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Summary of the Eleventh Circuit Ruling on ObamaCare

On August 12, 2011, an Eleventh Circuit panel affirmed the District Court's holding that the Patient Protection and Affordable Care Act's "individual mandate," requiring most uninsured Americans to buy and indefinitely maintain health insurance, was unconstitutional because it exceeded Congress's power under the Commerce Clause and was not an exercise of Congress's power to tax. *State of Florida ex rel. Atty. Gen. v. U.S. Dept. of Health & Human Services*, 11-11021 (11th Cir. Aug. 12, 2011) [hereinafter Slip Op.]. Unlike the District Court, however, the Circuit panel held that the individual mandate was severable from the remainder of the Act. Thus, the holding of unconstitutionality is limited to the individual mandate portion of the Act. The Court also held that the Act's expansion of Medicaid eligibility did not unduly coerce the states.

In sum, the court held (1) that the plaintiffs had standing, (2) that the Medicaid expansion mandate did not unduly coerce the states, (3) that the individual mandate was an unconstitutional exercise of Congressional power under the Commerce Clause, (4) that the individual mandate was a penalty, not a tax, and (5) that the individual mandate is severable from the rest of the Act. Chief Judge Dubina and Judge Hull co-authored the panel's opinion. Judge Marcus concurred in part and dissented in part. With regard to standing, the taxing power, and the Medicaid expansion he concurred; he would, however, have held the individual mandate constitutional under the Commerce Clause.

I. The plaintiffs had standing.

The court first considered whether the plaintiffs had standing to challenge the individual mandate. The court noted that the government did not challenge the individual plaintiffs' standing and in fact had conceded that one of the individual plaintiffs did have standing. The government did challenge the states' standing. (There was no dispute that the states had standing to challenge the Medicaid expansion, as that part of the Act directly affected the states). Slip Op. at 8-9. Given that the individual plaintiffs had standing to challenge the individual mandate, the court found that it did not have to consider whether the states had standing to challenge the mandate. *Id.* at 10.

II. The Medicaid expansion mandate was not "unduly coercive."

The state plaintiffs challenged the Act's requirement that states must expand eligibility for Medicaid or possibly lose all federal Medicaid funding. The court rejected the states' claim. *Id.* at 53.

The Court began by noting that Congress, in exercising its power to spend, could place conditions on receiving those funds. In this case, Congress was conditioning the states' right to

receive Medicaid funds on expanding eligibility for the program. The Supreme Court has imposed four primary restrictions on Congress's power to place conditions on receiving federal funds. First, the spending itself must be in pursuit of the general welfare. Second, the conditions must be reasonably related to the spending's purpose. Third, the condition must be unambiguous so that states may knowingly choose whether to accept funds. Finally, the spending cannot induce states to engage in activities that would be unconstitutional. *Id.* at 55-56.

The states did not contend that the Medicaid expansion violated the first, third, or forth of these restrictions. The states did suggest that the conditions violated the second restriction, but the court held that the condition Congress imposed—expanding eligibility for Medicaid coverage—was "undeniably related" to Medicaid's purpose (providing federal assistance to states to reimburse costs of medical treatment for needy people). *Id.* at 56 n.63.

The states' primary argument was that the Medicaid expansion provision, by requiring states to expand Medicaid eligibility or possibly lose Medicaid funds, "coerced" the states into complying with federal objectives. *Id.* at 56-57. While most circuits that have considered similar cases have concluded that the coercion argument provides no viable defense to Spending Clause legislation, the court here concluded that because the Supreme Court had raised the coercion argument in two conditional spending cases, the court had a duty to consider the argument. *Id.* at 59-63. Nonetheless, five factors led the court to conclude that the Medicaid expansion did not unconstitutionally coerce states. First, from the beginning of the Medicaid program, Congress reserved the right to change the program. Thus, states that choose to participate were warned that their obligations could change. *Id.* at 64. Second, the federal government will bear nearly all the costs associated with the expansion. *Id.* at 65. Third, the states have nearly four years from the time the bill became law to decide whether to participate in Medicaid. This gives states ample opportunity to determine how to deal with the expansion. *Id.* at 66. Fourth, the states have power to tax and raise revenue and thus fund their own program if they do not like Congress's conditions. *Id.* Finally, it is not a "forgone conclusion" that states will lose all Medicaid funding if they choose not to expand Medicaid eligibility because the Act gives HHS discretion to withhold all or merely a portion of funding from a noncompliant state. *Id.* All these factors together convinced the court that despite the Act's requirement that states expand eligibility if they continue to participate in Medicaid, the states have a real choice and thus have not been forced to participate.

