The previews are contributed by the Legal Information Institute, a nonprofit activity of Cornell Law School. This department includes an in-depth look at two cases plus executive summaries of other cases before the Supreme Court. The executive summaries include a link to the full text of the preview.

On March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act (Health Care Act). The Health Care Act is a comprehensive piece of legislation aimed at reforming health care in the United States. A number of states and organizations have brought lawsuits challenging the constitutionality of two aspects of the Health Care Act: the minimum coverage provision and expansion of the Medicaid program. Beginning in 2014, the minimum coverage provision will require every individual (with a few exemptions) to carry a minimum level of health insurance or pay a "penalty." The Medicaid expansion will extend Medicaid coverage to all individuals below 133 percent of the poverty level.

At the appellate level, the Eleventh Circuit held that the minimum coverage provision was an unconstitutional use of congressional power, but that it was severable from the rest of the Health Care Act. Regarding the Medicaid expansion, the Eleventh Circuit held that the expansion was constitutional and did not amount to coercion.

The Supreme Court will now rule on the constitutionality of these provisions. If the Court determines that either the minimum coverage provision or the Medicaid expansion is unconstitutional, the Court will then need to decide whether the provision is severable from the remainder of the Health Care Act. The Court will also rule on the applicability of the Anti-Injunction Act, despite the abandonment of this argument during the appeals process. If the Anti-Injunction Act applies here, the Court will not be able to adjudicate on the minimum coverage provision's constitutionality until the provision becomes effective in 2014.

Ultimately, the Supreme Court will hear oral argument on four issues: the application of the Anti-Injunction Act; the constitutionality of the minimum coverage provision; the severability of the minimum coverage provision; and the constitutionality and severability of the Medicaid expansion.

Nat'l Fed. of Indep. Bus. v. Sebelius (11-393) and Florida v. Dep't of Health & Human Servs. (11-400) (consolidated on severability)

Appealed from the U.S. Court of Appeals for the Eleventh Circuit (Aug. 12, 2011)

Oral argument: March 28, 2012

Background

The Supreme Court must determine whether, if declared unconstitutional, the minimum coverage provision can be severed from the remainder of the Patient Protection and Affordable Care Act (Health Care Act).

Implications

Several senators contend that the minimum coverage provision cannot be severed from the Health Care Act. They argue that there is no severability provision in the Health Care Act and that judicial severance would interfere with Congress' legislative powers. The Texas Public Policy Foundation and the Cato Institute assert that the Congress included the minimum coverage provision as the key to effective health care reform. The Texas Public Policy Foundation and the Cato Institute argue that allowing the judiciary to disregard the integral nature of the minimum coverage provision eviscerates Congress' representative role.

In contrast, several states contend that invalidating the Health Care Act would constrain Congress' legislation power and thwart state efforts to comply with the act. Some states have already constructed the infrastructure necessary to implement the Medicare and Medicaid provisions. Congress would have prohibited such state preparations, these states argue, had Congress anticipated that a court would invalidate the entire Health Care Act after finding one provision unconstitutional. The American Medical Student Association argues that the presumption for severability protects Congress, as elected representatives, against a judicial intrusion into largely political decisions.

The American Civil Rights Union (ACRU) contends that severing the minimum coverage provision, but permitting the remainder of the Health Care Act to take effect, would trigger a "death spiral" by encouraging people to discontinue their health insurance policies until they were in dire need of health care. ACRU argues this would place the increased costs of providing health insurance on an ever-shrinking pool of insured people. According to several economists, without the minimum coverage provision insurance companies would face at least $715 billion in costs from 2012 through 2021 due to the Health Care Act.

American Public Health Association (APHA) argues that invalidating the Health Care Act would prevent Americans from receiving the benefits of health care reform that are unrelated to insurance reform. APHA contends that the Health Care Act reforms more than insurance regulations, pointing to the creation of the National Prevention, Health Promotion and Public Health Council, and the promotion of wellness and disease prevention. Missouri adds that striking down the Health Care Act would deprive Americans of benefits that are already in effect, including break times for nursing mothers, student loan reforms, and standards for nutrition labeling at restaurants.

Legal Arguments

The National Federation of

PREVIEWS *continued on page 60*

Independent Business (NFIB) and several states argue that the minimum coverage provision is not severable from the remainder of the Health Care Act, as made clear by legislative intent. NFIB and the states argue that Congress' focus on the minimum coverage provision during the legislative bargaining process and the central role the provision plays to offset the economic consequences of the rest of the Health Care Act show that the congressional intent in this case was for the entire Health Care Act to fall or stand on the basis of the constitutionality of the minimum coverage provision.

