

# U.S. Supreme Court to Decide Constitutionality of Affordable Care Act

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## HEALTHCARE ALERT - NOVEMBER 15, 2011

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Yesterday, the United States Supreme Court granted certiorari (meaning it has agreed to hear an appeal) on three petitions concerning the constitutionality of the Affordable Care Act (“ACA”). Given the Supreme Court’s timeline for the filing of briefs, oral argument will likely be scheduled for the end of March or beginning of April 2012. The Supreme Court has set aside five and a half hours for oral arguments on four different issues. Under this timeline, the Court’s final ruling will likely be handed down at the end of June 2012, just before the Court recesses for the summer.

### Key Points About The Decision

The Supreme Court has complete discretion to decide which cases (and which issues raised by those cases) it will hear. Each year the Court receives approximately 10,000 certiorari petitions, of which it hears between 80 and 100. A petition must receive the vote of four Justices to be granted certiorari.

Five petitions were under consideration for certiorari in this round of the Court’s review: *Thomas More Law Center v. Obama*, *NFIB v. Sebelius*, *HHS v. Florida* (certiorari was sought by both sides), and *Liberty University v. Geithner*. The Court’s decision to grant certiorari in *NFIB v. Sebelius* and by both the plaintiffs and the government in *HHS v. Florida* raises four issues before the Court:

- First, the Court will consider the issue of severability of the individual mandate from the other provisions of the ACA (this was the only issue raised in *NFIB v. Sebelius* and the third question in *Florida v. HHS*). The Court has allocated 90 minutes to hear oral arguments on the severability issue.
- Second, the Court will consider the constitutionality of the individual mandate (question one in *HHS v. Florida*). Specifically, the Court will decide whether or not the Commerce Clause of Article I of the Constitution grants Congress the powers to enact the minimum coverage requirements of the ACA. The Court has allocated two hours to hear oral arguments on the individual mandate issue.
- Third, the Court will consider whether the suit brought by the respondents (the states in *Florida v. HHS*) challenging the individual mandate is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a). Specifically, the Court will consider whether the insurance -mandate penalties amount to a type of tax that can only be challenged after it is collected, rather than before. If the answer is yes, then courts would not have legal subject matter jurisdiction to consider such challenges until individuals start paying penalties after the mandate goes into effect in 2014. The Court has allocated one hour to hear oral arguments on the Anti-Injunction Act issue.

- Fourth and finally, the Court granted certiorari on the Constitutionality of the expansion of the Medicaid program to individuals earning up to 133% of the Federal Poverty Level. Specifically, the Court will consider whether the spending conditions that the ACA imposes on the states in funding additional Medicaid beneficiaries are effectively “coercive,” such that they amount to an impermissible commandeering of state dollars by the federal government under the Constitution. The Court has allocated one hour to hear oral arguments on the commandeering issue.

Of note, the Order List issued on November 14th neither granted nor denied certiorari in two of the cases under consideration: *Thomas More Law Center v. Obama* and *Liberty University v. Geithner*. In all likelihood, the Court will hold these petitions until June, and then dispose of them in a manner consistent with its holding in the *HHS v. Florida* cases.

### **Summary of the Cases on Which Certiorari was Granted**

- In Florida, twenty-six states and several other plaintiffs (including the National Federation of Independent Business (“NFIB”)) sued, and the Eleventh Circuit ruled that the ACA’s individual mandate was unconstitutional. However, the Eleventh Circuit declined to adopt the more controversial and sweeping conclusion of the district court — that the individual mandate could not be “severed” from the remainder of the ACA and thus the entire ACA was rendered unconstitutional. In addition, the Eleventh Circuit rejected the state plaintiffs’ argument that the ACA’s expansion of Medicaid was unconstitutional.
- The state plaintiffs, NFIB, and the federal government all appealed. The NFIB plaintiffs appealed primarily on the issue of whether the individual mandate (if struck down as unconstitutional) could be “severed” from the remainder of the ACA. The state plaintiffs appealed on the severability and individual mandate issues, as well as on the issue of whether the ACA’s expansion of Medicaid is constitutional. Finally, the federal government appealed (as the unsuccessful party below), arguing that the Eleventh Circuit erred in its conclusion that the individual mandate was unconstitutional.

### **Other Cases Could Be Reviewed As Well**

In addition to the cases on which certiorari was granted today, one additional case (*Virginia v. Sebelius*) became ripe for certiorari review only last week. The Court will consider whether to grant review in the Virginia case on November 22. Additionally, the DC Circuit’s November 8 opinion in *Seven-Sky v. Holder* (upholding the constitutionality of the ACA) will likely be appealed as well, but it will probably be several months before the Court decides whether to grant review of that case. As discussed above, the Court must also dispose of the petitions in *Thomas More Law Center v. Obama* and *Liberty University v. Geithner*.

### **Next Steps – Briefing Schedule**

Now that the Supreme Court has granted certiorari, each party will have the opportunity to submit briefs to the Court in support of their position. Under the Supreme Court rules, the petitioner has 45 days to file a brief, after which

opposing parties have 30 days to file their response. After the responses have been filed, the petitioner then has 30 days to file a final reply brief.

Additionally, third parties may seek leave to submit amicus (friend-of-the-court) briefs with the Court. Given the high profile of the issues in these cases, numerous amicus briefs are expected to be filed. Amicus briefs are due 7 days after the main brief is filed by the party whom the amicus brief supports (for instance, an amicus brief supporting a petitioner's position is due 7 days after the petitioner's brief is filed). If you are interested in filing an amicus brief, please contact your Foley Hoag attorney to discuss further details. If you would like to speak further with someone regarding these issues, please contact [Thomas Barker](#), [Brian Carey](#) or [Tad Heuer](#) or any member of Foley Hoag's [Health Care](#) and [Government Strategies](#) group.