III. Congress did not have the power under the Commerce or Necessary and Proper Clauses to enact the individual mandate.

The court began its analysis of the Commerce Clause power by quoting James Madison's exposition in The Federalist No. 45: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." While recognizing the Supreme Court's expansive interpretation of the Commerce Clause during the last century, the court noted two limiting factors the Supreme Court had articulated: "First, Congress's regulation must accommodate the Constitution's federalist structure and preserve 'a distinction between what is truly national and what is truly local.'" Slip Op. at 104. "Second, the Court has repeatedly warned that courts may not interpret the Commerce Clause in a way that would grant to Congress a general police power, which the Founders denied the National Government and reposed in the States." *Id.* Therefore, in examining the individual mandate, the court looked "not only to the action itself but also its

implications for our constitutional structure," the "ultimate goal" of which is "the protection of individual liberty." *Id.* at 105.

The government defended the individual mandate by arguing that "it regulates 'quintessentially economic' activity related to an industry of near universal participation . . . . [and] that Congress has mandated only how Americans finance their inevitable health care needs." *Id.* at 106. In response, the plaintiffs argued "that 'activity' is a prerequisite to valid congressional regulation under the commerce power . . . . [and] that Congress's authority is to 'regulate' commerce, not to compel individuals to *enter into* commerce." *Id.* at 106-07. The court rejected the activity/inactivity dichotomy as unpersuasive, unworkable, and not expressly supported by Supreme Court precedent. *Id.* at 109-11. Nonetheless, the court noted that all previous Commerce Clause cases "involved attempts by Congress to regulate preexisting, freely chosen classes of activities." *Id.* at 109.

The court defined the issue before it as "whether the federal government can issue a mandate that Americans purchase and maintain health insurance from a private company for the entirety of their lives." *Id.* at 112. The Court examined Supreme Court precedent and concluded that "[w]hat the Court has never done is interpret the Commerce Clause to allow Congress to dictate the financial decisions of Americans through an economic mandate." *Id.* at 115. "The individual mandate is a sharp departure from all prior exercises of federal power." *Id.* at 120.

The court compared the individual mandate with *Wickard v. Filburn*, 317 U.S. 111 (1942) (representing "the zenith of Congress's powers under the Commerce Clause"), where the Court upheld an Act prohibiting a famer from growing wheat, beyond the quota allowed by law, for his own consumption. The court found that even the expansive powers authorized by *Wickard* did not justify the individual mandate. In *Wickard*, the Act at issue affected only farmers who had voluntarily entered the stream of commerce by producing a marketable commodity. But "[i]ndividuals subjected to [the individual] mandate have not made a voluntary choice to enter the stream of commerce, but instead are having that choice imposed upon them by the federal government." Slip Op. at 123. "If an individual's mere decision not to purchase insurance were subject to *Wickard's* aggregation principle, we are unable to conceive of *any* product whose purchase Congress could not mandate under this line of argument." *Id.* at 125.

In addition, the court held that "the individual mandate is breathtaking in its expansive scope." *Id.* at 130. "The government's position amounts to an argument that the mere fact of an individual's existence substantially affects interstate commerce, and therefore Congress may regulate them at every point of their life. This theory affords no limiting principles in which to confine Congress's enumerated power." *Id.* at 130-31. The Government's "proposed limiting principles" regarding the uniqueness of the health insurance market "are not limiting principles, but limiting circumstances," and are merely "a convenient sleight of hand to deflect attention from the central issue in the case." *Id.* at 132, 135.

The court noted further that the fact that both the insurance and health care markets "fall[] within the sphere of traditional state regulation," *id.* at 152-53, "strengthens the inference of a constitutional violation." *Id.* at 156-57. "When this federalism factor is added to the numerous indicia of constitutional infirmity delineated above, we must conclude that the individual mandate cannot be sustained as a valid exercise of Congress's power to regulate activities that substantially affect interstate commerce." *Id.* at 157.

