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ACA litigation, a six-year summary

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March 23, 2016

Here is a quick summary of Affordable Care Act litigation. At least for now, it leaves out contraceptive-coverage and abortion cases, but otherwise, it's as comprehensive as I can make it.

The past six years have featured

* global challenges to the Act;

* challenges to the individual mandate;

* constitutional challenges to the Exchange system, and litigation about it, including litigation about grandfathering and other plan requirements;

* litigation about the Act's Medicaid provisions, and also about the degree to which standard Medicaid provisions continue to be in effect after the Act took effect;

* challenges to the Act's employer play or pay system, and alleged challenges to the Obama Administration's delays in implementing that system; and

* other legal challenges to parts of the Act or rules interpreting parts of the Act.

Finally, there are some brief observations to be made about the extent to which the Act creates individually enforceable rights, and the extent to which States have standing to litigate things about the Act.

Litigation about the Act has reached the Supreme Court four times. In National Federation of Independent Business v. Sebelius,[1] the Court held, through an opinion by Chief Justice Roberts, that the Act's individual mandate could be sustained under the Tax Power but that it would be unconstitutionally coercive for HHS to enforce the Act's Medicaid expansion against unconsenting States by withholding funds from those States' existing Medicaid programs. In Burwell v. Hobby Lobby Stores,[2] the Court held that under RFRA the Act's contraceptive-services mandates imposed a substantial burden on some employers' exercise of

[1] 132 S.Ct. 2566 (2012).
[2] 134 S.Ct. 2751 (2014).

religion, including some employers who were closely held for-profit corporations, and that the mandate did not satisfy RFRA's least-restrictive-means requirement. In King v. Burwell,[3] the Court interpreted the Act's premium tax credit statute to allow residents of States with federally operated Exchanges to get premium tax credits. In the Zubik cases,[4] the Court is considering challenges to a policy that requires religious institutions that do not want to cover contraceptives for their employees to notify the Government, and their insurance carriers, about that in a particular way.

Global challenges to the Act

Cases asserting that Congress enacted the Affordable Care Act in violation of the Origination Clause include Sissel,[5] Hotze,[6] and Bank.[7] So far, they have been unsuccessful.

Cases raising the theory that the Act must fall as a matter of non-severability because some vital piece of the Act was unconstitutional have included NFIB itself and the Virginia case.

In NFIB/Florida, District Judge Vinson held that the individual mandate was unconstitutional and so the entire Act, lacking a severability clause, must fall.[8] Although the Eleventh Circuit affirmed the district court's merits decision about the individual mandate, it reversed the district court's severability ruling.[9] In NFIB at the Supreme Court, the plurality opinion and the joint dissent appear to have addressed rather different severability issues. The plurality opinion held that it was proper to sever the unconstitutional applications of the Medicaid defunding statute, 42 U.S.C. § 1396c, from the rest of the Act.[10] The joint dissent would have invalidated both the individual mandate and the Medicaid expansion, and would then have held that the entire Act must fall as a matter of severability doctrine.[11]

In the Virginia case, District Judge Hudson held that the individual mandate was unconstitutional but that the rest of the Act could be implemented.[12] The Fourth Circuit then held that the Commonwealth lacked standing, and the Supreme Court held Virginia's petition for cert until it decided NFIB on the merits.[13]

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[3] 135 S.Ct. 2480 (2015).

[4] Nos. 14-1418, 14-1453, 14-1505, 15-105, 15-119, 15-191, and 15-35. Zubik v. Burwell, No. 14-1418, the Third Circuit case, is the case that has the lowest docket number.

[5] Sissel v. U.S.D.H.H.S., 760 F.3d 1 (D.C. Cir. 2014), adhered to on denial of rehearing, 799 F.3d 1035 (D.C. Cir. 2015), cert. denied, No. 15-543 (Jan. 19, 2016).

[6] Hotze v. Burwell, 784 F.3d 984 (5th Cir. 2015), cert. denied, No. 15-622 (Feb. 29, 2016).

[7] Bank v. U.S.D.H.H.S., No. 1:15-cv-431 (E.D. N.Y., filed 1/28/2015).

[8] Florida ex rel Bondi v. U.S.D.H.H.S., 780 F.Supp.2d 1256, 1299-1305 (N.D. Fla. 2011).

