison persons who fail to obey its commands, leaving them with "a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice."[20]

Because the Court construed payments under the individual mandate as taxes authorized by the Constitution, the Court had no reason to analyze whether the individual mandate was severable from the ACA's other provisions.

The Supreme Court held that the ACA's Medicaid expansion provision is unconstitutionally coercive.

Under the Spending Clause, Congress has the authority to grant federal funds to states contingent on the states' acceptance of certain conditions, as long as the states' acceptance of the conditions is voluntary and knowing. If the states have no choice—if the pressure exerted by the financial inducement is so coercive as to be compulsive—Congress has exceeded its Spending Clause authority and violated the Constitution.

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13 Roberts Opinion at 35-36.

14 *Id*. at 36-37.

15 *Id*. at 41.

16 *Id*. (emphasis in original).

17 *Id.*

18 *Id.* at 42, quoting *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994).

19 *Id*. at 43.

20 *Id.* at 44.

Seven Justices agreed that the provision of the ACA that threatened the states with the withdrawal of all their federal Medicaid funding unless they complied with the ACA's Medicaid expansion provisions violated the Constitution's Spending Clause. The Court held, by a 5-4 majority, that the remedy for this violation was to invalidate this condition as it applies to funding for the current Medicaid program, thus permitting the federal government to withdraw only the funding related to the ACA Medicaid expansion where a state refuses to comply with the Medicaid expansion. By the same 5-4 majority, the Court held that the unconstitutional condition was severable from the rest of the ACA.

In his opinion, joined by Justices Breyer and Kagan, the Chief Justice noted that Congress's Spending Clause authority permits it to establish cooperative federal-state programs and to condition the receipt of funds under such programs.[21] However, the legitimacy of such an exercise of the Spending Clause power "rests on whether the state voluntarily and knowingly accepts the terms of the 'contract.'"[22] The Chief Justice noted that "Congress may use its spending power to create incentives for states to act in accordance with federal policies. But when 'pressure turns into compulsion,' the legislation runs contrary to our system of federalism."[23]

The Chief Justice concluded that "the financial inducement"—in this case, the threat to all of a state's federal Medicaid funding if the state failed to comply with the Medicaid expansion—"is much more than the 'relatively mild encouragement'" that the Court had found permissible in *South Dakota v. Dole*[24]: "it is a gun to the head."[25] The threatened loss of such a large percentage of a state's overall budget is "an economic dragooning that leaves the states with no real option but to acquiesce in the Medicaid expansion."[26]

Importantly, in reaching this conclusion, Chief Justice Roberts found "[t]he Medicaid expansion . . . accomplishes a shift in kind, not merely degree" in the Medicaid program.[27] Instead of covering medical services to four categories of needy persons,[28] "Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level," a population of childless adults not previously covered by Medicaid, as "an element of a comprehensive national plan to provide universal health insurance coverage."[29] He rejected the government's contention that the Medicaid expansion is merely a modification of the existing program that the states accepted when they accepted the Medicaid statute's reservation of "the right to alter, amend, or repeal any provision."[30] "[I]f Congress intends

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21 *Id.* at 46-47.

22 *Id.* at 47.

23 *Id.*

24 483 U.S. 203, 211 (1987).

25 Roberts Opinion at 51.

26 *Id.* at 52.

27 *Id.* at 53.

28 The four categories of needy people covered by pre-ACA Medicaid are the disabled, the blind, the elderly and families with dependent children.

29 Roberts Opinion at 53-54.

30 *Id.* at 53, quoting 42 U.S.C. § 1304.

to impose a condition on the grant of federal monies, it must do so unambiguously," and it cannot "surpris[e] participating states with post-acceptance or 'retroactive' conditions.'"[31] Here, "[a] state could hardly anticipate that Congress's reservation of the right to 'alter' or 'amend' the Medicaid program included the power to transform it so dramatically."[32]

Rounding out the majority, Justices Scalia, Kennedy, Thomas and Alito, in their joint dissent, agreed with the Chief Justice that the Medicaid expansion was unconstitutionally coercive:

> The ACA does not legally compel the States to participate in the expanded Medicaid program, but the Act authorizes a severe sanction for any State that refuses to go along: termination of all the State's Medicaid funding. For the average State, the annual federal Medicaid subsidy is equal to more than one-fifth of the State's expenditures. A State forced out of the program would not only lose this huge sum but would almost certainly find it necessary to increase its own health-care expenditures substantially, requiring either a drastic reduction in funding for other programs or a large increase in state taxes. And these new taxes would come on top of the federal taxes already paid by the State's citizens to fund the Medicaid program in other States.[33]