Lastly, the court rejected the government's argument that the individual mandate was a "necessary and proper" means of making effective a "larger regulatory scheme." The court reasoned that "the Supreme Court has to date never sustained a statute on the basis of the 'larger

regulatory scheme' doctrine in a facial challenge, where [as here] plaintiffs contend that the entire class of activity is outside the reach of congressional power," *id.* at 159, and that the "larger regulatory scheme" rationale only allowed Congress to remove burdens to its ability to regulate interstate commerce. "An individual's uninsured status in no way interferes with Congress's ability to regulate insurance companies." *Id.* at 164.

The court concluded by noting that while Congress has broad power under the Commerce Clause, "what Congress cannot do . . . is mandate that individuals enter into contracts with private insurance companies for the purchase of an expensive product from the time they are born until the time they die." *Id.* at 167. "The federal government's assertion of power, under the Commerce Clause, to issue an economic mandate for Americans to purchase insurance from a private company for the entire duration of their lives is unprecedented, lacks cognizable limits, and imperils our federalist structure." *Id.* at 171. The court summed up its holding regarding the individual mandate:

> This economic mandate represents a wholly novel and potentially unbounded assertion of congressional authority: the ability to compel Americans to purchase an expensive health insurance product they have elected not to buy, and to make them re-purchase that insurance product every month for their entire lives. We have not found any generally applicable, judicially enforceable limiting principle that would permit us to uphold the mandate without obliterating the boundaries inherent in the system of enumerated congressional powers.

Id. at 206.

IV. The Individual Mandate was a penalty, not a "tax."

The court agreed with every other federal court to discuss the issue that "the individual mandate operates as a regulatory penalty, not a tax." *Id.* at 173. "The plain language of the statute and well-settled principles of statutory construction overwhelmingly establish that the individual mandate is not a tax, but rather a penalty." *Id.* at 174. "The individual mandate as written cannot be supported by the tax power." *Id.* at 189.

V. The Individual Mandate was severable.

Having found that the individual mandate was unconstitutional, the court was faced with determining whether the mandate could be severed from the rest of the Act (or, in other words, whether finding the individual mandate unconstitutional required invalidating the entire Act). The court found that the individual mandate was severable. *Id.* at 205.

The court first noted that there is a presumption in favor of severability. *Id.* at 189. The test for whether an unconstitutional provision is severable from the remainder of a statue is whether it is "evident" that Congress would not have enacted the constitutional provisions of the statute without the unconstitutional provision, so long as what is left can fully operate as law. *Id.* at 191. The court concluded that the vast majority of the Act passed this test with little problem because "[t]he lion's share of the Act has nothing to do with the private insurance, much less the mandate that individuals buy insurance." *Id.* at 192.

That an earlier version of the reform bill contained a severability clause that Congress excluded from the final bill did not change this conclusion. Both the Senate and House drafting

manuals state that severability clauses are "unnecessary unless they state that all or some portions of an act should *not* be severed." *Id.* at 193. The clause that appeared in the earlier version of the Act was a severability clause, not a non-severability clause, so deleting that clause only deleted an unnecessary clause and did not indicate any legislative intent against severability. *Id.* at 194.

The court noted that the severability question was more difficult concerning the Act's provision for guaranteed issue and prohibition on preexisting condition exclusions, but the court found for several reasons that it was not evident that Congress would not have enacted these provisions without the individual mandate. First, the court noted that Congress did not include a non-severability clause in the Act. Second, none of the insurance reforms in the act included a cross-reference to the individual mandate. Furthermore, Congress included a number of other provisions in the Act that further the same goal—encouraging and facilitating people in buying insurance and thus reducing the number of uninsured—that the individual mandate was meant to further. Finally, the court found the individual mandate to be riddled with exceptions and exemptions and thus a relatively toothless means of furthering the goal of reducing the number of uninsured. "There is tension, at least, in the proposition that a mandate engineered to be so porous and toothless is such a linchpin of the Act's insurance product reforms that [those reforms] were clearly not intended to exist in [the mandate's] absence." *Id.* at 202.

The court recognized that Congress had made findings that the individual mandate was essential to the Act's overall operation, but noted that those findings merely "track[ed] the language of the Supreme Court's Commerce Clause decisions," in an attempt to support the individual mandate's constitutionality; thus, the findings were not particularly relevant to the entirely different question of "whether Congress would have enacted the Act's *other insurance market reforms* without the individual mandate." *Id.* at 203.