[9] Florida ex rel Attorney General v. U.S.D.H.H.S., 648 F.3d 1235, 1320-1328 (11th Cir. 2011).

[10] NFIB, 132 S.Ct. 2566, 2607-2608 (plurality opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

[11] NFIB, 132 S.Ct. 2566, 2666-2677 (joint dissent of Scalia, Kennedy, Thomas, and Alito, JJ.).

[12] Commonwealth of Virginia ex rel Cuccinelli v. Sebelius, 728 F.Supp. 768, 789-790 (E.D. Va. 2010).

[13] Virginia ex rel Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011), cert. denied, No. 11-420 (June 29, 2012).

Challenges to the individual mandate

There have been about 25 challenges to the individual mandate. Most, but not all, depended on a Commerce Clause theory and so came to a close with the NFIB decision, if not before; many had already been dismissed on standing grounds.[14]

NFIB held that the individual mandate could be sustained as an exercise of the Tax Power.[15] Whether or not the Chief Justice's observations about the Commerce Power and the Necessary and Proper Clause[16] were integral to the decision or were simply dicta is an issue that may never be cleanly resolved.[17]

At the time NFIB was released, Courts of Appeals had decided for the Government on Commerce Power grounds in the Sixth Circuit (Thomas More)[18] and, more or less, in the D.C. Circuit (Seven-Sky),[19] while a district court decision against the individual mandate was being appealed to the Third Circuit (Goudy-Bachman)[20] ... and, of course, the Eleventh Circuit had decided against the Government on the Commerce Power.[21]

In the Liberty University case, the Fourth Circuit had vacated a pro-mandate district court Commerce Clause decision[22] on the theory that the Anti-Tax Injunction Act barred the litigation.[23] That ruling was partly vacated after NFIB,[24] but due to NFIB's holding on the merits, the case then proceeded primarily as an attack on the employer play or pay system. The Fourth Circuit eventually held that neither the individual nor the employer mandates violated the Free Exercise Clause, RFRA, or equal protection.[25]

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[14] Standing dismissals include: Baldwin v. Sebelius, No. 3:10-cv-1033 (S.D. Cal., Aug. 27, 2010), 2010 Westlaw 3418436, aff'd, 654 F.3d 877 (9th Cir. 2011); Bellow v. U.S.D.H.H.S., No. 1:10-cv-165 (E.D. Tex., June 20, 2011), 2011 Westlaw 2462205; Boyle v. Sebelius, No. 2:11-cv-7868 (C.D. Cal., Feb. 3, 2012), Bryant v. Holder, 809 F.Supp.2d 563 (S.D. Miss. 2011) (no standing to raise state employee claims, but finding standing to raise medical privacy claims); Kinder v. Geithner, 695 F.3d 772 (8th Cir. 2012); New Jersey Physicians v. President of the U.S., 653 F.3d 234 (3d Cir. 2011); Peterson v. U.S., 774 F.Supp.2d 418 (D. N.H. 2011); Purpura v. Sebelius, No. 3:10-cv-4814 (D. N.J., Apr. 21, 2011), 2011 Westlaw 1547768, aff'd, 2011 Westlaw 4494187 (3d Cir., Sept. 29, 2011); Shreeve v. Obama, No. 1-10-cv-71 (E.D. Tenn., Nov. 4, 2010), 2010 Westlaw 4628177; Van Tassel v. U.S., No. 1:10-cv-310 (M.D. N.C., Nov. 15, 2010) (magistrate's recommendation).

[15] NFIB, 132 S.Ct. 2566, 2594-2600 (opinion of Roberts, C.J.).

[16] NFIB, 132 S.Ct. 2566, 2585-2593 (opinion of Roberts, C.J.).

[17] Compare NFIB, 132 S.Ct. 2566, 2593-2594, 2600-2601 (opinion of Roberts, C.J.), with id. at 2629 & n.12 (opinion of Ginsburg, J., joined by Breyer, Sotomayor, and Kagan, JJ.).

[18] Thomas More Law Center v. Obama, 651 F.3d 529 (6th Cir. 2011).

[19] Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011).

