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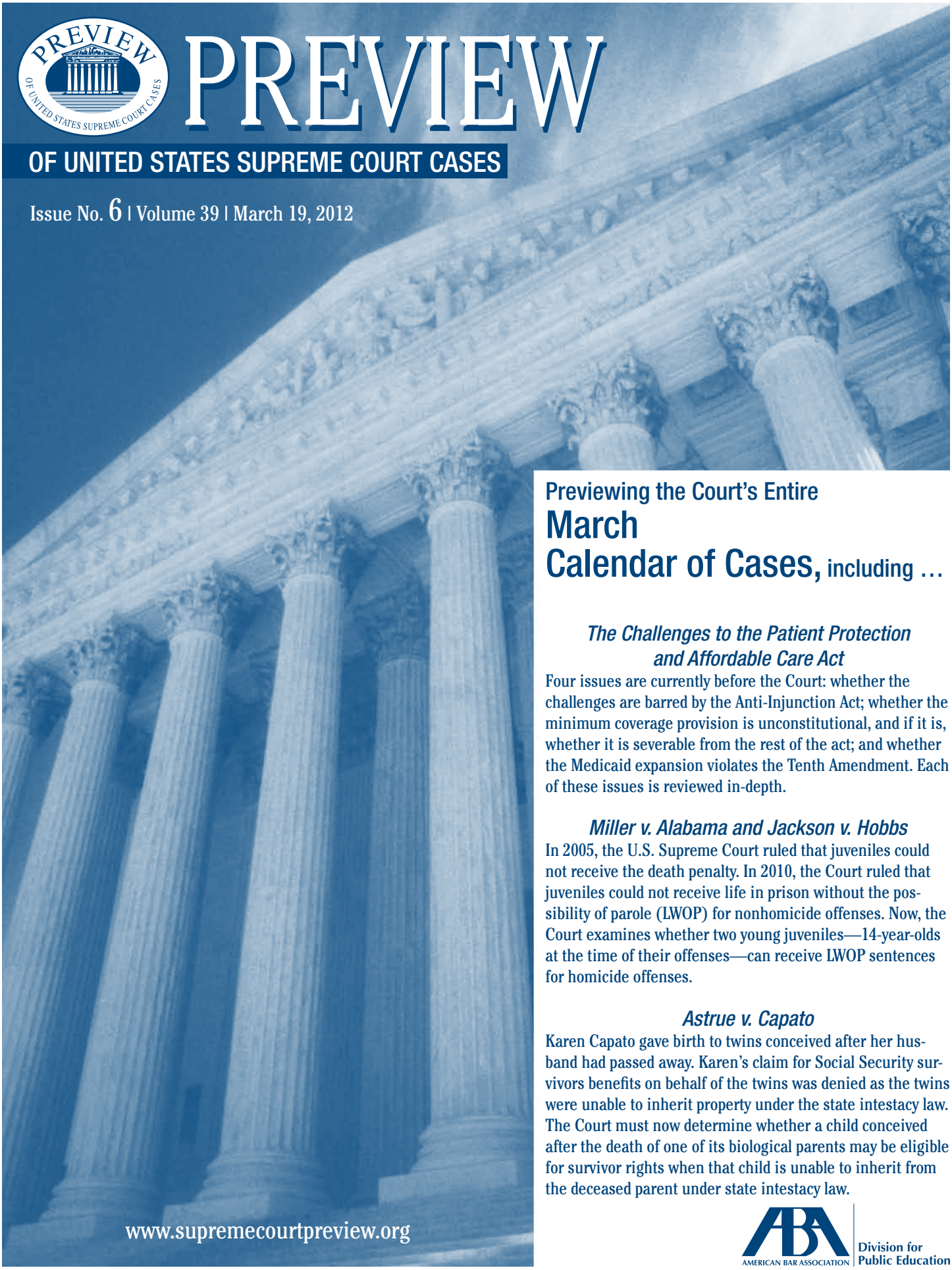

Previewing the Court's Entire March Calendar of Cases, including …

The Challenges to the Patient Protection and Affordable Care Act

Four issues are currently before the Court: whether the challenges are barred by the Anti-Injunction Act; whether the minimum coverage provision is unconstitutional, and if it is, whether it is severable from the rest of the act; and whether the Medicaid expansion violates the Tenth Amendment. Each of these issues is reviewed in-depth.

Miller v. Alabama and Jackson v. Hobbs

In 2005, the U.S. Supreme Court ruled that juveniles could not receive the death penalty. In 2010, the Court ruled that juveniles could not receive life in prison without the possibility of parole (LWOP) for nonhomicide offenses. Now, the Court examines whether two young juveniles—14-year-olds at the time of their offenses—can receive LWOP sentences for homicide offenses.

Astrue v. Capato

Karen Capato gave birth to twins conceived after her husband had passed away. Karen's claim for Social Security survivors benefits on behalf of the twins was denied as the twins were unable to inherit property under the state intestacy law. The Court must now determine whether a child conceived after the death of one of its biological parents may be eligible for survivor rights when that child is unable to inherit from the deceased parent under state intestacy law.

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U.S. SUPREME COURT March 2012 CALENDAR

MONDAY

MARCH 19

Astrue v. Capato

Southern Union Company v. United States

MARCH 26

United States Department of Health and Human Services et al. v. State of Florida et al.

TUESDAY

MARCH 20

Miller v. Alabama

Jackson v. Hobbs

MARCH 27

United States Department of Health and Human Services et al. v. State of Florida et al.

WEDNESDAY

MARCH 21

Vasquez v. United States

Reichle v. Howards

MARCH 28

National Federation of Independent Business et al. v. Kathleen Sebelius et al. and *State of Florida et al. v. United States Department of Health and Human Services et al.*

State of Florida et al. v. United States Department of Health and Human Services et al.

CONTENTS

In the February Issue, the article on *Armour v. City of Indianapolis* erroneously stated that Chief Justice Roberts wrote a brief in *Allegheny Pittsburgh Coal Co. v. Webster County Commission* with E. Barrett Prettyman, whose name appears on the federal courthouse in D.C. In fact, the *Allegheny Pittsburgh* case was argued by Barrett Prettyman Jr., the son of the judge whose name is affixed on the D.C. courthouse.

This month, the *PREVIEW* website (www.supremecourtpreview.org) features:

- a sign-up for our weekly e-blasts highlighting all the merits and amicus briefs submitted to the Court and
- all the merits and amicus briefs for the March cases.

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Catherine Hawke
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In a Jury Trial, Must the Jury Determine the Length of a Criminal Environmental Violation Before the Judge Imposes a Fine?

CASE AT A GLANCE

Southern Union Company, a corporation, was tried by a jury and convicted of knowingly storing substantial quantities of mercury, a hazardous waste. The statute permitted the imposition of a fine of up to $50,000 for each day that the violation existed. After the jury found the corporation guilty, the judge determined the number of days that the violation occurred and imposed a fine of $6 million and payments to community groups of an additional $12 million. Affirming the conviction, the First Circuit rejected the company's challenges to the conviction and to the fine. As to the fine, the court ruled that *Apprendi v. New Jersey,* 530 U.S. 466 (2000), which held that facts which increase the penalty imposed after a criminal conviction must be determined by a jury beyond a reasonable doubt rather than by a judge under a less rigorous standard, was inapplicable to the imposition of a fine. The Supreme Court agreed to hear the corporation's challenge to the sentence.

Southern Union Company v. United States
Docket No. 11-94

Argument Date: March 19, 2012
From: The First Circuit

by Alan Raphael
Loyola University Chicago School of Law, Chicago, IL

ISSUE

Do the Fifth and Sixth Amendment principles governing *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and subsequent cases, requiring a jury to determine any facts increasing a criminal penalty, apply to the imposition of fines following a criminal conviction of a corporation?

FACTS

Southern Union Company, a natural gas corporation, violated federal environmental regulations regarding the storage of mercury, a hazardous waste, at a facility it owned in Rhode Island. Southern Union was convicted in 2009 after a jury trial in the United States District Court for the District of Rhode Island. Evidence established that over a hundred pounds of mercury was stored in a variety of containers, some of which leaked, in a storage yard that was not secure; vandals entered the facility and removed some of the substance to nearby apartment complexes, endangering the residents and requiring temporary evacuation of those complexes and environmental remediation costing millions of dollars. Testimony indicated that the corporation, repeatedly made aware of its noncompliance with regulations regarding storage of hazardous waste, failed to take action to comply with the regulations over the course of more than two years.

The jury convicted Southern Union on one count of the indictment, finding that the mercury was improperly stored without a permit for 762 days, from September 19, 2002, to October 19, 2004. The jury was not asked to determine the number of days the violation existed but rather "to determine whether … at some point in time the liquid mercury was discarded by being abandoned." The statutory fine for the knowing storage of hazardous waste without a permit is "not more than $50,000 for each day of violation." 42 U.S. C. § 6928(d). Following the recommendations of the presentence report, the district court determined that the violation existed for the entire length of time charged and that the maximum allowable penalty was $38.1 million. The judge imposed a $6 million fine and a $12 million "community service obligation" for a total payment of $18 million.

On appeal, the corporation raised numerous arguments, including that it had not violated the regulations, that it was denied due process of law, and that the imposition of the fine violated *Apprendi v. New Jersey,* 530 U.S. 466 (2000). Southern Union relied on the language of *Apprendi,* which held that the right to a jury trial found in the Fifth Amendment requires that, if a criminal case is tried before a jury, "any fact that increases the penalty for a crime" beyond the statutory maximum must be determined by the jury, rather than the judge, and that the standard of proof required under the Sixth Amendment is proof beyond a reasonable doubt, rather than the predominance of the evidence standard routinely used by judges. In affirming the judgment, the court of appeals rejected all of the corporation's arguments. The only issue before the Supreme Court is the *Apprendi* issue.

Before the First Circuit, Southern Union argued that restricting *Apprendi* to apply only to terms of confinement was inconsistent with the Supreme Court's language referring to "penalty" and would mean that the protections of the Fifth and Sixth Amendments would be unavailable to corporations, which can face criminal charges but which

cannot be incarcerated following conviction. The government cited dicta from *Oregon v. Ice,* 555 U.S. 160 (2009), arguing that "*Apprendi* does not apply to criminal fines, which have historically been within the discretion of judges, and not assigned to juries for determination." The appellate court recognized that no precedent governed the application of *Apprendi* to criminal fines although in previous cases the First Circuit had without discussion applied *Apprendi* to the imposition of fines.

In its opinion, the First Circuit rejected the district court conclusion that the jury verdict implicitly determined that the hazardous waste violation had persisted for every day of the 762 days referred to in the indictment. The court indicated that such a finding was not required for a guilty verdict; such a verdict only needed proof that the regulations had been violated at some point in that time span. Southern Union had produced evidence that at several times during the period it was discussing a mercury recycling project and claimed this evidence demonstrated that it was in compliance with the regulations at those times. Although the First Circuit held that "[t]he district court could not conclude from the verdict form the number of days of violation the jury had necessarily found," it affirmed the imposition of the fine, finding that *Apprendi* did not apply to the imposition of fines and thus that it was proper for the court to determine the number of days that the offense occurred and impose the fine it considered to be appropriate. Further, the appellate court concluded that if its *Apprendi* analysis was wrong, the error was not harmless and would require a remand to the district court for resentencing and reconsideration of several issues not addressed by the appellate court.

The First Circuit adopted the government's argument that the reasoning and language of *Ice* led to the conclusion that "*Apprendi* does not apply to criminal fines, which have historically been within the discretion of judges, and not assigned to juries for determination." *Ice* upheld consecutive sentences for criminal sexual assaults on a minor. Under Oregon law, consecutive sentences are allowed after the court determines either that the defendant was convicted of two or more offenses not arising out of the same course of conduct or that the defendant intended to commit more than one offense, or that the offense created a risk of causing greater harm to the victim. In *Ice,* the Supreme Court determined that *Apprendi* was inapplicable, because historical practice predating the adoption of the United States Constitution and continuing since that time shows that the decision whether sentences for multiple offenses should be concurrent or consecutive was not within the province of the jury but rather was left to judges.

A contrary rule, the *Ice* Court indicated, would endanger a variety of practices commonly left to judges in imposing sentences, such as evaluation of the character of the defendant, determining the length of supervised release following a prison sentence, requirements for a convicted person to attend drug or other rehabilitation programs, and "the imposition of statutorily prescribed fines and orders of restitution." Although recognizing that the *Ice* language regarding fines was dicta, and concerned an issue not before the Supreme Court, the First Circuit concluded that it "must give this language great weight." In the court's view, it was required to heed recently issued dicta that has not subsequently been disclaimed or distinguished and that the reasoning of *Ice* compels leaving the determination of a fine to a judge rather than submitting it to a jury. According to the court of appeals, common law left determination of fines to judges and application of *Apprendi* to the setting of fines was not appropriate; once the jury had determined the defendant's guilt, it was left to the judge to choose a fine within the legislatively approved limits.

CASE ANALYSIS

A series of United States Supreme Court cases since 2000 require that, when a criminal case is tried by a jury, any determination of fact, other than that of a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Apprendi,* the jury found the defendant to have unlawfully possessed a firearm after he discharged a gun into another's home. That offense carried a penalty of between five and ten years in prison. By a preponderance of the evidence standard, the judge determined that the motive for the firing of the gun was to intimidate the victim on account of his race, in violation of the state "hate crimes" law. These laws allowed the sentence to be increased to as much as 15 years. The trial court imposed a sentence of 12 years on the defendant. The Supreme Court concluded that the imposition of a sentence greater than the maximum 10 years allowed under the firearms statute was improper because the determination of racial animus should have been made by the jury by the standard of guilt beyond a reasonable doubt. For *Apprendi* purposes, the statutory maximum sentence is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington,* 542 U.S. 296 (2004).

The *Apprendi* principle was applied in *Ring v. Arizona,* 536 U.S. 584 (2002), to require a jury to find any fact necessary for the imposition of a death sentence. *Blakely* invalidated a sentence enhancement based on a judge's determination that the crime was "excessively cruel," as allowed by the state sentencing guidelines. Thus, the Supreme Court required that factual determination to be submitted to the jury and to be determined by proof beyond a reasonable doubt. Similarly, the Court applied *Apprendi* to limit judicial discretion in sentencing under the federal sentencing guidelines. *United States v. Booker,* 543 U.S. 220 (2005). *Cunningham v. California,* 549 U.S. 270 (2007), applied *Apprendi* to a finding of aggravated circumstances permitting the imposition of a higher range of sentences under a state determinate sentencing scheme. None of these cases involved criminal fines, but the language in each of the decisions referred to the determination of facts which increase punishments; there was no indication in the decisions that the punishments referred to were limited to custodial sentences.

Southern Union asserts that in jury trials, *Apprendi* requires the jury to determine by proof beyond a reasonable doubt any fact which increases the punishment after conviction beyond what would be permitted by the jury's finding of guilt. The language of *Apprendi* refers to penalties rather than to incarceration and, the company argues, there is no principled reason or historical evidence to exclude fines from the term *penalties*. The jury's guilty verdict in this case constituted a determination that at some point in the period of 762 days the company improperly stored mercury; thus, it could receive a maximum $50,000 fine for one day's violation. According to Southern Union, the jury had to determine the number of days the violation lasted, after which the judge had the discretion to determine the amount of the fine with the upper limit being $50,000 for every day the jury found the law to have been broken.

In support of this proposition, Southern Union points to the fact that numerous courts have applied *Apprendi* to determination of fines, that historical evidence shows that juries had some role in setting of fines, and that *Ice* was a narrow decision involving only the question of the application of *Apprendi* to the determination of whether sentences for multiple counts should be consecutive or concurrent. Southern Union points out that the *Apprendi* Court discussed cases involving various types of punishment, including fines, and recognized that judges historically had great discretion in imposing various types of punishment. Nevertheless, the *Apprendi* Court ruled that the Constitution required decisions increasing the level of possible punishment to be made by juries. Southern Union argues that it would have made no sense for the Court to discuss these cases if it viewed the rule it announced as being inapplicable to the determination of fines.

Finally, the company contends that the First Circuit's limiting of *Apprendi* would have numerous adverse consequences. Fines are a significant element of punishment for both individuals and corporations and are the main type of punishment possible for a corporation convicted of a crime. The appellate court's rule would lead innocent defendants to plead guilty in order to avoid the imposition of large fines. Further, according to the company, an affirmance of the decision in this case would undermine the scope of *Booker* regarding the use of sentencing guidelines.

The United States relies heavily on the language of *Ice* indicating that any extension of *Apprendi* requires "consideration of the doctrine's core purposes, the historical role of the jury, and the potential effect on the administration of justice." The United States argues that the Court has long recognized in a variety of contexts that loss of property as a result of fines is a substantially less significant constitutional interest than is loss of liberty or life. According to the government's brief, both at common law and throughout our nation's existence, judges have had substantially more discretion in determining fines as compared to the imposition of terms of incarceration or the death penalty. The United States asserts that having juries determine fines would undermine the goal of sentencing guidelines to standardize punishment to reflect the harm caused by a defendant's actions and to treat similarly situated defendants alike. In addition, evidence regarding appropriate fines is often complex and confusing to juries; according to the government, having juries consider fines may require introduction of evidence that will be prejudicial to the defense or could lead to bifurcated trials, which the Constitution has never before required before imposing fines as punishments.

SIGNIFICANCE

The *Apprendi* line of cases is one of the most significant changes in constitutional criminal procedure in the past two decades. Because a high percentage of court cases involve prosecution of crimes, any decision about the mechanics of trial and sentencing has an impact on many tens of thousands of cases annually nationwide. These decisions have not just altered common law rules about the roles of judges and juries, but have also changed at both state and federal levels the prior reliance as binding law on the sentences generated by sentencing guidelines. Thus any extension or restriction of the scope of the rule is important not only to an understanding of the requirements of the Fifth and Sixth Amendments but also because it may affect innumerable trials and the nature of proof required to obtain convictions of those accused of crimes.

These decisions have almost all been made by narrowly divided majorities, often by 5-4 votes. Although several justices have indicated in subsequent cases that *Apprendi* was wrongly decided, there is no reason to believe that the Court is inclined to reverse that ruling. The chief author of the *Apprendi* doctrine is Justice Scalia. In *Ice,* however, Justice Scalia was in the minority; the decision was written by Justice Ginsburg, who had voted in favor of all the previous applications of *Apprendi*. Their disagreement in *Ice* may be on narrow grounds or may be an indication that Justice Scalia's position no longer commands a majority and that the Court is not inclined to apply *Apprendi* to additional situations beyond what has already been decided.

This case gives the Court the opportunity to clarify the scope of *Apprendi* and the significance of the *Ice* dicta. *Apprendi* and the cases that follow indicate that any fact that adds to the possible penalty imposed on a defendant convicted of a crime must be determined by a jury and that the standard of proof requires a showing of guilt beyond a reasonable doubt. If affirmed, the First Circuit *Southern Union* decision would represent a significant curtailment of the scope of *Apprendi,* limiting its application only to facts affecting the length of confinement or imposition of the death penalty as punishment after conviction rather than having it apply to any punishment. Because corporations can be convicted of crimes but cannot be sentenced to imprisonment, such a ruling would make the protections of the Fifth and Sixth Amendments applied by *Apprendi* inapplicable to corporate defendants. The Court could disavow the dicta in *Ice* or interpret it narrowly. For example, it could hold that the amount of fine to be imposed after criminal conviction is to be determined by the court, as long as it fits within the bounds established by the legislature, while still requiring a jury to determine any fact that would trigger the exercise of that discretionary authority. In the present case, such a ruling could invalidate the fine imposed upon the Southern Union Company, because the jury needed to determine by the reasonable doubt standard the number of days the violation existed, while leaving it up to the judge to determine the size of the fine within the legislatively set standard of imposing a fine in an amount of up to $50,000 per day.

In most jurisdictions, a court may choose among many different types of punishment following conviction on a criminal charge. These include incarceration, probation, probation with conditions, fines, restitution, diversionary programs, community service requirements, and other dispositions. The language of *Apprendi* refers to "penalties" rather than to loss of liberty. There is little reason to limit *Apprendi* to only one type of sanction and not to apply it to factual determinations resulting in additional or alternate types of punishment. Perhaps the Court will illuminate what the majority meant by the *Ice* dicta in order to help clarify the future scope of the *Apprendi* doctrine. On the other hand, the Court needs only to resolve the case before it, and may not provide substantial guidance, instead awaiting other cases to reach those issues.

Alan Raphael is a member of the faculty of Loyola University Chicago School of Law and teaches criminal procedure and constitutional law. He can be reached at araphae@luc.edu or 312.915.7140.

PREVIEW of United States Supreme Court Cases, pages 214–217.