The joint dissent noted that, "[i]n structuring the ACA, Congress unambiguously signaled its belief that every state would have no real choice but to go along with the Medicaid expansion. If the anti-coercion rule does not apply in this case, then there is no such rule."[34]

In considering the proper remedy for the Medicaid expansion's violation of the Spending Clause, Chief Justice Roberts noted that 42 U.S.C. § 1396c permits the Secretary of Health and Human Services (HHS) "to withhold *all* 'further [Medicaid] payments . . . to the State' if she determines that the State is out of compliance with any Medicaid requirement, including those contained in the expansion."[35] But Congress is not free "to penalize States that choose not to participate in that new [Medicaid expansion] program by taking away their existing funding."[36] Thus, the Secretary "cannot apply § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion."[37] Chief Justice Roberts' opinion states "[t]hat fully remedies the constitutional violation we have identified."[38] Section 1396c "is unconstitutional when applied

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31 *Id.* at 54.

32 *Id.*

33 Dissent at 28.

34 Dissent at 38, 46 ("it is perfectly clear from the goal and structure of the ACA that the offer of Medicaid expansion was one that Congress understood that no state could refuse"). Justices Ginsburg and Sotomayor would have found the Medicaid expansion within Congress's Spending Clause power.

35 Roberts Opinion at 56 (emphasis in original), quoting 42 U.S.C. § 1396c.

36 *Id.* at 55.

37 *Id.* at 56.

38 *Id.*

to withdraw existing Medicaid funds from states that decline to comply with the expansion."[39] He concludes that the unconstitutional application of section 1396c is severable from the rest of the ACA because "[w]e are confident that Congress would have wanted to preserve the rest of the Act."[40]

While Justice Ginsburg, in an opinion joined by Justice Sotomayor, would have upheld the Medicaid expansion under the Spending Clause, given the holding, she "entirely agree[s] with the Chief Justice as to the appropriate remedy. It is to bar the withholding found impermissible—not, as the joint dissenters would have it, to scrap the expansion altogether."[41]

Impact on the States and on the Medicaid Program

The Court's decision on the Medicaid expansion will require further in-depth analysis to determine the full legal effect of the ruling and its likely impact not only on the ACA's implementation and the implementation of other ACA Medicaid provisions, but also on the enactment of future changes to the Medicaid program. The Court's decision also could have far-reaching impacts on overall coverage levels resulting from the ACA, on state and federal budgets, and on Medicare and Medicaid reimbursement.

Section 2001(a) of the ACA requires states to cover under-65, non-pregnant, non-Medicare or Medicaid-entitled individuals at or below 133 percent of the federal poverty level (FPL).[42] For 2014, 2015 and 2016, the federal share of the cost to cover this "expansion population" is 100 percent; the federal share of covering this group declines gradually to 90 percent in 2020 and subsequent years, with each state paying 10 percent of the cost of coverage.[43] The Congressional Budget Office estimated that, by 2019, the ACA's Medicaid expansion would cover an additional 16 million uninsured, low-income Americans who otherwise would remain uninsured.[44]

Our initial reading is that the Court essentially has made the Medicaid expansion voluntary for states by ruling that states cannot be penalized through the loss of their present-day federal funding or "match." Under the ACA, states that choose not to cover the "expansion population" would not only lose the enhanced federal match for that population (100 percent in 2014-2016 and phasing down to 90 percent in 2020 and thereafter), but also could forfeit the federal match they historically had received for the populations they already covered.

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39 *Id*. He notes, however, that the "holding does not affect the continued application of § 1396c to the existing Medicaid program. Nor does it affect the Secretary's ability to withdraw funds provided under the [ACA] if a state that has chosen to participate in the expansion fails to comply with the requirements of that Act." *Id.*

40 *Id*. at 57.

41 Ginsburg Opinion at 40; *see also* Ginsburg Opinion at 60-61. Justices Scalia, Kennedy, Thomas and Alito dissented with respect to the remedy. They believe that "[t]he most natural remedy would be to invalidate the Medicaid expansion" because the majority's approach forces states to "choose between expanding Medicaid or paying huge tax sums to the federal fisc for the sole benefit of expanding Medicaid in other States." Dissent at 47. Furthermore, the Court should not attempt to solve a constitutional problem by rewriting the Medicaid expansion. *Id*. at 48. They would also strike down the ACA in its entirety as inseverable. Dissent at 48-65.

