

Health Law and Policy Update:

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Supreme Court Upholds Affordable Care Act

Last Thursday, the U.S. Supreme Court affirmed the constitutionality of the Affordable Care Act in a five-four opinion written by Chief Justice John Roberts. The individual mandate to purchase health insurance was found constitutional as a tax.

Over the past two years, the Affordable Care Act, also known as Obamacare, has helped nearly 2 million Coloradans gain access to health care, expanded services and peace of mind. That includes:

- More than 40,000 young adults in Colorado under the age of 26 have gained health insurance.
- In 2011 alone, 39,000 Colorado Medicare recipients saved over \$22 million on their prescription.
- 291,000 children in Colorado with pre-existing conditions can never be denied coverage.
- Many Coloradans are opening the mail this month to find rebates from their insurance companies. because of the Medical Loss Ratio requirements on insurance companies.

These are just a few of the positive changes that are a direct result of the Affordable Care Act. Yesterday's decision allows Colorado to continue on the path towards ensuring that all Coloradans have the security of knowing they have access to quality, affordable health care.

Today's Update explains the major points in the Court's decision.

The Majority Opinion

Written by Chief Justice Roberts, who was joined by Justices Breyer, Ginsberg, Kagan, and Sotomayor who disagreed with the Commerce Clause analysis, but agreed as to the constitutionality of the Act under Congress's power to tax.

There were four issues before the Court:

1. Whether the Anti-Injunction Act required them to wait to take the case until sometime after 2014, the first time people are required to comply with the mandate;
2. Whether the individual mandate is constitutional under Congress's Commerce Clause power or under its taxing power;

3. Whether the Medicaid expansion to 133 percent of the Federal Poverty Level is permissible; and
4. Whether, if any part of the Act were found unconstitutional, it would all be unconstitutional.

In answering those questions, the Court said:

First, Congress has the power to decide when the Anti-Injunction Act, which restrains the courts from interfering prior to the collection of a new tax, applies. Here Congress said that the consequence of failing to satisfy the minimum coverage requirement (or individual mandate) is a penalty, not a tax. Therefore for purposes of the Anti-Injunction Act, the penalty does not operate as a tax and the Court could go on to decide the case.

Next, the Court turned to the question of whether the individual mandate is a valid exercise of Congress' Commerce Clause power. This was the issue most often discussed by scholars, lawyers and the public as the case was working its way up to the Supreme Court and the one that raised the spectre, for some, of whether or not Congress could go so far as to require people to buy broccoli. The Commerce Clause analysis turned on the question of whether the failure to purchase health insurance is economic activity. The Government argued, and several lower courts agreed, that there is economic activity here because health care represents an enormous part of our economy in which virtually everyone is active, at some point in their lives, so the issue is really a question of timing, not of participation. In addition, there are significant economic consequences associated with the failure to purchase health insurance, among them the added cost of insurance for those that do purchase coverage.

The Chief Justice said, however, that the failure to purchase health insurance is not economic activity and Congress cannot, under the Commerce Clause, penalize people for doing nothing. Construing inactivity as commerce, said Justice Roberts, opens "a new and potentially vast domain to congressional authority." This case is different from other Commerce Clause cases where the people being regulated were choosing to engage in some form of economic activity. An example is the case of a wheat farmer who was not allowed to grow his own wheat because Congress used its Commerce Clause power to limit the amount of wheat grown for personal consumption. There at least the farmer had chosen to engage in the activity of growing wheat.

The mandate is constitutional, however, because the mandate penalty is really a tax. Although most people, including the Government, did not pay a lot of attention to this

argument, in the end, all five justices in the majority agreed that the monetary consequence imposed on people not purchasing health insurance is a tax, and Congress has the power to levy such a tax. The activity/inactivity distinction so important to the Commerce Clause analysis does not apply in the tax context. Congress can impose a capitation tax as well as tax all sorts of things that do not require activity. The mandate is not a legal command to purchase health insurance; it is a tax hike for people without insurance. The mandate establishes a condition - you have to buy health insurance. Failure to comply with that condition means you have to pay a tax. (We note that this discussion in the opinion references the specific prohibition in the ACA against use of criminal sanctions for failure to pay the tax several times.)

Why doesn't the Anti-Injunction Act analysis apply here if the mandate is a tax? The Court said that the penalty is not a tax for purposes of the Anti-Injunction Act analysis. The Anti-Injunction Act was written to restrain the judiciary's ability to enjoin the collection of a tax before it takes effect because there are times when it is essential that Congress have the power to raise revenue. Therefore, because Congress called the consequences of failing to comply with the mandate a penalty, the Anti-Injunction Act, which only applies in the tax context, is not triggered in this case.

