The Affordable Care Act in Court – Litigation Continues Unabated

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The Affordable Care Act has been a lightning rod for litigation, generating hundreds of cases seeking to have all or parts of the law declared illegal. This article focuses on Supreme Court cases that have assessed the ACA over the past decade and highlights those on the Court's pending docket.

Introduction

In the words of Chief Justice John Roberts, the Affordable Care Act (ACA) "aims to increase the number of Americans covered by health insurance and decrease the cost of health care" [1]. Enacted over a decade ago, the ACA has been a lightning rod for litigation, generating hundreds of complaints seeking to have all or parts of the law declared illegal. This article focuses on cases that have made their way to the US Supreme Court.

Over 900 pages long, the ACA contains hundreds of provisions. The law requires most individuals to have health insurance coverage and reforms health insurance markets by, among other things, barring insurers from excluding people who have preexisting health conditions. It expands Medicaid to cover additional low-income groups, including working-poor adults and former foster youth. And it includes numerous public health provisions, addressing everything from breastfeeding to nutritional labeling and nondiscrimination in health care [2]. Even before the COVID-19 pandemic, the ACA had extended health coverage to about 20 million people [3].

By the end of the day on which President Barack Obama signed the ACA into effect, four lawsuits had been filed alleging it was unconstitutional. These cases, and more than 30 other later-filed actions, culminated in the Supreme Court's 2012 decision, *National Federation of Independent Business v. Sebelius (NFIB)* [1]. The Court heard six hours of oral argument and received over 140 legal briefs on the *NFIB* case, setting two modern-day records. Chief Justice Roberts's opinion for the Court held that Congress properly used its taxing authority to enact the ACA insurance mandate provisions that require most individuals to maintain a minimum level of health insurance coverage or pay a tax penalty. On the other hand, the Court found the ACA's mandated Medicaid expansion to non-disabled, low-income adults unduly coercive, reasoning that states were not on notice that Medicaid funding would be predicated on including this population group when they began participating in Medicaid in the first place. This part of the *NFIB* decision made a state's initial decision whether to expand Medicaid to the adult group optional (currently, 12 states, including North Carolina, have not opted in). Four justices (Scalia, Kennedy, Thomas, and Alito) dissented in full; they would have held the individual mandate and the Medicaid expansion unconstitutional and vacated the ACA in its entirety [1].

The ACA returned to the Supreme Court three years later in *King v. Burwell* [4]. The *King* Court reviewed provisions that make tax credits available to limited-income people who could not otherwise afford health insurance premiums. Finding that these credits are properly available to individuals nationwide, Chief Justice Roberts's 6-3 opinion signaled that a majority of the Court had had enough of ACA litigation, concluding that, "[i]n a democracy, the power to make the law rests with those chosen by the people," not with the courts [4].

Over the last decade, Congress has rejected more than 50 attempts to repeal the ACA [5]. Meanwhile, individuals and organizations have continued to file lawsuits challenging all or parts of the law. One particularly long-running dispute—with well over 100 lawsuits—involves the ACA's requirement that health insurance, including most employer-sponsored insurance, cover preventive care for women without cost sharing, as provided for in guidelines supported by the Health Resources and Services Administration (HRSA) [6]. These guidelines include all FDA-approved contraceptive methods among the required care. Obama-era regulations exempted some entities, such as churches, and accommodated other religiously affiliated nonprofits by allowing them to opt out of this coverage, after which it would be provided to employees through the insurer or other third party. In 2014, the Supreme Court extended the opt-out to a for-profit company closely held by a religious family [7].

After the Trump administration took office, it issued

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regulations broadly exempting both for-profit and nonprofit employers with a religious or moral objection to contraceptives. Pennsylvania and New Jersey challenged these regulations as violating the ACA and laws that establish the procedures federal agencies must follow when issuing rules. At the end of the 2019-2020 term, the Supreme Court upheld the Trump administration rule. Writing for the Court in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, Justice Clarence Thomas concluded that the ACA gives federal agencies "virtually unbridled discretion" to decide what counts as preventive care, including the ability to create exemptions [8]. Justices Ruth Bader Ginsburg and Sonia Sotomayor dissented, criticizing the majority opinion as failing to appropriately consider the interests of women in women's health: "Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the *nth* degree" [8].

Meanwhile, the Court is set to decide another potential blockbuster ACA case after oral argument in November. The case is *Texas v. California* (previously titled *Texas v. United States*). Once again, the Court will focus on the ACA's requirement that individuals maintain minimum health insurance coverage or pay a tax penalty. In 2017, Congress set the tax penalty at zero while leaving the remainder of the ACA intact. Two individuals and a group of Republican state attorneys general, led by Texas, went to court arguing that Congress's action made the individual mandate unconstitutional and that, as a result, the entire ACA must fall [9]. They filed their case with Reed O'Connor, a Texas judge who has struck down other parts of the ACA. True to form, Judge O'Connor ruled against the ACA in its entirety. On appeal, the Fifth Circuit agreed that the mandate is unconstitutional but remanded the case for Judge O'Connor to reassess his decision to upend the entire law [9]. Notably, as the case was being litigated, the Trump administration flipped positions from defending the ACA to supporting the position of Texas. As a result, a group of 21 state attorneys general—led by California and including the North Carolina attorney general—and House Democrats intervened to defend the law. Thus, the title of the case, *Texas v. California*, now reflects a red state-blue state battle. And in an unusual move, the Supreme Court agreed to hear the case without waiting for the remand to take place.