ATTORNEYS FOR THE PARTIES

For Petitioner Southern Union Company (Carter G. Phillips, 202.736.8000)

For Respondent United States (Donald B. Verrilli Jr., Solicitor General, 202.514.2217)

AMICUS BRIEFS

In Support of Petitioner Southern Union Company

Chamber of Commerce of the United States of America (Benjamin C. Block, 202.662.5205)

Does "The Anti-Injunction Act" Prevent the Supreme Court from Deciding Whether the Affordable Care Act Is Constitutional?

CASE AT A GLANCE

The Anti-Injunction Act, 26 USC § 7421, says that "no suit for the purpose of restraining the assessment or collection of any tax may be maintained in any court by any person." If the Anti-Injunction Act bars this lawsuit, the Supreme Court will not be able to decide whether the Patient Protection and Affordable Care Act (ACA) is constitutional and the lower court opinions will be vacated. The parties to this case all want the Supreme Court to decide the ACA's constitutionality. They all argue that the Anti-Injunction Act (AIA) does not bar this lawsuit, but for different reasons. Three amici disagree and argue that AIA bars this lawsuit, but several amici join the parties in arguing that it does not.

United States Department of Health and Human Services et al. v. State of Florida et al.
Docket No. 11-398

Argument Date: March 26, 2012
From: The Eleventh Circuit

by Bryan Camp and Jordan Barry
Texas Tech School of the Law and University of San Diego School of Law

INTRODUCTION

To decide a case, a federal court must have the power to adjudicate matters of that type. This concept is known as "subject matter jurisdiction." Generally, federal courts only have subject matter jurisdiction when a federal statute gives it to them. And what Congress gives, it can also take away. The question in this case is whether 26 USC § 7421, which prohibits "any person" from suing the federal government "for the purpose of restraining the assessment or collection of any tax," strips federal courts of their power to decide this case at this time. This law is commonly called "the Anti-Injunction Act" because it prevents federal courts from hearing cases where taxpayers are seeking court orders, such as injunctions, to prevent the government from assessing or collecting federal taxes. So before the Supreme Court can address whether the ACA is a constitutional exercise of congressional power, it must first decide that the Anti-Injunction Act (AIA) either (1) does not take away subject matter jurisdiction from the federal courts or (2) does not apply to this case. If the AIA is jurisdictional and does apply, courts likely will not be able to decide whether the ACA is constitutional until at least 2015.

ISSUES

Is the Anti-Injunction Act jurisdictional? That is, when the act applies, does it take away subject matter jurisdiction from federal courts or is it merely a defense that the federal government can raise if it chooses?

If the Anti-Injunction Act is jurisdictional, does it apply to the challenges to the ACA?

FACTS

In 2009 Congress enacted the ACA. Several provisions were codified in title 26, the Internal Revenue Code (the code), including one commonly called the individual mandate. This provision, codified in § 5000A, requires individuals to have health insurance beginning in 2014. Individuals who fail to do so must report that failure on their tax returns and must pay an amount labeled a "penalty" along with their federal income and other taxes. In § 5000A(g) Congress specified how the IRS must assess and collect this penalty.

Several states and some individuals sued the federal Department of Health and Human Services (the government) challenging the constitutionality of several provisions of the ACA, including § 5000A. Initially, the government argued that AIA barred the plaintiffs' suit. The federal district court disagreed and went on to find the individual mandate unconstitutional. On appeal to the Eleventh Circuit Court of Appeals, the federal government dropped the AIA procedural argument. The Eleventh Circuit ruled the individual mandate unconstitutional. It did not discuss the AIA in its opinion.

Although the Eleventh Circuit did not address § 7421, three other courts of appeals have. The Sixth Circuit and the District of Columbia Circuit decided that the AIA does not prevent courts from reaching the merits of the constitutional issues and that the ACA is constitutional. *Thomas More Law Center v. Obama,* 651 F. 3d 529 (6th Cir. 2011); *Seven-Sky v. Holder,* 681 F. 3d 1 (D.C. Cir. 2011). However, the Fourth Circuit concluded that the AIA does bar challenges to the ACA at this time and did not reach the constitutional issues. *Liberty University v. Geithner,* 2011 U.S. App. LEXIS 18618; 2011 WL 3962915. 2011-2 U.S. Tax Cas. (CCH) & 50,613.

Because all of the parties contend that the AIA does not bar this suit, the Supreme Court appointed a special Amicus, Robert Long (Amicus Long), to argue that the AIA does bar the suit.

CASE ANALYSIS

This section will put the AIA into context and then explain the various positions the parties take as to each of the two questions presented. It does not discuss the related but separate question of standing.

Background: The General Rule of § 7421

The administration of taxes in the United States has historically been divided into two functions: (1) the determination of tax, which culminates in an act of assessment, and (2) the collection of taxes assessed. Section 7421 speaks in those terms, prohibiting suits seeking to restrain either the assessment or collection of taxes. Since the creation of the Internal Revenue Service (the IRS) in 1862, taxpayers have been required to pay assessed taxes before they could contest their liability for them. Enacted in 1867, the Anti-Injunction Act is part of the cement holding this "pay first, litigate later" regime together. As the Supreme Court explained in 1876:

> [T]here are provisions for recovering [a] tax after it has been paid. ... *But there is no place in [the U.S. tax] system for an application to a court of justice until after the money is paid.*
>
> That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

State R.R. Tax Cases, 92 U.S. 575, 613 (1876) (emphasis added)

Over time, Congress amended the AIA to create several exceptions to the general "pay first, litigate later" regime. Two are important to this case, the Deficiency Procedure and the Collection Due Process Procedure.

1. Deficiency Procedure

In 1924, Congress created a special procedure to allow taxpayers to restrain some assessments of certain types of taxes, notably income and gift taxes. It provided that, in some circumstances, the IRS must give taxpayers a "Notice of Deficiency" before making an assessment. Taxpayers then have a chance to challenge the Deficiency in the Tax Court. At the time it created this special procedure, Congress amended the AIA so that it did not apply to suits challenging Deficiencies.

There are many, many taxes that are not subject to this procedure. For example, employment taxes, which are imposed on employers for the privilege of employing workers, are not subject to the Deficiency Procedure. The IRS need not issue a Notice of Deficiency and can simply assess the tax and start collection activities.

Similarly, "Assessable Penalties," a group of penalties imposed on taxpayers for various bad behaviors, do not trigger the Deficiency Procedure. Taxpayers wishing to contest Assessable Penalties must follow the general "pay first, litigate later" rule of the AIA. For example, § 6673 allows courts to impose a fine of up to $25,000 against taxpayers who advance frivolous arguments in court. The IRS then simply assesses that fine and starts collection. Section 6676 allows the IRS to assess a penalty against taxpayers who claim excessive refunds. Again, the IRS just assesses the penalty and starts collection. Many Assessable Penalties have little to do with tax liability and are more in the mold of nontax regulatory requirements. For example, tax preparers who fail to put their social security numbers on returns they prepare, employers who fail to furnish proper documentation to their employees, and parents who refuse to obtain social security numbers for their children are all subject to Assessable Penalties.

Although Assessable Penalties are called "penalties," § 6671(a) makes clear that they are generally treated as taxes throughout the Code. This means that the AIA fully applies to Assessable Penalties. Thus, taxpayers must generally pay Assessable Penalties before contesting them—unless the Collection Due Process (CDP) Procedure applies.

2. Collection Due Process Procedure

In 1998, Congress created the CDP Procedure, a special procedure that allows taxpayers to restrain certain types of collection actions. Similar to the Deficiency Procedure, the CDP procedure requires the IRS to tell taxpayers that it proposes to levy on their property or that it has just filed a notice of federal tax lien. Taxpayers may then seek relief from the IRS Office of Appeals and, if unhappy with that result, may seek judicial review in the Tax Court. As it did with the Deficiency Procedure, Congress explicitly amended the AIA so that it would not apply to the CDP Procedure.

The CDP Procedure generally only allows taxpayers to contest the manner in which the IRS proposes to collect an already-assessed tax. However, taxpayers who were not given a prior opportunity to contest the merits of their tax liability can also do that in a CDP proceeding. Thus, when the IRS is collecting an assessed Deficiency, taxpayers may not use the CDP process to get a second prepayment opportunity to contest the merits of the assessment because they already had that opportunity through the Deficiency Procedure. But, when the IRS is collecting an Assessable Penalty, taxpayers who are entitled to a CDP proceeding are generally able to contest the merits of that assessment before having to pay it.

Several parties and Amici attack the idea that the AIA takes away federal courts' jurisdiction over suits seeking to restrain the assessment or collection of taxes. Instead, they say, it merely gives the federal government a defense to such suits. If the government waives the defense (as it has done here), courts have the power to decide such cases. Mounting this attack are (1) the Private Respondents; (2) the State Respondents; and (3) Amici Curiae Liberty University, Inc., Michele Waddell and Joanne Merrill. Defending the jurisdictional nature of the AIA are (1) the government; (2) Amicus Long; (3) Amici Curiae Mortimer Caplin and Sheldon Cohen, who are distinguished former Commissioners of the IRS (Amici Former IRS Commissioners) and (4) Amicus Curiae Center for the Fair Administration of Taxes (Amicus CFAT). The chief arguments on both sides are summarized below, generally without attribution to the particular parties advancing them.

Those attacking the jurisdictional nature of the AIA note that the statute neither refers to courts' power expressly nor uses the word "jurisdiction." They cite various cases from the late 1800s through the 1940s in which the Court did not treat the AIA as jurisdictional. They

also point out that the Supreme Court recognized exceptions to the AIA in *Enochs v. Williams Packing & Nav. Co.,* 370 U.S. 1 (1962), and *South Carolina v. Regan,* 465 U.S. 367 (1984). They argue that these exceptions are inconsistent with the AIA being jurisdictional. They also raise policy arguments against treating statutes as jurisdictional when there is any ambiguity.

Those defending the jurisdictional nature of the AIA assert that, in *Enochs,* the Court deliberately put an end to what it described as a history of vacillation about the nature of the AIA. In *Enochs,* the Supreme Court flatly stated that "The object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." Since *Enochs,* the Supreme Court has consistently viewed the AIA as jurisdictional. Moreover, the defenders argue that while the AIA does not expressly say that courts do not have jurisdiction, the Court has interpreted other statutes with similar language as jurisdictional. They concede that the Supreme Court created exceptions to the AIA in *Enochs* and *Regan,* but argue that these exceptions are entirely consistent with the AIA being jurisdictional. They also raise policy arguments of their own. First, the defenders contend that treating the AIA as a waivable defense would invite taxpayers to ignore the statute and sue, hoping that they could convince the government to waive its defense or that the government might simply forget to assert it. Second, it would permit the executive branch to play favorites, or at least create that impression, by waiving the defense in some instances but not in others.

Alliances shift on this issue. Between them, the State Respondents and Private Respondents raise four chief arguments explaining why the AIA does not apply to their suit, even if it is jurisdictional: First, they argue that the § 5000A "penalty" is not a "tax" within the meaning of the AIA. Second, plaintiffs argue that they are only challenging the individual mandate itself, not the § 5000A penalty. Since they are challenging the requirement to have insurance, not the penalty meant to enforce that requirement, they contend that they are not seeking to restrain the assessment or collection of a "tax" and, accordingly, the AIA does not apply. Third, the State Respondents assert that the AIA bars suits by "any person" and that a state is not a "person" within this definition. Fourth, the State Respondents argue that their lawsuit qualifies for the exception to the AIA that the Supreme Court recognized in *Regan.* Amicus Cato Institute and Amicus CFAT join the first and third arguments. The government is more selective. It supports the first argument but affirmatively argues against the others. The Court-appointed Amicus Long and Amici Former IRS Commissioners defend the applicability of the AIA from all the attacks. Amici Tax Law Professors dispute the first argument but do not address the others.

1. The Anti-Injunction Act does not apply to the § 5000A penalty.
Those arguing that the AIA does not apply to the § 5000A penalty advance arguments based on statutory text and congressional intent. Before looking at these issues, it is helpful to highlight a few aspects of § 5000A that provide support for each side's arguments.

Congress debated whether to call the § 5000A penalty a "tax" or a "penalty" and deliberately chose to call it a "penalty." However, it placed the individual mandate and the penalty enforcing it within the Code. Congress charged the IRS with administering and enforcing the individual mandate and the penalty enforcing it: Congress instructed the IRS to assess and collect the § 5000A penalty "in the same manner as an assessable penalty." Recall that assessable penalties generally fall within the reach of the AIA. Congress also chose to make insurance status a part of what taxpayers must self-report to the IRS each year on their income tax returns and to have taxpayers submit the penalty with their income tax returns.

In addition, Congress distinguished the § 5000A penalty from other liabilities that the IRS is charged with collecting. Congress put three unique restrictions on the IRS's ability to collect the penalty: It prohibited the IRS from seeking criminal sanctions against violators; it prohibited the IRS from using levies to enforce the § 5000A penalty; and it prohibited the IRS from filing notices of federal tax lien with respect to taxpayers' liability for the § 5000A penalty.

As discussed below, the litigants have starkly differing opinions about the implications of these various actions and language choices.

The Textual Argument
This argument is about the word "tax" in the AIA. It starts simple but quickly gets complex. Remember, the AIA is part of the Code. Those attacking the AIA start by noting that Congress deliberated on what to call the provision and decided it was a penalty and not a tax. Thus, the § 5000A penalty is not a "tax" within the meaning of the AIA.

Those who defend the applicability of the AIA counter that § 5000A(g) provides that the § 5000A penalty is to be "assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." The first sentence of § 6671(a) says that the assessable penalties of subchapter B of chapter 68 "shall be assessed and collected in the same manner as taxes." Section 7421 applies to taxes, so the IRS can assess and collect taxes without judicial interference. Accordingly, they contend, in order for the § 5000A penalty to be assessed and collected in the manner that § 5000A(g) provides, the § 5000A penalty must constitute a tax for purposes of the AIA. The defenders assert that courts have routinely applied the AIA to Assessable Penalties and that they should apply it to § 5000A.

The attackers agree that the AIA applies to Assessable Penalties, but they argue that this is because of the second sentence of § 6671(a) instead of the first. The second sentence of § 6671(a) says that whenever the word "tax" is used in the Code, it includes the Assessable Penalties codified in subchapter B of chapter 68. The attackers argue that the second sentence of § 6671(a) does not apply to § 5000A because § 5000A is not codified within subchapter B of chapter 68, and § 5000A lacks any language that resembles the second sentence of 6671(a). Accordingly, while the word "tax" in the AIA includes certain Assessable Penalties, it does not include the § 5000A penalty.

The defenders disagree that the second sentence of § 6671(a) is the reason that the AIA applies to Assessable Penalties. In addition, they argue that § 6671 is not the only reason that the word "tax" in the AIA includes Assessable Penalties. Amici Former IRS Commissioners argue that when the word "tax" is used in the Code, it includes penalties and interest as a general matter. They point to §§ 6201 and 6202 as examples, among others. Amicus Cato Institute disagrees. It argues that in almost all of the examples given, Congress explicitly provided that the penalties were to be treated as taxes and that the bar of the AIA was to apply.

Amici Tax Law Professors support the Amici Former IRS Commissioners by pointing to the limitations that Congress imposed on the IRS's

ability to use certain collection powers to collect the § 5000A penalty. The statutes creating those collection powers only allow the IRS to use them to collect "taxes." The fact that Congress limited the IRS's ability to use those tools with respect to the § 5000A penalty implies that those powers would otherwise have been available to the IRS, and that would only be true if the § 5000A penalty is a tax within the ordinary meaning of that term as it is used in the code.

Congressional Intent

Congress forbade the IRS from using its administrative levy power or filing a notice of federal tax lien with respect to the § 5000A penalty. The attackers of the application of the AIA argue that prepayment judicial review of the § 5000A penalty would not interfere with the IRS's activities in the same way as it would with respect to other liabilities the IRS is charged with collecting. Thus, these unique assessment and collection provisions render the normal logic behind the AIA inapplicable. Accordingly, conclude the attackers, Congress could not have intended for the AIA to apply to the § 5000A penalty.

The defenders respond with three reasons why the logic of the AIA still applies to § 5000A. First, the IRS can still collect the penalty. It can set off tax refunds, including those created by refundable credits, or file civil suits. Second, the IRS must still assess the penalty, and the AIA applies to suits that seek to restrict either assessment or collection actions. Moreover, Congress instructed the IRS to assess the penalty in the same manner as Assessable Penalties. If Congress had wanted the AIA not to apply, the defenders assert, it could easily have amended the AIA or instructed the IRS to assess the penalty in the same manner as a Deficiency. Third, Amici Tax Law Professors point out that the collection actions that Congress prohibited are precisely those that trigger the CDP Procedure. If Congress had allowed the IRS to use those collection tools, taxpayers would be able to avoid the AIA using the CDP exception described above. Thus, the restriction on collection powers is as much a command that the "pay first, litigate later" rule applies as it is a restriction on the IRS.

2. Plaintiffs are not seeking to restrain the assessment or collection of the penalty but only the requirement to buy health insurance.

Private Respondents contend that even if the § 5000A penalty is a tax, they are not seeking to enjoin its assessment or collection. Rather, they are seeking to enjoin the individual mandate—the requirement that they purchase health insurance. Private Respondents say that they will, in fact, acquire the required health insurance if they have to, so they won't even incur the § 5000A penalty. That is, they are trying to avoid the legal obligation imposed by § 5000A, not the penalty for noncompliance.

The defenders of the applicability of the AIA counter that even if the Private Respondents plan to comply with the individual mandate and not incur the § 5000A penalty, other individuals would not comply and would incur the § 5000A penalty. As Amicus Long points out, in similar situations the Supreme Court has held that "a suit seeking to enjoin the assessment or collection of anyone's taxes triggers the literal terms of § 7421(a)."

The defenders also argue that, since the individual mandate has no enforcement mechanism except the penalty, the two provisions cannot be separated. The attackers counter that the individual mandate and penalty provision can be separated because certain low-income taxpayers are required to have insurance but are exempt from the penalty if they do not.

Finally, the defenders say that the motives of the litigants are not important to the AIA; it applies to any lawsuit that would have the effect of restraining the assessment or collection of a tax. The attackers reject this interpretation and submit that it applies only to suits whose purpose is restraining the assessment or collection of tax. Both sides invoke the same Supreme Court precedents to support their divergent views.

3. The AIA only bars suits by "any person" and a state is not a "person."

The State Respondents suggest that the word "person" in the AIA does not include a "state." They support their argument by noting that the word "person" does not usually include states and that § 7701, the Code provision defining the word "person" for tax purposes, includes many organizations and entities but does not mention states.

The government switches sides here and joins Amicus Long in defending the application of the AIA to states. Both point out that the term "includes" in § 7701 means the definition is not exclusive and could therefore encompass states as well. They further point out that the Supreme Court has found states to be "persons" for many other tax provisions and that the Court has previously recognized that § 7421's "any person" language was not added to limit the reach of § 7421 but to broaden its reach to prevent suits by third parties that would interfere with the collection of others' taxes.

4. Regan *excepts the States' lawsuit from the AIA.*

State Respondents argue that their challenge to § 5000A is not barred as it falls within the exception to the AIA recognized in *South Carolina v. Regan,* 465 U.S. 367 (1984). That exception applies when a plaintiff would not have any other way to obtain judicial review of the federal government's actions. In *Regan,* South Carolina claimed that a federal statute that made interest on certain South Carolina state bonds taxable instead of tax-free violated the Tenth Amendment. The only way for South Carolina to obtain judicial review was by seeking an injunction, so the Court held the AIA would not apply. The State Respondents argue that this exception should apply here because there is no other procedure for them to protect their interests.

The government and Amicus Long disagree. In *Regan,* the statute at issue applied to bonds issued by the state, but here the individual mandate does not apply to states, just to individuals. In *Regan,* South Carolina was defending its own interest in being able to issue bonds in the form it chose; here, the states are not directly affected by the individual mandate. Rather than seeking to protect their own constitutional rights under the Tenth Amendment, the states are seeking to protect the interests of their citizens.

SIGNIFICANCE

A ruling that the AIA is jurisdictional and that it bars consideration of this suit would invalidate all the court rulings on the constitutionality of the ACA thus far. Federal courts would not be able to rule on that question until 2015 unless Congress passes a special statute.

The significance of a ruling that the AIA is jurisdictional but does not apply to this suit would depend on why the Court concluded that it does not apply. Both the government and Amici CFAT urge the Court

to go this route and craft a very narrow ruling based on the unique nature of the assessment and collection provisions.

A ruling that the AIA is not jurisdictional and has been waived would be a surprise and would create significant uncertainty about who can waive the statute's defense and how deliberate waiver must be.

There is yet another possibility. Some courts have postponed the AIA analysis until after they decide whether § 5000A is a constitutional exercise of congressional taxing power. They reason that if the § 5000A penalty is not a tax for purposes of the constitutional taxing power, it cannot be a "tax" within the meaning of the AIA. It seems doubtful the Supreme Court would go this route, however, and none of the briefs have argued for it. As the government's brief points out, the constitutional meaning of "tax" may differ from the statutory meaning. For example, in the early 1920s Congress tried to use its taxing powers to regulate child labor. The Supreme Court held that the AIA barred prepayment lawsuits challenging the law but held that the law was not a constitutional exercise of the taxing power when the matter came properly before the Court.

