

## NOTE

# HOW TO REACH THE CONSTITUTIONAL QUESTION IN THE HEALTH CARE CASES

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Although the Supreme Court has agreed to hear three suits challenging the 2010 health care reform legislation, it is not at all clear that the Court will resolve the constitutional questions at stake in those cases. Rather, the Justices may decide that a Reconstruction-era statute, the Tax Anti-Injunction Act (TA-IA), requires them to defer a ruling on the merits of the constitutional challenges until 2015 at the earliest. Lower-court judges in two circuits have already adopted this view. In September 2011, Judge Diana Motz of the Fourth Circuit held (for a two-judge majority) that the TA-IA—which provides that “[n]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person”<sup>1</sup>—bars courts from considering health care challenges for another three-and-a-half years.<sup>2</sup> In November, Judge Brett Kavanaugh of the D.C. Circuit similarly concluded (in dissent) that the

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1. 26 U.S.C. § 7421(a) (2006). The Act includes a limited number of explicit exceptions, *see id.*, but none of these exceptions appears to apply to the health care challenges.

2. *Liberty Univ., Inc. v. Geithner*, No. 10-2347, 2011 U.S. App. LEXIS 18618, at \*21 (4th Cir. 2011). In 2015, a taxpayer who had been assessed a penalty for failing to abide by the minimum-coverage requirement could pay the penalty and then bring a claim for a refund in a federal district court. *See* 28 U.S.C. § 1346(a). Note that although taxpayers can challenge certain other provisions of the Internal Revenue Code in U.S. Tax Court *before* paying the tax, the Tax Court’s jurisdiction does not appear to extend to the minimum-coverage penalty. Section 6213 of the Internal Revenue Code, 26 U.S.C. § 6213, allows taxpayers to file petitions with the Tax Court after they have received a notice of deficiency pursuant to 26 U.S.C. § 6212, and § 6212 only authorizes such notices if “there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44.” *See* 26 U.S.C. § 6212(a). However, the penalty for failure to comply with the minimum-coverage requirement, *see* 26 U.S.C.A. § 5000A (West 2011), falls within subtitle D, chapter 48, of the Internal Revenue Code, and thus outside the set of provisions that might trigger a notice of deficiency. I thank Chaim Gordon for this point.

TA-IA prohibits federal courts from exercising jurisdiction over challenges to the health care law for the time being.<sup>3</sup> While it is impossible to know whether a majority of Justices will be persuaded by the TA-IA argument, the Court has instructed the parties to the health care challenges to brief the TA-IA question and has set aside a full hour for oral argument on the issue. More recently, it asked a prominent Washington attorney—Robert Long of Covington & Burling—to appear as *amicus curiae* in support of the position that the TA-IA applies in this instance. At the very least, these facts suggest that the Supreme Court views the potential TA-IA jurisdictional bar as a serious concern.<sup>4</sup>

Yet even if one thinks that Judges Motz and Kavanaugh correctly interpreted the TA-IA, one might still have *pragmatic* reasons for wanting the Court to rule on the constitutionality of the health care reform law before 2015. By then, federal and state agencies will have spent millions of dollars implementing the health care reform law, and private enterprises—including small businesses—will have spent millions more. Evidently, the Obama Administration would also prefer that the matter be decided sooner rather than later: although the Justice Department had previously sought to invoke the TA-IA's jurisdictional bar as a way to fend off challenges to the health care law, the Solicitor General stated in a recent certiorari-stage brief that “[t]he federal government no longer contends that the [Tax<sup>5</sup>] Anti-Injunction Act applies to pre-enforcement challenges to the minimum coverage provision.”<sup>6</sup> Indeed, prior to the Fourth Circuit's ruling, the Justice Department warned the appellate court panel that “postponing review” of the constitutionality of the health care legislation would create an unnecessary “threat of disruption.”<sup>7</sup>

Fortunately (at least for those who favor a quick resolution to the constitutional questions at stake in the health care litigation), there *is* a way for the So-

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3. *Seven-Sky v. Holder*, No. 11-5047, 2011 U.S. App. LEXIS 22566, at \*97 (D.C. Cir. Nov. 8, 2011) (Kavanaugh, J., dissenting).

