

## Summary of Supreme Court Affordable Care Act Opinion

Written by Thomas Barker, Brian P. Carey, Tad Heuer

June 28, 2012

### Overview

In a 5-4 decision issued today and authored by Chief Justice John Roberts, the United States Supreme Court has upheld the Affordable Care Act (ACA)'s individual mandate – the requirement that most individuals obtain health insurance that meets the statutory definition of minimum essential coverage. The four traditionally liberal justices – Ginsburg, Breyer, Sotomayor, and Kagan – joined Chief Justice Roberts to uphold the mandate as a constitutional application of Congress's taxing authority. Justices Scalia, Kennedy, Thomas, and Alito dissented.

In reaching this outcome, however, a majority of the Court's justices – the dissenters as well as Chief Justice Roberts – expressly rejected the argument that Congress was authorized to enact the individual mandate under either the Commerce Clause or the Necessary and Proper Clause of the Constitution.

The Court also issued a fractured opinion on Congress's authority to expand Medicaid to a larger portion of the population (and on Congress's related authority to penalize states that did not wish to participate in the expansion). While the Court upheld the authority of Congress to expand the Medicaid program to states that wanted to participate, the Court also held that Congress could not withhold existing Medicaid funds from states in an effort to penalize those states's refusal to participate in the expansion.

### Brief Background

After hearing six hours of oral argument in March 2012, the Court faced four main questions: 1) Whether the Anti-Injunction Act precluded the Court from hearing challenges to the constitutionality of the individual mandate until 2015; 2) whether the individual mandate was constitutional; 3) if the individual mandate was unconstitutional, whether the mandate was "severable" from the remainder of the ACA; and 4) whether the ACA's expansion of Medicaid was lawful.

### Constitutionality of the Mandate

After ruling that the Anti-Injunction Act did not preclude the Court from reaching the merits of the case, the Court first addressed the constitutionality of the individual mandate.

The four traditionally liberal justices were prepared to uphold the constitutionality of the mandate as a permissible exercise of Congress's authority under any of the three theories proposed by the federal government: namely, the Commerce Clause, the Necessary and Proper Clause, or the Taxing Clause. In contrast, the four dissenting justices argued that the entire ACA was unconstitutional under any of these three theories.

Chief Justice Roberts broke this deadlock in favor of the mandate's constitutionality. Before doing so, however, he agreed with the dissenters that the mandate was not a constitutional exercise of either the Commerce Clause or the Necessary and Proper Clause. As to the Commerce Clause, Chief Justice Roberts noted that "[t]he power to regulate commerce presupposes the existence of commercial activity to be regulated," and concluded that the individual mandate "does not regulate existing commercial activity." In doing so, Chief Justice Roberts rejected the government's argument that because all individuals will eventually need to utilize the health care system, the mandate can be sustained under the Commerce Clause because "health insurance is a unique product." Similarly, Chief Justice Roberts rejected the constitutionality of the mandate under the Necessary and Proper Clause, ruling that 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 those reforms effective.”

Nevertheless, Chief Justice Roberts agreed that the mandate was a permissible exercise of Congress’s taxing authority, and joined with the four traditionally liberal justices to provide five votes for upholding the mandate. Noting that the Court does not consider whether a given statute embodies sound policies, but rather “whether Congress has the power under the Constitution to enact the challenged provisions,” Chief Justice Roberts, writing for the majority, held that the ACA “merely imposes a tax [that] citizens may lawfully choose to pay in lieu of buying health insurance.”

In other words, while opponents had argued that the mandate forced individuals to either obtain insurance or pay a penalty as punishment for failing to do so, Chief Justice Roberts noted that the choice to purchase insurance and the choice to pay the penalty were both lawful and permissible: “The only thing that [citizens] may not lawfully do is not buy health insurance and not pay the resulting tax.” In short, the majority concluded that “[o]ur precedent demonstrates that Congress had the power to impose the exaction in §5000A under the taxing power, and that §5000A need not be read to do more than impose a tax. That is sufficient to sustain it.”

## Medicaid Expansion

The ACA requires states to provide Medicaid coverage by 2014 to nonelderly citizens and eligible legal residents with incomes up to 133 percent of the federal poverty level. At present, many States cover adults with children only if their income is considerably lower, and do not cover childless adults. The government argued that state participation in Medicaid is entirely voluntary, and that states can always withdraw from Medicaid if they find the conditions too onerous. The state opponents responded that the expansion constitutes impermissible federal “coercion,” under the Tenth Amendment to the Constitution, because the practical dependence of states on federal Medicaid funds means that states have no real choice but to abide by the new conditions.