Predictably, the California-led parties take the position that the individual mandate is constitutional. They point out that the ACA continues to authorize a tax penalty (which a future Congress can reset) and argue that, while the mandate is currently unenforceable, that does not make it unconstitutional [9]. They also argue that, even if the Court disagrees, it should sever the rest of the ACA from the unconstitutional part. Two opinions from the Court's just-ended term strongly support this position—one from Justice Brett Kavanaugh, noting the Court's "decisive preference for surgical severance rather than wholesale destruction" of a statute, and the other from the Chief Justice, stating the Court's preference to "use a scalpel rather than a bulldozer" when curing an unconstitutional defect in a statute [10, 11].

If the ACA survives this challenge, will litigation come to an end? Most likely, no. Other cases are already in the queue. One group of cases involves the ACA's expansion of Medicaid to non-disabled adults. Early on, the Trump administration announced that it would resist the expansion by authorizing states to condition Medicaid coverage for this group on work requirements [12]. Thereafter, the Secretary of Health and Human Services began encouraging states to impose work requirements. Affected individuals in Arkansas and New Hampshire filed suits challenging the Secretary's action as unauthorized by law and arbitrary. The DC Circuit Court of Appeals agreed. Authored by Reagan appointee Judge David B. Sentelle, the circuit opinion quotes the words of the Medicaid Act itself to conclude that Medicaid's purpose is to "furnish medical assistance" to low-income people in need [13, 14]. The opinion focuses strongly on that objective and contrasts the Medicaid Act with other public assistance statutes, such as Temporary Assistance to Needy Families, that expressly tie the benefit to work requirements. Evidence also showed that the vast majority of adult Medicaid enrollees are already working or cannot work due to chronic conditions or caregiving responsibilities; yet, these requirements cost hundreds of millions of dollars to administer, while in Arkansas alone tens of thousands of people lost Medicaid coverage in the first months after the restriction was put in place [15]. In July 2020, the Secretary petitioned the Supreme Court to reverse the decisions.

Two cases at the DC Circuit provide additional examples of issues that will see further litigation. *State of New York v. U.S. Dep't of Labor* involves the Trump administration's attempt to expand use of association health plans (AHPs), which operate under the Employee Retirement Income Security Act (ERISA) and are partly exempt from ACA rules [16]. A 2018 regulation would allow groups of employers to band together for the sole purpose of creating an AHP, and might even allow for single-person AHPs [17]. Invalidating most of the regulation, the district court found that "[t]he Final Rule is clearly an end-run around the ACA" [18]. The DC Circuit heard oral argument on the United States' appeal on November 14, 2019.

The other case, *Association for Community Affiliated Plans v. U.S. Department of Treasury*, involves short-term, limited-duration insurance (STLDI) [19]. STLDI is low-premium, high-deductible, limited-benefit coverage that has traditionally been purchased by individuals who would otherwise be uninsured for a short period of time, for example while between jobs. The ACA exempts STLDI from its insurance reforms, thus allowing it to, for example, vary premiums based on health status and provide limited health benefits. Obama-era regulations defined STLDI as plans lasting less than three months [20]. In 2018, the Trump administration redefined STLDI as coverage lasting under a year that can be renewed for up to three years [21]. The Association

for Community Affiliated Plans (ACAP), the American Psychiatric Association, and others were concerned that, as redefined, STLDI plans would draw healthy people out of the risk pool for ACA-compliant insurance, thus threatening market stability while reinvigorating discriminatory insurance practices [19]. However, their legal challenge failed in a 2-1 circuit court decision. The majority reasoned that the STLDI rule could not be inconsistent with the ACA because Congress had carved out an exception for STLDI in the Health Insurance Portability and Accountability Act (HIPAA) and, when it enacted the ACA, had cross-referenced HIPAA [19]. The Court also found the administration's stated reasons for the change—to increase access to affordable health insurance and consumer choice—were reasonable ones [19].

Concluding, the court observed that a new administration could revisit the definition, but, "as judges, our role is narrow: to ensure only that the Departments reasonably exercised the policymaking authority granted to them and not to us" [19]. So, as yet another court reminds us of the limited role of the judiciary, there can be no doubt that parties opposing the ACA have made—and will continue to make—unprecedented use of the courts in their efforts to bring the statute down. NCMJ

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