[20] Goudy-Bachman v. U.S.D.H.H.S., 811 F.Supp.2d 1086 (M.D. Pa. 2011), summarily vacated and remanded for dismissal, No. 11-4160 (3d Cir., Oct. 11, 2012).

[21] Florida ex rel Attorney General v. U.S.D.H.H.S., 648 F.3d 1235 (11th Cir. 2011).

[22] Liberty University v. Geithner, 753 F.Supp.2d 611 (W.D. Va. 2010).

[23] Liberty University v. Geithner, 671 F.3d 391 (4th Cir. 2011).

[24] Liberty University v. Geithner, No. 11-438 (Nov. 26, 2012).

[25] Liberty University v. Lew, 733 F.3d 72 (4th Cir. 2013), cert. denied, No. 13-306 (Dec. 2, 2013).

In the D.C. AAPS case, shortly after NFIB, the district court rejected takings and substantive due process claims against the individual mandate.[26]

In the Coons case, the Ninth Circuit rejected a substantive due process claim that the individual mandate violated rights to medical autonomy and non-disclosure of personal medical information.[27]

Other attacks on the individual mandate that persisted past the NFIB decision appear to have been limited to the Origination Clause cases and the originally pro se Cutler case, which challenged the statute's limitation of exemptions to the individual mandate to religious exemptions.[28] Now that cert has been denied in Cutler and Sissel, and now that the Fifth Circuit has ruled in the Hotze case that Dr. Hotze himself, who has health insurance, lacks standing to bring an Origination Clause challenge to the individual mandate – and the Supreme Court has denied cert[29] -- there may not be any individual mandate cases remaining before the courts.

Constitutional challenges to the Exchange system

Judge Vinson's decision in the Florida/NFIB case dismissed a claim that the Exchange system coerced States.[30] The plaintiff States appealed this ruling to the Eleventh Circuit, which did not mention it,[31] perhaps because the States' briefing was so perfunctory,[32] and the plaintiff States did not include that Exchange-coercion claim among the issues raised to the Supreme Court, although they did include an overruling-Garcia claim,[33] which the Court declined to consider.

Statutory and semi-constitutional litigation about aspects of the Exchange system

The issue in the premium tax credit cases was whether Federally operated Exchanges were sufficiently "Exchange[s] established by the State under [42 U.S.C. § 18031]" for residents of States with Federally operated Exchanges to get premium tax credits under 26 U.S.C. § 36B. Once the Supreme Court had resolved the statutory issue in the Government's favor in King v.

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[26] Asso. of American Physicians & Surgeons v. Sebelius, 901 F.Supp.2d 19 (D. D.C. 2012), aff'd, 746 F.3d 468 (D.C. Cir. 2014), cert denied, No. 14-350 (Jan. 12, 2015). The claim that a person receiving Social Security is entitled to refuse to enroll in Medicare Part A without penalty, dismissed on standing grounds, does not appear to be an ACA-related claim.

[27] Coons v. Lew, 762 F.3d 891 (9th Cir. 2014), cert denied, No. 14-525 (Mar. 30, 2015).

[28] Cutler v. U.S.D.H.H.S., 797 F.3d 1173 (D.C. Cir. 2015), cert. denied, No. 15-632 (Jan. 11, 2016).

[29] Hotze v. Burwell, 784 F.3d 984 (5th Cir. 2015), cert. denied, No. 15-622 (Feb. 29, 2016).

[30] Florida ex rel McCollum v. U.S.D.H.H.S., 716 F.Supp.2d 1120, 1154-1156 (N.D. Fla. 2010).

[31] Florida ex rel Attorney General v. U.S.D.H.H.S., 648 F.3d 1235 (11th Cir. 2011).

[32] Page 59, note 6 of the States' principal brief raised the Exchange-coercion issue and the overruling-Garcia issues as follows: "The States also continue to maintain that the employer mandate and health exchange benefit provisions violate the Tenth Amendment. Although the district court dismissed those claims as foreclosed by Supreme Court precedent, R.E. 424–25, the States reserve their right to challenge the Supreme Court's decisions in *Garcia* and *Hodel* before the Supreme Court."

[33] Question 2 (of 3 questions) in the States' cert petition, No. 11-400.