The Department of Health and Human Services (HHS) asserts that the fact that many of the provisions of the Health Care Act are already in effect and functioning show that the Health Care Act can operate without the minimum coverage provision, and that Congress intended such. HHS concedes that if the minimum coverage provision is unconstitutional, the community-rating and guaranteed-issue provisions must fall. However, HHS argues that the Health Care Act contains many other provisions "wholly unrelated" to the minimum coverage provision. Ultimately, HHS contends that the minimum coverage provision is constitutional and argues that because NFIB and the states do not have standing, the Court should not rule on this issue.

HHS argues that the states and NFIB do not have standing to raise the severability issue because they must show an injury by each Health Care Act provision before any severability challenge. HHS asserts that being affected by one provision is not enough to provide standing to challenge the entire Health Care Act. HHS contends that an adversarial process is necessary to ensure that all issues are fully litigated and that cannot be achieved unless the parties are injured by the entire act, providing them motivation to strongly advocate their positions with respect to each provision. HHS argues that without the injury requirement the Court would be issuing an unconstitutional advisory opinion.

The states counter that they have standing because deciding if parts of an act can be severed is one way for courts to provide a remedy related to a single provision. Indeed, the states contend that the main purpose of allowing courts to decide on severability is to protect congressional intent. Because the states maintain that they have standing, they argue that this puts them in a position to help the Court determine Congress' intent in enacting the Health Care Act. Their challenge to severability in this case is not actually a challenge to the other provisions of the Health Care Act, the states argue, but rather an argument about which remedy would best effectuate congressional intent.

NFIB argues that the relevant inquiry in determining whether an unconstitutional provision is severable is whether Congress would have chosen to enact the statute without that provision, not whether an act can function without the provision. To determine if Congress would have enacted the statute without the provision at issue, NFIB argues, a court must look to the provision's role in the legislative process, the economic connection between the provision and the act, and the provision's effect on the act's purpose. NFIB maintains that courts should determine whether removing the unconstitutional provision would undermine an act's goals, and, if it would, the court should invalidate the entire act.

HHS contends that the Court should sever any unconstitutional provisions, but retain those provisions that function independently. HHS argues that the Court must engage in statutory construction rather than try to predict the outcome if Congress had attempted to pass the act without the unconstitutional provision. HHS contends that the states and NFIB have not overcome the presumption of severability by showing that it is "evident" that Congress would have wanted the act to fall if the minimum coverage provision was unconstitutional. HHS contends that because the minimum coverage provision is not effective until 2014, but a number of other provisions are already functioning, Congress intended the provisions to operate independently.

NFIB argues that without the minimum coverage provision the Health Care Act cannot function as Congress intended. NFIB and the states argue that the minimum coverage provision increases the demand for health care, while the guaranteed-issue and community-rating provisions increase the supply by prohibiting discriminatory health care insurance pricing. The states and NFIB maintain that Congress' goal of affordable health care can only be effectuated if both supply and demand increase together. NFIB argues that the minimum coverage provision offsets the economic consequences of all the act's provisions, not just the community-rating and guaranteed-issue provisions, and selectively striking down provisions is a policy choice that the Court should leave to Congress.

HHS argues that Congress' goal was to increase the availability of affordable health care, not merely to balance supply and demand. HHS contends that only the guaranteed-issue and community-rating provisions cannot function without the minimum coverage provision—all the other provisions independently advance affordable coverage and do not rely on the minimum coverage provision. As examples, HHS cites that the government has previously expanded Medicaid coverage and employer-responsibility regulations without corresponding minimum coverage provisions. Additionally, HHS argues, the fact that Congress included so many provisions that advance its goal suggest that Congress is committed to keeping as many of those provisions as possible.

Conclusion

If the Supreme Court finds the minimum coverage provision unconstitutional, it will determine whether to strike down just that provision or the entire Health Care Act. Petitioners argue that because the minimum coverage provision is essential to the Health Care Act, the entire act should fall. In contrast, the respondents argue that if the minimum coverage provision is unconstitutional, the Court should sever that provision and uphold all other provisions that Congress would

have enacted without the minimum coverage provision.

Full text is available at www.law.cornell.edu/supct/cert/11-393.

Prepared by Meredith Carpenter and Charlotte Davis. Edited by Kelly Halford.

Dep't of Health & Human Servs. v. Florida (11-398)

Appealed from the U.S. Court of Appeals for the Eleventh Circuit (Aug. 12, 2011)

Oral argument: March 26, 2012

Background

Though the focal point of this case is the Health Care Act's constitutionality, the Supreme Court instructed the parties to argue an issue that was abandoned during the appeals process—whether the Tax Anti-Injunction Act (AIA) bars the challenge against the individual mandate. The AIA blocks courts from hearing challenges brought to "restrain[] the assessment or collection of any tax" before the government has attempted such assessment or collection.