4. One might think that if the health care law's penalty provision falls within the TA-IA's definition of a “tax,” then the answer to the constitutional question would be straightforward, since Congress unquestionably has the “Power To lay and collect Taxes.” U.S. CONST. art. I, § 8, cl. 1. Note, though, that a provision may be a “tax” for the purposes of the TA-IA's jurisdictional bar but *not* a “tax” for the purposes of Article I, Section 8. See *Alexander v. “Americans United” Inc.*, 416 U.S. 752, 759 (1974); *Bailey v. George*, 259 U.S. 16, 20 (1922); *Liberty Univ.*, 2011 U.S. App. LEXIS 18618, at \*32-33; Michael C. Dorf & Neil S. Siegel, “*Early-Bird Special*” *Indeed!: Why the Tax Anti-Injunction Act Permits the Present Challenges to the Minimum Coverage Provision*, 121 *YALE L.J. ONLINE* (forthcoming 2012), available at <http://ssrn.com/abstract=1969540> (manuscript at 7 n.33). Thus, if the Court finds that the TA-IA applies in 2012, it will not necessarily have to uphold the health care law's penalty provision as a constitutional exercise of Congress's Tax Power in 2015.

5. I will refer to 28 U.S.C. § 7421 as the *Tax* Anti-Injunction Act to distinguish it from 28 U.S.C. § 2283, also often called “the Anti-Injunction Act.”

6. Consolidated Brief for Respondents at 6 n.5, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, No. 11-393 and 11-400 (U.S. Oct. 18, 2011).

7. Supplemental Brief for Appellees at 7, *Liberty Univ. v. Geithner*, No. 10-2347 (4th Cir. May 31, 2011).

licitor General to bypass the TA-IA bar—even if one agrees with the interpretation of the TA-IA adopted by the Fourth Circuit and Judge Kavanaugh. Specifically, the Solicitor General can initiate an action against one or more of the fourteen states that have announced their intention to resist enforcement of the health care law, and he can bring this action directly in the Supreme Court under the Court’s original jurisdiction. Such an action would be a suit for the purpose of *facilitating*—not *restraining*—the enforcement of the health care law. Thus, it would open up an avenue to an immediate adjudication of the constitutional challenges.

### I. SUING A STATE IN THE SUPREME COURT

Fourteen states have enacted laws seeking to stymie the enforcement of the Patient Protection and Affordable Care Act (PPACA)—and particularly PPACA’s minimum-coverage provision—within their jurisdictions. For example, in November 2011, the voters of the State of Ohio approved a constitutional amendment providing that “[i]n Ohio, no law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system.” Two other states have enacted anti-health-care-mandate constitutional amendments, and eleven more have adopted statutes with similar language.<sup>8</sup> These state laws clearly conflict with PPACA, which requires individuals to acquire health insurance for themselves and their dependants starting in 2014 (with the first penalties being assessed the following year).

The clear conflict between state and federal law with respect to the health care mandate could provide grounds for the Justice Department to bring suits against Ohio and the other mandate-resisting states. In *United States v. Arizona*, the Justice Department challenged a controversial state immigration law on the grounds that it violated the Supremacy Clause;<sup>9</sup> the Solicitor General could bring a similar cause of action in this instance. The federal government’s prayer for relief might include a request for a declaratory judgment confirming that the relevant state statutes and amendments are invalid,<sup>10</sup> as well as a permanent in-

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8. The states that have passed anti-mandate statutes are Georgia, Idaho, Indiana, Louisiana, Kansas, Missouri, New Hampshire, North Dakota, Tennessee, Utah, and Virginia. The states (aside from Ohio) that have passed anti-mandate constitutional amendments are Arizona and Oklahoma.

9. *Cf.* Complaint at 23, *United States v. Arizona*, 703 F. Supp.2d 980 (D. Ariz. 2010), *aff’d*, 641 F.3d 339 (9th Cir. 2011), *petition for cert. filed*, No. 11-182 (U.S. Aug. 10, 2011). In *Arizona*, the Justice Department also brought causes of action based on federal preemption and the dormant Commerce Clause.

10. The Declaratory Judgment Act of 1934, 28 U.S.C. §§ 2201-02, authorizes this cause of action. Although the Act includes an exception for “controvers[ies] with respect to Federal taxes,” *see* 28 U.S.C. § 2201(a), note that the Solicitor General would *not* be seeking a declaratory judgment with respect to a federal tax. Rather, the Solicitor General would be

junction prohibiting the officers, agents, and employees of these fourteen states from enforcing their anti-mandate laws.