Bryan Camp is George H. Mahon Professor of Law, Texas Tech School of the Law, and Jordan Barry is Associate Professor of Law, University of San Diego School of Law. Professors Barry and Camp prepared one of the Amici briefs in this case. Professor Camp was an attorney in the IRS Office of Chief Counsel for many years before entering teaching in 2001. He can be reached at bryan.camp@ttu.edu or 806.742.3990. Professor Barry was in private practice at Fried, Frank, Harris, Shriver & Jacobson before entering teaching in 2009. He can be reached at jbarry@sandiego.edu.

PREVIEW of United States Supreme Court Cases, pages 218–222.

ATTORNEYS FOR THE PARTIES

For Petitioner United States (Donald B. Verrilli Jr., Solicitor General, 202.514.2217)

For Private Respondents (Michael A. Carvin, 202.879.3939)

For State Respondents (Paul Clement, 202.234.0090)

For Court-Appointed Amicus (Robert A. Long Jr., 202.662.6000)

AMICUS BRIEFS

In Support of Respondents

Cato Institute (Ilya Shapiro, 202.842.0200)

Liberty University (Mathew D. Staver, 800.671.1776)

State Chambers of Commerce (William V. Custer IV, 404.572.6600)

In Support of Vacatur

Tax Law Professors (Michael B. de Leeuw, 212.859.8000)

Opposing Vacatur

Center for Fair Administration of Taxes (A. Lavar Taylor, 714.546.0445)

In Support of Neither Party

Mortimer Caplin and Sheldon Cohen (Alan B. Morrison, 202.994.7120)

Other

American Center for Law and Justice (Jay Alan Sekulow, 202.546.8890)

Should Everyone Be Required to Have Health Insurance?

CASE AT A GLANCE

A key component of the Patient Protection and Affordable Care Act is the individual mandate or minimum coverage provision requiring that all Americans, with limited exceptions, maintain a base level of health care coverage. Those who fail to do so are liable for a penalty assessed by the IRS. This challenge asks the Supreme Court to determine whether Congress has the power under the Constitution's Commerce Clause to issue such a mandate and, further, if Congress has the right to assess a penalty and/or a tax against those who refuse or fail to meet the mandate.

United States Department of Health and Human Services et al. v. State of Florida et al.
Docket No. 11-398

Argument Date: March 27, 2012
From: The Eleventh Circuit

by Elliott B. Pollack
Pullman & Comley, LLC, Hartford, CT

ISSUES

Does Congress hold the power under the Constitution's Commerce Clause to mandate the purchase of health insurance?

Does Congress have the right to assess a penalty and/or a tax against those who refuse or fail to do so?

INTRODUCTION

The 2010 Patient Protection and Affordable Care Act, sometimes referred to with the jaw-breaking acronym PPACA or the more palatable ACA, is seen by virtually all health care policy experts as the most important piece of health care legislation out of Washington since Medicare and Medicaid were enacted in 1965. The United States Supreme Court appears to agree.

As T. R. Goldman comments in the January 2012 issue of *Health Affairs,* "the high court's commitment to filling its entire … calendar with arguments about the law during the week of March 26, 2012, constitutes an extraordinary event. With five and one-half hours [now expanded to six] of argument over three days, the hearing will be one of the Court's longest in decades." Of the several questions the Supreme Court will consider, this article focuses on the "minimum coverage" requirement—the provision of ACA that creates the individual mandate of health insurance coverage.

Section 1501 of the ACA, modified by § 10106, subtitled "Shared Responsibility for Health Care" mandates that all Americans, with certain limited exceptions, maintain "minimal essential health care coverage" beginning in 2014. Certain individuals whose religious beliefs preclude doing so, illegal aliens, and prisoners are exempted. Section 1502 imposes the obligation on insurance companies to file informational returns to identify the names of their insureds and the dates of coverage. The Internal Revenue Service is tasked to notify taxpayers who are not enrolled about accessing coverage through the health-benefit exchange operating in their state.

With generations of lawyers schooled about the virtually unlimited scope of the Commerce Clause and against the backdrop of U.S. Circuit Court of Appeals decisions which have both upheld (Sixth Circuit and District of Columbia Circuit) and rejected this claim (Eleventh Circuit), the Court's anticipated ruling is of overwhelming importance. University of Texas Professor Lucas A. Powe Jr. looks back to the Supreme Court's jurisprudence in 1936 and 1937, first ruling against President Roosevelt's New Deal programs and a year later supporting them, as the most recent relevant historical parallel with respect to Commerce Clause jurisprudence. If he is correct, we will have waited more than 80 years for the legal landscape to thunder so mightily again about this topic.

By way of background, the 2006 health care reform law approved by then Governor Mitt Romney in Massachusetts appears to have pioneered the individual mandate requirement with the exception that Massachusetts residents face up to a maximum of a $1,200 yearly penalty for failing to carry health coverage. Under the ACA, the penalty begins at $95 in 2014 and rises gradually to $695 annually in 2016.

FACTS

In 1898, before his tenure on the Supreme Court, Louis D. Brandeis wrote that individuals have the right to be "left alone" by the government and private economic actors. One hundred fourteen years later, do the sentiments espoused by Justice Brandeis, later recognized in constitutional rulings, trump the claim in the pending appeal that Congress has the authority under the Commerce Clause to require us to buy health insurance?

In *Wickard v. Filburn,* 317 U.S. 111 (1942), Congress's Commerce Clause jurisdiction was upheld as to agricultural crop quota legislation even though farmer Filburn intended to use the grain for his family and not to sell it. According to the Court, by growing his own grain, Filburn could reduce his activity in the grain market. Fifty-three years after *Wickard, United States v. Lopez,* 514 U.S. 549 (1995), stands as the clause's high-water mark; the *Lopez* Court tossed out the claim that Congress could prohibit guns in schools under the Commerce Clause on the basis that gun violence could affect the overall performance of the economy. The connection between the regulation of interstate commerce and the laudable objective of reducing gun-related deaths in schools was too remote to be approved by the Supreme Court.

In as much as the Court granted certiorari from the opinion of the Eleventh Circuit Court of Appeals on August 12, 2011, overturning the ACA entirely, the discussion here will begin with that ruling and that of the trial court with respect to the mandate.

Judge Vinson's Decision

United States Florida Northern District Court Judge Roger Vinson declared the entire ACA unconstitutional last January. 750 F. Supp. 2d 1256. Preceded by various district court results out of Lynchburg and Richmond, Virginia, Detroit, and the District of Columbia, Judge Vinson held that the imposition of a penalty upon individuals for not purchasing health insurance improperly extends the Commerce Clause's jurisdiction.

Being uninsured is not an act, he ruled. Congress may only require us to act or not to act under the Commerce Clause. Judge Vinson perceived the individual mandate as an unprecedented expansion of Commerce Clause jurisdiction, which would regulate the passive status of individuals. The reasoning that a decision not to acquire health insurance is active, rather than passive, and amounts to a decision as to how each person chooses to pay for health care was utterly unconvincing to Judge Vinson. (It did carry the day for Judge Laurence Silberman of the Sixth Circuit—a well-known conservative). The assertion that the nonpurchase penalty tax was a proper exercise of federal government's taxation powers was also rejected by Judge Vinson as a penalty disguised as a tax.

Judge Vinson equated the ACA minimum coverage requirement with the compulsory consumption of a less than beloved vegetable. If the individual mandate is upheld, he wrote:

> Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because those who eat healthier tend to be healthier and are thus more productive and put less of a strain on the health-care system.

As a sound bite, the broccoli analogy is wonderful. Does it hold up under closer scrutiny, or did Judge Vinson accurately describe the legal issue facing the Supreme Court—albeit in a culinary metaphor? A 2-1 decision of the Court of Appeals for the Eleventh Circuit affirmed Judge Vinson's ruling, thus generating this appeal.

The Eleventh Circuit Decision

Quoting James Madison's comment in *Federalist Papers No. 45,* the Eleventh Circuit Court of Appeals placed a marker on the table that it would pick up later in its opinion. "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained." The court's trenchant coda to Madison was, "the commerce power has in a sense come to dominate federal legislation."

Lopez, the court noted, delimits the "constitutionally mandated division of authority," which was designed to ensure protection of fundamental liberties. The lesson of *Lopez,* Judges Dubina and Hull wrote (they co-authored the majority opinion) is that Congress must observe the "distinction between what is truly national and what is truly local" while not acquiring a general police power over the states.

The Eleventh Circuit agreed with the contention of the 26 state respondents and the individual plaintiffs who brought the pending litigation that the health insurance mandate effectively requires "individuals to *enter* into commerce so that the federal government may regulate them. …" An individual who chooses not to purchase insurance is not within commerce; her decision "is marked by the *absence of a commercial transaction.*" Judges Dubina and Hull noted further that power under the Commerce Clause operates on "existing or ongoing activity," not on the absence of a transaction.

Fending off the claim that the Supreme Court had never held that activity is the predicate for congressional commercial legislation under the Commerce Clause, the majority observed that this was probably the case "because (the Court) has never been faced with the type of regulation at issue here."

Distinguishing *Gonzalez v. Raich,* 545 U.S. 1 (2005), the Supreme Court's decision upholding the regulation of the growing of marijuana at home for personal use as relating to an activity "that substantially affect(s) interstate commerce," the Eleventh Circuit kept returning to its characterization of the individual mandate as one that impacts the *absence* of behavior. Although *Gonzalez* did not purport to reach interstate commerce, Justice Scalia's concurring comment in *Gonzalez* that "marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market" appears not to have impacted the Eleventh Circuit's reasoning.

Americans have already been subjected, the court of appeals recognized, to "a limited set" of personal mandates *before* passage of the ACA. Affirmative demands to take action such as jury service, the military draft, filing tax returns, and answering census takers' questions are distinguishable because they are "duties owed to the government attendant to citizenship. …" The reference in the Constitution to the requirement of a periodic census (Article I, § 2), the power to lay and collect taxes (Article I, § 8), and the power to raise and support armies (Article III, § 2) stood out to the court as transcending the limitations of the Commerce Clause.

A health insurance mandate cannot equate with the military draft, the Eleventh Circuit stated. Without regard to the lack of a provision in the Constitution permitting Congress to make military service compulsory, the court observed that purchasing health insurance to control the cost of health care is not "a duty owed to the government as a condition of citizenship." No mention was made of the fact that health insurance, let alone any reasonable concept of health care, did not exist in the eighteenth century; bloodletting was to be a favored method of maintaining and restoring health well into the nineteenth century.

Another prong of the Eleventh Circuit's opinion was its respect for the states' long-established and powerful role in regulating insurance and the provision of health care—notwithstanding that Congress also has legislated extensively and powerfully in those arenas. Noting that insurance is more traditionally linked to the states' as compared to the federal government's activities, the court's Commerce Clause analysis was thus fortified by its perception that Congress had encroached in this area so as to "[strengthen] … the inference that the individual mandate exceeds constitutional boundaries."

The United States maintained before the court of appeals that the individual mandate was a necessary adjunct to a "broader regulation of the insurance health care market" and therefore appropriately relied on the Commerce Clause. Characterizing *Gonzalez* as the only application of the "larger regulatory scheme doctrine," the Eleventh Circuit rejected the notion that Congress's acknowledged ability to regulate insurance companies would be enhanced by an individual mandate.

The Eleventh Circuit also rejected the argument that the individual mandate is necessary to avoid the consequences of adverse selection and cost shifting in the creation and underwriting of health care insurance mechanisms. "[A]n unconstitutional regulation … [is not converted] into a constitutional means [to assist private insurance companies] engendered by Congress' broader regulatory reform of health insurance products."

The Commerce Clause could not support the insurance coverage mandate, the Eleventh Circuit ruled. The ACA obligation imposed upon Americans "to purchase insurance from a private company for the entire duration of their lives is unprecedented, lacks cognizable limits and imperils our federal structure," it held.

An alternative claim was made by the United States: the individual mandate may survive constitutional scrutiny under the Tax and Spending Clause of the Constitution. The government focused on the broad nature of the federal taxing power and the fact that "a tax 'does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.'" *United States v. Sanchez,* 340 U.S. 42 (1950).

It was erroneous for the United States to rely on the Tax Clause, Judges Dubina and Hull ruled, because the ACA repeatedly refers to the imposition individuals must suffer for not obtaining health insurance coverage as a penalty. Many other provisions in the hundreds of pages of the ACA text refer to taxes rather than penalties making it difficult to insist on the interchangeability of the terms, the Eleventh Circuit observed.

The ACA legislative history discerned by the Eleventh Circuit also supported the conclusion that Congress intended to enact a penalty. While the committee and floor comments of various senators and congresspersons leading to the passage of ACA characterized the mandate as a tax, the court was unwilling to give weight to these "assorted statements" given the text of the law and other "more reliable indicators of congressional intent."

Lastly, the substantial revenue projected from collecting the penalty from noninsurance buyers failed to impress the Eleventh Circuit. The receipt of revenue, it concluded, was simply incidental to the failure to obtain health care insurance.

CASE ANALYSIS

The amicus brief of Citizens' Council for Health Freedom furnishes an interesting insight into the viability of the Eleventh Circuit's rulings in light of its analysis as to the original intent behind the Commerce Clause. The council quotes Alexander Hamilton in *Federalist Paper No. 83:* "[The] specification of particulars [referring to the claim of enumerated powers] evidently excludes all pretension of a general legislative authority." On this and similar authority, the council asserts *Wickard* must be overturned in order to overturn the ACA individual mandate. *Wickard*'s holding that Congress may regulate anything that *substantially affects* commerce under the Commerce Clause, the council argues, opened the floodgates to all manner of regulation since virtually everything can be said to have some effect on commerce. *Wickard* was effectively undercut sub silentio by *Lopez* and by *United States v. Morrison,* 529 U.S. 598 (2000), the council wrote. The Supreme Court must and should now expressly consign this "seminal case," as Tevi Troy styles it in the February 2012 issue of *Commentary,* to the legal dustbin.

The Department of Health and Human Services (HHS) stresses the active, even if sometimes unintentional, extensive involvement of the federal government in health care and in insurance markets. Medicare and Medicaid, the Children's Health Insurance Program, tax deductions given to employers for paying their employees' health insurance premiums, the nontaxable status afforded to employees for the value of their health insurance premiums, the regulation of employer-sponsored health coverage through the Employee Income Security Act, among others, demonstrate how thoroughly the government has already planted itself within the field of health insurance. Further, HHS points out that our current way of paying for health care on a national level has serious financial costs. According to HHS, 50 million people who lacked health insurance in 2009 consumed health care resources far above their ability to pay for services; 2008 data cited by HHS indicate that uninsured Americans pay for only 37 percent of their health care costs. As a result, the need for health care providers to capture these uninsured costs by inflating the charges to insured consumers, the so-called "cost shift," increases health care insurance premiums for the balance of Americans; according to HHS, this cost shift certainly has an impact on commerce among the states.

Given these realities, the government maintains that the ACA "establishes a framework of economic regulation and incentives." To reform the health care insurance system by broadening Medicaid coverage, encouraging an expansion of employer-sponsored insurance through tax measures, and establishing "tax penalties" to incentivize the insured requires a minimum level of health insurance—and other measures as well. Characterizing the charge for not complying with the mandate as at bottom a "tax," HHS argues that Congress assigned adverse tax consequences to the "alternative of citizens' attempted self-insuring."

Emphasizing that the minimum coverage provision is a key component of the ACA's broad health care market reforms, HHS cites discriminatory underwriting practices in its Supreme Court brief as another important justification for the legislation. It notes that previous legal reforms carried out by states without the individual mandate largely failed. If Congress is entitled to reform the interstate market in health care insurance, HHS asserts, it must, by extension, be legally entitled to require that almost all individuals obtain coverage. As a "necessary component of a broader scheme of interstate economic

regulation," both the ACA and the individual mandate have a major impact on economic conduct which, in turn, substantially impacts interstate commerce.

Congress has a broad discretion in determining how to achieve its constitutionally available targets. Since "insurance is by far the predominant means of paying for health care in this country," HHS maintains that Congress was certainly entitled to employ health insurance as the same "mechanism" to deal with the problem of cost shifting.

HHS strongly disagreed with the Eleventh Circuit's view that it would have been constitutional under the Commerce Clause for Congress to require health insurance when health care was being sought, rather than in advance. Mandating advance coverage, the petitioners wrote, is unassailably reasonable given that it is frequently difficult, if not impossible, to obtain health insurance after the need arises. Established law mandates that those requiring emergency care have access to hospital and clinic emergency rooms even if they cannot pay or do not have insurance. This reality, HHS points out, makes it "infeasible as well as inhumane" to limit Congress's power under so "semantic and formalistic" an analysis.

Lastly, HHS asserts that the taxing power, howsoever characterized as a penalty in the statute, practically operates as a tax whose calculation, in part at least, is linked to income, with a floor and ceiling. The ACA requirement to report and to pay the tax on an individual's income tax return filed with the Internal Revenue Service helps, it asserts, to support the argument. It is immaterial which word Congress uses in this context, concludes HHS. Whether characterized as a "penalty" or as a "tax," the imposition of the charge was constitutionally permissible under the circumstances.

Twenty-six states led by Florida characterize the individual mandate as a "threat to liberty. …" The states argue that through the ACA, Congress is asserting "the power to compel individuals to engage in commerce in order more effectively to regulate commerce." This is the first time in the history of the country, they maintain, that Congress has asserted such an "unbounded power"; rejecting it will not imperil any other legislation or a sound health care policy.

It is significant, the states assert, that while individuals must obtain health care insurance by virtue of ACA, they are not required to use that insurance when obtaining health care. According to the states, this gap further demonstrates the weakness of the constitutional arguments asserted by the United States. The states contend that use would more closely relate to actions taken in commerce and therefore be more likely to survive scrutiny.

"If Congress not only can regulate individuals once they decide to enter into commerce, but can compel them to enter commerce in the first place …", the states hold that the concept of enumerated powers and limitations on Congress's ability to act will no longer exist.

The historic quality of this litigation is also emphasized by the states, characterizing the individual mandate as "*the first ever* law of its kind." To uphold the constitutionality of the ACA would grant Congress a "*carte blanche*" to violate the "structural limitations" of the Constitution.

The states further challenge the petitioners' reliance on a tertiary definition of the term "regulate" in the Commerce Clause of "to order; to command" which derives from Samuel Johnson's 1619 *Dictionary of the English Language* as presented in the 1773 edition of that text. The states demand: How could such a remote definition govern "the popular understanding of the power granted to the new federal government" in the Commerce Clause 220 years ago? Congress may well have the power to regulate, direct, or command individuals who may voluntarily engage in commerce, they agree. However, the ACA seeks to command individuals "to enter into commerce in the first place." Congress was duly warned by the Congressional Budget Office almost 20 years ago, the states remind, that Congress had "never required people to buy any goods or services as a condition of lawful residence in the United States. …"

Wickard v. Filburn does not support the ACA, the states conclude. According to the states, that decision validated "an intricate system of quotas and subsidies to [prevent] wheat for on-farm consumption from having an indirect effect on prices." *Wickard* did not force any individual to enter any market as does the ACA, the states argue.

Neither should reliance on the Necessary and Proper Clause of the Commerce Clause be condoned inasmuch as the individual mandate conflicts with the states' recognized powers to protect their residents, presumably from federal intrusion.

It is pointless, the states write, to argue that the individual mandate is simply the other side of a coin that could have imposed regulations and created federal subsidies to insurance companies to compensate for the "cost shift." Since the public would oppose this approach, resorting to a financial tax/penalty in ACA was obviously the only choice available to Congress. However, by doing so, "Congress neatly avoided the political constraints that the Constitution contemplates will limit its power to enact unpopular regulations and general taxes." Thus, the states argue, the ACA is nothing more than an end run around the Constitution.

Reinforcing the Eleventh Circuit's conclusion that the "tax" as it is characterized by the petitioners is really a penalty for failure to comply with the mandatory health insurance requirement, the states reject the idea that the word "penalty" was "some linguistic oversight." A "penalty" enforces a legal requirement; a "tax" is designed to support government operations, the states point out.

SIGNIFICANCE

Is ACA a proper exercise of congressional power to reform our staggering health care system consistent with Congress's powers under the Commerce and Tax and Spending Clauses? Or is it a constitutionally improper effort "to compel the uninsured into engaging in economic activity that is harmful for them but beneficial to third parties," as the private respondents' brief asserts? Almost 50 years after the passage of the Medicare and Medicaid program and recognition by virtually all stakeholders that the shortcomings in our health care system require national solutions, the impact of a Supreme Court ruling that invalidates the individual mandate is difficult to predict, especially given the Court's need to determine whether any potential constitutional defect in the individual mandate can be severed from ACA as a whole.

