National Family Planning & Reproductive Health Association

July 2012

Supreme Court Decision on the Affordable Care Act:
What Family Planning Providers and Systems Need to Know

On June 28, 2012, the Supreme Court issued its long-awaited ruling on the constitutionality of the Affordable Care Act (ACA). In a 5-4 decision, Chief Justice John Roberts joined Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan in upholding the ACA. Justice Anthony Kennedy, whom many had speculated would be the "swing" vote if the law was upheld, instead joined Justices Antonin Scalia, Clarence Thomas, and Samuel Alito, Jr. in ruling against the ACA in its entirety.

The court ruled in *National Federation of Independent Business v. Sebelius*[1] that all provisions of the health care reform law are constitutional except for the federal government's power to require states to expand their full-benefit Medicaid programs. This document examines the top five things NFPRHA members should understand about the court's decision on the ACA.

1. The Individual Mandate is Constitutional

The Bottom Line: *Congress has the power to require individuals to pay a penalty for not having insurance coverage after 2014.*

The central legal issue of the case was the ACA's "individual mandate," which requires every American to maintain a minimum level of health insurance coverage – known as "minimum essential coverage" – beginning in 2014. This requirement can be satisfied by a number of coverage options, including employer-sponsored coverage, coverage purchased through the state-based exchanges, or government-sponsored coverage (such as Medicaid). If a person does not purchase or otherwise obtain minimum essential coverage, she/he would have to pay a financial penalty known as a "shared responsibility payment."

Opponents of the law argued that the individual mandate violated the Constitution's Commerce Clause, which gives Congress the power to regulate interstate commerce and has traditionally included economic activity that "substantially affects" or is "in the stream of" interstate commerce. The key issue with regard to the individual mandate was whether the Commerce Clause allows Congress to regulate economic *inactivity*, as opposed to economic *activity*. On this point, the court's

[1] *National Federation of Independent Business v. Sebelius* combines three separate cases appealed to the Supreme Court from the Eleventh Circuit Court of Appeals. The other two cases were *Department of Health and Human Services v. Florida* and *Florida v. Department of Health and Human Services*.

majority[2] agreed with the plaintiffs that the individual mandate exceeds Congress' power under the Commerce Clause, finding that Congress' power is limited to regulating "activity" as opposed to "inactivity."

However, an alternative theory proposed in the case by the federal government argued that the individual mandate was constitutional under Congress' power to "lay and collect Taxes."[3] The court's majority[4] agreed with the government's assertion, finding that the financial consequence imposed on individuals for not having insurance coverage functions as a tax, even though the ACA calls it a "penalty." Because the individual mandate was upheld, the court did not need to decide on the issue of "severability" – whether the ACA could continue without the individual mandate.

***The Big Picture**: The decision leaves the penalty for not maintaining insurance coverage intact. However, the court's framing of the penalty as a tax will certainly be used as a political point by those who oppose the ACA.*

2. The Medicaid Expansion is Constitutional, But the Federal Government's Power to Enforce the Expansion Is Not

***The Bottom Line**: The court's ruling effectively makes the ACA's Medicaid expansion optional for states, but all other Medicaid-related requirements remain in effect.*

The ACA requires states to expand eligibility for full-benefit Medicaid to all individuals with annual incomes up to 133% of the federal poverty level (which in 2012 equals $14,856 a year) beginning in 2014. The federal government will pay 100% of the cost of the Medicaid expansion for three years beginning in FY 2014, and will gradually reduce its commitment to 90% in FY 2020 and beyond.

The Constitution's Spending Clause empowers Congress to address issues of national concern by offering federal funds to states in exchange for the states' agreement that they will follow certain conditions of funding. Under this authority, Congress included a provision in the ACA allowing the Secretary of the US Department of Health and Human Services (HHS) to take away a state's *existing* Medicaid funds if the state did not expand Medicaid as directed by the ACA.

Medicaid is a voluntary state/federal partnership – states are not required to participate in the program, but all states currently do. Plaintiffs argued that the Medicaid expansion was unconstitutionally "coercive" to states because it conditioned federal Medicaid funds on the states'

[2] On this point, the majority was Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito.

[3] Art. I, §8, cl. 1.

[4] On this point, the majority was Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan.

expansion of full-benefit Medicaid eligibility, and states are too dependent on federal Medicaid funds to say no. The federal government argued that the provision was not coercive because:

- Medicaid is a voluntary state/federal partnership, and states are not required to participate in the program (though all do);
- The Spending Clause allows Congress to attach conditions to the receipt of federal funds, and the ACA's Medicaid expansion is no different;
- Congress has repeatedly amended Medicaid's mandatory coverage categories since the program's inception, without incident;
- No court has ever ruled a condition on federal funds invalid for being coercive; and
- The Medicaid expansion cannot be coercive since the federal government is paying for nearly all of it.

The Supreme Court sided with the plaintiff and found for the first time ever that Congress' use of its Spending Power authority was unduly coercive. Even more surprising, 7 of the court's 9 justices agreed that states were being coerced into expanding their Medicaid programs. The justices were divided, however, about the remedy for this violation: 4 justices wanted to strike down the expansion completely, while 3 wanted to remove the enforcement provision but allow the expansion to stand. In the end, Justices Ginsburg and Sotomayor – who wanted to uphold the provision in its entirety – sided with Chief Justice Roberts and Justices Kagan and Breyer to uphold the Medicaid expansion by striking down the enforcement provision. The majority ruled that the Secretary of HHS cannot terminate all of a state's federal Medicaid funding if the state chooses not to expand its full-benefit Medicaid program in accordance with the ACA. States that choose not to expand their full-benefit Medicaid programs will lose the enhanced federal matching support (FMAP) authorized by the ACA for the expansion population, but not their existing federal funding for their current Medicaid population.