Implications

The Cato Institute contends that the majority of courts to face this issue have concluded that the AIA does not apply to suits attempting to enjoin the individual mandate's penalty provision. The Center for the Fair Administration of Taxes (CFAT) asserts that, if the AIA applies to the individual mandate's penalty, the decision would open the floodgates for taxpayer cases challenging penalties assessed against them. CFAT argues that the same flood of challenges would occur if the Court allowed Executive Branch to waive AIA application.

Mortimer Caplin and Sheldon Cohen, former IRS commissioners, argue that if the AIA does not apply here, it would allow a mass of claims against the individual mandate, clogging the courts and causing delays. This flood of lawsuits, Caplin and Cohen contend, would begin because taxpayers could challenge individual mandate assessments in court, rather than availing themselves of tax code administrative procedures. Robert Long, a court-appointed amicus curiae, notes that the AIA's application here will prevent this premature judicial interference with the prompt administration of the tax system.

The American Center for Law and Justice (ACLJ) points out that this challenge to the individual mandate's constitutionality does not justify AIA application because the suit poses no interference to the efficient administration of the tax system. CFAT asserts that Congress did not intend the AIA to apply to "penalty" challenges; therefore, allowing the challenge to go forward would not damage the AIA's credibility or effectiveness. ACLJ further notes that Congress' intended result vis-à-vis the individual mandate is to create effective health insurance markets, a goal that should not implicate the AIA.

Caplin and Cohen assert that if the individual mandate does not fall into the AIA's purview, this would interfere with the orderly collection of taxes and circumvent the AIA's very purpose. Various tax law professors reiterate the argument that the function of the AIA is to facilitate the "pay first, litigate later" tax regime that allows for the efficient administration of the tax system. The Department of Health and Human Services, Department of the Treasury, and Department of Labor (collectively HHS) contend the AIA applies regardless of the term employed (tax or penalty) because the individual mandate operates in conjunction with the penalty provision and creates "only tax consequences."

Legal Arguments

HHS argues that the AIA only applies to cases involving taxes, whereas the individual mandate provides for a penalty. Private respondents, two individual citizens and the National Federation of Independent Business (collectively NFIB), add that "taxes" and "penalties" are treated as distinct legal concepts throughout the tax code. State respondents (the states) assert that the individual mandate's penalty must be something other than a tax because Congress specifically directed the IRS to collect the penalty in the same manner as a tax, language that Congress would not have included if the penalty itself was a tax.

Long counters that the penalty at issue is a tax subject to the AIA because the provision falls within the broad ordinary meaning of "tax." Long argues that Congress only used the term "penalty" to imply expected compliance with the mandate. Long asserts that the individual mandate's penalty is a tax subject to the AIA because of Congress' direction that the penalty be assessed and collected as a tax. Long argues that this requires that the AIA apply to the mandate's penalty because the AIA affects how taxes are assessed and collected—free of judicial restraint.

HHS argues that if the individual mandate's penalty provision is a tax subject to the AIA, then the Court can not hear the case because the challenges to the individual mandate implicitly include challenges the penalty provision. HHS asserts that because parties may only contest a statute's consequences, and not its phrasing, in court, the parties may not make a legal claim exclusively against the individual mandate where the mandate is not independent of its penalty.

NFIB, however, argues that the AIA does not bar this suit because the claim concerns the individual mandate, and not the penalty. The penalty provision is irrelevant to this claim, NFIB argues, because if the individual mandate is found to be constitutional then its members will comply, thereby avoiding the penalty provision entirely. The states argue that their claim is also against the mandate itself because the states' injury comes from future increased enrollment in state Medicaid programs and not from a penalty that does not apply to the states.

Long asserts that the mandate and the penalty are tightly coupled because the penalty is the only method available to enforce the mandate. Additionally, Long contends that the claims themselves do attack the penalty provision directly because the suit "seeks an injunction against 'enforcement' of the [Health Care] Act"—enforcement that is achieved through the penalty provision.

HHS argues that the AIA applies to

PREVIEWS *continued on page 62*

states in the same manner as an individual. HHS contends that, as courts have found when applying other internal revenue laws, states are "persons" under the AIA. HHS further asserts that the addition of "by any person" to the AIA's language was intended to clarify that the AIA applies to third parties, like states, and not to limit the AIA from suits involving states.