If anything, Professor Powe's characterization of the significance of this case would seem to be vastly understated.

Elliott B. Pollack is a member of Pullman & Comley, LLC, in Hartford, Connecticut, the Health Law Editor of ABA's *PREVIEW* of United States Supreme Court Cases, and adjunct faculty at University of Connecticut Law School. He can be reached at ebpollack@pullcom.com or 860.424.4340.

PREVIEW of United States Supreme Court Cases, pages 223–228.

ATTORNEYS FOR THE PARTIES

For Petitioner United States (Donald B. Verrilli Jr., Solicitor General, 202.514.2217)

For Private Respondents (Michael A. Carvin, 202.879.3939)

For State Respondents (Paul Clement, 202.234.0090)

AMICUS BRIEFS

In Support of Petitioners

104 Health Law Professors (Charles Fried, 617.495.4636)

AARP (Thomas C. Goldstein, 202.362.0636)

Advocacy for Patients with Chronic Illness, Inc. (Jennifer C. Jaff, 860.674.1370)

American Association of People with Disabilities (Rochelle Bobroff, 202.289.6976)

American Cancer Society (Mary P. Rouvelas, 202.661.5707)

American Federation of Labor and the Congress of Industrial Organizations (James B. Coppess, 202.637.5337)

American Hospital Association (Catherine E. Stetson, 202.637.5491)

American Nurses Association (Ian Millhiser, 202.481.8228)

Blue Cross and Blue Shield of Massachusetts, Inc. (Robert E. Toone Jr., 617.832.1000)

California Endowment (Kathleen M. Sullivan, 212.849.7000)

Child Advocacy Organizations (Jeffrey O. Bramlett, 404.881.4100)

Commonwealth of Massachusetts (Martha Coakley, 617.727.2200)

Constitutional Law and Economics Professors (Wilson R. Huhn, 216.789.0507)

Constitutional Law Scholars (Andrew J. Pincus, 202.263.3000)

David R. Riemer and Community Advocates (Dean A. Strang, 608.257.0945)

California Public Employees' Retirement System (Peter H. Mixon, 916.795.9675)

Economic Scholars (Richard L. Rosen, 202.942.5000)

Governor of Washington Christine Gregoire (Kristin Margret Houser, 206.622.8000)

Health Care for All, Inc. (Wendy E. Parmet, 617.373.2019)

Health Care Policy History Scholars (Geoffrey F. Aronow, 202.373.6277)

Jewish Alliance for Law and Social Action (Andrew M. Fischer, 617.423.7904)

Lambda Legal Defense Fund (Douglas Hallward-Driemeier, 202.508.4600)

Law Professors Barry Friedman, Matthew Adler, et al. (Jeffrey A. Lamken, 202.556.2000)

NAACP Legal Defense and Educational Fund, Inc. (Elise C. Boddie, 212.965.2200)

National Women's Law Center (Melissa Hart, 303.735.6344)

Prescription Policy Choices, Professors of Law, and Professors of Health Policy (Michael Kevin Outterson, 617.353.3103)

Service Employees International Union and Change to Win (Jonathan Weissglass, 415. 421.7151)

Senate Majority Leader Harry Reid, House Democratic Leader Nancy Pelosi and Congressional Leaders and Heads of Committees of Relevant Jurisdictions (Walter Dellinger, 202.383.5319)

Small Business Majority Foundation, Inc. and the Main Street Alliance (Douglas L. McSwain, 859.255.8581)

State Legislators from All Fifty States, the District of Columbia, and Puerto Rico (Elizabeth B. Wydra, 202.296.6889)

States of Maryland, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, New Mexico, New York, Oregon, and Vermont, and the District of Columbia (William F. Brockman, 410.576.7055)

Young Invincibles (Paolo Giuseppe Gaetano Annino, 850.644.0879)

In Support of Respondents

1851 Center for Constitutional Law (Christopher P. Finney, 513.533.2980)

American Catholic Lawyers Association, Inc. (Bertram P. Goltz Jr., 973.244.9895)

American Center for Law and Justice, 119 Members of the United States Congress, and More Than 144,000 Supporters of the ACLJ (Jay Alan Sekulow, 202.546.8890)

American Civil Rights Union, the Social Security Institute, and the 10th Amendment Foundation, Inc. (Peter J. Ferrara, 703.582.8466)

American College of Pediatricians (Dorinda C. Bordlee, 480.483.3597)

American Legislative Exchange Council (John P. Elwood, 202.639.6518)

American Life League (Robert L. Sassone, 714.962.8107)

Association of American Physicians and Surgeons, Inc., and Individual Physicians (David P. Felsher, 212.308.8505)

Authors of the *Origins of the Necessary and Proper Clause* (Gary Lawson, Robert G. Natelson, Geoffrey P. Miller, and Guy I. Seidman) and the Independence Institute (David B. Kopel, 303.279.6536)

Caesar Rodney Institute (Grant Martin Lally, 516.741.2666)

Catholic Vote and Steven J. Willis (Patrick Gillen, 734.355.4728)

Cato Institute, Competitive Enterprise Institute, Pacific Legal Foundation, 14 Other Organizations, and 333 State Legislators (Ilya Shapiro, 202.842.0200)

Center for Constitutional Jurisprudence, Judicial Education Project, Reason Foundation, the Individual Rights Foundation, the Heritage Foundation, Ending Spending, Inc., and Former Senators George Lemieux and Hank Brown (Christopher R. J. Pace, 305.577.3100)

Citizens and Legislators in the Fourteen Health Care Freedom States (Nicholas C. Dranias, 602.462.5000)

Citizens' Council for Health Freedom (John Remington Graham, 418.888.5049)

Commonwealth of Virginia Ex Rel. Attorney General Kenneth T. Cuccinelli II (E. Duncan Getchell Jr., 804.789.7240)

Docs4PatientCare, Benjamin Rush Society, Pacific Research Institute, Galen Institute, and Angel Raich (Erik S. Jaffe, 202.237.8165)

Economists (Steven A. Engel, 202.261.3300)

Employer Solutions Staffing Group (Rebecca J. Levine, 952.920.8444)

Egon Mittelmann, Esq. (Egon Mittelmann, 310.273.5860)

Former U.S. Department Officials (Theodore B. Olson, 202.955.8500)

Foundation for Moral Law (John A. Eidsmoe, 334.262.1245)

Independent Women's Forum (Kevin J. Hasson, 202.841.2981)

Institute for Justice (Steven M. Simpson, 703.682.9320)

HSA Coalition, Inc., and the Constitution Defense Fund, a Project of Freedomworks Foundation (Ed R. Haden, 205.226.8795)

John Boehner, Speaker of the House (Carrie Campbell Severino, 616.915.8180)

Judicial Watch, Inc. (Paul J. Orfanedes, 202.646.5172)

Landmark Legal Foundation (Richard P. Hutchinson, 816.931.1175)

Liberty Legal Foundation (Van R. Irion, 865.809.1505)

Liberty University, Inc., Michele Waddell, and Joann Merrill (Mathew D. Staver, 800.671.1776)

Members of the United States Senate (Carrie Campbell Severino, 616.915.8180)

Missouri Attorney General (Christopher A. Koster, 573.751.1800)

Montana Shooting Sports Association (Quentin M. Rhoades, 406.721.9700)

Mountain States Legal Foundation (Steven J. Lechner, 303.292.2021)

Oklahoma (Patrick R. Wyrick, 405.522.4448)

Partnership for America (Charles J. Cooper, 202.220.9600)

Project Liberty (Allan E. Parker Jr., 210.614.7157)

Rutherford Institute (Alfred W. Putnam Jr., 215.988.2700)

Senator Rand Paul (Bridget Maloney Bush, 502.589.7616)

Single Payer Action, It's Our Economy, and Fifty Medical Doctors Who Support Single Payer (Oliver B. Hall, 617.953.0161)

Stephen M. Trattner (Stephen M. Trattner, 410.353.0446)

Tax Foundation (Joseph Darcy Henchman, 202.464.6200)

Texas Public Policy Foundation (Mario Loyola, 512.472.2700)

Thomas More Law Center, Jann Demars, John Ceci, Steven Hyder, and Salina Hyder (Robert Joseph Muise, 855.835.2352)

Virginia Delegate Bob Marshall (William J. Olson, 703.356.5070)

Washington Legal Foundation and Constitutional Law Scholars (Ilya Somin, 703.993.8069)

Other

Health Foundation of Greater Cincinnati (James A. Feldman, 202.730.1267)

If the Supreme Court Finds That the Minimum Coverage Provision Exceeds the Scope of Congress's Powers, Should Only That Provision Be Declared Unconstitutional,or Should the Entire Affordable Care Act Be Declared Unconstitutional?

CASE AT A GLANCE

One of the four issues that the Supreme Court has asked to be briefed and argued is "severability." The issue before the Court is, if the minimum coverage provision—the individual mandate—is declared unconstitutional, is it severable from the rest of the Patient Protection and Affordable Care Act or does the entire act need to be declared unconstitutional?

National Federation of Independent Business et al. v. Kathleen Sebelius et al.
and
State of Florida et al. v. United States Department of Health and Human Services et al.
Docket Nos. 11-393 and 11-400

Argument Date: March 28, 2012
From: The Eleventh Circuit

by Erwin Chemerinsky
University of California, Irvine School of Law

ISSUE

Would other provisions of the Patient Protection and Affordable Care Act be severable from the minimum coverage provision in the event the minimum coverage provision were to be declared unconstitutional?

FACTS

The Patient Protection and Affordable Care Act (ACA) is a large statute that does many different things. Its goal was to expand access to affordable health care, to regulate the terms on which health care is offered, and to control the costs of health care. It also contains many provisions concerning other aspects of health in the United States.

For example, one aspect of the act is to provide tax credits for small businesses to increase the subsidy for employee health coverage, while at the same time imposing a tax liability on large employers that do not provide adequate coverage to full-time employees. Another part of the act increases Medicaid coverage—the constitutionality of which is one of the separate issues before the Court—seeking to add as many as 10 million individuals to the Medicaid rolls in the next decade.

Additionally, the act regulates many aspects of the market for health insurance. For example, the act provides that insurers cannot rescind coverage absent fraud or intentional misrepresentation on the part of a policyholder. Insurers no longer may impose lifetime dollar limits on essential benefits, and there are restrictions on the ability of insurers to impose annual dollar limits on coverage. Insurers are generally required to provide family coverage that includes adult children until age 26. Also, the act bars insurers from denying coverage to individuals because of preexisting medical conditions.

The act changes aspects of Medicare payment rates and reimbursements. The goal of these provisions is to significantly reduce the costs of the Medicare program to the government.

The act also has a number of other provisions, which are not directly related to insurance but relate to the health care system. For example, the act requires chain restaurants to disclose nutritional information about standard menu items; establishes a National Prevention, Health Promotion, and Public Health Council; amends an aspect of the False Claims Act; and reauthorizes the Indian Health Care Improvement Act.

Except for the increased burden on the states with regard to Medicaid funding, none of these provisions are being challenged as unconstitutional. The provision being challenged is the "minimum coverage provision," often called the individual mandate. This is the part of the act that establishes new tax penalties to be paid by nonexempted individuals who do not maintain a minimum level of health coverage for themselves. Congress determined that without the individual mandate, many individuals would not purchase health insurance until they needed care. This would increase premiums for those purchasing insurance and preclude many of the reforms in the act. To ensure coverage of the greatest number of people and to reform the provision of health insurance requires creating the largest possible risk pool.

The minimum coverage provision is challenged as exceeding the scope of Congress's powers. If the Court were to declare this

unconstitutional, there is then the question of whether the entire act should be struck down or whether the minimum coverage provision is severable.

The petitioners on this issue are four individual plaintiffs, the National Federation of Independent Business, and 26 states. They filed suit in the United States District Court for the Northern District of Florida. The District Court found the individual mandate to be unconstitutional as exceeding the scope of Congress's powers. The district court concluded that this provision is not severable from the rest of the act and declared the entire law unconstitutional. The district court stayed its ruling pending appellate review.

The United States Court of Appeals for the Eleventh Circuit affirmed the holding that the individual mandate is unconstitutional as exceeding the scope of Congress's powers but reversed on the question of severability. The court of appeals stated that "the lion's share of the Act has nothing to do with private insurance, much less the mandate that individuals buy insurance." The court of appeals separately addressed two provisions of the act, the "guaranteed issue" and "community rating" provisions, which require insurers to enroll every applicant for insurance and prohibit insurers from denying, canceling, capping, or increasing the cost of coverage based on an individual's preexisting health conditions, medical history, or past experience with respect to insurance claims.

Although the parties agreed that these provisions are not severable, the Eleventh Circuit disagreed and found that the provisions could be severed and the rest of the act upheld even though the court declared the individual mandate unconstitutional. The court of appeals said that it was "not persuaded that it is evident (as opposed to possible or reasonable) that Congress would not have enacted the two reforms in the absence of the individual mandate." The court of appeals observed that these provisions were meant to "help consumers who need it the most" and concluded that Congress would have adopted these provisions even without the individual mandate.

CASE ANALYSIS

If the Supreme Court upholds the minimum coverage provision of the act or decides that it cannot rule on it because of the Anti-Injunction Act, the Court will not need to address the severability question. But if the minimum coverage provision is declared unconstitutional as exceeding the scope of Congress's powers, then the severability question will loom large and the Court will have to decide whether the entire Patient Protection and Affordable Care Act is unconstitutional.

The parties disagree on a threshold question of whether the issue of severability is even properly before the Supreme Court. The United States argues that the petitioners lack standing to challenge the constitutionality of the other provisions of the act because they are not affected by them. The United States argues, "Petitioner may not challenge the myriad provisions of the Act that do not apply to them. Parties must demonstrate standing for each form of relief they seek and, in doing so, cannot rely on the rights of third parties."

By contrast, the petitioners argue that severability is a "remedial question" and that there is no need for challengers to show that they have standing to object to each provision for the entire act to be declared unconstitutional. The state petitioners argue, "Severability does not involve a distinct challenge to the remaining provisions of an act that must be supported by independent standing. Instead, severability considers the consequences for the balance of the statute of the invalidation of the provisions that the challenger has already successfully attacked." The state petitioners contend that imposing a separate standing requirement for the challenge to each part of the act "would frustrate the remedial powers of the courts."

The Eleventh Circuit did not address the standing question in finding that the minimum coverage provision is severable from the rest of the act. The United States has raised it again in the Supreme Court.

Assuming that the Court addresses the severability question, all of the parties agree that ultimately the question of severability is one of legislative intent: Would Congress have enacted the rest of the statute without the part of the law declared unconstitutional? As the Supreme Court has explained, "After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of the statute to no statute at all?" *Ayotte v. Planned Parenthood of New England,* 546 U.S. 320 (2006). The inquiry for severability is whether the "statute created in [the] absence [of the invalid provision] is legislation that Congress would not have enacted." *Alaska Airlines v. Brock,* 480 U.S. 678 (1987).

The United States has agreed with the petitioners that the "guaranteed issue" and "community rating" provisions are not severable. That, though, is not necessarily determinative of the severability question as to these provisions. Although the United States made the same concession in the Eleventh Circuit, that court nonetheless found that these provisions were severable and concluded that "the touchstone of severability analysis is legislative intent, not arguments made during litigation."

Not surprisingly, the parties disagree about the severability of the remainder of the act. Both the state petitioners and the private petitioners argue that the remainder of the Patient Protection and Affordable Care Act would not have been adopted without the minimum coverage provision. The state petitioners say that "[w]ithout the constitutionally invalid individual mandate, Congress would not have enacted the provisions designed to ensure a supply adequate to meet the demand created by the mandate or the cost-savings provisions designed to counterbalance the expensive supply-side provisions."

The state petitioners agree with the federal district court that the individual mandate is "the very heart of the Act itself." The state petitioners declare, "Simply put, without guaranteed issue and community rating, the impetus for the ACA would disappear, and the Act's whole private insurance expansion would unravel, for insurance companies would remain free to turn away millions of the very same uninsured individuals to whom the Act promised insurance." The state petitioners thus argue that "[t]he Court should therefore hold the ACA invalid in its entirety."

The private petitioners likewise argue that the act would not have been adopted without the individual mandate and therefore invalidating that provision requires that the entire act be declared unconstitutional. They state, "[W]ithout the individual mandate at its heart, no statute remotely resembling the Act would or could have been enacted. Once the mandate is invalidated, the entire Act must fall with it."

The private petitioners argue that requiring all individuals to purchase health insurance or pay a tax penalty provided a "mammoth subsidy" to insurance companies. This subsidy was what allowed Congress to impose other costly restrictions on insurance companies, such as not putting a cap on benefits and not excluding individuals based on preexisting conditions. The private petitioners say that "[p]articularly in light of the deletion of a severability clause from an earlier version of the bill, and the House's determination to consider the Act on an all-or-nothing basis, it is clear that Congress intended this unique legislative deal to rise or fall as a whole."

By contrast, the United States argues that except for the guaranteed issue and the community rating provisions, the remainder of the act is severable and should remain even if the individual mandate is struck down. The United States argues that it is incumbent on a court to strike down no more of a law than necessary to comply with the Constitution. The United States quotes a recent Supreme Court decision declaring "[w]hen confronting a constitutional flaw in a statute," a court must "try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enterprise Fund v. Public Accounting Oversight Board,* 130 S.Ct. 3138 (2010).

The United States argues that there is a strong presumption in favor of partial, rather than total, invalidation of a statute. The United States agrees with the Eleventh Circuit that the "lion's share" of the act does not depend on or relate to the individual mandate. The United States argues that "[o]ther provisions can operate independently and would still advance Congress's core goals of expanding coverage, improving public health, and controlling costs even if the minimum coverage provision were held unconstitutional."

The United States also stresses that severability is strongly supported by the fact that many of the provisions of the act are already in effect even though the individual mandate does not become effective until 2014. The United States says "that time lag establishes conclusively that much of the act operates independently of the minimum coverage provision."

Thus, there are two very different visions of the act being presented to the Supreme Court. The petitioners contend that the entire act was a hard fought compromise in Congress and that the individual mandate was the key without which the act would not have been adopted. The United States, by contrast, says that the act contains a myriad of provisions, some having nothing to do with the individual mandate, and that these likely would have been adopted even without the individual mandate.

In assessing severability, the Supreme Court has declared that it "must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress's basic objectives in enacting the statute." *United States v. Booker,* 543 U.S. 220 (2005). None of the parties deny that the vast majority of the act is "constitutionally valid"; the constitutional challenges are to the individual mandate and the increased burden on the states for Medicaid coverage.

There is disagreement between the parties over whether some of the other provisions could function independently, but the parties obviously agree that some of the portions that have nothing to do with the provision of care by insurance companies could do so. The major disagreement between the parties is whether Congress would have enacted them, and the act, without the individual mandate.

SIGNIFICANCE

The Supreme Court has allocated 90 minutes of oral argument to the issue of severability. This likely reflects its sense of the complexity and importance of the issue. If the Court upholds the individual mandate, it will not even address the severability question. But if the Court strikes down the individual mandate as exceeding the scope of Congress's powers, then the severability clause becomes key as the Court has to determine whether to invalidate the rest of the act.

Although there have been many Supreme Court decisions concerning severability, none have concerned a statute with the political and social significance of the Patient Protection and Affordable Care Act. Even among judges who have found the individual mandate to be unconstitutional, only one, the district court judge in this case, declared the entire act unconstitutional. Declaring the entire act unconstitutional might seem drastic, even to justices who find the individual mandate unconstitutional. On the other hand, there is no doubt that the individual mandate is a key part of the act, and if it is unconstitutional, the Court must decide whether Congress would have adopted the remainder of the law without it.

Erwin Chemerinsky is Dean and Distinguished Professor of Law at the University of California, Irvine School of Law. He can be reached at echemerinsky@law.uci.edu or 949.824.7722.

PREVIEW of United States Supreme Court Cases, pages 229–232.