42 In practice, the threshold is 138 percent of the FPL, due to a five percent income disregard in the eligibility calculation.

43 Patient Protection and Affordable Care Act, Pub. L. 111-148, § 2001(a)(3).

44 Letter from Douglas Elmendorf, Director, Cong. Budget Office to Hon. Nancy Pelosi, Speaker, U.S. House of Representatives (March 20, 2010), *available* at: http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/amendreconprop.pdf.

A number of governors have expressed opposition to covering the "expansion population" and, therefore, may take advantage of the remedy included in the Court's decision to decline covering the additional population without the risk of losing all federal Medicaid funding.

It is unclear the extent to which states will or will not participate in this now-voluntary expansion. States that choose to opt out of the Medicaid expansion could leave a significant number of individuals without affordable coverage options. Under the ACA, the federal government is authorized to provide health insurance premium subsidies for individuals between 100 and 400 percent of FPL, which will be used to purchase coverage from a qualified health plan through a health insurance exchange. If a state chooses not to cover the "expansion population" and does not otherwise provide coverage to individuals up to 100 percent of FPL, the people "in between" will have neither Medicaid coverage nor federal subsidies to purchase plans on the state's exchange, and they could remain uninsured. Presumably, at least some portion of this "in-between" population would fall within the individual mandate's exemption of individuals for whom coverage is unaffordable and therefore would not have to pay the penalty (or "tax," as the Court has determined it is).

The Court's ruling also has ramifications for Medicare and Medicaid reimbursement because the level of uninsured individuals will affect disproportionate share hospital (DSH) payments under the Medicare and Medicaid programs. Starting in 2014, the ACA requires reductions to DSH payments under both programs and adjustments based on the percentage of uninsured individuals. DSHs accepted a reduction in Medicare and Medicaid DSH payments in return for an increase in the number of patients with private or Medicaid coverage, but the Court's ruling could limit the anticipated expansion of the Medicaid program significantly. The effect of the Court's ruling may be more limited for states like Tennessee and Hawaii, which operate their Medicaid programs through waivers and receive allotments through a separate process.

The Court held that its ruling does not affect the validity of the non-Medicaid expansion provisions in the ACA, including the other Medicaid provisions. As a result, these other provisions can continue to be implemented, including other Medicaid provisions addressing issues such as program integrity, CHIP, demonstration projects and grants.

There are a number of questions that government regulators will need to consider in the coming weeks and months in order to provide guidance and clarity to federal agencies, states and other Medicaid stakeholders going forward. Resolution of these issues may require involvement of the courts.

- **What ACA provisions constitute the "Medicaid expansion" for purposes of the Court's ruling?** The implications of which ACA provisions constitute the Medicaid expansion may be significant because of the HHS Secretary's authority under section 1904 of the Social Security Act (SSA)[45] to withdraw federal Medicaid funds for a state's failure to comply with Medicaid requirements. While the Court ruled that the Secretary cannot apply section 1904 of the SSA and withdraw existing federal Medicaid funds for a state's failure to comply with the requirements of the Medicaid expansion, she can continue to apply section 1904 with respect to ACA Medicaid funds if a state fails to comply with other ACA requirements.

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[45] 42 U.S.C. § 1304.

Chief Justice Roberts in his opinion does not expressly identify what provisions constitute the Medicaid expansion. Although he discusses the requirement to cover the newly eligible population, federal financing levels for this population and providing this population with an essential health benefits package, there is a lack of clarity about which other ACA provisions are part of the Medicaid expansion. The states argued that other ACA provisions are part of the Medicaid expansion, including (1) maintenance of effort requirements, under which a state is prohibited from changing eligibility standards for adults until the state's health insurance exchange is operational, and for children until October 1, 2019; (2) requiring states to use a new income test based on modified adjusted gross income; and (3) requiring states to assume responsibility for providing care and services in addition to paying for care and services.