The states counter that the AIA does not apply to them because states are not "persons" under a statute unless Congress clearly intends to include states within that term. The states rely upon *South Carolina v. Regan*, which held that the AIA did not apply to aggrieved parties who had no alternative forum to litigate claims. The states argue that they are exempted from the AIA under *Regan* because they are aggrieved parties without any other recourse, as neither the mandate nor the penalty applies to them directly.

Long retorts that the states are not aggrieved parties under *Regan*. Unlike in *Regan*, Long contends, the individual mandate does not directly injure the states because they are not liable for the penalty and they are not authorized to sue on their citizenries' behalf. Without this direct injury, Long asserts that the states are not aggrieved parties and cannot avoid AIA application to their suit.

HHS argues that the AIA limits jurisdiction and restricts a court's authority to hear cases. For support, HHS points to Supreme Court precedent and compares the AIA to the Tax Injunction Act, a related statute modeled on the AIA that the Court found jurisdictional. Long argues that the AIA's language demonstrates that it is jurisdictional because the text bars suits in "any court," which speaks directly to the power of the courts and not to the rights of any party.

NFIB counters that Congress did not intend for the AIA to be jurisdictional, as illustrated by the AIA's lack of jurisdictional language and its location in the tax code's procedure and administration sections. NFIB asserts that these factors distinguish the AIA from related jurisdictional statutes, which contain jurisdictional language and are placed in the tax code's jurisdiction section. The states further argue that the AIA is merely a claims-processing rule, speaking to litigants' rights and not to a court's authority to adjudicate.

Conclusion

While the parties agree that the AIA should not apply because the challenged provision is a penalty and not a tax, they differ on the extent to which the AIA applies for cases challenging the mandate, instead of the penalty provision, and whether the AIA's limitations are jurisdictional. However, Court-appointed amicus Robert Long argues that the AIA should apply in this case because the mandate is a tax subject to the AIA and that the AIA imposes jurisdictional limitations. The Court's decision will affect the litigation regarding the individual mandate's constitutionality, as well as the claimants' ability to challenge the assessment of tax code penalties. Full text is available at www.law.cornell.edu/supct/cert/11-398.

Prepared by Brandon Bodnar and Milson Yu. Edited by Jacqueline Bendert.

Dep't of Health & Human Servs. v. Florida (11-398)

Appealed from U.S. Court of Appeals for the Eleventh Circuit (Aug. 12, 2011)
Oral argument: March 27, 2012

Background

The Patient Protection and Affordable Care Act's (Health Care Act) minimum coverage provision requires all eligible individuals to have the "minimal essential" level of health care coverage. Beginning in 2014, those who fail to purchase coverage are required to pay a penalty fee, which will increase from 2014 to 2016, or a percentage of their income if it is higher than the penalty fee.

Implications

Private respondents, two individual citizens and the National Federation of Independent Business (collectively NFIB) argues that the individual mandate deprives citizens of the freedom to choose their financial relationships. According to states respondents (the states), there is no difference between requiring individuals to purchase health care insurance and requiring individuals to purchase a car, because in both situations Congress could justify the requirement under the premise that individual decisions, when aggregated, affect interstate commerce. NFIB notes that compelling commerce in this way would create a centralized government, which could mandate the purchase of goods by characterizing the failure to buy as an "economic decision" that hurts the relevant market. The states argue that there is no clear boundary in determining what decisions have sufficient effects on interstate commerce to justify government regulation.

Several health law professors argue that the individual mandate should not be scrutinized without considering health care's unique place in society—it's an expansive industry with which nearly every American interacts, but health care costs on the individual level are much less predictable than costs in comparable markets. Health care is also different, law professors note, due to the considerations for human life that trump an inability to afford the care. Because the health care market is so different from any other market, the American Hospital Association (AHA) argues that respondents' "slippery slope" argument fails.

The states argue that the individual mandate imposes costs on all individuals by requiring everyone to purchase of health care insurance, regardless of need. NFIB contends that health care is not a unique "near-universal" business because many of those who are currently uninsured will not need health care services, but will have to pay annual insurance costs. The American Center for Law & Justice asserts that insurance costs are now being imposed on the entire population based only on the possibility that some individuals will obtain future health care services without insurance. Oklahoma argues that these health care concerns are better left to the judgment of the states because a state can easily mold its laws to reflect people's will.

Petitioners the Department of Health and Human Services, Department of the Treasury, and Department of Labor (collectively HHS) argues that the Health Care Act's individual mandate is necessary to prevent individuals from driving up health care costs by waiting to purchase coverage until they need medical services. Congressional leaders assert that when uninsured individuals use health care services, which 94% of them do, those costs are shifted to the insured in the form of higher premium costs. HHS contends the mandate also assists in lowering health care premiums for all by increasing insurer competition. Several states argue that the problems of underinsured citizens and high health care costs plague every state, and that states cannot cure these problems on their own.