ATTORNEYS FOR THE PARTIES

For State Petitioners (Paul Clement, 202.234.0090)

For Private Petitioners (Michael A. Carvin, 202.879.3939)

For Respondent United States (Donald B. Verrilli Jr., Solicitor General, 202.514.2217)

For Court Appointed Amicus (H. Bartow Farr III, 202.775.0184)

AMICUS BRIEFS

In Support of Petitioners

American Center for Law and Justice, 117 Members of the United States Congress, and More Than 103,000 Supporters of the ACLJ (Jay Alan Sekulow, 202.546.8890)

American Civil Rights Union (Peter J. Ferrara, 703.582.8466)

Competitive Enterprise Institute, Thomas P. Miller, Joseph R. Antos, Christopher J. Conover, Earl L. Grinols, Michael A. Morrisey, Tomas J. Philipson, Scott E. Harrington, James C. Capretta, Robert Kaestner, and James W. Henderson (Thomas M. Christina, 864.271.1300)

Economists (Steven A. Engel, 202.261.3300)

Family Research Council and 27 Members of the U.S. House of Representatives (Nelson Lund, 703.993.8045)

Justice and Freedom Fund (James L. Hirsen, 714.283.8880)

Members of the United States Senate (James F. Bennett, 314.773.8900)

National Restaurant Association (Leon R. Sequeira, 202.463.2400)

Texas Public Policy Foundation and Cato Institute (Richard A. Epstein, 773.450.4476)

Western Center for Journalism (Gary Kreep, 760.788.6624)

In Support of Respondents

AARP, the Center for Medicare Advocacy, Inc., Medicare Rights Center, National Committee to Preserve Social Security and Medicare, the National Council on Aging, and the National Senior Citizens Law Center (Rochelle Bobroff, 202.289.6976)

American Academy of Actuaries (Kristin A. Feeley, 202.434.5000)

American Medical Student Association, Doctors for America, National Hispanic Medical Association, National Medical Association, National Physicians Alliance, and Society of General Internal Medicine (Ian Millhiser, 202.481.8228)

American Public Health Association, American Academy of Pediatrics, American Lung Association, American School Health Association, Association of Schools of Public Health, the National Association of County and City Health Officials, the National Association of Local Boards of Health, National Health Law Program, Public Health Law Association, the Public Health Law Center and Public Health Law & Policy (Martha Jane Perkins, 919.968.6308)

Missouri Attorney General (Christopher A. Koster, 573.751.1800)

States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, New Mexico, New York, Oregon, and Vermont, the District of Columbia, and the Governor of Washington (Daniel J. Powell, 415.703.5830)

Michigan Legal Services, Inc., and Other Michigan Nonprofit Corporations (Gary A. Benjamin, 313.590.6136)

National Indian Health Board (Geoffrey D. Strommer, 503.242.1745)

Other

America's Health Insurance Plans and Blue Cross Blue Shield Association (Patricia A. Millett, 202.887.4000)

American Benefits Council (James R. Napoli, 202.416.5862)

Chamber of Commerce of the United States of America (K. Lee Blalack, 202.383.5300)

American Hospital Association (Catherine E. Stetson, 202.637.5491)

Asian & Pacific Islander American Health Forum (Mark A. Packman, 202.772.2320)

David R. Riemer and Community Advocates (Dean A. Strang, 608.257.0945)

Washington and Lee University School of Law Black Lung Clinic (Timothy C. MacDonnell, 540.458.8562)

Does the Affordable Care Act Violate the Tenth Amendment and Related Federalism Principles by Coercing States into Expanding Coverage Under the Medicaid Program?

CASE AT A GLANCE

Medicaid is a cooperative federal-state program that funds medical care for needy individuals. Under the program, the federal government provides funds to participating states, and participating states agree to abide by certain federal standards. The Affordable Care Act, or the ACA, sets a new standard by expanding Medicaid eligibility to individuals with incomes up to 133 percent of the federal poverty level. While participating states must accede to this expansion, the federal government will pay for 100 percent of Medicaid costs associated with the expansion through 2016; the federal share then gradually decreases to 90 percent in 2020.

State of Florida et al. v. United States Department of Health and Human Services et al.
Docket No. 11-400

Argument Date: March 28, 2012
From: The Eleventh Circuit

by Steven D. Schwinn
The John Marshall Law School, Chicago, IL

ISSUE

Does Congress unconstitutionally compel states to expand Medicaid eligibility by conditioning receipt of federal Medicaid funds on the expansion of Medicaid eligibility, even when Congress pays for the expansion?

INTRODUCTION

Congress has authority to spend funds to promote the general welfare. It also has authority to set conditions on those funds, even when the conditions apply to states. But while Congress can use these authorities to encourage states to adopt its conditions, Congress cannot use these authorities to compel states.

FACTS

Medicaid, established in 1965, is a cooperative federal-state program designed to fund medical care for needy individuals. Under the program, the federal government provides funds to states that elect to participate. Participating states, in turn, provide their own additional funds and agree to comply with certain federal requirements. While participation is optional, every state participates.

First and foremost, Medicaid requires participating states to fund the provision of certain health care benefits to specific categories of needy individuals. Beyond this basic requirement, states may elect to cover additional categories of individuals and to provide additional medical benefits. Every state has opted to extend Medicaid eligibility to some additional populations and to cover some additional medical benefits.

The Medicaid program puts states on notice that Congress can change the requirements. In the Social Security Act, Congress reserves the "right to alter, amend, or repeal any provision" of the act. 42 U.S.C. § 1304. And under the act, states agree to amend their own plans consistent with changes in federal law. Congress has changed the requirements many times since 1965, frequently expanding the scope of mandatory eligibility and mandatory benefits, sometimes dramatically, and states have changed their own plans accordingly.

The most recent change, the one at issue here, expanded eligibility to certain individuals under age 65, not receiving Medicare, with incomes up to 133 percent of the federal poverty level. Under the ACA, states must provide these individuals only with the Medicaid Act's "benchmark" or "benchmark-equivalent" coverage provisions—provisions that allow states to choose options that may be less comprehensive than the traditional Medicaid benefit package.

The federal government will pay 100 percent of the cost of coverage for newly eligible individuals through 2016. Then the federal share gradually decreases to 93 percent in 2019. In 2020 and after, the federal government will pay 90 percent of these costs. (The typical federal contribution rates for the Medicaid program range from 50 percent to 83 percent of a state's Medicaid expenditures.) Moreover, the federal government will pay 90 percent of the state administrative costs incurred to upgrade state systems to comply with the expansion until 2015. (The federal government ordinarily pays 50 percent of a state's administrative costs.)

A group of 24 states, a state's attorney general, and a governor sued the Department of Health and Human Services to halt

implementation of the Medicaid expansion. (The petitioners are simply referred to as "the states" below.) The states argued that the expansion exceeded Congress's power to set conditions on the receipt of federal funds—that the expansion was unduly coercive in violation of the Tenth Amendment and related federalism principles. The district court rejected their claim, and the court of appeals affirmed. This appeal followed.

CASE ANALYSIS

Congress has authority under Article I, Section 8, of the Constitution to spend money to promote the general welfare. It also has ancillary authority to set conditions on its spending programs, or to say how its money will be used. Congress can set conditions on its spending programs even when those conditions bind the states. Thus, federal spending programs work like a contract with participating states: the federal government agrees to give money to the states in exchange for their agreement to comply with the attached conditions. If a state declines or fails to comply with the conditions, it sacrifices the federal funds. The spending power is significant because it allows Congress to affect policies indirectly (by way of conditioned spending to the states) that it could not affect directly (by way of its Commerce Clause authority, for example).

But the spending power is not absolute; there is a limit. While Congress can use its spending power to encourage the states to adopt certain policies, it cannot use its spending power to compel them to adopt those policies. In other words, states must be free to decline federal funds and the attached conditions; state choice is essential. Two leading cases illustrate this principle.

The first is *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937). In that case, Steward Machine Company challenged a federal tax-and-credit program under the Tenth Amendment. Congress imposed the tax on certain employers but allowed a 90 percent refund if the state imposed its own tax to create a state unemployment compensation program that satisfied certain federal requirements. The Court wrote that a federal program, like the tax-and-credit program, would violate the Tenth Amendment if it operated as a "weapon[ ] of coercion, destroying or impairing the autonomy of the states." But it ruled that the program there did not go so far, and it upheld the program against the Tenth Amendment challenge.

The second case is *South Dakota v. Dole,* 483 U.S. 203 (1987). In that case, a state argued that a federal spending program violated the Tenth Amendment when it conditioned 5 percent of the state's federal highway funds on the state's establishing a legal drinking age of 21. The Court, citing and quoting *Steward Machine Co.,* wrote that a condition "might be so coercive as to pass the point at which 'pressure turns into compulsion'" and thus violates the Tenth Amendment. But, like the Court in *Steward Machine Co.,* the *Dole* Court ruled that the program there did not go so far.

The parties frame their arguments around that ill-defined point at which "pressure turns into compulsion." The states argue that the massive amounts of federal money in the Medicaid program and the structure of the ACA make the Medicaid expansion compulsory on the states, while the government argues that the Medicaid program merely pressures states to accede to its many conditions, including the ACA's expansion.

The states proffer three principal arguments. First, the states argue that the Court should reaffirm that Congress may not use its spending power coercively against the states. They say that interference with state sovereignty is a core limitation on congressional authority, and that the Court has long recognized that Congress may not intrude on state sovereignty. The states contend that Congress unconstitutionally coerces them when it eliminates the element of choice from a spending program, and that the Court must then enforce a limit on congressional authority.

Second, the states argue that the ACA's Medicaid expansion is unconstitutionally coercive. The states say that the ACA itself is the best evidence of coercion. In particular, they say that the ACA's universal coverage provision forces low-income individuals to purchase insurance, but that the expanded Medicaid program is the only insurance option for these individuals; as a result, states must accede to the expanded Medicaid program so that their low-income citizens can comply with the universal coverage provision. Moreover, the states argue that the ACA's tax subsidies for low-income individuals who purchase health insurance apply only to those individuals who do not qualify for Medicaid, suggesting that Congress intended that states would accede to Medicaid expansion. And the states contend that prior amendments to the Medicaid program illustrate that Medicaid expansion is unconstitutionally coercive: whenever Congress sought to expand Medicaid in the past, they say, Congress gave states an additional financial incentive for the incremental expansion and did not, as here, threaten to take away all Medicaid funding for noncompliance with the expansion.

The states also argue that Medicaid's sheer size makes the expansion unconstitutionally coercive. They say that their failure to comply with the expansion means that they would lose all of their federal Medicaid funding, including "preexisting" Medicaid funding (i.e., funding available before the ACA expansion). They claim that the massive funds they receive under the Medicaid program make noncompliance with the expansion untenable and unconstitutionally coercive.

The states claim that they have no realistic option but to comply with the expansion. They argue that Medicaid is funded by their citizens' own federal tax dollars, and that they cannot deprive their citizens of a return on those taxes by declining federal funding under the massive Medicaid program. And they say that they cannot reasonably replace Medicaid with their own programs, given the expenses of such programs, at least in the short run.

In sum, they argue that Medicaid expansion is unconstitutional under *Steward Machine Co.* and *Dole*. They argue that the programs challenged in those cases provided the states a reasonable option to decline the federal funds. In *Steward Machine Co.,* states could reasonably decline the federal incentive to create a state unemployment compensation fund; in *Dole,* states could reasonably decline the paltry 5 percent of federal highway funding. In contrast, the states argue that they have no such reasonable option to decline the massive amounts of federal money under their entire Medicaid program, and that Medicaid expansion therefore looks more like unconstitutional commandeering of the states.

Third, the states argue that the Court could rule the Medicaid expansion unconstitutional without a wholesale invalidation of all federal spending legislation. They say that unconstitutional coercion is so

clear here that the Court does not need to determine the precise point at which encouragement becomes coercion to rule that Medicaid expansion exceeded it. Moreover, they say that Medicaid expansion is different than other run-of-the-mill federal spending conditions because it is inextricably tied to the universal coverage provision of the ACA, and because the Medicaid program involves so much more money than other federal spending programs. In short, the states argue that Medicaid expansion is no ordinary federal spending program, and that the Court could comfortably rule it unconstitutional while still preserving the vast majority of federal spending programs and attached conditions.

The government proffers three principal arguments in response. First, the government argues that Congress has broad authority under the Spending Clause and the Appropriations Clause to set conditions on the receipt of federal funds. The government points to a string of Supreme Court cases, including *Dole,* that say that the government can set the terms of its spending, even against the states, so long as it does not "compel States to implement federal programs." The government says that it has set and expanded Medicaid qualification standards "many times," and that states must accept each expansion as a condition of participating in the Medicaid program itself (and not merely as a condition of receiving incremental funding for a single offensive expansion). The government claims that the expansion here meets an important need; is a valid condition; and is an integral, nonseverable part of the overall Medicaid program. In short, according to the government, the overall Medicaid package now includes this expansion. States can take it or leave it, but they cannot peel off this expansion from the rest of the Medicaid requirements and hope to stay in the program.

Second, the government argues that the expansion to Medicaid is a valid, legitimate condition on this federal spending program. The government says that the Medicaid expansion in the ACA is not unprecedented, as the states claim—indeed, it is consistent with historical expansions of the Medicaid program—and that it is not especially burdensome on the states. The government points to the fact that it will initially pay 100 percent of the cost of expansion and reduce that amount to 90 percent in 2020—far greater percentages than the usual federal contribution rates for Medicaid. Moreover, the government contends that the projected increase in state spending will be offset by cost savings under other provisions of the ACA, and that states can still exercise their full flexibility in reducing Medicaid costs within the Medicaid program itself (e.g., through design of service delivery systems or through the rates they pay for care).

The government claims that the states' mere reluctance to turn down Medicaid funding does not make the expansion unconstitutionally coercive. The government argues that it has wide authority to encourage states with federal funds, but "that doesn't mean that the federal government, simply by *offering,* has coerced the State into *accepting.*" The government also says that setting the line anywhere short of outright compulsion would improperly require the courts to rule on a quintessential matter of policy. According to the government, the sheer size of the Medicaid program does not make it unconstitutionally coercive: it has always been the largest grant-in-aid program, and it has only grown over time, with the full assent of the states. Further, the government asserts that it belies common sense to say, as the states do, that the more generous a federal program is to the states, the more it unconstitutionally compels the states. The government contends that the Medicaid Act puts states on full notice that Congress can change program requirements from time to time, and that states do not have an option to accept or reject any particular change; instead, the government can withhold federal Medicaid funding in full for noncompliance with any portion of the act. The government says that the states' argument that Medicaid is paid for by state taxpayers (and is therefore unconstitutionally coercive because state taxpayers seek a return on their tax payments) turns our federal system on its head: Medicaid is paid for by *federal* taxpayers, and states and their citizens can elect to participate or not. Finally, the government claims that the states' position would also render other pre-ACA features of Medicaid unconstitutional, and that their position is contradicted by the fact that Congress could dismantle Medicaid today and reenact the full Medicaid program, including the expansion, tomorrow without violating the Constitution.

The government argues that the states are wrong to say that other provisions of the ACA render the Medicaid expansion unconstitutionally coercive. The government says that the universal coverage provision does not render the Medicaid expansion unconstitutionally coercive because the universal coverage provision does not force low-income individuals to obtain coverage. (They may be exempt, or they can pay a tax penalty in lieu of coverage.) And the government contends that it is not relevant that it did not provide a "contingency plan": the government reasonably anticipated, based on the states' participation in Medicaid and their coverage beyond what the act requires, that states would accept the new generous federal benefits under the Medicaid expansion.

Third, the government argues that the Court should not strike the entire ACA if it rules that the Medicaid expansion is unconstitutional. The government says that the states did not properly present this argument. But in any event, the government says that the Court should sever the Medicaid expansion from the rest of the ACA, if it holds the Medicaid expansion unconstitutional. (This is not the principal severability argument in the ACA challenges. That argument, over whether the universal coverage provision is severable, is covered in a different article.)

SIGNIFICANCE

Most immediately, this case will impact needy individuals' access to medical care. Medicaid expansion in the ACA sweeps in a substantial new population of eligible individuals—most notably, single adults who earn less than 133 percent of the federal poverty level—and pays for medical services for them. As both parties seem to agree, these individuals do not have meaningful health insurance options. A ruling for the government will ensure that they receive medical services and benefits under Medicaid; a ruling for the states will mean that they do not.

Outside of that most central aspect, the case is also important because it tests the limits of one of Congress's most significant and wide-ranging authorities, the power to spend money. Congress's power to spend money—along with its ancillary power to set conditions on that money—is enormous. This power allows Congress to operate vast programs and to effect sweeping policies in all areas of life, without respect to the bounds on other congressional authorities in the Constitution (such as the Commerce Clause). This power also allows Congress to operate many kinds of cooperative federal-state

programs, achieving joint policy aims through the combined and coordinated efforts of the federal and state governments. Many of these programs, such as Medicaid, have enjoyed a long history and have become embedded in our system of federalism.

At the same time, this broad power can threaten to encroach on state sovereignty. State governments often complain about the heavy hand of the federal government, federal requirements with which they disagree, and a lack of federal financial support for implementing federal requirements—the complaint about so-called unfunded mandates.

This case gives the Roberts Court a chance to jump into the fray and to take a crack at defining the scope of the enormous federal spending power in relationship to the states. In particular, it gives the Court a chance to better define the point at which "pressure becomes compulsion" and thus to restrain federal power to condition its money on states' adoption of certain policies. Because the Court has so far identified only a theoretical limit on this power, this case gives the Court a chance to actualize and concretize the limit set out in *Steward Machine Co.* and *Dole*.

But drawing a line short of actual, direct compulsion—where, for example, the federal government directly commandeers the states—could be tricky business for the Court, as both parties recognize. This is more usually the stuff for the political branches. Moreover, that kind of line-drawing could create uncertainty about the validity of other cooperative federal-state programs—the kind of uncertainty that the Court may shy away from, especially considering the size and reach of some of these programs.

There is another problem with this case. The federal government pays for 100 percent of the Medicaid expansion through 2016, and then a declining portion to 90 percent in 2020. This hardly looks like a state-sovereignty-infringing condition; instead, it looks like a fully funded federal program, at least until 2016. It is not even obvious why the states have standing to challenge this until 2016, when even then they only have to pony up a very modest contribution. The Eleventh Circuit seemed to reject the states' challenge largely on this basis—the fact that the federal government fully funds the expansion through 2016.

There is one particularly interesting doctrinal component to the case. The states argue as if they could peel away the Medicaid expansion as one objectionable condition of the Medicaid program. The government contests this; it says that the Medicaid program, with all its conditions, is a unified whole. This case gives the Court an opportunity to fine-tune its *Dole* analysis by considering each additional, incremental condition to a cooperative program and whether that last condition tips the scale for the whole program. The states' position also suggests that they believe that they should be able to opt out of the expansion without opting out of the preexpansion Medicaid program. Treating the expansion as separate or severable from the rest of the Medicaid program could generate uncertainty in other cooperative federal-state programs, considering the variety of conditions and their evolution.

The Roberts Court has not yet ruled on a federalism challenge to a cooperative federal-state program. But its related cases, and the justices' positions in other federalism cases that raise similar state-sovereignty concerns, suggest that, on the whole, it may not be entirely friendly to this challenge. Moreover, only Justice Scalia remains from the *Dole* Court; he joined the *Dole* majority opinion in full. (Chief Justice Roberts wrote an amicus brief in that case in support of the state, but his position as attorney for an amicus in *Dole* is a poor predictor of his position here.)

Finally, we cannot consider this case, or any challenge to the ACA, without considering the politics. These cases are obviously laden with politics, especially in this presidential election year. This case takes a back seat to the challenge to congressional authority to enact the universal coverage provision. Still, look for both parties to make hay out of whatever ruling the Court issues here. We can hear the sound bites already: states' rights and federal mandates on the one side, and access to health care and economic justice on the other.

Steven D. Schwinn is an associate professor of law at The John Marshall Law School and coeditor of the Constitutional Law Prof Blog. He specializes in constitutional law and human rights. He can be reached at sschwinn@jmls.edu or 312.386.2865.

PREVIEW of United States Supreme Court Cases, pages 233–237.

ATTORNEYS FOR THE PARTIES

For State Petitioners (Paul Clement, 202.234.0090)

For Respondent United States (Donald B. Verrilli Jr., Solicitor General, 202.514.2217)

AMICUS BRIEFS

In Support of Petitioner

American Civil Rights Union and the Social Security Institute (Peter J. Ferrara, 703.582.8466)

Association of American Physicians and Surgeons, Inc., and Individual Physicians (David P. Felsher, 212.308.8505)

Center for Constitutional Jurisprudence, Pacific Legal Foundation, Cato Institute, Congressman Denny Rehberg, and Dr. Jeff Colyer (John C. Eastman, 714.628.2500)

Economists (Steven A. Engel, 202.261.3300)

Independence Institute (David B. Kopel, 303.279.6536)

Indiana State Legislators, the James Madison Institute, and Christopher Conover (Asheesh Agarwal, 317.916.1300)

James F. Blumstein (James F. Blumstein, 615.322.3710)

Texas Public Policy Foundation and 36 Texas State Legislators (Richard A. Epstein, 773.450.4476)

In Support of Respondents

American Hospital Association (Catherine E. Stetson, 202.637.5491)

Catholic Sisters (David J. Burman, 206.359.8426)

David R. Riemer and Community Advocates (Dean A. Strang, 608.257.0945)

David Satcher, M.D., Ph.D. (Samuel R. Bagenstos, 734.764.1358)

Disability Rights Legal Center (Chris M. Amantea, 213.532.2102)

Faithful Reform in Health Care and the WISC Health Care Working Group (Thomas Wayne Coons, 202.408.8400)

Health Law & Policy Scholars and Prescription Policy (Michael Kevin Outterson, 617.353.3103)

Leadership Conference on Civil and Human Rights, the Asian American Legal Defense and Education Fund, National Aids Housing Coalition, the National Economic and Social Rights Initiative, National Health Care for the Homeless Council, the National Law Center on Homelessness & Poverty, Poverty & Race Research Action Council, the Urban Justice Center, and Wild for Human Rights (Martha F. Davis, 617.373.8921)

Michigan Legal Services, Inc., and other Michigan Nonprofit Corporations (Gary A. Benjamin, 313.590.6136)

National Health Law Program, American Academy of Pediatrics, Association for Community Affiliated Plans, Easter Seals, Inc., National Association of County and City Health Officials, National Association of Local Boards of Health, National Council on Aging (Martha Jane Perkins, 919.968.6308)

National Minority Aids Council; AmFAR, the Foundation for Aids Research; HIV Medicine Association; National Alliance of State & Territorial Aids Directors; and Treatment Access Expansion Project (Marc A. Hearron, 202.778.1663)

States of Oregon, Vermont, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, Massachusetts, New Mexico, and New York, and the Governor of Washington (Anna M. Joyce, 503.378.4402)

Service Employees International Union and Change to Win (Stephen P. Berzon, 415.421.7151)

Senate Majority Leader Harry Reid, House Democratic Leader Nancy Pelosi, and Congressional Leaders (Christopher J. Wright, 202.730.1300)

State Legislators from the Fifty States, the District of Columbia, and Puerto Rico (Elizabeth B. Wydra, 202.296.6889)

May Secret Service Agents Be Sued Under the First Amendment for Retaliatory Arrest When the Arrest Was Based on Probable Cause?