Burwell,[34] the lower courts dismissed two pending cases, Pruitt v. Burwell and Halbig v. Burwell,[35] while limited issues remain to be resolved in Indiana v. IRS.[36]

In House v. Burwell,[37] the House of Representatives is challenging payment of cost sharing reductions under 42 U.S.C. § 18071 in the alleged absence of an appropriation.

Ohio v. U.S. – does requiring state employers to make transitional reinsurance payments violate the ACA or the Tenth Amendment? A federal district court has said no.[38]

Texas v. U.S. – does subjecting state Medicaid managed care plans to plan assessments violate the ACA or coerce States in violation of NFIB's Medicaid holding? The Government has filed a motion to dismiss, and will be filing another after plaintiffs file an amended complaint.[39]

ACLI v. D.C. – does subjecting plans not offered on an Exchange to plan assessments violate the ACA or deny due process to insurers? A federal district court has said no, and a panel of the D.C. Circuit has just washed the case out on jurisdictional grounds.[40]

In the Missouri Navigator case, the Eighth Circuit held on review of a preliminary injunction that federal law probably pre-empted and limited Missouri's pro-broker, anti-Navigator statutes[41]; and that is what the district court has just held on summary judgment.[42]

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[34] 135 S.Ct. 2480 (2015), affirming King v. Burwell, 759 F.2d 358 (4th Cir. 2014), affirming King v. Sebelius, 997 F.Supp.2d 415 (E.D. Va. 2014).

[35] The district court in Pruitt had granted summary judgment to the State employer, Oklahoma ex rel Pruitt v. Burwell, 51 F.Supp.3d 1080 (E.D. Okla. 2014), and the case was on appeal to the Tenth Circuit, No. 14-7080. The Halbig litigation had proceeded through a district court opinion in favor of the Government, Halbig v. Sebelius, 27 F.Supp.3d 1 (D. D.C. 2014), a D.C. Circuit reversal, Halbig v. Burwell, 758 F.3d 390 (D.C. Cir. 2014), and a D.C. Circuit determination to vacate the panel opinion and hear the case en banc, No. 14-5018, 2014 Westlaw 4627181 (Sept. 4, 2014).

[36] Indiana v. IRS had survived a motion to dismiss, 38 F.Supp.3d 1003 (S.D. Ind. 2014), and was pending on cross-motions for summary judgment when the Supreme Court took cert in King v. Burwell. After the Supreme Court decided the statutory issue, the parties agreed that the school corporations' Tenth Amendment claims were the only claims remaining to be decided.

[37] United States House of Representatives v. Burwell, No. 1:14-cv-1967 (D. D.C.), see __ F.Supp.3d __, 2015 Westlaw 5294762 (Sept. 9, 2015) (denying motion to dismiss Appropriations Clause claim for lack of standing).

[38] Ohio v. U.S., __ F.Supp.3d __, 2016 Westlaw 51226 (S.D. Ohio, Jan. 5, 2016), Sixth Circuit appeal filed, No. 16-3093.

[39] Texas v. U.S., No. 7:15-cv-151 (N.D. Tex.), motion to dismiss filed Jan. 27, 2016, amended complaint filed Feb. 24, 2016, second motion to dismiss contemplated by March 30.

[40] American Council of Life Insurers v. D.C. Health Benefit Exchange Authority, 73 F.Supp.3d 65 (D. D.C. 2014), appeal dismissed, No. 14-7206 (March 1, 2016).

[41] St. Louis Effort for AIDS v. Huff, 782 F.3d 1016 (8th Cir. 2015).

[42] St. Louis Effort for Aids v. Huff, No. 2:13-cv-4246 (W.D. Mo., March 18, 2016).

Finally, two challenges to the Obama Administration's "administrative fix" for allowing people to maintain or reacquire coverage under existing plans have been dismissed for lack of standing and are on appeal.[43]

Litigation concerning the Act's Medicaid provisions

In the controlling plurality opinion, NFIB/Florida held that when an enormous Spending Clause program like Medicaid involves two analytically separable programs, one new, the other old, in which a State might be deprived of all "old" funds if it did not adopt the new program, it would be unconstitutional to enforce this requirement via withholding funds from the old program.[44] States are to have a choice, then, about whether to expand Medicaid, and a State that does not do this may not be thrown out of the Medicaid program.