Legal Arguments

HHS argues that the individual mandate falls within Congress' powers under the Necessary and Proper Clause. HHS contends that the Necessary and Proper Clause gives Congress the broad power to pass federal legislation in order to further a legitimate purpose. HHS points out that the Health Care Act serves a legitimate purpose—to reform the health care market—and the individual mandate is crucial to the viability of the act. HHS argues that the mandate provides the financing for the anti-discriminatory practices that the guaranteed issue and community-rating provisions seek to accomplish. The individual mandate, HHS contends, prevents individuals from increasing insurance costs by waiting to purchase health insurance until a medical need arises, thereby exploiting the guarantee-issue and community-rating provisions. HHS also contends that the mandate fall under Congress' Commerce Clause powers because it regulates the purchase of healthcare, which is "commercial and economic in nature." HHS insists that this type of activity affects interstate commerce because it has financial implications for many other industries. Congress has validly employed its commerce power, HHS argues, by incentivizing uninsured citizens to purchase insurance and stop passing the costs onto those who are insured.

NFIB contends that the Necessary and Proper Clause does not create congressional power, but rather limits Congress to enacting legislation that is necessary to implement one of the specifically enumerated constitutional powers. NFIB insists that the individual mandate exceeds Congress' power by compelling individuals to subsidize the costs generated by the Health Care Act's regulations. NFIB points out that the individual mandate offsets the high costs that the Health Care Act incurs by passing those costs onto healthy taxpayers, who then have to pay a premium exceeding their actuarial risk. Moreover, NFIB contends that the Commerce Clause only gives Congress power to regulate economic activity that directly relates to a legitimate interstate goal; however, NFIB insists, the failure to obtain health insurance is not an economic activity. NFIB argues that, under the Commerce Clause, Congress can only regulate noneconomic activity if it undermines the regulation of commerce, which, NFIB contends, the failure to purchase health care insurance does not. Similarly, the states contend that the Commerce Clause gives Congress the power to *regulate* commerce, not the power to *create* commerce. The states assert that Congress does not have the power to compel taxpayers to engage in commerce by requiring the purchase of health insurance via the individual mandate. The states also contend that because individual mandate regulates individual financial decisions, not interstate commerce, Congress lacks the authority to mandate the purchase of health insurance.

HHS maintains that the individual mandate also falls within Congress' independent power to levy taxes. HHS contends that although the individual mandate's language states that it imposes a "penalty" upon taxpayers who fail to obtain the required health insurance coverage, the penalty should be considered a tax. The penalty provision, HHS argues, has the essential elements of tax law—it is part of the Internal Revenue Code and enforced by the IRS, it will raise substantial money, and the consequences are directed towards those who fail to comply with the individual mandate. HHS asserts that if a taxpayer fails to meet the individual mandate's requirements and falls subject to the penalty, the individual will be subject to tax consequences that are based on their household income and reported in their federal income tax return. The mandate, HHS argues, is meant to be read in context with the associated penalty provision, as the mandate itself does not create an "independently enforceable legal obligation." HHS asserts that the proper reading is to view the mandate only as a "predicate" for the tax assessed by the penalty provision.

NFIB insists that the individual mandate falls outside the realm of the Congress' taxing power. NFIB contends that the mandate and penalty are separate, and because the mandate is a requirement that cannot itself be construed as part of the tax law, the penalty arising from a failure to comply with the mandate cannot be upheld as a tax law. The states argue that the way in which the mandate's penalty operates meets the exact definition of a penalty—it punishes for violations of "a separate legal command," the mandate. NFIB also poses another problem that characterizing the penalty as a tax would impose: what category the tax would fall under. NFIB points out that even if the penalty were categorized as a direct tax or as non-direct tax, each designation would create its own constitutionality issues. The states contend that including the penalty as part of the tax code is not determinative of its nature. This is clear, the states argue because other revenue-generating measures, including comparable civil penalties, have not been considered taxes because of their location in the tax code.

Conclusion

The Health Care Act's minimum coverage provision requires that all eligible individuals purchase health care insurance, and those who fail to obtain coverage must pay a penalty. NFIB asserts that Congress does not have the power to enforce the individual mandate and that the mandate infringes on the freedom to refrain from certain business relationships. HHS maintains

PREVIEWS *continued on page 64*

that the minimum coverage provision is constitutional and necessary to lower the costs of health care insurance, making it more accessible to many individuals, and to effectively regulate a problematic health care system.

Full text is available at www.law.cornell.edu/supct/cert/11-398.