Such a suit would accomplish two important tasks. First, since the states would almost certainly respond with the affirmative defense that PPACA (or some portion thereof) is unconstitutional, the suit would serve as a vehicle for the Supreme Court to consider the constitutionality of the health care law. But unlike other potential vehicles, the TA-IA plainly would *not* apply to such a suit. Recall that the TA-IA only applies to a suit “for the purpose of restraining the assessment or collection of any tax.” By contrast, our hypothetical suit would be a suit for the purpose of *facilitating* the assessment or collection of a tax (assuming that the minimum-coverage penalty is indeed a “tax”). Thus, the TA-IA would not prevent the Court from reaching the merits of the case.

Second, an original action in the Supreme Court—as compared with a suit by the federal government in a district court—could place the question of the constitutionality of the health care law *immediately* before the Justices. Article III of the Constitution grants the Supreme Court original jurisdiction over cases “in which a State shall be a Party,” and the Judiciary Act confirms that the Court has “original but not exclusive jurisdiction” over “[a]ll controversies between the United States and a State.”<sup>11</sup> The Supreme Court has exercised original jurisdiction in these United States-v.-State actions repeatedly over the years.<sup>12</sup> While the Justice Department sometimes chooses to bring suits against states in federal district court, this is by no means a requirement. In this instance, an original action in the Supreme Court would avoid the long delay of lower-court adjudication. The Court could consolidate the United States-v.-State action with the other health care cases that are set for oral argument in March 2012.

## II. POSSIBLE OBSTACLES—AND WHY THEY ARE NOT OBSTACLES AFTER ALL

While an original action by the Solicitor General and against the states in the Supreme Court would seem to be an easy end-run around the TA-IA, there are several possible obstacles that one ought to consider before concluding that this end-run would be successful. Ultimately, however, none of these obstacles is especially daunting.

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seeking a declaratory judgment with respect to the validity of the state statutes and state constitutional amendments that seek to nullify the health care mandate.

11. 28 U.S.C. § 1251(b).

12. *See, e.g.*, *United States v. Alaska*, 521 U.S. 1 (1997); *United States v. Louisiana (Mississippi Boundary Case)*, 470 U.S. 93 (1985); *United States v. Maine*, 420 U.S. 515 (1975); *United States v. Louisiana*, 363 U.S. 1 (1960); *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. California*, 332 U.S. 19 (1947); *United States v. Minnesota*, 270 U.S. 181 (1926); *United States v. Texas*, 143 U.S. 621 (1892).

First, the Supreme Court might determine that—regardless of the constitutionality of health care reform—the federal government has not suffered an “injury in fact” on account of the states’ (mostly rhetorical) resistance to PPACA. If so, the United States would not have standing to pursue its action. But the Solicitor General could quite plausibly respond that the mandate-resisting states—by declaring the minimum-coverage provision to be inapplicable within their jurisdictions—are interfering with the federal government’s sovereign interest in enforcing its own laws. While the federal government seeks to ensure that individuals comply with the minimum-coverage requirement by the beginning of 2014, the fourteen states are essentially saying to their citizens (through statements enshrined in those states’ codes and constitutions): “Ignore the federal government’s exhortations, because the minimum-coverage requirement does not apply to you.” It would be very unusual for the Court to conclude that the federal government lacks standing to pursue a claim against a state or its officials when that claim arises out of the United States’s sovereign interests.<sup>13</sup>

Moreover, the state plaintiffs in the health care challenges face a trickier problem of standing than the federal government would encounter. In *Virginia ex rel. Cuccinelli v. Sebelius*, a Fourth Circuit panel found that the Commonwealth of Virginia does not have standing to pursue its constitutional challenge to the health care law because the state has no “sovereign interest” at stake.<sup>14</sup> By contrast, the federal government *does* have a sovereign interest at stake: its interest in the “general supremacy of federal law.”<sup>15</sup> Historically, the Justices have been more willing to conclude that the federal government has standing to sue in its own courts than to conclude that a state government has standing to sue in federal courts. Thus, to the extent that the issue of standing is a concern for those who fear that the Supreme Court will not reach the merits of the health care challenges, the case for an original action by the Solicitor General against the mandate-resisting states is even stronger. Justices who are inclined to say that the states lack standing to pursue their health care challenges might be less inclined to say that the federal government lacks standing to pursue its original action against the mandate-resisting states.<sup>16</sup>

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13. Constitutional law scholar Michael Dorf has suggested that “the federal government ALWAYS has Article III standing to sue to enforce a federal obligation.” See Mike Dorf, *Preemption and Federal Government Standing*, DORF ON LAW (July 12, 2010, 2:50 AM), <http://www.dorfonlaw.org/2010/07/preemption-and-federal-government.html>.