With one exception, post-NFIB Medicaid expansion litigation has been in state court.

Ohio: In State ex rel Cleveland Right to Life v. State of Ohio Controlling Board,[45] the original statutory scheme had given the Governor and the Controlling Board to accept the expansion, but the Ohio Legislature had passed language taking that authority away, which the Governor had vetoed. The Controlling Board proposed to accept and dispense the funds despite language in its authorizing statute that said it needed to follow legislative intent. The question was whether the vetoed anti-expansion riders expressed legislative intent in a way that was binding on the Controlling Board. The Ohio Supreme Court's answer was no.

Arizona: In Biggs v. Betlach,[46] the Arizona appellate courts are considering whether a provider fee is really a "tax" that has to be enacted with a legislative supermajority. The trial court decided, no, it wasn't a tax,[47] and the case is back before the appellate courts.

Alaska: In Alaska Legislative Council v. Walker,[48] the state Medicaid statutes distinguish between coverage that is "required by the Social Security Act" and coverage of "optional groups." The Governor decided that the expansion is in a mandatory category and accepted it. The Legislative Council argues that the NFIB decision turned the expansion into an option. The state trial court denied the Legislative Council an anti-expansion TRO and has recently granted the Governor's motion for summary judgment.

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[43] American Freedom Law Center v. Obama, 106 F.Supp.3d 104 (D. D.C. 2015), appeal pending, No. 15-5164 (D.C. Cir.); State of West Virginia v. U.S.D.H.H.S., No. 1:14-cv-1287, __ F.Supp.3d __, 2015 Westlaw 6673703 (D. D.C., Oct. 30, 2015), appeal pending, No. 15-5309 (D.C. Cir.).

[44] NFIB, 132 S.Ct. 2566, 2601-2608 (plurality opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

[45] 3 N.E.3d 185 (Ohio 2013).

[46] No. 1CA-CV 15-0743 (Ariz. App.).

[47] Biggs v. Brewer, CV 2013-011699, 2015 Westlaw 5122302 (Maricopa Co. Superior Court, Aug. 26, 2015).

[48] Case No. 3AN-15-09208 CI (Alaska Superior Court) (Decision and Order, March 1, 2016).

Florida: In Scott v. U.S.,[49] the Governor sued HHS in federal district court on the theory that the agency's failure to approve renewal of an 1115 waiver in the amount demanded by the Governor was an attempt to coerce Florida into expanding Medicaid. HHS denied that that was what it was doing. The Governor voluntarily dismissed the case as it became clear that the trial judge was not about to issue any preliminary injunctions.

Post-NFIB cases about Medicaid maintenance of effort have come from Maine. In Mayhew v. Sebelius,[50] the First Circuit declined to assert jurisdiction over HHS's failing immediately to approve a state plan amendment reducing eligibility. In Bourgoin v. Sebelius,[51] a federal district court turned back a challenge by Maine Medicaid beneficiaries by holding that the State of Maine was an indispensable party to the action they had filed against HHS. Finally, in Mayhew v. Burwell,[52] the First Circuit turned back a Maine challenge to a different maintenance of effort requirement, the requirement that until 2019 a State not reduce eligibility for people under 21.

Other Medicaid litigation involves State Medicaid agencies' processing applications with reasonable promptness and the opportunity for a fair hearing, even though the applications have come in through the Exchange system instead of directly to the State agency.

In Wilson v. Gordon,[53] the district court granted a preliminary injunction ordering the TennCare Medicaid waiver program promptly to process TennCare applications that had come in through the Federally operated Exchange.

Walker v. Selig[54] is to the same general effect. The district court issued a preliminary injunction ordering that the Arkansas Medicaid agency process Ms. Walker's applications and give her a fair hearing.

Finally, in California, the State had agreed to a mitigation plan after delays in processing hundreds of thousands of Medi-Cal applications, but had failed to follow various state statutes in implementing the plan. In Rivera v. Douglas,[55] a superior court judge issued a preliminary injunction ordering the State agency to comply with State law.