Prepared by Jenny Liu and Lisa Schmidt. Edited by Jacqueline Bendert.

Florida v. Dep't of Health & Human Servs. (11-400)

Appealed from U.S. Court of Appeals for the Eleventh Circuit (Aug. 12, 2011)
Oral argument: March 28, 2012

Background

The Patient Protection and Affordable Care Act (Health Care Act) expanded the Medicaid program to require states to provide healthcare to individuals under the age of 65 receiving income below 133 percent of the federal poverty level. The Health Care Act provides that the federal government will initially cover the entire cost of care for newly eligible individuals. After 2016, the amount of federal coverage will decrease slightly each year until 2020, at which point federal cost coverage will remain steady at 90 percent of the cost of care for newly eligible individuals.

Implications

A group of state legislators praise the expansion of Medicaid, and contend that it will allow for an immense reduction in the number of uninsured Americans, with little or no cost to the states. Oregon argues that without national reform, states would be practically unable to expand their own Medicaid programs for fear of overburdening their system with applicants from other states that provide fewer health care benefits.

Florida argues that states that fail to meet the onerous requirements of the new Medicaid program face the potential loss of billions of dollars in federal aid. The Association of American Physicians (AAP) argues that essentially mandating that states increase health care spending through the expansion of Medicaid places unavoidable fiscal pressure on the states when many of them already struggle financially.

The Department of Health and Human Services (HHS) argues that Medicaid expansion is within Congress' spending power, which allows Congress to set conditions with which the states must comply in exchange for federal funds. In fact, Oregon argues, far from crippling the power of the states, federal action can aid the states in pursuing their desired policies. Oregon contends that if the Medicaid expansion is viewed as coercive it would halt this federal and state cooperation, preventing Medicaid from meeting changing healthcare needs.

On behalf of Florida, the American Civil Rights Union (ACRU) insists that Congress' imposition of mandatory requirements on the states directly threatens federalism. The ACRU argues that Congress' coercion of the states into participation in the expanded Medicaid program interferes with state sovereignty. The ACRU argues that the Health Care Act's expansion of Medicaid exceeds the limits of Congress' power by removing the states' discretion in their application of Medicaid.

Legal Arguments

Florida maintains that upholding the Medicaid expansion provision would represent an unprecedented increase in congressional power and allow Congress to unconstitutionally use its spending power as an "instrument for total subversion of the governmental powers reserved to the individual states." Florida argues that the expansion of Medicaid is the federal government commandeering tax dollars to coerce the states to accomplish what would be unconstitutional for the federal government to do itself. Florida argues that with this as precedent, Congress would have the ability use the spending power to circumvent constitutional restrictions.

HHS argues that the expansion of Medicaid falls within Congress' broad spending power. HHS contends that previous Supreme Court restrictions on the spending power allow Congress to spend to promote the general welfare, as long as funding conditions are clear and unambiguous and the conditions are related to the federal program. HHS contends that where Congress complies with these restrictions, Congress may broadly use its spending power to advance policy objectives. HHS maintains the Medicaid expansion is a valid use of the spending power, as Congress clearly stated objectives with which states must comply in order to receive the federal funding.

Florida maintains that although Congress can place conditions on federal funding, Congress cannot use the spending power to coerce states into a course of action. Florida contends that conditions on federal funding are only valid when a state can voluntarily accept or reject the terms and the funding. Florida argues that Congress has set forth a mandatory course of action for each state by enacting the Medicaid expansion and the individual mandate at once, because some individuals will only be able to obtain health care insurance through Medicaid. The existence of needy individuals in each state, Florida contends, forces states to accept the Medicaid expansion and the conditions on federal funding in order to comply with the individual mandate.

HHS argues that the Medicaid expansion merely fills gaps in the act that originally created the Medicaid program. Because the original Medicaid act fell within Congress' spending power, HHS maintains that the Health Care Act's extension of Medicaid eligibility falls within this power. HHS argues that this extension is set forth in clear, unambiguous terms, complying with the requirement for exercising Congress' spending power. HHS contends that Congress retained the ability to expand, contract, or otherwise alter Medicaid. Congress has exercised this right several times throughout the history of Medicaid; therefore, HHS asserts that the expansion set forth in the Health Care Act is not unprecedented.

Florida argues that there is no real alternative to compliance with the Medicaid expansion and, coupled

with the large amount of federal funding at stake, this effectively forces states to comply with the expansion. Florida asserts that other provisions of the Health Care Act offer states the choice to comply, for example by providing mechanisms to create a federal "health benefit exchange" if the states decided not to create one. Florida argues there is no meaningful choice with respect to the Medicaid expansion. First, Florida contends that Medicaid is the only program under which a needy individual forced to acquire health insurance can obtain such insurance. Second, Florida argues that states electing not to participate in expansion will forego an amount of federal funding that will create significant budgetary problems. Florida asserts that if a state wishes to refuse Medicaid expansion then it must refuse Medicaid altogether, thereby relinquishing funding that it had been receiving under the old Medicaid program.