CASE AT A GLANCE

The respondent, Steven Howards, had an encounter with former Vice President Richard Cheney in which he spoke with Cheney and then touched him on the shoulder in some fashion and was subsequently arrested. He was charged with state law harassment and detained for a few hours, but the charges were dropped. Howards sued the Secret Service agents who arrested him for violating his civil rights under the First (free speech) and Fourth (unreasonable arrest) Amendments. Only the First Amendment claims have survived to reach the Supreme Court. Because the case was appealed before trial (an interlocutory appeal), the facts are viewed in the light most favorable to Howards.

Reichle v. Howards
Docket No. 11-262

Argument Date: March 21, 2012
From: The Tenth Circuit

by Barbara L. Jones
Minnesota Lawyer, Minneapolis, MN

ISSUES

Does probable cause bar a First Amendment retaliatory arrest claim?

Should Secret Service agents be protected by qualified or absolute immunity under these facts?

FACTS

The conflict began on June 16, 2006, when Steven Howards was walking through a shopping mall in Beaver Creek, Colorado. Vice President Richard Cheney was at the same mall, meeting with members of the public; Howards decided to talk to him. A Secret Service agent, Petitioner Dan Doyle, overheard Howards talking on his cell phone; Doyle heard Howards say that he was going to ask the Vice President how many kids he had killed that day, a reference to the war in Iraq. Doyle decided to "keep an eye" on Howards. Howards spoke to the vice president, telling Cheney his policies were "disgusting," and then somehow touched him on the shoulder. Accounts differ as to the nature of the touch.

Howards then left the vicinity, joining his family with the plan to take his son home. Howards eventually returned to the mall and was approached by Petitioner Virgil Reichle, who asked to speak to him. Howards declined and the agents later said he appeared anxious and had erratic movements. It turned out that Howards had since lost track of his son and was looking for him. He was also carrying an opaque bag, containing a pair of shoes. Howards subsequently said he did not touch Cheney, which he later admitted was untrue, and was uncooperative during the investigation. Reichle became visibly angry when Howards said he should not be questioned for his antiwar views, according to some accounts.

Reichle then arrested Howard for assault. Howards was taken to the local sheriff and detained until his wife could post a $500 bond. State harassment charges were eventually dismissed, and no federal charges were filed.

According to Howards, "after this unconstitutional arrest, Petitioners engaged in a cover-up and ended up accusing each other and their colleagues of having committed multiple federal crimes in conjunction with this case." Reichle has been transferred to Guam.

Howards sued the Secret Service agents for retaliatory arrest. Howards claimed that he was arrested in retaliation for exercising his First Amendment rights and in violation of the Fourth Amendment right to be free from unreasonable seizures. Howards brought his claims under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), which allows a direct action under the constitution in certain circumstances. The district court denied the agents' immunity, saying there were disputed fact issues about the agents' assertions of immunity. It said that the Fourth Amendment claims failed because there was probable cause for the arrest but allowed the First Amendment claims to survive. The Tenth Circuit agreed on the immunity issue and also said that the First Amendment claim could go forward regardless of probable cause because there is credible evidence that the actual motive for the arrest was to punish Howards for protected speech.

There is now a split in the circuits, with the Ninth and Tenth ruling one way on retaliatory arrest and the Second, Sixth, Eighth, and Eleventh ruling another.

CASE ANALYSIS

The petitioner Secret Service agents start off by laying out their understanding of the Supreme Court's precedent on constitutional torts. According the petitioners, the precedent requires balancing citizens' interests in their constitutional freedoms against the "legitimate need for government actors to perform their discretionary duties without constant fear of damage suits." The 1977 case of *Mount Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, set out a balancing test for constitutional tort cases: a plaintiff must show that the defendant took a significant adverse action that was substantially motivated by the plaintiff's exercise of constitutionally protected conduct. If the plaintiff makes that showing, the burden then shifts to the defendant to show that he or she would have reached the same decision in the absence of the protected conduct; in this case, that would mean the Secret Service agents must show that they still would have arrested Howards even if he hadn't exercised his First Amendment speech rights.

The Supreme Court applied this balancing test to retaliatory prosecution cases in 2006 in *Hartman v. Moore,* 547 U.S. 250. The *Hartman* Court held that in a retaliatory prosecution case, the requirement of probable cause provides an objective test for determining whether the allegedly retaliatory action was caused by the plaintiff's exercise of his or her constitutional rights. Establishing the existence of probable cause enables the defendant to show that prosecution would have occurred without a retaliatory motive, the Court said. The petitioners argue that a similar rule should be applied to this case: In other words, if there is probable cause for an arrest, the Court need not enquire more deeply into the officer's motives. A no-probable cause rule for retaliatory arrest would give officers in the field a clearly defined, objective, and workable standard to determine when they cannot arrest without fear of a lawsuit for retaliation.

Here, the petitioners argue, the Secret Service must be protected in its duty to make "potentially life-or-death decisions" to protect the president and other leaders. A probable cause standard is highly probative and readily applied at the outset of a case and would give the law clarity, petitioners continue. "Law enforcement officers … need and deserve an objective, bright-line rule to apply in the field when deciding whether to arrest under circumstances that might give rise to a retaliation claim," they argue. Such a standard, petitioners assert, would also filter out unmeritorious claims early in the legal process—before costly discovery.

The petitioners also point out that four circuits apply *Hartman*'s no-probable cause rule to retaliatory arrest cases. The Ninth and Tenth Circuits permit retaliatory arrest cases "despite" probable cause, they say.

The petitioners then move on to the question of immunity and argue that they should be protected by qualified immunity because the law was unsettled. No Secret Service agent could have anticipated being sued for a retaliatory arrest, they argue.

The petitioners also argue that *Hartman* effectively confers qualified immunity on all criminal investigators and other government actors. "Extending *Hartman* in this fashion would effectively confer qualified immunity from claims of retaliatory arrest on law enforcement officers when the arrest is supported by probable cause."

A qualified immunity standard is even more important for Secret Service agents acting in their protective capacity, petitioners continue. Although agents who will take a bullet for an official will certainly take a lawsuit, qualified immunity is still meaningful, they say.

One of the differences between this case and a retaliatory prosecution case is the presumption of regularity accorded to prosecutors. In *Hartman,* the Court recognized a "presumption of regularity" in prosecutorial decision making, thereby raising the burden of proof for a plaintiff seeking to challenge the actions of a prosecutor. Prosecutors are also immune from liability for the decision to prosecute. Petitioners argue this presumption should be extended to Secret Service agents. Even if the Court does not want to fashion such a rule broadly extending qualified immunity, these specific agents should be immune, they continue.

Finally, the agents argue that the Court has never recognized a *Bivens* action for retaliatory arrest and should not do so now.

Respondent Howards argues that the Tenth Circuit correctly declined to apply the *Hartman* probable cause rule in this case because probable cause is immaterial when the arresting officer is actually motivated by personal animus. According to Howards, *Hartman* properly applies to complex causation cases involving multiple and remote actors resulting in an alleged retaliatory prosecution. In other words, the prosecutor acts as a "filter" and can separate retaliation from an actual crime, applying an objective probable cause standard. Under *Hartman,* "the inquiry into the subjective motives of distant actors who may have played a role in motivating the prosecution is too attenuated from the myriad reasons for the decision made by a prosecutor to prosecute, thus foreclosing a retaliatory prosecution suit," Howards argues. But in a retaliatory arrest case, the actor with the animus is the one taking the adverse action and, Howards points out, the arrestee is not protected by a filter.

The split in the circuits has arisen because the courts extending *Hartman* are wrong and have applied the case without careful analysis, Howards argues. Howards urges the Court to return to the 1977 *Mt. Healthy* standard: A plaintiff must show that he or she was engaged in protected speech, and the defendant's conduct was substantially motivated by retaliation. Under this test, the burden then shifts to the defendant (the Secret Service agents) to prove that the same action would have been taken in the absence of the protected conduct. This test has proved workable for more than 30 years, Howards says.

In contrast, extending *Hartman* to retaliatory arrests as petitioners urge will mean that the basic vitality of the First Amendment will be "bureaucratized" into irrelevancy, as it will constantly be trumped by the pettiest offenses, respondent Howards says. "It will embolden and encourage rogue officers seeking to punish protected speech to search for any legal justification in support of a *post hoc* judicial finding of probable cause to support the suppression of our most fundamental freedom," he concludes.

Moving on to the question of immunity, Howards argues that absolute immunity is unnecessary for Secret Service agents generally and in this case specifically. Law enforcement, including the Secret Service, has been well protected by the doctrine of qualified immunity for decades. Howards notes that there is no common-law tradition of affording Secret Service agents absolute liability.

Furthermore, Howards argues that the petitioners are not entitled to qualified immunity because they violated clearly established law when they arrested him. The unconstitutionality of a law enforcement action taken to punish First Amendment rights is long settled. Qualified immunity does not turn on whether the existence of a damages remedy for unconstitutional conduct is settled.

Howards encourages the Court to reject the argument that national security requires a diminution of civil rights and points out that he did nothing to get arrested besides criticize the vice president. "This case involved no 'split-second' decisions relating to life or death or highly-trained agents thrown into the crucible of a dangerously charged political demonstration," he argues.

Finally, Howards says that a First Amendment retaliatory arrest is cognizable under *Bivens*. Howards argues that the petitioners' stance that the First Amendment claim is not authorized under *Bivens* was raised for the first time on appeal; Howards continues on to address the merits of this claim out of an "abundance of caution." The Court has repeatedly assumed, without deciding, that a First Amendment claim may be brought under *Bivens*. A *Bivens* claim will lie when there are no alternative, existing procedures for protecting the right in question, and the case calls for the kind of remedial determination that is appropriate for a common-law tribunal, with no special factors counseling hesitation before authorizing the litigation, the respondent argues. This is such a case, Howards contends.

SIGNIFICANCE

There may not be a bright-line rule about retaliatory arrests, but there is a bright line drawn between the amici in this case—law enforcement on one side, the American Civil Liberties Union on the other.

The Supreme Court could choose to frame this case as a First Amendment question, concerning itself primarily with the remedy for an arrest purportedly made in violation of a person's First Amendment rights; or it could view the case as a question of qualified immunity. The petitioners mingle the issues by saying that the *Hartman* probable cause standard for retaliatory arrests effectively confers qualified immunity.

The Supreme Court has a reputation, based on cases such as *Citizen's United v. Federal Election Commission* (campaign financing) and *Snyder v. Phelps* (protestors at military funerals), as being very protective of the First Amendment. But a recent study reported in *The New York Times* (http://www.nytimes.com/2012/01/08/us/study-challenges-supreme-courts-image-as-defender-of-free-speech.html?_r=1) indicated that the Court is ruling in favor of free speech at a lower rate than any of the Courts led by the three previous chief justices.

And, the Court also has a reputation for being very protective of official immunity. Just weeks ago, in *Messerschmidt v. Millender,* a case involving the Fourth Amendment challenge to a search, the Court upheld qualified immunity. In so doing, it reversed the Ninth Circuit, which is aligned with the Tenth Circuit in *Reichle*. (The petitioners took care to make this link obvious, likely considering that the Supreme Court frequently doesn't see eye-to-eye with the Ninth Circuit.) On the other hand, in *Messerschmidt,* the Court relied on the existence of a search warrant signed by a magistrate as an indication that the officers acted in objective good faith.

And last January, in *Minneci v. Pollard,* the Court held that prison guards at private prisons contracting with the federal government cannot be sued for constitutional violations under *Bivens* where state tort law provides some remedy.

Discussing these and other cases, Professor Erwin Chemerinsky of University of California, Irvine School of Law, wrote in the *ABA Journal* (http://www.abajournal.com/mobile/article/chemerinsky_new_hurdles_for_civil_rights_cases/) that the Court has started to find that officers have qualified immunity if there is no case on point telling them that their conduct is unconstitutional. "Requiring that the plaintiff have a case on point to overcome qualified immunity will create an obstacle for civil rights plaintiffs in many cases," Chemerinsky wrote. This is one of them.

But quite possibly overriding all the constitutional concerns that can be raised will be the Court's unwillingness to tie the hands of Secret Service agents by exposing them to claims for civil damages. Although the claim that law enforcement shouldn't be second-guessed is raised routinely, that doesn't make it invalid or unpersuasive. "Courts are not well positioned to predict with the necessary degree of precision the impact of recognizing liability on the primary conduct of agents in the field, or to fine-tune any available remedies to assure that important public-safety goals are not unduly compromised," argues the United States in its amicus brief in support of the petitioners.

Barbara Jones is an attorney and managing editor of *Minnesota Lawyer* newspaper. She can be reached at barbara.jones@minnlawyer.com or 651.587.7803.

PREVIEW of United States Supreme Court Cases, pages 238–240.

ATTORNEYS FOR THE PARTIES

For Petitioners Virgil D. Reichle Jr. et al. (Sean R. Gallagher, 303.572.9300)

For Respondents Steven Howards et al. (David A. Lane, 303.571.1000)

AMICUS BRIEFS

In Support of Petitioners Virgil D. Reichle Jr. et al.

FBI Agents Association et al. (J. Brett Busby, 713.223.2300)

International City/County Management Association et al. (Lisa E. Soronen, 202.434.4845)

United States (Donald B. Verrilli Jr., Solicitor General, 202.514.2217)

In Support of Respondents Steven Howards et al.

American Civil Liberties Union (Christopher A. Hansen, 212.549.2606)

In Support of Neither Party

William G. Moore Jr. (Paul Michael Pohl, 412.391.3939)

Does the Supreme Court's Harmless Error Precedent Permit a Determination Based Solely on the Weight of the Untainted Evidence Without Consideration of the Effect of the Error on the Trial?

CASE AT A GLANCE

During petitioner Alexander Vasquez's federal drug conspiracy trial, the government introduced second-hand hearsay evidence that Vasquez's trial counsel had advised him to plead guilty. The district court overruled Vasquez's hearsay objection and admitted the hearsay statements as substantive evidence. On appeal, all panel members agreed that admitting the statements for the truth of the matter asserted was erroneous. But the majority concluded that the error was harmless based solely on its view that the other evidence of guilt was overwhelming. The Court must now decide whether the Seventh Circuit's harmless error analysis is consistent with its harmless error precedents.

Vasquez v. United States
Docket No. 11-199

Argument Date: March 21, 2012
From: The Seventh Circuit

by George A. Couture
Atlanta, GA

ISSUES

Did the Seventh Circuit violate the Supreme Court's precedent on harmless error when it focused its harmless error analysis solely on the weight of the untainted evidence without considering the potential effect of the error on the jury?

Did the Seventh Circuit violate the Sixth Amendment right to a jury trial by determining that a defendant should have been convicted without considering the effects of the district court's error on the jury that heard the case?

FACTS

A federal grand jury returned a two-count indictment against Alexander Vasquez charging him with (1) conspiracy to possess with intent to distribute more than 500 grams of cocaine and (2) attempting to possess with intent to distribute more than 500 grams of cocaine. After a jury trial that included two days of jury deliberation, Vasquez was convicted of count one (conspiracy) and acquitted of count two (attempt).

According to the trial evidence, Vasquez and two codefendants, Joel Perez and Carlos Cruz, were arrested in Arlington Heights, Illinois, on August 5, 2008, following a failed cocaine transaction. The drug deal had been initiated several days earlier when Perez contacted Cruz about getting a kilogram of cocaine. Cruz then contacted Alejandro Diaz, a person Cruz knew to be involved in cocaine deals. Unbeknownst to Cruz, Diaz was a government informant. Cruz, Diaz, and Perez arranged for the deal to occur on August 5.

On that day, Cruz and Perez, with Cruz driving, went to a Shell gas station to meet Diaz. When they arrived, Diaz instructed them to follow him to another location to get the cocaine. Perez then walked next door to a Denny's parking lot where Vasquez was waiting in a black Pontiac Bonneville. Perez called Cruz on a cell phone and told Cruz he was unwilling to follow Diaz; Perez indicated his desire to consummate the deal at their present location. Cruz then came to the Denny's parking lot. Prior to that time, Vasquez had nothing to do with the deal. He was not involved in the negotiations; was never mentioned to Diaz; and was unknown to Cruz, the government's only testifying cooperating witness. Indeed, Cruz testified that Vasquez was not to play any role in the transaction.

Shortly after Cruz got to the Denny's parking lot, Diaz called Cruz to find out where Cruz and Perez were. Cruz told Diaz that Perez wanted to complete the deal in the parking lot. Perez told Cruz to tell Diaz that "we got the money here." Cruz also testified that Vasquez repeated the statement, "tell him we got the money here." A few minutes later, law enforcement agents surrounded the parking lot and approached the Bonneville to arrest Cruz, Perez, and Vasquez. Cruz, who was outside of the car, surrendered and was arrested. Vasquez put the Bonneville in reverse and struck two police cars leaving the parking lot. A drug enforcement agent unsuccessfully tried to get Vasquez to stop as he exited the parking lot.

A few minutes later, police found the Bonneville abandoned in a nearby Walmart parking lot. Shortly thereafter, they spotted and separately apprehended both Vasquez and Perez. At the time of their arrests, Vasquez was carrying a cell phone and Perez had two cell

phones. Phone records later revealed that there were calls between Vasquez's cell phone and both of Perez's cell phones on the day of arrest and the day before.

The police towed, and subsequently searched, the Bonneville. Police found $23,000 cash in a hidden compartment in the passenger side of the dashboard. The Bonneville belonged to Perez and his wife, Marina Perez. There was no evidence that Vasquez knew about the hidden compartment or was connected to the $23,000.

At the trial, and over Vasquez's objection, the government introduced evidence pursuant to Fed. R. Evid. 404(b) of his involvement in a 2002 cocaine transaction involving Perez that resulted in a conviction. The district court found such evidence admissible to show Vasquez's knowledge and intent under Rule 404(b).

Although Vasquez did not testify at trial, he did present the testimony of several witnesses, including Perez's wife, Marina. Marina testified that Perez had asked her to pick him up at the parking lot where the failed drug deal took place. Further, Marina testified that she asked Vasquez to go in her place because she was having a disagreement with Perez. She told Vasquez to use the Bonneville because it was blocking Vasquez's car which was parked in the garage. Marina also testified that this was the only reason Vasquez went to the parking lot.

After Vasquez rested his case-in-chief, the district court granted the government's request for an emergency continuance and allowed the government to recall Marina for further questioning. The court also admitted recorded telephone calls between Marina and Perez, which had been recorded while Perez was incarcerated. Although Vasquez objected to the admission of any recordings based on hearsay, the district court allowed the government to introduce the recordings of four calls for the truth of the matter asserted. As a result, the jury heard one call that included secondhand hearsay that Vasquez's trial counsel had encouraged Vasquez to plead guilty. In another call, Marina told Perez that Vasquez's trial counsel told her that if they went to trial, "everybody is going to lose."

During closing arguments, the government emphasized the recorded calls between Marina and Perez. While deliberating, the jury requested a transcript of Marina's testimony. Eventually, the jury returned a split verdict, convicting Vasquez of conspiracy, but acquitting him of attempt.

