



States make Medicaid expansion case

By: [Jennifer Haberkorn](#)

January 10, 2012 05:28 PM EST

Twenty-six states on Tuesday asked the Supreme Court to overturn the health care reform law's mandatory state expansion of the Medicaid program, a sleeper issue in the health care reform lawsuit that could determine how much leverage the federal government has with the states on any issue.

The states, led by Florida, argue that the federal government can't force them to expand the Medicaid program, which has operated as a partnership between the feds and the states, as part of the 2010 health reform law. They argue that the Medicaid expansion is possibly more coercive than the law's individual mandate.

"While some individuals are exempt from the penalties designed to enforce the mandate, no state is exempt from the massive penalty — the loss of the entirety of funding under the single largest grant-in-aid programs for the states — and so Congress did not even contemplate the possibility of a state opting out of Medicaid," attorney Paul Clement, who is representing the states, wrote in a brief to the court Tuesday.

The Medicaid argument, one of four issues in the health care law that the court has agreed to consider, is thought to be the toughest climb for the law's challengers. But if the Supreme Court takes the states' side, the ruling could limit whether the federal government can use money as an incentive for the states to act on any issue.

The states argue that the law's Medicaid expansion is an illegal "commandeering" of states' autonomy. Beginning in 2014, Americans who earn up to 133 percent of the federal poverty level will qualify for coverage, and the states will have to cover them if they want to stay in the program.

The states say that the federal government fundamentally changed the program in the 2010 law in ways the states never imagined when Congress created the voluntary Medicaid program in 1965.

Clement argues that the law is coercive because it ties all of the federal funding to the expansion, which is mandatory if the states want to stay in Medicaid. The states say the Medicaid program is so engrained in the national culture — and their budgets — that they have no real choice to leave it.

"If the ACA does not cross the line, no act of Congress ever will," Clement wrote.

Many legal and health policy experts were surprised that the court agreed to review the constitutionality of the Medicaid expansion, since a lower court hasn't struck it down and the issue of federal authority is relatively settled policy. Courts have generally agreed that the feds are allowed to use money as a carrot to get the states to act.

The last time the Supreme Court addressed the issue was in the late 1980s, when South Dakota challenged the law that tied federal transportation money to state requirements for increasing the drinking age to 21.

The Supreme Court upheld it, writing that the policy was legal — though it suggested that at some point, federal incentives will become so strong that they're illegal.

"They said at a certain point, we don't know what that is, incentives become coercion," said

any semblance of a “choice,” so the Medicaid expansion is illegal.

The federal government argues that it is still a choice — even if it’s a difficult one. The Obama administration will have a chance to flesh out its argument in its own brief, which is due to the court by Feb. 10.

So far, the lower courts have agreed with the federal government. Both the Florida district court and the 11th Circuit Court that heard the 26 states’ lawsuit said the Medicaid expansion is valid.

Ron Pollack, executive director of Families USA, which supports the law and the Medicaid expansion, said the Medicaid question could have wider-reaching implications than whether the mandate to buy insurance is valid. A ruling for the states would be a “radical change in doctrine in what the federal government can do in respect with states on various initiatives,” he told POLITICO.

It would also be a blow to the health care reform law.

“This really is an essential piece of the architecture for expanding coverage for those people who don’t have it,” Pollack said. About half of those who will get new insurance coverage through the ACA will do so through Medicaid.

Pollack argues that states will be better off immediately after the expansion goes into effect. For three years, the expansion is 100 percent financed by the government (it gradually decreases to 90 percent). Plus, with more residents covered by Medicaid, the states’ bills for uncompensated care and uninsured emergency room visits would presumably decrease.

“For the states to argue this is harmful is really just incredible,” he said.

Jocelyn Guyer, co-executive director at the Georgetown Center for Children and Families and a senior researcher at the university’s health policy institute, said she’s confident the expansion will be upheld.

“The fact that all the states have taken up [Medicaid] reflects that it’s such a great deal,” she said. “We see this as highly unlikely, so we’re not spending a lot of time on it.”

This article first appeared on [POLITICO Pro](#) at 5:22 p.m. on January 10, 2012.

CORRECTION: *A previous version of this story misstated the name and affiliation of Ilya Shapiro.*