Challenges to the employer play or pay system

In the Liberty University case, the university employer challenged the employer play-or-pay system as unconstitutional, but the Fourth Circuit reached the merits of those claims and held

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[49] Nos. 3:15-cv-193 and -195 (N.D. Fla.).
[50] No. 12-2059 (1st Cir., Sept. 13, 2012)
[51] No. 2:13-cv-55 (D. Me.), see 296 F.R.D. 15 (D. Me. 2013).
[52] Mayhew v. Burwell, 772 F.3d 80 (1st Cir. 2014), cert. denied, No. 14-992 (June 8, 2015).
[53] No. 3:14-cv-1492 (M.D. Tenn., Sept. 2, 2014), 2014 Westlaw 4347807, appeal pending, No. 14-6191 (6th Cir.).
[54] No. 2:15-cv-166 (E.D. Ark., Oct. 30, 2015).
[55] Case No. RG14740911 (Alameda Co. Superior Court, Jan. 20, 2015), appeal filed, (Feb. [], 2016).

that both the Commerce Clause and the Tax Power supported the employer mandate and that it did not violate the Free Exercise Clause or RFRA.[56]

In the Hotze case, Dr. Hotze's employer challenged the employer mandate under the Origination Clause and as an unconstitutional taking, and the district court held that the employer mandate was constitutional[57]; but on appeal, the Fifth Circuit held that the Tax Anti-Injunction Act precluded consideration of those issues.[58]

In the Northern Arapaho Tribe case, the Tribe claimed an exemption from the employer mandate, but lost at the preliminary injunction stage[59] and on summary judgment.[60]

In the Florida/NFIB case, the plaintiff States claimed that the employer play or pay system could not constitutionally be applied to State employers, and asked that Garcia be overruled. Judge Vinson rejected that claim.[61] Oklahoma was not a party to NFIB, but in the Oklahoma premium tax credit case, when the State suggested that the system was unconstitutional as applied to State employers and that Garcia should be overruled, the Pruitt district court dismissed that claim.[62] The issue of overruling Garcia remains active in the Indiana v. IRS litigation, where although the State itself is bound by Judge Vinson's ruling because it was a party to Florida/NFIB,[63] the school corporations continue to assert that Garcia should be overruled and that both the employer mandate and the employer reporting requirements are unconstitutional.[64]

Two alleged challenges to delays in implementing the employer play or pay system were dismissed for lack of standing. I say "alleged" because one suit was from the employer side[65] and the other suit was from medical practitioners who did not accept insurance.[66] It is hard to see, and was hard for the courts to see, how employers should have had standing to challenge non-imposition of a requirement on them and how practitioners should have had standing to challenge non-imposition of a requirement on employers.[67]

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[56] Liberty University v. Lew, 733 F.3d 72 (4th Cir. 2013), cert. denied, No. 13-306 (Dec. 2, 2013).
[57] Hotze v. Sebelius, 991 F.Supp.2d 864 (S.D. Tex. 2014).
[58] Hotze v. Burwell, 784 F.3d 984 (5th Cir. 2015), petition for certiorari pending, No. 15-622.
[59] Northern Arapaho Tribe v. Burwell, 90 F.Supp.3d 1238 (D. Wyo. 2015).
[60] Northern Arapaho Tribe v. Burwell, __ F.Supp.3d __, 2015 Westlaw 4639324 (D. Wyo., July 2, 2015), appeal filed, No. 15-8099 (Tenth Circuit).
[61] Florida ex rel McCollum v. U.S.D.H.H.S., 716 F.Supp.2d 1120, 1151-1154 (N.D. Fla. 2010).
[62] Oklahoma ex rel Pruitt v. Sebelius, No. 6:11-cv-30 (E.D. Okla., Aug. 12, 2013), 2013 Westlaw 4052610, *9.
[63] Indiana v. IRS, 38 F.Supp.3d 1003, 1014-1018 (S.D. Ind. 2014).
[64] See the joint notice filed on July 21, 2015, in Indiana v. IRS, No. 1:13-cv-1612 (S.D. Ind.).
[65] Kawa Orthodontics v. Secretary, U.S. Dep't of the Treasury, 773 F.3d 243 (11th Cir. 2014), cert denied, No. 14-1367 (Oct. 5, 2015).
[66] Ass'n of American Physicians and Surgeons v. Koskinen, 768 F.3d 640 (7th Cir. 2014).
[67] As Judge Easterbrook explained in AAPS, 768 F.3d at 641, "McQueeney and many of the Association's members operate cash-only practices and do not accept insurance. One would suppose, therefore, that they are better off as a result of the IRS's policy, for fewer people will carry insurance and plaintiffs will have more potential to attract business. They appear to believe, however, that insurance is "free" to workers—that wages do not adjust to reflect the value of pensions, insurance, and other fringe benefits. If that is so, then employers that do not provide