Medicaid

Seven Justices agreed with this portion of the opinion. Justices Ginsberg and Sotomayor did not.

The Supreme Court determined that the Medicaid expansion under the Affordable Care Act can be allowed to proceed; however, the Court declared that the provision allowing removal of all of a state's Medicaid funding if it does not adopt the expansions is overly coercive and unconstitutional under the Spending Clause.

Medicaid, which was created under Congress's Spending Clause power, is a state-federal partnership and state participation is optional. The federal government contributes an average of 57 percent of the funding for the program (50 percent in Colorado) but requires that as a condition of participation and funding, states must adhere to minimum requirements. Until the ACA, the Medicaid program had largely been limited to children, pregnant women, low-income parents of children in Medicaid, the elderly, blind and disabled. The ACA, however, required states to expand their Medicaid programs to all individuals under the age of 65 with incomes less than 133 percent of poverty (\$15,056 for an individual in 2012). In return for implementing this expansion the federal government would provide states 100 percent of the funding for the expansion in the first few years and phase down to providing 90 percent of the funding in later years. This was a truly meaningful expansion for two

reasons. First, it includes the population of very low-income adults without dependent children for whom Medicaid has never been categorically available. Second, it provides an enormous commitment of federal funding to help states with the implementation. Under the ACA as passed, states were required to expand their Medicaid programs to all eligible individuals under 133 percent of the Federal Poverty Level. The consequence to a state of not expanding coverage was losing all federal Medicaid dollars, including for coverage of pre-ACA eligible individuals.

The Supreme Court acknowledged: "We have long recognized that Congress may use this [Spending Clause] power to grant federal funds to the States, and may condition such a grant upon the States' 'taking certain actions that Congress could not require them to take.'" However, the Court continued, "when 'pressure turns into compulsion' the legislation runs contrary to our system of federalism..." Thus, the Court determined that conditioning all of a state's Medicaid funding on the adoption of the Medicaid expansion is overly coercive and not permissible under the Spending Clause because it effectively removes state choice. But the Court held that so long as a state's participation in the expansion is not compulsory, the Medicaid expansion can proceed and the federal government can offer the greatly enhanced funding match for participating states. A state can choose not to proceed with a Medicaid expansion and that state will only lose the benefit of the funding associated with the expansion itself, not its entire federal funding match.

Dissent

Justices Scalia, Kennedy, Thomas, and Alito, the four dissenters, believed that the individual mandate should be struck down. They agreed with the Chief Justice that the individual mandate is not valid under Congress's Commerce Clause powers. The dissent stated that the individual mandate is unprecedented in that it "directs the creation of commerce," which, in their opinion, exceeds Congress's power under the Commerce Clause. They disagreed, however, with the Court's decision to uphold the mandate as a valid exercise of Congress's taxing power. According to the dissent, the individual mandate is a penalty, not a tax, and therefore should be struck down. The dissent states that the Court has never "classified as a tax an exaction imposed for violation of the law," which, they said, is how the individual mandate functions. They argued further that, in the context of this case, it is not appropriate for the Court to decide whether the individual mandate is a tax. The dissenters wrote that "to say that the individual mandate merely imposes a tax is not to interpret the statute but to rewrite it," thereby placing the power to tax with the Court rather than with Congress.

The dissent believed that the entire Medicaid expansion should be struck down. The dissenters wrote that allowing states to decline the Medicaid expansion would require those states to essentially subsidize other states that do accept the Medicaid

expansion. This, according to the dissent, would be politically destabilizing and "undermine state sovereignty." The dissent fails to address, however, how refusing federal money as part of the Medicaid expansion is different than refusing other federal money for roads, transportation and public health. Finally, the dissenters argued that since, in their opinion, the individual mandate and Medicaid expansion are both invalid, the entire ACA should have been struck down.

Read More

- The Supreme Court's [full opinion](#).
- National Health Law Program [summary](#) of decision.
- Colorado Health Institute: [Fact Sheet](#) and [Report](#) on implications of Supreme Court ruling for Colorado.
- Scotus Blog:
 - [Don't call it a mandate - it's a tax](#)
 - [A reader's guide to health care ruling](#)
 - [Today's health-care decision: In Plain English](#)