HHS argues that the determinative factor is whether the states have a legal choice to turn down federal funding. HHS contends that the size of the federal grant should not serve to limit the conditions Congress can place on funding; rather, the unusually large size of the federal grant attached to Medicaid expansion merely increases the incentive for states to participate in the program. HHS asserts that anti-coercion measures are not relevant because such measures aim to protect against congressional acts that commandeer state governments to achieve what Congress itself cannot, not acts that give states a legal choice whether or not to participate. HHS argues that the lack of a specific alternative to Medicaid participation is merely a reflection of the fact that all fifty states have taken part in Medicaid for many years, and Congress had no reason to believe that states would opt out, especially given how much of the expansion the federal government is funding.

Florida argues that if the Supreme Court determines the Medicaid expansion to be unconstitutional, it should invalidate the remainder of the Health Care Act. Florida asserts that the Medicaid expansion is necessary to achieve the Health Care Act's goal of near universal coverage, as the expansion will insure half of those newly insured under the act. Because of its integral role, Florida intends that it is clear that Congress did not intend the Health Care Act to survive without the Medicaid expansion.

HHS argues that if the Medicaid expansion is unconstitutional, it is severable from the remainder of the Health Care Act because the expansion is within the Social Security Act, which includes a severability clause. Additionally, HHS argues that if the Court finds that the Medicare expansion is coercive, the Court should allow objecting states to opt out but still permit the consenting states to participate in the expansion and receive federal funds.

Conclusion

Florida argues that the Medicaid expansion is unconstitutional because it exceeds Congress' spending power and, because of the size of the program and the amount of funding at stake, it is coercive as states do not have a realistic choice to turn down participation. HHS contends that Congress' spending power is broad and Medicaid expansion is not coercive because states may legally opt out of the program. The Supreme Court's decision will affect access to health care for needy individuals, the financial burden undertaken by states to provide that care, and the extent to which states have can determine their own Medicaid participation. Full text is available at www.law.cornell.edu/supct/cert/11-400.

Prepared by Amanda Bradley and Brooks Kaufman. Edited by Kelly Halford.

Astrue v. Capato (11-159)

Appealed from the U.S. Court of Appeals for the Third Circuit (Jan. 4, 2011)
Oral argument: March 19, 2012

After her husband's death, Karen Capato underwent in vitro fertilization using his frozen sperm and gave birth to twins. Capato applied for Social Security benefits on behalf of her twins as survivors of a deceased wage earner. The Social Security Administration denied her claim. An administrative law judge affirmed, ruling that state intestacy law controls eligibility for survivor benefits for posthumously conceived children under the Social Security Act. Therefore, the twins were ineligible for benefits under the applicable Florida law. On appeal, the district court affirmed the ALJ's decision. The Third Circuit reversed and ruled that the act's plain language entitles the twins to survivor benefits. Michael Astrue, commissioner of the SSA, argues that the act requires the agency to apply state intestacy law to determine whether an applicant is the child of an insured wage earner for the purpose of receiving survivor benefits. Capato contends that the act entitles undisputed biological children of married parents to survivor benefits, without referring to state intestacy laws. The Supreme Court's decision will interpret the act's mandate on the determination of survivor benefits eligibility, and balance legislative rulemaking with unanticipated scientific progress. Full text is available at topics.law.cornell.edu/supct/cert/11-159.

Prepared by Amanda Hellenthal and Chuan Liu. Edited by Colin O'Regan.

Jackson v. Hobbs (10-9647)

Appealed from the Supreme Court of Arkansas (Oct. 7, 2004)
Oral argument: March 20, 2012

At age fourteen, Kuntrell Jackson was sentenced to life imprisonment without the possibility of parole for felony-murder when his cousin killed a shop attendant during a robbery. Arkansas law made a life-without-parole sentence mandatory, so neither Jackson's age nor the fact that he was not the triggerman entered into the sentencing consideration. After the Arkansas Supreme Court affirmed Jackson's conviction, a state court denied Jackson's petition for habeas corpus in which he argued that a life-without-parole sentence on a fourteen-years-old constitutes unusual and cruel punishment under the Eighth Amendment. Arkansas Department of Corrections Director Ray

PREVIEWS *continued on page 66*

Hobbs, asserts that such a sentence is constitutionally permissible and in line with national standards. The Supreme Court's decision will help delineate the bounds of Eighth Amendment protection with respect to life-without-parole sentences for young juveniles convicted of homicide, particularly when they were not the triggermen. Full text is available at topics.law.cornell.edu/supct/cert/10-9647.