- **In the future, what changes can be made to the Medicaid program that are not unduly coercive on the states?** In the past, Congress has made changes to the Medicaid program under section 1904 of the SSA, in which it reserves the right "to alter, amend, or repeal any provision" of the SSA. However, the Court found that conditioning the receipt of current Medicaid funding on coverage of the "expansion population" was impermissibly coercive, noting that the Medicaid expansion transformed the program dramatically.[46] It is unclear what changes Congress could make to the Medicaid program in the future under this standard.
- **Now that covering the newly eligible population is voluntary, how will this provision be implemented?** Now that the Medicaid expansion is no longer a requirement, a number of questions need to be answered on how it will be implemented. Is the Medicaid expansion going to be treated as a new state option? Is the January 1, 2014, start date an "all-or-nothing" proposition, or can a state that chooses not to cover the "expansion population" beginning on January 1, 2014, choose, at a later date, to cover that group under the state's Medicaid program? It also is not clear what the result would be if a state chose to cover the "expansion population" beginning on January 1, 2014, but ceased to cover that group at a later date.

Impact on Other Key Stakeholders

The ACA and all implementing regulations—with one exception relating to Medicaid expansion—now are affirmed as the law of the land and will remain so, barring any successful litigation or successful legislative activity to repeal them. This provides all stakeholders with greater certainty about the future and increased stability. There is, nevertheless, a tremendous amount of work that will need to be accomplished between now and 2014 in order to achieve successful and timely implementation of the programs and reforms mandated by the ACA. Implementation of major programs is never easy. Given the magnitude of the changes made by these new programs, the shortness of the time in which to accomplish them and the delays in the development of some of the implementing regulations, it would be wise to expect some significant implementation and operational issues that will have to be addressed.

The Supreme Court's decision does not mark the end of litigation over the ACA, although the action now moves to litigation over more discrete provisions of the ACA or the implementing regulations. Such litigation may challenge the constitutionality of some provisions or the statutory authority under the ACA to impose certain regulatory requirements. There are a number of current lawsuits that illustrate this. There is ongoing litigation that challenges the constitutionality of the Independent Payment Advisory Board, as well as litigation

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[46] *See supra* at 6-7.

that challenges Congress's constitutional authority to impose limitations on physician-owned hospitals. Also, religious organizations and employers have filed a number of lawsuits challenging, on constitutional and statutory grounds, the regulations requiring the provision of contraceptives as preventive services and the failure to provide a meaningful exemption for religious organizations.

Below we discuss some of the implications for certain stakeholders: the federal government, states, hospitals and other providers, drug and device manufacturers, employers and group health plan sponsors, and health insurance issuers.

- **Federal Government:** In the run-up to the issuance of the Supreme Court's decision, HHS, the Centers for Medicare & Medicaid Services (CMS), the Center for Consumer Information and Insurance Oversight (CCIIO), the Department of Treasury, and the Department of Labor continued their ACA implementation efforts. Now that the constitutionality of the ACA as a whole has been resolved, these agencies need to strengthen their efforts to achieve implementation of the ACA reforms in the time frame established by the statute. In particular, CCIIO will need to work closely with states that intend to have a state-run exchange or a State Partnership with a "Federally Facilitated Exchange" in operation by January 1, 2014.

  Given the Supreme Court's decision on Medicaid expansion, CMS and its Center for Medicaid and CHIP Services will need to take prompt action to develop guidance on a number of issues, including the issues outlined above, arising out of the new "voluntariness" of Medicaid expansion on the part of the states. We also expect that the Congressional Budget Office will evaluate the federal budgetary impact of the Medicaid decision insofar as it may reduce federal spending for Medicaid coverage in states that may elect not to cover the expansion population, while potentially increasing the cost of federal subsidies for additional low-income individuals purchasing coverage through an exchange.

  The Supreme Court's decisions also may mark important milestones in the Court's jurisprudence of the Constitution's Commerce and Spending Clauses. For example, this is the first time the Court has held that Congress exceeded its Spending Clause authority to impose requirements on the states as a condition of the receipt of federal funds. Agencies across the federal government may need to assess their current programs in light of the decisions.

- **The States:** The willingness of states to take action to implement ACA requirements, most notably health insurance exchanges and Medicaid expansion, has varied widely. With 26 states joining the constitutional challenge to the law, it is not surprising that many took a "wait-and-see" approach to ACA requirements. Despite the Court's validation of most of the ACA, some states may continue to wait on the outcome of the 2012 elections and any subsequent Congressional efforts to repeal and/or replace the ACA. Given the short timeframe before many major requirements go into effect in 2014, we expect many states to focus on implementation activities in earnest. Some states still may decline to establish health insurance exchanges, with the result that a federally facilitated exchange will need to be operated for the state, at least for some period of time.