On appeal to the Seventh Circuit, Vasquez pressed his claim that admission of the recorded calls was error. A divided panel affirmed Vasquez's conviction. *United States v. Vasquez,* 635 F.3d 889 (7th Cir. 2011). All panel members agreed that it was erroneous to admit the recorded statements for the truth of the matter asserted. But the majority concluded that the error was harmless. Quoting *United States v. Emerson,* 501 F.3d 804 (7th Cir. 2007), the majority stated "[t]he test for harmless error is whether, in the mind of the average juror, the prosecution's case would have been 'significantly less persuasive' had the improper evidence been excluded." It then noted the burden is on the government to prove "that a reasonable jury would have reached the same verdict without the challenged evidence." While the majority stated the "issue is close," it concluded the error was harmless based solely upon the other evidence. Specifically, the majority found the following evidence overwhelming: Vasquez's flight from the scene; cell phone logs showing several Perez and Vasquez contacts leading up to the aborted deal; and the similarity between the instant offense and Vasquez's 2002 drug conviction, i.e., Perez was involved and money was hidden in a car. This evidence, the majority concluded, "would have moved the jury to convict Vasquez without a nudge from anything it heard in the government's rebuttal case."

Judge Hamilton dissented and concluded the admission of the recordings was not harmless error and that Vasquez's conviction should be reversed and remanded for a new trial. Judge Hamilton's harmless error analysis was quite different than the majority's. He disagreed with the majority's conclusion that admitting the recordings was harmless because, in his characterization, "the government had so much other evidence." Relying upon the harmless error standard from *Neder v. United States,* 527 U.S. 1 (1999), Judge Hamilton noted the harmless error analysis does not call upon appellate courts to "become in effect a second jury," but to determine "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" He emphasized this standard is not "easy to satisfy" and identified four factors supporting his conclusion that the error was harmful: (1) "the modest strength of the government's evidence"; (2) "the prejudicial character of the evidence that was admitted erroneously"; (3) the jury's acquittal of the attempt charge; and (4) the importance that the government itself attributed to the erroneously admitted evidence during trial.

With respect to the strength of the government's case, Judge Hamilton noted the government's case was not as strong against Vasquez as it was against his codefendants Perez and Cruz. For example, both Perez and Cruz were recorded making arrangements for the drug transaction and showed up at the agreed upon time and place. In contrast, Vasquez was not recorded at all and neither Cruz, Diaz, nor the agents expected Vasquez to show up at the buy. Still, Judge Hamilton recognized there was circumstantial evidence against Vasquez, including Vasquez's presence at the scene of a planned drug buy driving a car with $23,000 cash in a hidden compartment and his dramatic and dangerous flight. In addition, Judge Hamilton noted Vasquez's 2002 drug conviction with Perez involving similarly hidden cash, as well as Cruz's trial testimony that Vasquez told Perez "tell [Diaz] we got the money here." But Judge Hamilton noted that the credibility of Marina's testimony was at least debatable and she offered an innocent explanation for Vasquez's presence on the scene in the Bonneville with the hidden cash. Judge Hamilton also discounted the importance of Cruz's testimony because of his status as a cooperating witness and the fact his disclosure of Vasquez's "money" comment came only a week prior to his testimony, long after he had been debriefed several times by law enforcement. As a result, Judge Hamilton concluded the jury could have treated the "money" comment as a late and false invention. While Judge Hamilton acknowledged the strength of the 404(b) and flight evidence, he cautioned against giving such evidence too much weight as evidence of guilt.

In sharp contrast to the majority, which did not address the prejudicial nature of the error, Judge Hamilton focused on the prejudicial effect. In his judgment, the erroneously admitted evidence "was just about as prejudicial as one could expect to encounter in a trial." "The jury heard that Vasquez's lawyer—the man who would soon make a closing argument asking them to find reasonable doubt in the government's case—had told Vasquez that he should plead guilty. …" Judge Hamilton reasoned that a juror who heard and believed that

statement would discount anything that lawyer said. He compared the error to evidence of a defendant's withdrawn guilty plea.

Furthermore, Judge Hamilton argued that both the jury's and the government's conduct provided "strong indications" the error was not harmless. For example, the jury acquitted Vasquez of the attempt charge, signaling that the jury viewed the case as close. Also, the government's extraordinary efforts to obtain and introduce the tape recordings, i.e., its weekend emergency motion to continue following Marina Perez's testimony, and its emphasis on the recorded statements in closing argument, showed the importance of Marina's testimony and the government's corresponding need to impeach her. In light of all these factors, Judge Hamilton concluded he was not convinced beyond a reasonable doubt that the jury would have convicted Vasquez absent the error.

CASE ANALYSIS

Generally, when an appellate court determines that an error occurred during a criminal proceeding, it may still affirm the trial court's judgment by finding that the error was harmless. See 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."); Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). In *Chapman v. California,* 386 U.S. 18 (1967), the Supreme Court explained that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of a conviction." The purpose of the harmless error analysis is to avoid "setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." Thus, errors amendable to review by harmless error are known as "trial errors." *Arizona v. Fulimante,* 499 U.S. 279 (1991). Conversely, there are a small number of "structural errors" that are never considered harmless, and thus not subject to harmless error review, because they fundamentally undermine the reliability and fairness of the trial, e.g., the denial of the right to counsel.

If the error is a trial error, the harmless error standard varies depending upon whether the error is constitutional or nonconstitutional. As the *Chapman* Court asserted: "before a federal constitutional error can be held harmless, the [reviewing] court must be able to declare a belief that it was harmless beyond a reasonable doubt." Under *Chapman,* the government must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." The *Chapman* Court itself criticized overemphasis on finding errors harmless based upon overwhelming evidence of guilt. Alternatively, to find a nonconstitutional error harmless, a court must only find "that the judgment was not substantially swayed by the error." *Kotteakos v. United States,* 328 U.S. 750 (1946). Thus, unless the Court concludes that the Seventh Circuit's harmless error analysis itself violated the Sixth Amendment, as Vasquez argues, the hearsay error is probably nonconstitutional error subject to the *Kotteakos* standard.

Vasquez contends that the Seventh Circuit failed to properly apply the Supreme Court's harmless error precedents because it determined the erroneously admitted evidence was harmless without considering the error's effect. In support, Vasquez argues that the Court has consistently applied the same mode of harmless error analysis since the enactment of the first harmless error statute in 1919. 28 U.S.C. § former 391 (1919). Under this standard, the Court's original cases interpreting harmless error were careful to avoid substituting the Court's judgment for that of the jury. See, e.g., *Weiler v. United States,* 323 U.S. 606 (1945); *Bollenback v. United States,* 326 U.S. 607 (1946). Instead, they required consideration of an error's effect in the "context of the entire record." This is so, Vasquez emphasizes, because the purpose of the harmless error analysis is to determine whether the error influenced the jury. He relies heavily on *Kotteakos,* which he asserts is full of warnings for courts about conducting harmless error analysis to avoid substituting their own judgment for that of the jury, e.g., "it is not the appellate court's function to determine guilt or innocence."

Furthermore, Vasquez argues that the Court has repeatedly warned against conducting harmless error analysis that only considers whether the defendant would have been convicted in an error-free trial. *Kotteakos; Bihn v. United States,* 328 U.S. 633 (1946). He claims the proper inquiry must include consideration of the weight of the evidence, but it cannot be the sole criteria. In the years since *Kotteakos* was decided, Vasquez emphasizes the Court has repeatedly stated the proper focus is the effect on the jury. See, e.g., *Fishwick v. United States,* 329 U.S. 211 (1946); *Carpenters v. United States,* 330 U.S. 395 (1947). Further, Vasquez argues that the Supreme Court's analysis in every case applying the harmless error rule since the enactment of 28 U.S.C. § 2111—Congress' reenactment in 1949 of the harmless error statute—has been consistent with *Kotteakos*. See, e.g., *Steward v. United States,* 366 U.S. 1 (1961); *Fahy v. Connecticut,* 375 U.S. 85 (1963); and *Chapman*.

Moreover, Vasquez argues the Seventh Circuit's analysis, and other courts as well, misinterpreted the Court's harmless error jurisprudence by focusing on isolated statements in a few of the Court's opinions. For example, Vasquez traces the origins of the overwhelming evidence standard to language in two cases, *Harrington v. United States,* 395 U.S. 250 (1969), and *Schneble v. Florida,* 405 U.S. 427 (1972). In both of these cases, Vasquez argues the Court repeated the *Kotteakos* and *Chapman* rules, but also proffered statements which some courts have taken out of context. In *Harrington,* the Court stated that "the case against Harrington was so overwhelming that we conclude the violation of *Bruton* [*v. United States,* 391 U.S. 123 (1968)] was harmless beyond a reasonable doubt." In *Schneble,* the Court concluded "that the 'minds of the average jury' would not have found the State's case significantly less persuasive had the testimony … been excluded." As a result, Vasquez contends these courts have "subverted the original purpose of the harmless error analysis" in favor of a test that only focuses on whether there was overwhelming evidence of guilt apart from the error. He argues the "overwhelming evidence" test deletes the error and then merely asks the reviewing court to speculate about the outcome of an error-free trial that never happened. Vasquez contends such an analysis is at odds with the Court's consistent application of a harmless error rule that focuses on an error's potential impact on the jury's verdict.

Vasquez asserts the Sixth Amendment right to a jury trial compels the application of a harmless error standard that takes into account the effect of the error. Anything less, Vasquez argues, is tantamount to a judge making a determination of guilt that the Sixth Amendment

requires the jury to make, not judges. According to Vasquez, when a judge speculates about the outcome of a hypothetical error-free trial based upon otherwise untainted evidence, the judge is invading the province of the jury.

Finally, Vasquez argues the majority opinion applied a harmless error test that the Supreme Court has never endorsed. Consequently, Vasquez contends the majority opinion failed to consider the effect of the error in the context of his entire trial. Vasquez reiterates the same points cited by Judge Hamilton's dissent: that the government's case was not overwhelming; that it was based largely on circumstantial evidence that was contested; that he presented evidence of actual innocence through Marina Perez's testimony, which the government could not disprove; and the government relied heavily on the recorded statements in questioning and in closing argument. Under any harmless error standard, Vasquez claims the error was significant and his conviction should be reversed.

In response, the government argues that the erroneous admission of tape-recorded conversations between Marina and Perez for the truth of the matter asserted was harmless because it had no effect on the outcome. The government maintains the Seventh Circuit majority articulated the correct harmless error standard. Specifically, the government argues the Seventh Circuit explained that its inquiry was based on a review of the "evidence as a whole" and asked whether a "reasonable jury would have reached the same verdict without the challenged evidence." Moreover, the government contends, the majority's statement that the trial evidence "would have moved the jury to convict Vasquez without a nudge" from the erroneously admitted evidence reflects the court's conclusion that the error did not affect the verdict. That the court of appeals did not explain its rational was simply an "economical approach to the fact-bound portion" of its opinion, in the government's view, and generally consistent with harmless error analysis in the courts of appeals. The government notes the Supreme Court has never mandated lengthy explanations of such matters. See *Jones v. United States,* 527 U.S. 373 (1999) (noting that a "detailed explanation" of a federal court's harmless error analysis may not be necessary); *Sochor v. Florida,* 504 U.S. 527 (1992) (concluding that state court need not use "a particular formulaic indication" before their harmless error decisions will pass scrutiny). The government does note that *Sochor* remanded the case to state supreme court for application of proper harmless error standard where the court did "not explain or even 'declare a belief' that [the constitutional error] 'was harmless beyond a reasonable doubt' in that 'it did not contribute to the [sentence] obtained'" (quoting *Chapman*). Additionally, the government argues that inferences drawn from jury conduct are unreliable grounds for evaluating harmlessness. See, e.g., Fed. R. Evid. 606(b) (excluding from evidence any testimony from a juror about "any juror's mental processes concerning the verdict" or "the effect of anything on that juror's or another juror's vote"); *Yeager v. United States,* 129 S. Ct. 2360 (2009) (recognizing that it would be mere "conjecture" to ascribe a basis for jurors' actual votes on the basis of speculation of what occurred during deliberations).

The government emphasizes that almost all trials have errors and that the purpose of the harmless error doctrine is to avoid unjustifiable and significant social costs of unnecessary retrials. According to the government, harmless error jurisprudence achieves these goals by focusing on the trial's underlying fairness and assessing whether the error likely altered the trial's outcome. Further, the government argues the task of distinguishing between harmful and harmless errors "embodies three basic elements." First, the government contends harmless error analysis must reflect an appropriate level of confidence in the verdict, depending upon whether the error is of the constitutional or nonconstitutional type. In the case of nonconstitutional error, the standard is whether there is a "fair assurance" that the error did not have "substantial and injurious effect" on the verdict. *Kotteakos,* 328 U.S. at 765. By contrast, for constitutional errors, the government argues, pointing to *Chapman,* the test is confidence beyond a reasonable doubt that a constitutional error did not change the outcome.

Second, the government asserts the analysis must be objective, citing *Kotteakos,* and avoid any subjective inquiry into the unknowable deliberative process of the jury. Fed. R. Evid. 606(b), *supra; Harrington,* 395 U.S. at 254; *Yates v. Evatt,* 500 U.S. 391 (1991) (stating that harmless error analysis is not "a subjective enquiry into the jurors minds"). Third, the government submits that the objective nature of the harmless error inquiry must take into account the record as a whole, with due consideration of the jury instructions and the assumption that rational jurors follow instructions. To this third factor, the government argues harmless error analysis must assume that the jury was rational and that the objective analysis "weighs the probative force of the evidence that the jury *presumably* considered against the likely probative force of the error [ ]" (emphasis added). If, after applying these considerations, the government's case is sufficiently strong to give the required level of confidence, "fair assurance" for nonconstitutional errors or confidence beyond a reasonable doubt for constitutional errors, the error is harmless and the jury's verdict should be affirmed.

Additionally, the government argues the Seventh Circuit properly followed these principles in Vasquez's case and should be affirmed. The government emphasizes that the majority reviewed "the evidence as a whole," determined that a "reasonable jury would have reached the same verdict without the challenged evidence," and otherwise explained that nothing the jury "heard in the government's rebuttal case" would have "nudge[d]" the jury to convict.

In response to Vasquez's argument that the majority failed to consider the effect of the error, the government argues consideration of the impact of the error does not undermine the majority's opinion that the error was harmless. This is so, the government contends, because the court can conclude the error was harmless if the government's case is sufficiently strong. Further, in response to Vasquez's argument that his Sixth Amendment right to jury trial was violated by the majority's harmless error analysis, the government argues the majority's assessment was based upon the entire record and nothing but a "typical" appellate court process for determining whether a new trial remedy was in order. In other words, in finding the error harmless, the court did not find the defendant guilty or otherwise vitiate the jury's verdict.

Finally, even if the Court were to engage in a fact-bound record inquiry, which is unnecessary given the appellate court's evaluation of the whole record, the government asserts the hearsay error was harmless. The government submits its evidence against Vasquez was strong; the defense case was comparatively weak; and the prejudicial impact was not significant.

SIGNIFICANCE

The harmless error doctrine may be the most cited doctrine in criminal law. As a result, this case may be incredibly consequential. Harmless error doctrine separates those injuries to individual rights that warrant a remedy, i.e., new trial or new sentencing, from those errors that do not. Although there is room to debate whether the mode of harmless error analysis can be outcome determinative, the dueling opinions of the Seventh Circuit majority and dissent in this case suggests the analytical framework can make the difference between a new trial and an affirmance.

Not surprisingly, the parties disagree about the significance of the Court's ruling generally, and to Vasquez in particular. If the Court concludes that the Seventh Circuit's harmless error analysis was flawed, such a holding would be very significant to Vasquez who is currently serving a 20-year sentence. Beyond the instant case, a ruling in Vasquez's favor may obligate appellate courts to undertake a more detailed evaluation of the effect of errors and provide more detailed explanations as to their belief that errors are harmless. As Vasquez argues, "the effect-on-the-verdict test must review the entire record to determine the nature and effect of the error." The scope of this inquiry is necessarily more involved because it considers the extent to which the error was emphasized and whether the jury's verdict or conduct indicates the error was influential. In contrast, the overwhelming evidence test only looks at the untainted evidence. It is possible the Court could make further distinctions between the methods of harmless error review for constitutional and nonconstitutional errors, given the Court has already developed different standards applicable to each kind of violation.

Moreover, there are a potentially large number of cases that could be affected by the Court's ruling. According to the Administrative Office of the United States Courts, during the 12-month period ending March 31, 2011, there were more than 12,000 federal criminal filings in the United States Courts of Appeals. Although the vast majority of cases affirmed the criminal defendants' convictions and sentences, there were undoubtedly many cases in which the courts found error but concluded such error was harmless.

Further, to the extent the Court's ruling explicates the method by which constitutional errors are reviewed for harmless error, its ruling will necessarily impact state court evaluations of constitutional errors. *Chapman* held that before a federal constitutional error may be held harmless by a reviewing state court, the Court must be able to declare it was harmless beyond a reasonable doubt.

Finally, the retroactivity of the Supreme Court's ruling to collateral cases is less clear and depends upon whether the rule announced is considered a new or old rule. Generally speaking, new rules of constitutional criminal procedure will not be applied retroactively to cases that have become final before the new rules are announced unless they fall within two narrow exceptions. See *Teague v. Lane,* 489 U.S. 288 (1989).

George A. Couture is a federal judicial clerk in Atlanta, Georgia. He can be reached at georgecouture@gmail.com.

PREVIEW of United States Supreme Court Cases, pages 241–245.

ATTORNEYS FOR THE PARTIES

For Petitioner Alexander Vasquez (Beau B. Brindley, 312.765.8878)

For Respondent United States (Donald B. Verrilli Jr., Solicitor General, 202.514.2217)

AMICUS BRIEFS

In Support of Petitioner Alexander Vasquez

Jeffrey K. Skilling (Daniel M. Petrocelli, 310.553.6700)

National Association of Criminal Defense Lawyers (John D. Cline, 415.322.8319)

In Support of Respondent United States

Texas et al. (Jonathan F. Mitchell, 512.936.1695)

Is Life Without the Possibility of Parole Cruel and Unusual Punishment for 14-Year-Old Defendants?

CASE AT A GLANCE

In 2005, the U.S. Supreme Court ruled that juveniles could not receive the death penalty. In 2010, the Court ruled that juveniles could not receive life in prison without the possibility of parole (LWOP) for nonhomicide offenses. Now, the Court examines whether two young juveniles—14-year-olds at the time of their offenses—can receive LWOP sentences for homicide offenses.

Miller v. Alabama* and *Jackson v. Hobbs
Docket Nos. 10-9646 and 10-9647

Argument Date: March 20, 2012
From: The Alabama Court of Criminal Appeals and The Supreme Court of Arkansas

by David L. Hudson Jr.
Vanderbilt Law School, Nashville, TN

ISSUE

Does imposition of a life-without-parole sentence on a 14-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children?

FACTS

Miller v. Alabama

In 2002, 14-year-old Evan Miller, a victim of serious domestic abuse who tried to kill himself five times, lived with his mother in a trailer in Lawrence County, Alabama. He lived next door to 52-year-old Cole Cannon. When Cannon came over to the Miller trailer, Evan and another juvenile went to Cannon's trailer to steal. Cannon then returned to his home, finding the two youths. Cannon, Miller, and the other youth smoked marijuana together and Cannon drank. Cannon fell asleep, and Miller and the other youth robbed Cannon, who awoke. Miller and the other youth then beat Cannon with a baseball bat. They later set Cannon's trailer on fire and Cannon burned to death.

A jury convicted Miller of capital murder and sentenced him to life without parole (LWOP). The Alabama appellate courts affirmed his conviction and sentence. He also filed a petition for habeas corpus, asserting that the sentence was excessive and violated the Eighth Amendment's prohibition against cruel and unusual punishment in light of the Supreme Court's decision in *Roper v. Simmons,* 543 U.S. 551 (2005). In *Roper,* the Court ruled that the imposition of the death penalty on a juvenile murderer violated the Eighth Amendment.

Jackson v. Hobbs

In November 1999, Kuntrell Jackson, a 14-year-old boy, walked through the Chickasaw Courts projects in Blytheville, Arkansas, with two other young teenaged youths—15-year-old Derrick Shields and Jackson's 14-year-old cousin, Travis Booker. They discussed the idea of robbing a video store. The three proceeded to the store where Jackson originally stayed outside; sometime during the robbery, Jackson entered the store. During the robbery, Shields wielded a shotgun and shot the store clerk after she refused to give him money.

The clerk died from the gunshot wounds. The prosecutor charged Jackson, who had a juvenile record, as an adult on felony-murder charges. In July 2003, a jury convicted Jackson of felony capital murder and aggravated robbery. A judge sentenced him to life in prison without the possibility of parole. The Arkansas Supreme Court affirmed his conviction and rejected his constitutional arguments, including that he should have been advised of his *Miranda* rights.

In January 2008, Jackson filed a habeas corpus petition, asserting that the sentence was excessive in light of the Supreme Court's decision in *Roper*. A trial court rejected his motion in September 2008. He appealed to the Arkansas Supreme Court. During the pendency of that appeal, the U.S. Supreme Court ruled in *Graham v. Florida,* 560 U. S. __ (2010), that the imposition of a sentence of life in prison without the possibility of parole for a juvenile convicted of a nonhomicide offense violated the Eighth Amendment.