Other challenges

Coons v. Lew[68] held that a nondelegation challenge to the Medicare Independent Payment Advisory Board was not ripe for review.

Physician Hospitals of America v. Sebelius[69] held that an attack on the Act's restrictions on physician-owned hospitals had to be brought through the Medicare appeals process.

Johnson v. Office of Personnel Management[70] dismissed Senator Ron Johnson's attack on the "Congressional fix" for health insurance for members of Congress and Congressional staff for lack of standing.

Finally, in the Central United Life v. Burwell litigation,[71] a federal district court invalidated HHS's restrictions on the sale of fixed indemnity plans as beyond the statutory authority provided by the Act; an appeal to the D.C. Circuit is pending.

Individually enforceable rights under the Act

The Act is low on explicit authorizations for judicial review of administrative decisions.

Presumably the Administrative Procedure Act covers judicial review of federal decisions, while 42 U.S.C. § 1983 provides a cause of action for challenging state decisions that violate federal law.

So far as I can tell, there are no reported court decisions on anyone's claim that the subsidy system has made the wrong decision about someone's eligibility for subsidies or about the amount of a subsidy. Nor do there appear to be any reported court decisions on anyone's claim for a hardship exemption from the individual mandate.

One case in which application counselor and Navigator groups have successfully asserted enforceable rights under the Act is the Missouri Navigator case, where both the Eighth Circuit and the District Court have held that pro-Navigator ACA provisions preempt state regulatory statutes to the contrary.[72] More specifically, according to the District Court, four federal regulations preempt a state law saying that a navigator must not "provide advice concerning

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insurance also will not offer higher wages (other things equal). Then, when workers buy their own insurance (or pay the penalty tax), they will have less income available to purchase medical care from plaintiffs. That change in the demand for their services gives them standing, plaintiffs maintain. By the same logic, they could litigate about *any* tax policy."

[68] 762 F.3d 891 (9th Cir. 2014), cert denied, No. 14-525 (Mar. 30, 2015).

[69] 691 F.3d 649 (5th Cir. 2012).

[70] 783 F.3d 655 (7th Cir. 2015).

[71] No. 1:14-cv-1954, __ F.Supp.3d __, 2015 Westlaw 5316779 (D. D.C., Sept. 11, 2015), appeal pending, No. 15-5310 (D.C. Cir.).

[72] St. Louis Effort for AIDS v. Huff, 782 F.3d 1016 (8th Cir. 2015); Case No. 2:13-cv-4246 (W.D. Mo., March 18, 2016).

the benefits, terms and features of a particular health plan or offer advice about which exchange health plan is better or worse for a particular individual or employer."[73] Meanwhile, four federal regulations preempt a state law providing that "a [state] navigator shall not provide any information or services related to health benefits plans or other products not offered in the exchange."[74] Finally, three federal regulations preempt a state law that purports to require that "[u]pon contact with a person who acknowledges having existing health insurance coverage obtained through an insurance producer, a [state] navigator shall advise the person to consult with a licensed insurance producer regarding coverage in the private market."[75]

A premium tax credit case went all the way to the Supreme Court on the theory that individuals had a legally enforceable right to an "unaffordability" exemption to the individual mandate, based on the claim that unaffordability ought to be assessed without regard to premium tax credits because premium tax credits were allegedly unavailable in that individual's State.[76]

Medicaid recipients clearly continue to have the right to assert Medicaid claims.[77]

State standing issues

No one ever raised standing or exhaustion-of-administrative-remedies objections to the Florida plaintiff States' standing to challenge the Medicaid expansion.