  Given the short timeframe before the health insurance exchange requirements go into effect in 2014, we expect more states to focus on implementation activities in order to meet federal deadlines. At present, 14 states and the District of Columbia have established a state exchange through either legislative or executive action, and Arkansas is planning for a State Partnership exchange. Louisiana, Maine and New Hampshire have affirmatively decided not to create an exchange. The remaining states have either taken

no significant action or are evaluating their options. If a state intends to operate a state exchange or a State Partnership exchange, it will have until November 16, 2012, to submit an exchange blueprint to HHS. Some states may wait until after the November elections to make a decision about whether or not to submit one. Now that it is clear that ACA implementation will proceed, many states may conclude that there is not sufficient time to set up a state-run exchange and will notify HHS; others may not take any action to notify HHS. Still other states may attempt to have an operable exchange for the 2014 coverage year (as determined by January 1, 2013), but will not be ready. In any of these situations, HHS will operate a Federally Facilitated Exchange for the state, either under a State Partnership—where the state may administer plan management functions and/or in-person consumer assistance functions—or without the state as a partner.

With respect to Medicaid expansion, seven states and the District of Columbia have already elected to cover all or part of the "expansion population," pursuant to a state option in the ACA or a waiver. On the other hand, some believe that the "wait and see" approach of states that challenged the Medicaid expansion has been vindicated, at least in part, by the Supreme Court's holding that the Medicaid expansion provisions violated the Spending Clause. States have a number of important—and difficult—decisions to make. The remedy granted by the Court was not the remedy sought by the states that challenged the Medicaid expansion, but they now must decide whether to accept the federal Medicaid expansion funds and the concomitant obligations and requirements or to forego such funds and avoid the potentially costly accompanying requirements. Regardless of the decision any particular state may make, there will be fiscal and political implications.

- **Hospitals and Other Providers:** Implementation of the ACA's health care delivery system and fraud and abuse reforms will continue without interruption. Come 2014, the affirmance of the individual mandate means that providers may begin to see the benefits of a greater number of privately insured patients. Depending on the decisions made by the states, the Supreme Court's decision on Medicaid expansion may mean that providers will experience a more limited reduction in the number of uninsured patients they treat—and a more limited reduction in the amount of reduced fee or uncompensated care they provide. This may have a particular impact on DSHs that had accepted a reduction in Medicare and Medicaid DSH payments in return for an increase in the number of patients with private or Medicaid coverage. Medicare cuts on many providers that are to be used to finance other provisions of the legislation will remain in place.

- **Drug and Device Manufacturers:** The Court's decision allows implementation of key provisions impacting drug and device manufacturers to go forward. This includes ACA changes to the Medicare Part D Program (including closing the "donut hole"), the Medicaid Drug Rebate Program (including the definition of average manufacturer price (AMP)) and expansion of the 340B Drug Discount Program. The decision also allows Food and Drug Administration and CMS to continue with implementation efforts, including related to the Biologics Price Competition and Innovation Act and the Physician Payments Sunshine Act, both of which were enacted as part of the ACA. In response to the decision, Pharmaceutical Research and Manufacturers of America (PhRMA) and Biotechnology Industry Organization (BIO) both pledged to continue to support efforts to repeal the Independent Payment Advisory Board. The Advanced Medical Technology Association (AdvaMed) indicated that it will continue to work toward repeal of the 2.3 percent tax imposed by the ACA on the sale of certain medical devices effective after December 31, 2012. Earlier this month, the House passed legislation (H.R. 436) to repeal the device tax, and Republicans in particular are likely to continue to push for elimination of the tax. Democrats in the Senate are unlikely to move the repeal bill, and President Obama has indicated that he would veto the legislation if passed by the Senate The ACA's annual fee

on prescription drug manufacturers also is likely to stay in place. The fee is a set amount for each year, beginning with 2011, allocated among manufacturers.

