AUL Legal Team: Initial Analysis of Supreme Court Ruling in Healthcare

Today, the United States Supreme Court upheld the Affordable Care Act (ACA). In an opinion authored by Chief Justice John Roberts, the Court held that the "individual mandate"—the provision that requires nearly all Americans to purchase insurance or pay a penalty—is permissible under Congress' tax power. Further, the Court held that the ACA's dramatic expansion of Medicaid funding is constitutional, so long as States are not penalized for rejecting the expanded funding. As explained in more detail below, the Court's decision did not address any of the abortion-related provisions in the law; further, the decision is not an endorsement of the policies in the Act. Lawsuits challenging unconstitutional mandates in the law will go forward, and Congress can act to repeal anti-life provisions in the law.

The portion of the opinion in *NFIB v. Sebelius* that upheld the individual mandate under Congress's authority to "tax," in which Chief Justice Roberts was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, may be criticized as requiring a strained reading of the ACA. The Chief Justice admits that

The most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals 'shall' maintain health insurance (emphasis added).

However, while the Chief Justice does not think considering the individual mandate as a "tax" is the "most straightforward" reading of the ACA, he explicated that

The question is not whether that is the most natural interpretation of the mandate, but only whether it is a 'fairly possible' one. As we have explained, **'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality'** (emphasis added).

The Chief Justice's effort to save the statute from unconstitutionality, however, required reading the provision in a way he rejected earlier in the opinion:

It is of course true that the Act describes the payment as a 'penalty,' not a 'tax.' But while that label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress's taxing power.

While it will be hotly debated whether the Chief Justice's opinion was "reasonable" and permits meaningful limits to the enumerated tax power, it should be noted that the Justices who "joined" his opinion to uphold the individual mandate only did so in part. Justice Ginsburg authored a dissent which was joined by Justices Breyer, Sotomayor and Kagan[i] that would have upheld the individual mandate under every theory advanced by the Government. However, Chief Justice Roberts' opinion ensured that the individual mandate was not validated as an exercise of Congress's authority under the Commerce Clause or Necessary and Proper Clause of the Constitution.

Justices Scalia, Kennedy, Thomas, and Alito dissented, arguing that both the individual mandate and the Medicaid expansion were unconstitutional. In fact, the dissent would have struck down the entire ACA, stating that these provisions were not severable from the rest of the law.

Regardless of what one thinks about the merits of today's opinion, **it is *not* an endorsement of the ACA and its anti-life provisions.** Chief Justice John Roberts wrote for the majority, "We do not consider whether the Act embodies sound policies" (emphasis added).

Moreover, **today's opinion is not a declaration of the constitutionality of the anti-life provisions of the ACA**. Chief Justice Roberts wrote, "We ask only whether Congress has the power under the Constitution to enact the challenged provisions" (emphasis added). Of the *hundreds* of provisions in the ACA, *only two* were challenged in the lawsuit that the Court ruled on today. "The Act's 10 titles stretch over 900 pages and contain hundreds of provisions. This case concerns constitutional challenges to two key provisions, commonly referred to as the individual mandate and the Medicaid expansion."

The arguments advanced by Americans United for Life about the *unconstitutionality* of other provisions of the law were not ruled on by the Court. As AUL, along with lead counsel The Bioethics Defense Fund and other pro-life organizations outlined in our *Amicus Curiae* Brief submitted to the Court, **the ACA violates the Free Exercise Clause of the First Amendment by effectively forcing millions of individuals to personally pay a separate abortion premium in violation of their sincerely held religious, ethical, or moral beliefs.**

This is how the "abortion premium" works. The ACA **permits health plans that provide abortion coverage to participate in the Exchanges** that must be established in each state under the law. While states are allowed to enact new laws "opting out" of permitting insurance plans that cover abortions to participate in their Exchanges, some states are unable or unwilling to do so. To date, only 16 states have enacted opt-outs. Americans who are inadvertently or through employment enrolled in insurance plans that cover abortion in their state Exchange **will be required to pay an "abortion premium" that will be used exclusively to pay for abortions.**