The court's ruling was written narrowly, and leaves intact the ACA's other Medicaid-related requirements and the federal government's ability to enforce them. As the decision states, "Nothing in our opinion precludes Congress from offering funds under the ACA to expand the availability of health care, and requiring that states accepting such funds comply with the conditions on their use." The decision also leaves intact pre-ACA requirements, such as the freedom of choice requirement, which states must follow or else risk their existing Medicaid funding.

***The Big Picture**: Despite the narrowly drawn ruling, it will be some time before the full ramifications of this aspect of the decision becomes known, including how many states will choose not to expand their full-benefit Medicaid programs. Some states may attempt to use the ruling to the detriment of Medicaid providers and patients by trying to leverage the ruling in exchange for concessions from the federal government about the size, scope, or requirements of their Medicaid programs. The decision could ultimately have far-reaching implications for all laws that are validated by the federal government's Spending Clause powers (for example, federal civil rights statutes prohibiting discrimination on the basis of race, sex, etc.).*

3. The Supreme Court's Decision Means the Essential Protections of the ACA Stand

***The Bottom Line**: The court's ruling leaves nearly all key provisions of the law intact, including those specifically related to family planning and sexual health.*

The Supreme Court upheld the ACA, meaning key consumer protections will go forward, including:

- Starting in 2014, insurance plans cannot charge women more than men for insurance premiums based on sex/gender;
- Young adults may be covered on a parent's health plan until the age of 26;
- Insurance plans cannot place lifetime caps on coverage; and
- Insurance plans cannot deny coverage to children with pre-existing conditions now, or deny coverage to adults with pre-existing conditions starting in 2014.

- The women's preventive health services benefit – which goes into effect on August 1, 2012 – will provide insurance coverage of essential women's health services without co-pays, including contraceptive methods, counseling, and preventive visits

- The essential community provider provision, which requires insurance plans to contract with safety-net providers, including Title X providers, will continue to be implemented.

- States will also be able to continue applying for state plan amendments (SPAs) to expand Medicaid coverage of family planning services.

***The Big Picture**: The consumer protections in the ACA are popular with the American public and are likely to remain part of health insurance coverage regardless of the political makeup in Washington, DC.*

4. Federal and State Governments Will Focus on Implementation

***The Bottom Line**: Health reform implementation activities are far from being complete. Implementation activities must accelerate at the state and federal levels.*

The state-based insurance exchanges are scheduled to open in October 2013, and states choosing to expand their full-benefit Medicaid programs will work to do so by January 1, 2014. The federal government will renew its efforts to issue guidance and regulations related to those and other key aspects of the law, especially with regard to the Medicaid provisions, for which the government has published few regulations to date.

To date, 34 states and the District of Columbia (DC) have received approximately $850 million to fund their progress toward building exchanges. Fifteen states have established their exchanges, while 14 have not begun their work, and three have publicly announced their intention to not create an

exchange. Under the ACA, states are supposed to submit their exchange plans to HHS by November 16, 2012 – just 10 days after the fall elections.

Several states will proceed slowly to implement the law in anticipation of a change in the White House following the 2012 election. Failure to move on implementation will place states that delay at a disadvantage in the event the law remains intact following the election.

***The Big Picture**: Although the Supreme Court's decision settles many aspects of the ACA, the November 2012 elections may be the final arbiter of the ACA's fate. House Republicans will pass pro-forma legislation to repeal the ACA in the coming weeks, and will try to chip away at the law through the November elections.*

5. For NFPRHA Members, the Time is Now

***The Bottom Line**: NFPRHA members should identify ways to get involved in implementation to ensure access to comprehensive, quality family planning services.*

The magnitude of change in family planning service delivery is greater than any since the creation of the Title X program in 1970. As the federal government dramatically increases the role of insurance, both public and private, the safety net will need to adapt to meet the demands. In 2010, NFPRHA launched a project titled *Life After 40: The Family Planning Network and the ACA* designed to help prepare the field of publicly funded family planning for the health care delivery changes that were accelerated by the passage of the ACA.

The ACA contains thousands of policy changes that will impact health insurance and the health care delivery network and there will be challenges and rewards for family planning providers as the law is implemented. Many of the implementation decisions will be made at the state level. NFPRHA members should reach out to a wide variety of stakeholders including primary care associations, health insurance commissioners, and state Medicaid Directors because the success of the law will require the participation of those with expertise and experience in different components of health care provision.

The ACA will endure additional legal and political challenges and it is important for on supporters of the law to continue to highlight the ways the law expands family planning and other important services to millions of Americans. NFPRHA will continue to provide you with materials designed to help you raise awareness about the importance of implementing the ACA.

***The Big Picture**: Health reform implementation is a marathon, not a sprint. Family planning providers should get engaged and be prepared for many new challenges and opportunities, and know that NFPRHA is ready to help its members meet the goal of protecting access to high-quality family planning services.*