- **Employers/Group Health Plan Sponsors:** The Supreme Court's decision essentially means "business as usual" for employers and group health plans, in that the efforts to implement the ACA requirements need to continue. There are some short-term ACA requirements that employers/plan administrators will need to turn to in earnest, such as the requirement to issue a summary of benefits and coverage (SBC) document in connection with open enrollments starting on or after September 23, 2012. Similarly, the requirements relating to additional women's preventive coverage apply with respect to plan years beginning on or after August 1, 2012 (subject to an exception or delay for certain religious employers). The cap on salary reduction contributions to health flexible spending arrangements (FSAs) is effective for plan years beginning on or after January 1, 2013. Fees on both fully insured and self-funded plans to fund the Patient Centered Outcomes Research Institute (PCORI) and the contribution required with respect to fully insured and self-funded plans to fund the temporary reinsurance program soon will be effective. Employers need to continue to plan for the reforms that will be effective starting in 2014 and to determine how the employer responsibility requirements and the availability of health insurance exchanges and subsidies will impact the decision to offer group health coverage. In this regard, there is not yet final guidance on a number of key issues, including how part-time employees will be defined and how "minimum value" will be determined for purposes of the employer penalties.
- **Health Insurance Issuers:** As is the case with employers/group health plans, the Court's decision means that health insurance issuers will continue to implement the ACA requirements. For example, any rebates determined under the medical loss ratio (MLR) provisions will need to be paid by August 1, 2012, in accordance with final regulations. Preparation for the 2014 reforms, including the possibility of both state-run and federally facilitated exchanges, will continue. The taxes and fees imposed on health insurance issuers also will go into effect, including the contribution relating to the temporary reinsurance program, the industry fee, and the denial of deduction of compensation in excess of $500,000.

Likely Political Impact

The Court's decision allows the Obama Administration to continue with implementation of the ACA. While this is a major legal win for the Administration, even in his statement following the decision's announcement, President Obama acknowledged the "very real concerns that millions of Americans have shared" and said, "it should be pretty clear by now that I didn't do this because it was good politics."[47] Health care and the fate of the ACA will continue to be an issue for both sides leading up to the 2012 elections, with Democrats seeking to re-educate Americans on the law's provisions and value, and Republicans citing its cost impact on individuals, businesses and the economy. In a statement less than two hours after the decision was released, Governor Mitt Romney, the likely Republican nominee to challenge President Obama in November, vowed to take action to repeal "Obamacare" on his first day in office. The Romney campaign reportedly raised more than $4 million in the first 24 hours after the decision was announced, indicating that the ruling could energize those who favor repeal of the ACA.

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[47] Remarks by President on Supreme Court Ruling on the Affordable Care Act, June 28, 2012, *available at* http://www.whitehouse.gov/the-press-office/2012/06/28/remarks-president-supreme-court-ruling-affordable-care-act.

Republicans in the House have scheduled a vote on repeal of the law for July 11, 2012, that is expected to succeed, although no action is expected in the Senate, given the Democratic majority. House Speaker John Boehner (R-OH) said the "ruling underscores the urgency of repealing this harmful law in its entirety." Senate Republicans also expressed disappointment with the Court's decision, as well as support for repeal. Senate Republican Leader Mitch McConnell (R-KY) said the "decision makes one thing clear: Congress must act to repeal this misguided law. . . . It is my hope that with new leadership in the White House and Senate, we can enact these step-by-step solutions and prevent further damage from this terrible law." Democrats in the House and Senate celebrated the decision as a victory and restated the law's strengths: improving insurance transparency, affordability and preventive health care services.

Legislative changes to the ACA this year are highly unlikely prior to the elections this fall. With Republicans in control of the House and Democrats in control of the Senate, wholesale change also is unlikely in a lame duck session. It is possible that proposals targeting particular provisions, such as repealing the medical device tax and the Independent Payment Advisory Board (both of which already have gained bipartisan support), could gain some ground, if packaged with other legislative proposals that could move forward in a lame duck session. Broader changes to the structure of the ACA, including delay of effective dates or scaling back the availability of subsidies, also could come under consideration after elections, particularly if the modifications result in budgetary savings. It is not clear, however, what legislative action will be possible in a lame duck session, and proposals that increase the deficit may face significant hurdles.

Conclusion

Although the wait for the Supreme Court's ruling on provisions of the Affordable Care Act has come to a close, the Court's decision does not mark the end of questions about how the law will be implemented by the federal government and states, which states will expand Medicaid coverage and how, and what effect the ruling will have on other federal laws and programs. Nor does the Court's decision remove the issue of "health care" from the political conversation, and there undoubtedly will be continuing legal and legislative challenges to the Affordable Care Act. We will continue to monitor events and keep you informed of the legal, legislative and political developments related to this case as they unfold.

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