In February 2011, the Arkansas Supreme Court denied Jackson's petition, reasoning that *Roper* applied to death penalty cases and *Graham* applied to juveniles convicted of nonhomicide offenses. Consequently, according to the Arkansas Supreme Court, neither case applied to Jackson's situation.

Both juveniles applied to the Supreme Court, which granted certiorari to both and will hear their cases on the same day.

CASE ANALYSIS

Ultimately, this case may come down to which "difference" is more important—death or children. The U.S. Supreme Court famously wrote in *Gregg v. Georgia,* 428 U.S. 153 (1976) that "Death is different." But, the Court has issued a series of rulings—most notably *Roper* and *Graham*—which identify that children are different in the criminal justice system.

A key aspect of the Court's Eighth Amendment jurisprudence is the disproportionality principle—that a sentence should not be grossly disproportionate to the underlying criminal offense or offenses. Petitioners contend that a LWOP sentence for 14-year-old juveniles is a disproportionate sentence, that juveniles are still salvageable, and should receive a life prison term with the possibility of parole rather than be locked up for the rest of their lives.

The petitioners assert that the "constitutional logic of *Roper* and *Graham* control this case." The Court in both decisions emphasized that juveniles lack the maturity of adults and often act more impulsively without considering the consequences of their actions. Because of the undeniable differences between juveniles and adults, the Court has explained that certain sentences, when applied to juveniles, violate the Eighth Amendment. In *Roper,* the Court ruled that those who commit murder as juveniles cannot receive the death penalty. In *Graham,* the Court ruled that those who are convicted of nonhomicide offenses as juveniles should not receive life in prison without the possibility of parole. The *Graham* Court wrote that "life without parole is a particularly harsh punishment for a juvenile."

Crucial to the rulings in *Roper* and *Graham* was the extreme rarity of the sentences. Petitioner Jackson asserts that there are very, very few sentences of life in prison without the possibility of parole for 14-year-old juveniles; according to Jackson, there are only 79 such individuals sentenced nationwide. Several states have passed laws that prohibit the imposition of LWOP on juveniles at a young age. "The near-complete absence of express legislative approval of such a sentence for 13- and 14-year-olds reflects a consensus that the sentence would be excessively harsh punishment as applied to a young adolescent," the petitioner wrote. Jackson also points out that there is a "global consensus" against such harsh sentences: "The United States stands alone in sentencing children to die in prison without hope of ever winning release."

In response, respondent Ray Hobbs (the director of the Arkansas Department of Correction) contends that Jackson's sentence, "while severe," does not violate the Eighth Amendment, because Jackson participated in a capital murder—the most serious of all offenses. The gravity of the offense, respondent asserts, makes *Graham* inapplicable. "A juvenile murderer is therefore far more culpable than a juvenile who commits a nonhomicide offense and deserves a greater punishment," respondent argues.

Respondent and its amici also point out that *Roper* implicitly recognized the validity of the LWOP sentence as an alternative for juvenile murderers. The Court in *Roper* wrote: "to the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." Respondents contend that states should have the power to reserve the most egregious punishment for the most egregious juvenile offenders. Just because a sentence is unusual does not mean that it is unconstitutional, respondents conclude.

SIGNIFICANCE

These cases afford the Court another opportunity to speak to whether there is a clear dividing line between adults and juveniles in the criminal justice system. In the 1980s, legislators focused on the "adult crime, adult time" mantra and increased penalties for juvenile offenders, made it easier to transfer juvenile offenders to adult court, and passed automatic waiver laws.

Miller and *Jackson* are significant for those who believe fervently that juveniles should be treated differently. For example, the amicus brief of former Juvenile Court judges emphasize that an LWOP sentence for a juvenile ignores the reality that many juveniles should be given a second chance and an opportunity at education and rehabilitation. The case is also significant for state and local prosecutors—at least some of whom believe that the sentencing schemes should be left to the determination of individual states without, as the National District Attorneys Association asserts in its amicus brief, turning the "Eighth Amendment into a national code of juvenile justice."

Lastly, these cases are of great importance to crime victim organizations. These organizations assert that the harsh LWOP should be available for the worst of juvenile offenders; such a sentence offers finality to the criminal process for the victims' families rather than the recurring parole process. The National Organization of Victims of Juvenile Lifers asserts that a categorical ban against LWOP on juvenile murderers "would cause great harm to victims' families and undermine their right to participate in the criminal justice process."

The case also affords the justices another opportunity to spar over the role of international law in evaluating the appropriateness of criminal punishment under an "evolving standards of decency" standard. In *Atkins v. Virginia,* 536 U.S. 304 (2002), the Court disagreed over the relevance of how other countries treated mentally retarded inmates. The justices presumably could use these cases as a vehicle for addressing the importance (or lack thereof) of international laws and norms.

David L. Hudson Jr. is an attorney, author, and law teacher based in Nashville, Tennessee. He serves as a First Amendment Scholar for the First Amendment Center and teaches law classes at Vanderbilt Law School. He can be reached at dhudson@fac.org.

PREVIEW of United States Supreme Court Cases, pages 246–248.

ATTORNEYS FOR THE PARTIES

For Petitioners Evan Miller and Kuntrell Jackson (Bryan A. Stevenson, 334.269.1803)

For Respondent Alabama (John C. Neiman Jr., 334.353.2187)

For Respondent Arkansas (Kent G. Holt, 501.682.5322)

AMICUS BRIEFS

In Support of Petitioners Evan Miller and Kuntrell Jackson

American Bar Association (William T. Robinson III, 312.988.5000)

American Psychological Association (Danielle Spinelli, 202.663.6000)

Amnesty International (Constance De la Vega, 415.422.2296)

Certain Family Members of Victims Killed by Youths (Angela C. Vigil, 305.789.8904)

Former Juvenile Court Judges (Jonathan D. Hacker, 202.383.5300)

J. Lawrence Aber (Stephen M. Nickelsburg, 202.912,5000)

Jeffrey Fagan (Carl Micarelli, 212.909.6000)

Juvenile Law Center (Marsha L. Levick, 800.875.8887)

Professor of Law and His Students from Moritz College of Law at Ohio State University (Douglas A. Berman, 614.688.8690)

For Respondents Alabama and Arkansas

Michigan (John J. Bursch, 517.373.1124)

National District Attorneys Association (Christopher Landau, 202.879.5087)

National Organization of Victims of Juvenile Lifers (Thomas R. McCarthy, 202.719.7476)

Can a Child Conceived 18 Months After the Death of One of Its Biological Parents Be Eligible for Survivors Benefits Under Title II of the Social Security Act?

CASE AT A GLANCE

Karen Capato gave birth to twins conceived after her husband, Robert, had passed away. Karen then applied for Social Security survivors benefits on behalf of the twins. The claim was denied as the twins were unable to inherit property under the state intestacy law. The Court must now determine whether a child conceived after the death of one of its biological parents may be eligible for survivor rights under Title II of the Social Security Act (42 U.S.C. § 401, et seq.) when that child is unable to inherit from the deceased parent under state intestacy law.

Astrue v. Capato
Docket No. 11-159

Argument Date: March 19, 2012
From: The Third Circuit

by Margaret Robison Kantlehner
Elon University School of Law, Greensboro, NC

ISSUE

Can a child conceived after the death of one of its biological parents be eligible for survivor rights under Title II of the Social Security Act (42 U.S.C. § 401, et seq.) when that child is unable to inherit from the deceased parent under state intestacy law?

FACTS

In 1999, Robert Capato married Karen Kuttner in New Jersey. A few months later, he was diagnosed with esophageal cancer. The Capatos recognized that Robert's cancer treatments could leave him sterile, so Robert began depositing semen in a sperm bank in Florida. The Capatos intended to use the deposited semen for purposes of in vitro fertilization. Robert seemed to begin improving, and, in August 2001, Karen gave birth to their naturally conceived son, Devon. Robert's health then took a turn for the worse and the Capatos refocused on the possibility of in vitro fertilization. Although the Capatos swore before a notary that "[a]ny children born to us, who were conceived by the use of our embryos shall in all respects and for all purposes, including but not limited to, descent of property, [be] children of our bodies," Robert's will did not include this provision at the time of his death. Robert died in March of 2002. Eighteen months later, Karen gave birth to twins conceived via in vitro fertilization with Robert's semen.

Karen applied for Social Security survivors benefits on behalf of her twin children. The twins' claim was denied (Devon had qualified for survivors benefits). Karen applied and the matter was heard by an Administrative Law judge, who affirmed the denial. According to the judge, the children would need to show eligibility to inherit property under the state intestacy law of the wage earner's state of domicile at death. The judge determined the domicile at death of the wage earner, Robert, to be Florida.

The Social Security Appeals Council denied review. The U.S. District Court for the district of New Jersey affirmed the denial of benefits.

Karen then appealed to the United States Court of Appeals for the Third Circuit, which reversed the lower court. The Third Circuit rejected the assertion that state intestacy law and § 416(h)(2)(A) govern the eligibility for survivor benefits of all children conceived after a parent's death. The court said that § 416(e) clearly resolved the status of the children, so that there was no need to resort to § 416(h)(2)(A). The court went on to state that in order to agree with the Commissioner of Social Security, one would have to find that the biological children of a married couple were not children within the meaning of § 402(d) unless those children can inherit under the intestacy laws of the domicile of the decedent. The court found that the Capato twins were children within the meaning of the act, and remanded the case to the district court for a determination of whether the twins were dependent on Robert Capato, as is required to receive benefits under the act.

The Supreme Court of the United States granted the Commissioner of Social Security's petition for certiorari.

CASE ANALYSIS

Title II of the Social Security Act (42 U.S.C. § 401) allows children to receive benefits following the death of an insured parent. To qualify, the child must fit the statutory definition in § 416(e) which is "the child or legally adopted child of an individual."

In addition to the definition in § 416(e), § 416(h) provides other ways to determine whether an applicant qualifies as a "child."

1. Applicant is deemed a "child" if the insured and other parent went through a marriage ceremony that would have been valid but for certain legal impediments (§ 416(h)(2)(B))

2. Applicant is deemed a "child" if the insured had acknowledged paternity in writing (§ 416(h)(3)(C)(i))

3. Applicant is deemed a "child" if there is satisfactory evidence that the insured was the applicant's parent and the insured was living with or supporting the applicant at the time of the insured's death (§ 416(h)(3)(C)(ii))

4. Applicant is deemed a "child" if applicant can take personal property from the deceased under state intestacy law (§ 416(h)(2)(A))

If the applicant is deemed a "child" under one of these four tests, then the child will qualify for Social Security survivors benefits under § 416(h).

Under § 402(d)(1)(A)-(C) a child must also

1. File an application for benefits

2. Be unmarried and under the age of eighteen, and

3. Be dependent on the deceased wage earner at the time of the deceased wage earner's death

Petitioner, the Commissioner of Social Security, argues that the Social Security Administration and the district court were correct in holding that under § 416(h)(2)(A), Florida intestacy law must be applied to determine whether the twins should be considered children under the act. Since the twins would not inherit personal property under Florida intestacy law, they are not eligible for survivors benefits. Petitioner further argues that the legislative history of the act supports its position that Congress intended that children who could not inherit under state intestacy laws were ineligible to receive survivors benefits. Petitioner, citing *DeSylva v. Ballentine,* 351 U.S. 570 (1956), explains that although the term "children" in part describes a purely physical relationship, it also describes a legal status derived from the state law that creates those legal relationships. Even in the context of federal programs, child-parent relationships are generally determined by state law. Petitioner asserts that the court of appeals has created a fifth category of eligibility covering applicants who are "undisputed biological children" of deceased wage earners, despite the lack of such a category in the text of the statue. In the face of this lack of specific statutory text addressing "undisputed biological children," the petitioner concludes that the agency ruling was reasonable. Petitioner argues that because the agency's position is at least reasonable, it should be given deference and the agency's interpretation of the act should be upheld.

Respondent, Karen Capato on behalf of her twins, argues that the court of appeals was correct in ruling that § 416(h) is not applicable because the applicants are "children" under § 416(e). Since the applicants are the biological children of married parents, there is no need to resort to § 416(h) to determine whether they are entitled to inherit under state intestacy law. Respondent relies on the plain language of the act, stating that it is clear that Congress used the word "child" to mean the biological child of married parents. Respondent's review of the legislative history indicates that the act was amended in 1965 to address children of unmarried couples, implying that children of married couples were already eligible. Further, respondent asserts that posthumously conceived children are similarly situated to other eligible natural children and entitled to equal protection under the law. If posthumously conceived children of married couples are not allowed to receive the same Social Security survivors benefits as other natural children, they are denied equal protection under the law, which requires that a statutory classification be substantially related to an important governmental objective. The Supreme Court has struck down discriminatory laws relating to status of birth where the classification is justified by no legitimate state interest. Respondent argues that children, such as the Capato twins, should not be penalized for their parents' reproductive choices.

Turning to the petitioner's argument that the agency decision is due deference, the respondent denies that any deference is due because the statute is unambiguous. In the alternative, respondent asserts that the agency's interpretation of the statute is arbitrary and capricious and thus must fail.

SIGNIFICANCE

The Court's decision in this case will resolve a split of authority among the circuits. The Third and Ninth Circuits have held that posthumously conceived children may be entitled to survivors benefits despite their status under state intestacy law. The Ninth Circuit case, *Gillett-Netting v. Barnhardt,* (9th Cir 2004) 371 F.3d 593, held that in order for the children to receive survivors benefits, their father must have consented to posthumous conception and the support of any children born.

The Fourth and Eighth Circuits have held that the child must be able to take property under state intestacy law to be eligible for Social Security survivors benefits. The Fourth Circuit case, *Schafer v. Astrue,* (4th Cir 2011) 641 F. 3d 49, involved an applicant child born seven years after the death of his father. That child's father had a domicile of Virginia; because Virginia law does not allow a child born more than 10 months after the death of the parent to inherit under intestacy statutes, the Fourth Circuit denied the applicant survivors benefits.

A denial of the Capato twins' eligibility may give the Social Security Administration a basis for denial of survivors benefits to over 100 applicants who are posthumously conceived children. If the Court rules in favor of the Capato twins, an unknown number of children born by IVF, after the deaths of their fathers, could qualify for survivors benefits, regardless of their status under the laws of intestacy in the decedent's state of domicile. The current federal statutory scheme does not provide for any definition of "child" that includes posthumously conceived children of married couples or any limitations on the time that can lapse between death of the parent and subsequent conception of the child, who might then be able to claim survivors benefits. It remains to be seen whether the Court views the case as mainly involving deference to agency decision, since the court of appeals did not agree with the agency's view in this case. In order for the Supreme Court to even get to the step of granting deference to the agency's interpretation, the Court must find the statute to be ambiguous.

This case gives the Court the opportunity to define the word "child" and to consider the role of state law in the determination of the definition of the word. A ruling either way on this issue could provide some much needed clarification; most state laws currently do not address directly the legal issues created by posthumous conception, complicating matters for applicants. In making its determination of how to define "child," the Court could also address the applicability of current law to a variety of technological possibilities, most of which did not exist when the act was enacted.

Margaret Robison Kantlehner is an associate professor of law at Elon University School of Law. She can be reached at mkantlehner@elon.edu or 336.279.9205.

PREVIEW of United States Supreme Court Cases, pages 249–251.

ATTORNEYS FOR THE PARTIES

For Petitioner Michael J. Astrue, Commissioner of Social Security (Donald B. Verrilli Jr., Solicitor General, 202.514.2217)

For Respondent Karen K. Capato, on Behalf of B. N. C. et al. (Charles A. Rothfeld, 202.263.3000)

AMICUS BRIEFS

For Respondent Karen K. Capato, on Behalf of B. N. C. et al.

Cancer Legal Resource Center of the Disability Rights Legal Center (Mark B. Helm, 213.683.9100)

Jennifer Lahl (Catherine W. Short, 805.640.1940)

National Senior Citizens Law Center (Rochelle Bobroff, 202.289.6976)

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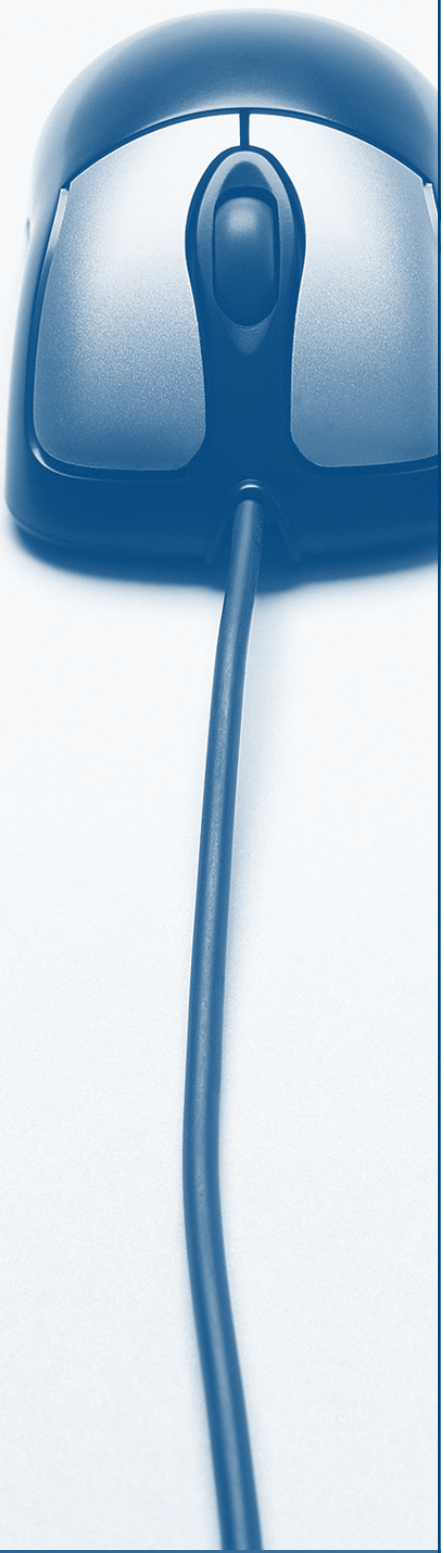

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Email: abapubed@americanbar.org

Contributors to This Issue

(1)
CRIMINAL PROCEDURE
Southern Union Company v. United States
Previewed by Alan Raphael, a member of the faculty of Loyola University Chicago School of Law and who teaches criminal procedure and constitutional law. He can be reached at araphae@luc.edu or 312.915.7140.

(2)
JURISDICTION
United States Department of Health and Human Services et al. v. State of Florida et al.
Previewed by Bryan Camp, the George H. Mahon Professor of Law at Texas Tech School of Law, and Jordan Barry, an associate professor of law at the University of San Diego School of Law. Professor Camp can be reached at bryan.camp@ttu.edu or 806.742.3990. Professor Barry can be reached at jbarry@sandiego.edu.

(3)
COMMERCE CLAUSE
United States Department of Health and Human Services et al. v. State of Florida et al.
Previewed by Elliott B. Pollack, a member of Pullman & Comley, LLC, in Hartford, Connecticut, and adjunct faculty at the University of Connecticut Law School. He can be reached at ebpollack@pullcom.com or 860.424.4340.

(4)
SEVERABILITY
National Federation of Independent Business et al. v. Kathleen Sebelius et al. and *State of Florida et al. v. United States Department of Health and Human Services et al.*
Previewed by Erwin Chemerinsky, Dean and Distinguished Professor of Law at the University of California, Irvine School of Law. He can be reached at echemerinsky@law.uci.edu or 949.842.7722.

(5)
TENTH AMENDMENT
State of Florida et al. v. United States Department of Health and Human Services et al.
Previewed by Steven D. Schwinn, an associate professor of law at The John Marshall Law School in Chicago. He can be reached at sschwinn@jmls.edu or 312.386.2865.

(6)
CIVIL RIGHTS
Reichle v. Howards
Previewed by Barbara L. Jones of the *Minnesota Lawyer.* She can be reached at barbara.jones@minnlawyer.com or 651.587.7803.

(7)
HARMLESS ERROR
Vasquez v. United States
Previewed by George A. Couture, a federal judicial clerk in Atlanta, Georgia. He can be reached at georgecouture@gmail.com.

(8)
SOCIAL SECURITY ACT
Astrue v. Capato
Previewed by Margaret Robison Kantlehner, an associate professor of law at Elon University School of Law in Greensboro, North Carolina. She can be reached at mkantlehner@elon.edu or 336.279.9205.

(9)
CRIMINAL LAW
Miller v. Alabama and *Jackson v. Hobbs*
Previewed by David L. Hudson Jr., an attorney, author, and law teacher based in Nashville, Tennessee. He serves as a First Amendment Scholar for the First Amendment Center and teaches law classes at Vanderbilt Law School. He can be reached at dhudson@fac.org.

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