The Court’s holding — pieced together from three separate opinions — is that while Congress is allowed to expand Medicaid, states that do not wish to participate cannot be penalized for this decision by having their existing Medicaid funds withheld.

- The first opinion, by three justices (Chief Justice Roberts, and Justices Breyer and Kagan) held that the Medicaid expansion was constitutional as to states that wanted to accept the additional funds, but that the provision allowing the Secretary of Health and Human Services to withhold all Medicaid funding (existing as well as prospective) from states that refused to accept the expansion funds amounted to unconstitutional coercion.
- The second opinion, by Justices Ginsburg and Sotomayor, would have found both the expansion and the “withholding” provision constitutional.
- The third opinion, by the four dissenting justices (Justices Scalia, Kennedy, Thomas, and Alito), would have declared the entire expansion unconstitutional.

As a result, five justices (comprised of the “Roberts Bloc” and the “Ginsburg Bloc”) agreed that the expansion was constitutional for states that wanted to participate. Similarly, seven justices (comprised of the “Roberts bloc” and the “Dissenter bloc”) agreed that the provision allowing the Secretary of HHS to withhold all Medicaid funding (both existing as well as prospective) from states that refused to accept the expansion funds amounted to unconstitutional coercion.

However, amongst these seven justices, the two blocs disagreed as to the remedy, and neither commanded a majority. The three-vote Roberts bloc felt that only the specific offending provision should be struck down (thus preventing states that did not want to participate in the expansion from potentially losing all of their existing Medicaid funds), while the four-vote Dissenter bloc wanted to declare the entire expansion unconstitutional (as to both states that wanted to participate and those that did not).

Justices Ginsburg and Sotomayor sided with the Roberts bloc, breaking the deadlock. In her concurrence, Justice Ginsburg stated she disagreed with the conclusion that the “withholding” provision was unconstitutional. She conceded, however, that if this was nevertheless the conclusion of a majority, the remedy should be the one endorsed by the three-vote Roberts bloc: to “bar the withholding [provision] found impermissible—not, as the joint dissenters would have it, to scrap the expansion altogether.”

## The Joint Dissent

In a single jointly-authored dissent, Justices Scalia, Kennedy, Thomas, and Alito argued strongly that both the mandate and the Medicaid expansion were unconstitutional and that as a result, the entire ACA should be found invalid. “The Act before us here exceeds federal

power both in mandating the purchase of health insurance and in denying nonconsenting States all Medicaid funding,” they wrote, arguing that “[t]hese parts of the Act are central to its design and operation, and all the Act’s other provisions would not have been enacted without them. In our view it must follow that the entire statute is inoperative.” Justice Thomas also wrote a separate short two-page dissent, rearticulating his long-held opposition to an expansive reading of the Commerce Clause.

On the question of the mandate, the joint dissent echoed Chief Justice Roberts’s skepticism about its constitutionality under the Commerce Clause. The dissenters asserted that if a failure to engage in economic activity (such as the failure to purchase health insurance) were nonetheless deemed to affect commerce, nothing would prevent Congress from making “mere breathing in and out the basis for federal prescription and [extending] federal power to virtually all human activity.”

The joint dissent also argued that Congress’s authority to condition a State’s continued receipt of Medicaid funds on acceptance of Medicaid expansion was unconstitutionally coercive, a point on which (as noted above) they formed a majority. However, the dissenters were not able to form a majority for their proposed remedy: that the entire Medicaid expansion program be struck down as a result. A majority of the Court concluded that the appropriate remedy was instead simply to strike the specific offending provision.

### **Watch a live presentation on the Affordable Care Act Opinion (July 12, 2012)**

#### RELATED INDUSTRIES

- [Healthcare](#)

#### RELATED PRACTICES

- [Federal Government Strategies](#)
- 

This communication is intended for general information purposes and as a service to clients and friends of Foley Hoag LLP. This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.

United States Treasury Regulations require us to disclose the following: Any tax advice included in this document was not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Attorney advertising. Prior results do not guarantee a similar outcome. © 2017 Foley Hoag LLP. All rights reserved.