14. *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 270-71 (4th Cir. 2011), *petition for cert. filed*, No. 11-420 (U.S. filed Sept. 30, 2011).

15. *Id.* at 269 (quoting *Pennsylvania v. Kleppe*, 533 F.2d 668, 677 (D.C. Cir. 1976)).

16. Closely related to the question of standing is the question of ripeness. The Justice Department has previously argued that the challenges to the individual mandate are not yet ripe for adjudication, *see, e.g.*, *Goudy-Bachman v. U.S. Dep’t of Health & Human Servs.*, 764 F. Supp. 2d 684, 693 (M.D. Pa. 2011), although the Justice Department has not pursued this argument in more recent briefs. Importantly, the United States-v.-State action would be a *facial* challenge to the state anti-mandate laws, not an as-applied challenge. “In the context of a facial challenge, a purely legal claim is presumptively ripe for judicial review because it does not require a developed factual record.” *Harris v. Mexican Specialty Foods, Inc.*, 564

Second, in defending against the Solicitor General's original action in the Supreme Court, the states might decide not to contest the constitutionality of the health care legislation. The states might decide that "disruption" to the Obama Administration's health care agenda is exactly what they want; deferring adjudication of the constitutional challenges until 2015 thus might serve the mandate-resisting states' immediate interests. If the states do not present an affirmative defense alleging that PPACA itself is unconstitutional, then the original action will not bring the constitutionality of the health care law squarely before the Supreme Court.

Fortunately for the Solicitor General, it is unlikely that the states would make this strategic move. Indeed, if the states had wanted to delay resolution of the constitutional controversy until 2015 (with the possible unconstitutionality of the reform package hanging over the federal government as a sword of Damocles until then), they would have waited until 2015 to bring their challenges.

Third, and finally, the Justices could invoke a prudential—rather than constitutional or statutory—rationale for declining to entertain an original action by the federal government against the mandate-resisting states. Under the Judiciary Act, the Supreme Court is allowed—though not required—to send federal-state disputes down to district court so that a trial judge or jury can serve as fact finder. The Court is especially likely to do so when the case is "essentially local in character" and when "adjudication . . . requires the presence of witnesses."<sup>17</sup> But health care challenges have already been litigated in nearly two dozen district courts, and the factual record is exceedingly well-developed. Moreover, the Supreme Court is already scheduled to hear (at least) three cases challenging the constitutionality of the health care law. The efficiency considerations that might lead the Court to refrain from exercising its original jurisdiction elsewhere are plainly inapplicable here.

In sum, an original action by the federal government against the mandate-resisting states would not be subject to the TA-IA's jurisdictional bar, and none of the other potential obstacles to the original-action approach seems especially troublesome. At the very least, filing an original action in the Supreme Court against the mandate-resisting states would reduce the risk that the constitutionality of health care reform will remain unresolved until 2015, since the original

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F.3d 1301, 1308 (11th Cir. 2009). Moreover, the Supreme Court has held that a claim is ripe for adjudication when "[t]he issue presented . . . is purely legal, and will not be clarified by further factual development," *see* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985)—criteria that would seem to be satisfied here. Finally, where questions of ripeness "concern only the requirement that the injury be imminent rather than conjectural or hypothetical," then courts have applied their standing analysis "equally and interchangeably" to ripeness. *See* *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 537-38 (6th Cir. 2011) (internal quotation marks omitted) (finding that constitutional challenges to the minimum-coverage requirement are ripe for adjudication); *cf.* *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 225-26 (2d Cir. 2006) ("[O]ur analysis of . . . standing . . . applies equally and interchangeably to . . . ripeness . . .").

17. *See* *United States v. California*, 297 U.S. 175, 188 (1936).

action would give the Justices one more way to work around the TA-IA. Neither the Obama Administration nor the mandate-resisting states want to prolong the country's uncertainty for another three-plus years while we wait for the Court to rule on the constitutional challenges. The original-action approach offers an escape from this limbo.