Prepared by Angela Chang and Tian Wang. Edited by Eric Schulman.

Miller v. Alabama (10-9646)

Appealed from the Alabama Court of Criminal Appeals (Aug. 27, 2010)
Oral argument: March 20, 2012

Fourteen-year-old Evan Miller was convicted of aggravated murder and sentenced by an Alabama state court to life in prison without parole. Miller appealed his conviction arguing that it violated the Eighth and Fourteenth Amendments. Miller points to the Supreme Court cases *Roper v. Simmons* and *Graham v. Florida*, which held that a minor cannot be sentenced to death and that a minor cannot be imprisoned for life for non-homicidal crime, respectively, as evidence that his conviction contravenes nationally held standards of decency. In response, the state of Alabama argues that *Roper* and *Graham* are factually distinct from this case and that national standards of decency support a sentencing a minor to life imprisonment without parole for certain extreme crimes. The Supreme Court in this case will address moral and doctrinal questions about where the American legal system draws the line in punishing adolescents. Full text is available at topics.law.cornell.edu/supct/cert/11-9646.

Prepared by Alison Carrizales and Tom Schultz. Edited by Eric Schulman.

Reichle v. Howards (11-262)

Appealed from the U.S. Court of Appeals for the Tenth Circuit (Mar. 14, 2011)
Oral argument: Mar. 21, 2012

Steven Howards criticized and touched Vice President Cheney while the vice president was on a meet-and-greet at a local shopping center. Virgil Reichle and Dan Doyle, two Secret Service agents, confronted Howards, and subsequently arrested him for assault. However, the state prosecutor dropped the charges against Howards, who then brought a First Amendment retaliatory arrest claim against the agents. The district court denied the agents' motion for summary judgment, ruling that the agents could not benefit from qualified immunity under the circumstances. The Tenth Circuit affirmed. The Supreme Court must now resolve whether one may raise a First Amendment retaliatory arrest claim when there was probable cause for one's arrest. A decision for Howards may deter law enforcement officers from making arrests for fear of retaliatory arrest claims, while a decision for the agents may enable officers to more easily target and punish speech which they oppose. Full text is available at topics.law.cornell.edu/supct/cert/11-262.

Prepared by William Dong and Alicia Lee. Edited by Edan Shertzer.

Southern Union Co. v. United States (11-94)

Appealed from the U.S. Court of Appeals for the First Circuit (Dec. 22, 2010)
Oral argument: March 19, 2012

After local youths broke into a Southern Union storage center that was improperly storing mercury, the incident resulted in a spill and cleanup effort. Southern Union was charged with storing hazardous waste without a permit under the Resource Conservation and Recovery Act. After a jury found Southern Union guilty, the district court judge determined the violation had continued for 762 days and imposed a $38 million fine. On appeal, Southern Union argued that the Supreme Court's decision in *Apprendi* requires that the jury determine the violation period. If a judge makes that determination, Southern Union contends that the court could impose a fine in excess of the actual violation, infringing upon Southern Union's Fifth and Sixth Amendment rights. The United States asserts that *Apprendi* is not applicable because it dealt with deprivations of life and liberty interests, not criminal fines. This decision has implications for consistent treatment of defendants and the efficiency of courts. Full text is available at topics.law.cornell.edu/supct/cert/11-94.

Prepared by Cheryl Blake and Jennifer Uren. Edited by Natanya DeWeese.

Vasquez v. United States (11-199)

Appealed from the U.S. Court of Appeals for the Seventh Circuit (March 14, 2011)
Oral argument: March 21, 2012

The U.S. District Court for the Northern District of Illinois convicted Alexander Vasquez of conspiring to possess with intent to distribute more than 500 grams of cocaine. However, the district court had erroneously admitted statements made during recorded telephone conversations by Marina Perez into evidence for their truth. On appeal, the U.S. Court of Appeals for the Seventh Circuit held that the lower court's error was harmless because the jury would have come to the same conclusion had there been no error. Vasquez now appeals, arguing that the Seventh Circuit misapplied the harmless-error analysis by ignoring the impact the error had on the jury. The Supreme Court will decide how courts should properly carry out harmless-error tests, as well as examine the possible constitutional questions such an error would create. Full text is available at topics.law.cornell.edu/supct/cert/11-199.

Prepared by Heather Byrne and Judah Druck. Edited by Colin O'Regan.