Additionally, there is great concern that many Americans will unwittingly enroll in plans that cover abortions, because the ACA includes two "secrecy clauses" in the provision. First, insurance plans that include abortion coverage **may only disclose the coverage in the plan's summary of benefits and coverage, at the time of enrollment. Second, neither Exchanges nor insurance plans may disclose the separate, monthly cost of the "abortion premium" that exclusively pays for abortions.**

The 23 lawsuits challenging the "HHS mandate" are also not affected by this ruling. The Obama Administration's violation of the First Amendment's guarantee of freedom of conscience was not at issue in today's case. Whether action comes through Congress or the courts, **there is an urgency to address this anti-life, anti-conscience mandate that will force private health insurance plans to provide coverage for the abortion-inducing drug *ella* as early as August this year.**

Further, **the ACA dramatically expands Medicaid funding. The Court's decision did not invalidate this expansion**—it merely held that the federal government could not cut off a state's *current* federal Medicaid funds if the state refuses to accept the *new* Medicaid funding.

Currently, the Hyde Amendment[ii] forbids the use of federal and state matching Medicaid funds for abortions or abortion coverage except in cases where continued pregnancy endangers the life of the woman or where the pregnancy resulted from rape or incest. This standard guides both federal and state funding for abortions under joint federal-state Medicaid programs for low-income women, and will apply to the new Medicaid funding provided through the ACA.

Critically, the Hyde Amendment is an appropriations "rider" that must be enacted by Congress every year; therefore, the federal limitation on the use of Medicaid funds to pay for abortions faces potential elimination annually. There are many in Congress who would abandon the Hyde Amendment altogether, and **the abortion lobby actively fights for the eradication of Hyde.**[iii]

It is therefore imperative that the Senate pass and the President sign the "No Taxpayer Funding for Abortion Act," which has already passed the House. This law would apply a comprehensive prohibition on federal funding for abortions or insurance coverage for abortion. In other words, this law would apply a Hyde-like restriction on abortion funding to all federal funds, including Medicaid funds and other funds authorized by or appropriated through the ACA.

Further Congress or a pro-life Administration, after carefully examining rules and regulations pertaining to Medicaid, Title X, and other sources of federal family planning funds, should place restrictions on recipients of federal family planning funding to protect life and ensure that the government is not subsidizing the abortion industry. Additionally, states should be permitted to enact additional restrictions on recipients of federal funds within their own jurisdiction.

It also bears repeating: **all of the anti-life provisions in the ACA remain, requiring Congress to act**. These provisions include:

- The lack of a comprehensive prohibition on the use of federal tax dollars for abortions, insurance coverage for abortion, and abortion-inducing drugs and devices;
- Federally-subsidized Qualified Health Plans (QHPs) may provide abortion coverage through the state insurance Exchanges required in all 50 states;
- Not all multi-state qualified health plans are prohibited from providing coverage for abortion;
- Many Americans will be required to pay an "abortion premium" to their insurance carrier;
- A "preventive care" mandate is being used to force coverage of drugs and devices known to end life;
- A failure to provide comprehensive First Amendment conscience protections for individuals, employers, and insurance companies that have religious or moral objections to abortion.

Two bills currently introduced in Congress would address the anti-life provisions in the Affordable Care Act—the "Protect Life Act" and the "Respect for Rights of Conscience Act."

Notably, Chief Justice Roberts opined that "Members of the Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, **who can be thrown out of office if the people disagree with them**. **It is not our job to protect the people from the consequences** of their political choices" (emphasis added).

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[i] Justices Breyer and Kagan did not join the Ginsburg dissent insofar as it would allow the federal government to penalize the states for not taking new Medicaid funding.

[ii] Hyde Amendment to the Medicaid Act, Title XIX of the Social Security Act (1976).

[iii] *See, e.g.* http://www.prochoiceamerica.org/media/fact-sheets/abortion-funding-restrictions.pdf.