

# Memorandum

**To: California Health Benefit Exchange Board**

**From: Gabriel Ravel, Staff Counsel**

**Date: August 17, 2011**

**Subject: Florida v. United States Department of Health and Human Services**

---

On August 12, 2011, in the case of Florida v. United States Department of Health and Human Services, a three-judge panel of the United States Court of Appeals for the Eleventh Circuit voted two-to-one in holding unconstitutional a key provision of the Patient Protection and Affordable Care Act (ACA). In the case, Florida, joined by twenty-five other states, two individuals, and the National Federation of Independent Business, sued to prevent the Department of Health and Human Services (DHHS) from enforcing the ACA. DHHS appealed this case from the Northern District of Florida, which in January held the entire ACA unconstitutional.

The majority opinion began with some preliminary matters. First, the opinion addressed the states' standing. Among the ACA provisions challenged in the case was the so-called individual mandate, which requires all individuals to purchase health insurance. DHHS challenged the states' ability to sue to enjoin the individual mandate because it affects their citizens and not the state governments. The court quickly concluded that the two individual plaintiffs undoubtedly have standing to pursue the case. As a result, it was irrelevant for purposes of this decision whether the states would have standing on their own. Next, after describing the ACA's structure, the court upheld the ACA's Medicaid expansion provisions as a constitutional exercise of Congress's authority to place conditions on receipt of federal funds.

The court then discussed whether the individual mandate was a valid exercise of Congress's authority to regulate interstate commerce, known as the Commerce Clause. First, the court gave a lengthy history of the Supreme Court's Commerce Clause decisions. Although the majority recognized that the Supreme Court has allowed Congress significant leeway to regulate activities affecting interstate commerce, it also stressed that there are limits to this authority.

Drawing from these precedents, the majority held the individual mandate unconstitutional. It noted that the individual mandate is an unprecedented use of the Commerce Clause authority. Never before had Congress dictated financial decisions for private citizens through an economic mandate. The court also cautioned that DHHS's interpretation of Commerce Clause authority would yield no exceptions to federal power. According to the court, insurance and health care are areas of traditional state concern, such that federal regulation is especially intrusive on state authority. Concluding its Commerce Clause analysis, the majority rejected the argument that the individual mandate was necessary and proper for other, constitutionally permissible

ACA provisions to work. The court held that the necessary and proper argument is suited only to challenges to a law as applied to specific situations, not to facial challenges such as this one.

The majority also rejected DHHS's argument that the individual mandate was a valid exercise of Congress's power to tax, as had every other court to consider the issue. The court held that the mandate is not a tax designed to raise revenue, but a penalty to punish non-compliance.

In a significant reversal of the district court, the majority held that the individual mandate is severable from the rest of the ACA. The district court struck down the entire ACA as unconstitutional because it held the individual mandate was inextricably bound up with the other provisions. However, the majority followed the general rule favoring severability, noting that the great majority of ACA provisions have nothing to do with private insurance or the individual mandate.

The lengthy dissent disputed the majority's conclusions. It highlighted how the mandate is necessary to combat the cost-shifting that occurs when the uninsured cannot pay for their medical care. This constitutes a serious economic problem that the ACA was designed to prevent, placing the individual mandate in the scope of Congress's authority to regulate interstate commerce. The dissent also noted that the mandate is an essential part of preventing adverse selection when insurance is available to individuals with pre-existing conditions. Without a mandate, individuals would have an incentive to wait to purchase insurance until they become sick.

Eventually, the constitutionality of the ACA is likely to be decided by the Supreme Court. There have been two appellate court decisions about the individual mandate, one from the Sixth Circuit upholding its constitutionality, and this decision striking it down. The Fourth Circuit also is considering a consolidated appeal from two district court decisions on the issue. The next step in the Florida case is likely to be DHHS's request for rehearing of the case en banc, meaning by a larger panel of appellate judges. Once the en banc panel decides the case or declines to hear it, the losing party probably will appeal the decision to the Supreme Court. It is likely that the Supreme Court will agree to hear the case whether or not the circuits are split after en banc review. A decision probably will issue from the Supreme Court in about a year to a year and a half. The timing of any decision will depend on if and when the Supreme Court agrees to hear the case.

Meantime, this decision will have little practical effect. States must continue to implement health care reform in order to meet the short federal deadlines.