The Fourth Circuit's decision in the Virginia case was that the Commonwealth lacked standing to challenge the individual mandate.[78] The Eleventh Circuit's decision in the Florida/NFIB case was that it did not matter whether the States had standing to challenge the individual mandate because the individual NFIB-linked plaintiffs did have standing.[79] Although there is some room for doubt about this, the Supreme Court appears to have aligned itself with the Eleventh Circuit.[80]

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[73] The four federal regulations are at 45 C.F.R. §§ 155.225(c)(1), 155.210(e)(2), 155.225(d)(8)(iii), and 155.210(c)(1)(iii)(C).

[74] The four federal regulations are at 45 C.F.R. §§ 155.210(e)(2), 155.215(a)(1)(D)(iii), 155.210(e)(2), and 155.225(c)(1).

[75] The three federal regulations are at 45 C.F.R. §§ 155.210(e)(2), 155.225(c)(1), and 155.225(d)(4).

[76] King v. Burwell, 135 S.Ct. 2480 (2015),

[77] Wilson v. Gordon, No. 3:14-cv-1492 (M.D. Tenn., Sept. 2, 2014), 2014 Westlaw 4347807, appeal pending, No. 14-6191 (6th Cir.); Walker v. Selig, No. 2:15-cv-166 (E.D. Ark., Oct. 30, 2015).

[78] Virginia ex rel Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011).

[79] Florida ex rel Attorney General v. U.S.D.H.H.S., 648 F.3d 1235, 1242-1244 (11th Cir. 2011) ("Although the question of the state plaintiffs' standing to challenge the individual mandate is an interesting and difficult one, in the posture of this case, it is purely academic and one we need not confront today. The law is abundantly clear that so long as at least one plaintiff has standing to raise each claim—as is the case here—we need not address whether the remaining plaintiffs have standing.").

[80] See NFIB, 132 S.Ct. 2566 at 2580 (describing the plaintiffs).

In the premium tax credit litigation, Oklahoma asserted sovereign standing to challenge tax credits going to its own citizens, a theory that the Pruitt district court rejected.[81] The State also asserted standing not to have the system operating in Oklahoma described as an "Exchange established by the State," a theory that survived a motion to dismiss.[82] More importantly, Oklahoma in Pruitt and Indiana and Indiana school corporations in Indiana v. IRS have successfully asserted standing as large employers who did not want to have employees getting subsidies, which would in turn impose penalties on them for not offering adequate coverage.[83] The Pruitt case has now been dismissed following King v. Burwell, but the Indiana school corporations continue to raise Tenth Amendment arguments against the employer play or pay system.[84]

In the Ohio v. U.S. case, the State lost on the merits of a challenge to State employers having to make transitional reinsurance payments; the Government did not raise any objections to its standing.[85]

The West Virginia v. HHS case challenges the Obama Administration's "administrative fix," which allows people who want to maintain or regain coverage under existing health plans to do that; the State's claim to standing is that the fix imposes regulatory burdens on it, a claim that the district court rejected.[86]

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[81] Oklahoma ex rel Pruitt v. Sebelius, No. 6:11-cv-30 (E.D. Okla., Aug. 12, 2013), 2013 Westlaw 4052610, *6-*7.
[82] Oklahoma ex rel Pruitt v. Sebelius, No. 6:11-cv-30 (E.D. Okla., Aug. 12, 2013), 2013 Westlaw 4052610, *9.
[83] Oklahoma ex rel Pruitt v. Sebelius, No. 6:11-cv-30 (E.D. Okla., Aug. 12, 2013), 2013 Westlaw 4052610, *8; Indiana v. IRS, 38 F.Supp.3d 1003, 1009-1013 (S.D. Ind. 2014).
[84] A joint notice filed in Indiana v. IRS, No. 1:13-cv-1612 (July 21, 2015), explains that the school corporations continue to assert Tenth Amendment claims.
[85] Ohio v. U.S., __ F.Supp.3d __, 2016 Westlaw 51226 (S.D. Ohio, Jan. 5, 2016), Sixth Circuit appeal filed, No. 16-3093.
[86] State of West Virginia v. U.S.D.H.H.S., No. 1:14-cv-1287, __ F.Supp.3d __, 2015 Westlaw 6673703 (D. D.C., Oct. 30, 2015), appeal pending, No. 15-5309 (D.C. Cir.).